BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan.	))))))	Case No. 23-301-EL-SSO

INITIAL POST-HEARING BRIEF
OF
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

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I. INTRODUCTION

The Public Utilities Commission of Ohio (Commission) should reject The Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company's (collectively, FirstEnergy or the Companies) proposed fifth electric security plan (ESP V) as unjust, unreasonable, and unlawful under R.C. 4928.143. More specifically, FirstEnergy's request for the Commission to approve a new rate plan, ESP V, that contains several above-market, nonbypassable charges, including three new riders, and results in the collection of billions of dollars from customers over the next eight years after FirstEnergy has already squandered *at least* \$60 million from customers for the House Bill 6 (HB 6) scandal is unconscionable and should be outright rejected by the Commission. The Commission should reject FirstEnergy's ESP V Application and ensure that customers are not paying for any unjust, unreasonable, or unlawful costs, including any costs associated with HB 6 that are embedded in the numerous riders and charges proposed by FirstEnergy in its ESP V.

Furthermore, the Commission should explicitly reject the over $1.6 billion[1] of additional, new costs proposed to be collected from customers through ESP V. The Commission should also reject FirstEnergy's proposal to collect up to $3.876 billion from customers over eight years through Rider DCR.[2] The Commission should also reject FirstEnergy's request to recover through Rider AMI amounts for Grid Mod II that are embedded in FirstEnergy's pending Grid Mod II application, which would equal an astonishing $626 million.[3] The Commission should also deny FirstEnergy's attempt to implement new, involuntary energy efficiency (EE) programs after the passage of HB 6—the very law that FirstEnergy itself spent millions bribing legislators and officials to pass—which statutorily terminated Ohio's mandatory EE programs that customers were required to pay for.

In short, as stated by OMAEG witness Seryak, "[m]any of FirstEnergy's proposals are, among other things, anticompetitive, unreasonable, imprudent, and not in the best interests of customers."[4] Additionally, FirstEnergy's proposed ESP V is more costly than the alternative market rate offer (MRO), and thus fails to satisfy the statutory requirement that an ESP, including its pricing and all other terms and conditions, be more favorable in the aggregate than an MRO (the MRO Test).[5]

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[1] *See* Company Ex. 2 at 11, Attachment SFL-1 at 10 (Direct Testimony of Santino Fanelli (Fanelli Direct)) (April 5, 2023); Company Ex. 3 at 20 (Direct Testimony of Brandon McMillen (McMillen Direct)) (April 5, 2023); Staff Ex. 2 at 4, 17 (Direct Testimony of Jonathan Borer (Borer Direct)) (October 30, 2023); Company Ex. 5 at Attachment ECM-2, Workpaper 2 (Direct Testimony of Edward Miller (Miller Direct)) (April 5, 2023).

[2] Assuming an increase of $21 million each year with a baseline of $390, then Rider DCR would have revenue caps of $411 million in Year 1, $432 million in Year 2, $453 million in Year 3, $474 million in Year 4, $ million in Year 5, $516 million in Year 6, $537 million in Year 7, and $558 million in Year 8, which totals $3.876 billion. *See also* Staff Ex. 8 at 5 (Direct Testimony of Devin Mackey (Mackey Direct)) (October 30, 2023), which performs similar calculations for Years 1–6.

[3] Tr. Vol. II at 381–82 (McMillen Cross-Examination).

[4] OMAEG Ex. 1 at 4 (Direct Testimony of John Seryak (Seryak Direct)) (October 23, 2023).

[5] R.C. 4928.143(C)(1).

Therefore, for the reasons discussed herein, OMAEG respectfully requests that the Commission reject FirstEnergy's proposed ESP V as it does not satisfy the statutory requirements of R.C. Chapter 4928, and FirstEnergy has not satisfied its burden to demonstrate that ESP V is just and reasonable and in compliance with Ohio law. Lastly, FirstEnergy's proposed ESP V is not supported by the record evidence, and, therefore, should be rejected.

Alternatively, if the Commission approves an ESP V for FirstEnergy, the Commission should modify FirstEnergy's proposal to explicitly deny FirstEnergy's requests to (1) continue the Delivery Capital Recovery Rider (Rider DCR) with significantly increased caps, (2) establish a new Vegetation Management Cost Recovery Rider (Rider VMC), (3) establish a new Storm Cost Recovery Rider (Rider SCR), (4) establish a new Energy Efficiency Cost Recovery Rider (Rider EEC), (5) implement new and costly Energy Efficiency and Peak Demand Reduction (EE/PDR) Programs, (6) continue the Advanced Metering Infrastructure / Modern Grid Rider (Rider AMI), (7) continue the current Economic Load Response Program Rider (Rider ELR) without implementing modifications to the ELR program, including expanding participation eligibility, and (8) implement an ESP term of eight years.

II. BACKGROUND

On April 5, 2023, FirstEnergy filed an application (Application) to establish its standard service offer (SSO) in the form of its ESP V to be in effect for eight years, from June 1, 2024 through May 31, 2032.[6] Under ESP V, FirstEnergy seeks to impose on customers approximately $1.6 billion in new charges through Riders DCR, VMC, SCR, and EEC.[7] As proposed, over the

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[6] Company Ex. 1 at 1 (FirstEnergy Application (Application)) (April 5, 2023).

[7] *See* Company Ex. 2 at 11, Attachment SFL-1 at 10 (Fanelli Direct); Company Ex. 3 at 20 (McMillen Direct); Staff Ex. 2 at 4, 17 (Borer Direct); Company Ex. 5 at Attachment ECM-2, Workpaper 2 (Miller Direct).

eight-year ESP V term, FirstEnergy would collect from customers an additional $120–$168 million through Rider DCR,[8] $759.8 million through Rider VMC,[9] at least $425 million through Rider SCR,[10] and $288.5 million through Rider EEC,[11] for a total of $1.59–$1.64 billion. This approximately $1.6 billion would be in addition to what FirstEnergy already collects from customers under ESP IV, such as in the case of Rider DCR, which already recovers $390 million annually from customers.[12]

In order to protect the interests of its many members that are customers with facilities located in FirstEnergy's service territories and to limit the amount of above-market charges that will be collected from them, the Ohio Manufacturers' Association Energy Group (OMAEG) sought intervention on May 3, 2023, which was granted on October 11, 2023. A hearing on the proposed ESP V commenced on November 7, 2023, and ended on December 6, 2023. Pursuant to the Attorney Examiner's directive on the last day of the hearing, OMAEG hereby files its initial brief in the above-captioned proceeding.

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[8] Company Ex. 2 at 11 (Fanelli Direct); Company Ex. 3 at 5 (McMillen Direct); Staff Ex. 8 at 3 (Mackey Direct); Tr. Vol. I at 73 (Fanelli Cross-Examination); Tr. Vol. II at 392 (McMillen Cross-Examination); Tr. Vol. XIV at 2442 (Mackey Cross-Examination); Tr. Vol. XIV at 2564 (Healey Cross-Examination).

[9] Tr. Vol. II at 444 (McMillen Cross-Examination); Tr. Vol. VI at 1333 (Standish Cross-Examination); Company Ex. 3 at 20 (McMillen Direct); Company Ex. 8 at 12 (Direct Testimony of Shawn Standish (Standish Direct)) (April 5, 2023); Staff Ex. 1 at 5 (Direct Testimony of Natalia Messenger (Messenger Direct)) (October 30, 2023); Kroger Ex. 1 at 10 (Direct Testimony of Justin Bieber (Bieber Direct)) (October 23, 2023).

[10] FirstEnergy's proposal is to collect from customers about $35 million each year in actual storm expenses. Tr. Vol. I at 75 (Fanelli Cross-Examination); Staff Ex. 2 at 4 (Borer Direct); Staff Ex. 10 at 30 (Direct Testimony of Christopher Healey (Healey Direct)) (October 30, 2023). Additionally, FirstEnergy proposed to collect $29.499 million for five years for existing storm cost deferrals dating back to 2009. Company Ex. 7 at 2, Attachment JL-1 (Direct Testimony of Juliette Lawless (Lawless Direct)) (April 5, 2023); Tr. Vol. VI at 1277–78 (Lawless Cross-Examination); Staff Ex. 2 at 17 (Borer Direct); Staff Ex. 10 at 30 (Healey Direct).

[11] Tr. Vol. V at 968 (Miller Cross-Examination); Company Ex. 5 at Attachment ECM-2, Workpaper 2 (Miller Direct); Tr. Vol. V at 1055 (Miller Re-Cross-Examination).

[12] Company Ex. 3 at 4 (McMillen Direct).

III. STANDARD OF REVIEW

R.C. 4928.143(C)(1) sets forth the following standard of review, which applies to ESP cases:

> The burden of proof in the proceeding shall be on the electric distribution utility. The commission shall issue an order under this division for an initial application under this section not later than one hundred fifty days after the application's filing date and, for any subsequent application by the utility under this section, not later than two hundred seventy-five days after the application's filing date. Subject to division (D) of this section, the commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. Additionally, if the commission so approves an application that contains a surcharge under division (B)(2)(b) or (c) of this section, the commission shall ensure that the benefits derived for any purpose for which the surcharge is established are reserved and made available to those that bear the surcharge. Otherwise, the commission by order shall disapprove the application.

In addition to, and in connection with, the provisions above, R.C. 4905.22 prescribes the following:

> Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.

IV. ARGUMENT

A. The Commission Should Reverse the Attorney Examiners' Rulings to Exclude Evidence Related to HB 6 Costs, which is Relevant and Material to the ESP V Case and the Costs Embedded Therein.

The Attorney Examiners incorrectly excluded evidence relating to HB 6, FirstEnergy's involvement and expenses related to the passage of HB 6, and the resulting criminal and civil investigations, audits, deferred prosecution agreement, SEC filing, and other documents that may demonstrate that costs associated with HB 6 have been included and are currently embedded in the riders and other charges being collected that will continue to be collected or that are proposed to be collected from customers through FirstEnergy's proposed ESP V. At the very least, the evidence should have been admitted into the record so that affected customers and other intervening parties could have argued that certain riders or costs are unjust and unreasonable and should not be approved in ESP V as certain costs embedded in those rates or riders were inappropriately or unlawfully included in furtherance of a crime or that simply were not authorized to be collected as a type of cost eligible for recovery under a particular rider or rate.

Over the objections of the parties, the Attorney Examiners excluded such evidence, which was then proffered by the offering intervenors, Northwest Ohio Aggregation Coalition (NOAC) and the Office of the Ohio Consumers' Counsel (OCC).[13] Ohio Adm.Code 4901-1-15(F) allows a party who was adversely affected by the ruling to raise the propriety of that ruling and seek reversal of the ruling by "discussing the matter as a distinct issue in its initial brief." Accordingly, OMAEG seeks reversal of the rulings described herein.

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[13] Proffer Tr. Vol. II at 236–37, Proffer NOAC Ex. 1 (Deferred Prosecution Agreement) (July 20, 2021), from *United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-86; Proffer Tr. Vol. II at 276–80, Proffer OCC Ex. 6 (FirstEnergy Corp. Form 10-K (Form 10-K)).

The excluded evidence included the Deferred Prosecution Agreement (DPA) entered into by FirstEnergy with United States Attorney's Office for the Southern District of Ohio,[14] FirstEnergy's "Form 10-K for the fiscal year ended December 31, 2022,"[15] and the FERC Audit Report from Docket No. FA19-1-000.[16] Additionally, the Attorney Examiners did not admit any Rider DCR audit reports, which audited the past costs embedded in Rider DCR, some of which may be passed through Rider DCR in ESP V; however, they did take administrative notice of one Rider DCR audit report, the 2022 Rider DCR Audit Report from Case No. 22-892-EL-RDR.[17]

All of this evidence contains important information regarding the costs associated with HB 6 that have been embedded, or will be embedded, in the various riders and other charges that FirstEnergy has been collecting for years and now wishes to continue collecting through ESP V. As explained by Walmart's attorney, "the Compan[ies are] proposing to populate new riders, to undo old riders, and to increase the cost of preexisting riders. And so while [FirstEnergy] argues that a specific cost -- preexisting cost isn't relevant to how much cost should be recovered in a rider, to the extent that there is an argument that can be made by [OCC] or anyone else that it would be inappropriate to increase the cost of any rider or populate a rider because of mistakes and cross-subsidization that the Companies have committed in the past, . . . bears directly upon the

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[14] Proffer Tr. Vol. II at 236, Proffer NOAC Ex. 1 (Deferred Prosecution Agreement).

[15] Tr. Vol. I at 108 (Fanelli Cross-Examination).

[16] Proffer Tr. Vol. II at 281–87, Proffer OCC Ex. 7 (FERC Audit Report, Docket No. FA19-1-000 (FERC Audit Report)) (February 4, 2022), from *In the Matter of FirstEnergy Corp.*, Docket No. FA 19-1-000.

[17] Administrative Notice, Tr. Vol. II at 287–88, Admin. Notice OCC Ex. 8 (Blue Ridge Audit Report (2022 DCR Audit Report)) (May 23, 2023), from *In the Matter of the 2022 Review of the Delivery Capital Recovery Rider of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 22-892-EL-RDR.

requests that, in fact, are in dispute in this case regardless of whether it touches on a specific misallocated cost that is at issue in a prior proceeding."[18]

NOAC's attorney proffered that, had the DPA been admitted, it (1) would have been used to impeach or question the credibility of the witness because "it shows acts of moral turpitude committed directly upon this forum" during prior ESP proceedings, (2) been used to demonstrate "that the [ESP V] riders were caried over from ESP IV and were subject to improper influence and corruption," and (3) would have been "relevant and material to the MRO versus ESP test in that it [. . .] shows that the Compan[ies previously] abused the Electric Security Plan process."[19]

The Attorney Examiners' ruling on the DPA was improper because the facts contained in the DPA's Statement of Facts were not in dispute, since among the DPA's provisions was the requirement that FirstEnergy could not raise defenses or assert affirmative claims in regulatory proceedings relating to these matters that "contradict in whole or in part, a statement contained in the Statement of Facts."[20] Given that a subsidiary cannot take an action that is adverse to what the parent company has agreed to, FirstEnergy also could not raise such defenses or claims in its regulatory proceedings. Additionally, clearly the admissions and actions of the parent company were in furtherance of its subsidiary as many of the resulting benefits of the admissions accrued directly to the regulated entities. Moreover, while the names in the DPA were redacted, the possibility of "confusion or prejudice" is low given that the identities of the officials involved in the scandal, including former Commission Chair Samuel Randazzo, are well known and can be easily identified by such information as "the dates that he served as Chairman."[21] Therefore, the

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[18] Tr. Vol. I at 124 (Fanelli Cross-Examination).

[19] Proffer Tr. Vol. II at 236–37, Proffer NOAC Ex. 1 (Deferred Prosecution Agreement).

[20] Proffer Tr. Vol. II at 236–37, Proffer NOAC Ex. 1 at 8–9 (Deferred Prosecution Agreement).

[21] Proffer Tr. Vol. II at 237, Proffer NOAC Ex. 1 (Deferred Prosecution Agreement).

Attorney Examiners should have allowed the DPA into evidence, or at least taken administrative notice of the document.

Similarly, OCC's attorney explained that Form 10-K and the FERC Audit Report, as well as the 2022 Rider DCR Audit Report, were all relevant because they demonstrate the connection between HB 6, Rider DCR, and FirstEnergy's improper accounting practices. For example, FirstEnergy made "an adjustment of over $100 million in the plant in service [PIS] balance as a result of the FERC audit," which was "addressed in the 10-K"[22] and will impact amounts collected under Rider DCR because the adjusted PIS balance was part of the rider's revenue requirement. A substantial adjustment like the one revealed in Form 10-K "shows a lack of accuracy in the Companies' accounting practices and allocation practices for that large of an adjustment to be made as a result of the FERC Audit, and it calls into question whether the Companies should be allowed to simply come in with periodic rider updates where there is no thorough review of the Companies' accounts as would happen in a base distribution rate case."[23] Additionally, the nature of the FERC Audit and the resulting adjustment are both discussed in the 2022 Rider DCR Audit Report.[24] As explained by OCC counsel, the inclusion of these costs and the continuation of Rider DCR will have a significant impact on FirstEnergy's customers, and presenting evidence demonstrating the unjustness and unreasonableness of FirstEnergy's Rider DCR proposal is exceedingly relevant to this proceeding.

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[22] Proffer Tr. Vol. II at 276–80, Proffer OCC Ex. 6.

[23] Proffer Tr. Vol. II at 279–80, Proffer OCC Ex. 6.

[24] Proffer Tr. Vol. II at 281, Proffer OCC Ex. 7 (FERC Audit Report).

1. Evidence related to the HB 6 investigations is relevant and material to Rider DCR and the costs embedded therein.

As noted by NOAC's attorney in his proffer of the DPA, FirstEnergy's admissions in the Statement of Facts, which are uncontested, included bribing former Chair Samual Randazzo with a \$4.3 million payment to his consulting company in return for Randazzo "performing official action in his capacity as PUCO Chairman to further FirstEnergy Corp.'s interests relating to . . . regulatory priorities."[25] This admission has since led to Randazzo's recent criminal indictment of eleven counts related to bribery and embezzlement, which revealed an alleged conspiracy scheme and scheme to defraud customers dating back to 2010.[26] The scheme to defraud customers appears to have been related to "settlement payments" received in conjunction with FirstEnergy's ESP II proceeding pending before the Commission in 2010, which created FirstEnergy's Rider DCR through the settlement that was later approved.[27] Five years later, in the settlement of ESP IV, the Signatory Parties[28] agreed to a continuation of Rider DCR for the eight-year term of ESP IV.

Even before the indictment, portions of ESP IV were under investigation—and remain under investigation—through a Rider DCR audit case, where the Commission expanded the audit

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[25] Proffer Tr. Vol. II at 237, Proffer NOAC Ex. 1 at 18 (Deferred Prosecution Agreement). *See also* Motion for Limited Stay of FirstEnergy's Distribution Riders and Memorandum in Support by Northwest Ohio Aggregation Coalition, Ohio Manufacturers' Association Energy Group and Office of the Ohio Consumers' Counsel at 2 (December 6, 2023) (hereinafter, Joint Motion for Limited Stay), *quoting United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement at 17 (July 20, 2021).

[26] Joint Motion for Limited Stay at 1, *citing United States of America v. Samuel Randazzo*, Case No. 1:23-cr-114, Indictment (November 29, 2023).

[27] *Id.*, *citing United States of America v. Samuel Randazzo*, Case No. 1:23-cr-114, Indictment at 16–19 (November 29, 2023). *See also In the Matter of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R. C. 4928.143 in the Form of an Electric Security Plan*, Case No. 10-388-EL-SSO, Application and Stipulation at 13 (March 23, 2010).

[28] While not a Signatory Party, Randazzo, on behalf of Industrial Energy Users-Ohio (IEU-Ohio), filed a letter with the Commission on May 28, 2015, stating that IEU-Ohio "shall not oppose either the settlement package described in the Stipulation or the Commission's approval of such settlement package." This was mere hours after FirstEnergy filed a supplemental stipulation naming IEU-Ohio as one of the few groups eligible to participate in a pilot program offering more favorable transmission billing (the Rider NMB Pilot).

scope to include an investigation of whether FirstEnergy violated R.C. 4928.145, which governs FirstEnergy's obligation to disclose "side agreements" made during the ESP IV case.[29] Similar to the 2022 Rider DCR Audit, other HB 6 audits and investigations—such as the FERC Audit referenced in Form 10-K—and/or ongoing criminal investigations may likely reveal more information on the side agreements and settlement payments between Randazzo and FirstEnergy that are the subject of the DPA, which specifically referenced Randazzo as being installed by FirstEnergy as the Commission's chairman in order to "perform[] official action for the benefit of [FirstEnergy], as requested and as opportunities arose."[30]

For example, the FERC Audit Report that OCC sought to admit into the record revealed that FirstEnergy "inappropriately capitalized the cost to electric plant in service,"[31] which led to a "$108 million adjustment in the balance of the Rider DCR account."[32] The FERC Audit also found that FirstEnergy "improperly accounted for and improperly reported lobbying expenses, donations and other costs that lacked proper supporting documentation or were misclassified."[33] Some of these costs were improperly recorded as general and administrative costs, and some were

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[29] *In the Matter of the 2020 Review of the Delivery Capital Recovery Rider of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 20-1629-EL-RDR, Entry (December 15, 2021) (hereinafter, 2020 Rider DCR Audit).

[30] Joint Reply to Ohio Energy Group's Memorandum Contra Motion for Limited Stay of Rider DCR in ESP V Distribution Riders by Northwest Ohio Aggregation Coalition, Office of the Ohio Consumers' Counsel and Ohio Manufacturers' Association Energy Group at 6 (December 26, 2023) (hereinafter, Joint Reply), *quoting United States of America v. Samuel Randazzo*, Case No. 1:23-cr-114, Indictment at 6 (November 29, 2023).

[31] Proffer Tr. Vol. II at 281, Proffer OCC Ex. 7 at 38 (FERC Audit Report).

[32] Administrative Notice, Tr. Vol. II at 288, Admin. Notice OCC Ex. 8 (2022 DCR Audit Report).

[33] Proffer Tr. Vol. II at 281, Proffer OCC Ex. 7 at 38 (FERC Audit Report).

improperly recorded as the cost of electric PIS.[34] Internal lobbyists expenses were also improperly accounted for.[35]

The commonality between the HB 6 investigations, the Rider DCR audits, the FERC Audit, and FirstEnergy's request to continue Rider DCR in the present ESP V case is clear. Rider DCR was first created by the 2010 ESP wherein "settlement payments" were paid by FirstEnergy to Randazzo's then-client—referred to as "Industry Group 1" in the indictment—in exchange for Industry Group 1's support for the settlement.[36] Rider DCR was later reapproved in ESP IV in accordance with a provision of FirstEnergy's ESP IV settlement that Randazzo, on behalf of Industry Group 1, agreed not to oppose seemingly in exchange for more favorable treatment as part of the ESP IV.[37] Not even four years later, with FirstEnergy's support, Randazzo became the Commission's Chairman in order to "perform[] official action for the benefit of [FirstEnergy], as requested and as opportunities arose."[38]

These "official actions" apparently included eliminating FirstEnergy's requirement to file a new base rate case in 2024 at the end of ESP IV, which may have allowed FirstEnergy to avoid reducing its rates due to any reduced operating costs in other areas of its business.[39] At the same

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[34] Proffer Tr. Vol. II at 281, Proffer OCC Ex. 7 at 46 (FERC Audit Report).

[35] Proffer Tr. Vol. II at 281, Proffer OCC Ex. 7 at 52 (FERC Audit Report).

[36] Joint Motion for Limited Stay at 2, *citing United States of America v. Samuel Randazzo*, Case No. 1:23-cr-114, Indictment at 17 (November 29, 2023).

[37] Joint Reply at 3. On behalf of IEU-Ohio, Randazzo filed a letter with the Commission on May 28, 2015 stating IEU-Ohio's non-opposition mere hours after FirstEnergy filed a supplemental stipulation naming IEU-Ohio as one of the few groups eligible to participate in the Rider NMB Pilot.

[38] Joint Reply at 4, *quoting United States of America v. Samuel Randazzo*, Case No. 1:23-cr-114, Indictment at 6 (November 29, 2023).

[39] Joint Reply at 4, *citing United States of America v. Samuel Randazzo*, Case No. 1:23-cr-114, Indictment at 11–12 (November 29, 2023). *See In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for an extension of the Distribution Modernization Rider*, Case No. 19-361-EL-RDR, Entry at ¶ 17 (November 21, 2019) (DMR Case) (wherein the Commission, under Randazzo, decided that "it is no longer necessary or appropriate for the Companies to be required to file a new

time, the continuation of Rider DCR would have allowed FirstEnergy to collect its capital expenses plus a guaranteed return on investment more quickly and without needing to file a rate case. And while it remains unclear how much of the public corruption involved in the passage of HB 6 was at the expense of FirstEnergy's consumers, various audit proceedings have revealed that at least some charges passed through Rider DCR were related to lobbying expenses and expenses for Randazzo's affiliated company (Sustainability Funding Alliance).[40]

Had the above evidence been admitted to the record, OMAEG and other intervenors could have more clearly demonstrated the connections and potential impacts that the various HB 6 audits and investigations, and/or criminal proceedings could have regarding the accounting of Rider DCR and the legitimacy of the costs charged to customers through Rider DCR. Such a demonstration would have made it clear how imperative it is that the Commission protect customers by denying approval of Rider DCR under ESP V, and/or not modifying or increasing the current Rider DCR until after FirstEnergy's next distribution rate case and/or after the HB 6 audit and investigation cases are resolved and Randazzo's indictment concludes.[41]

In light of the above, all of which should have been admitted into the record, the Commission should deny approval of Rider DCR or any modifications or increases to Rider DCR under ESP V until after the costs embedded in Rider DCR that have been collected from customers

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distribution rate case at the conclusion of the Companies' current ESP"); DMR Case, Case No. 19-361-EL-RDR, Entry at ¶ 1 (December 30, 2020) (wherein the Commission, after Randazzo stepped down, reversed the earlier decision and ordered FirstEnergy to "file a distribution rate case by May 31, 2024").

[40] *See* 2020 Rider DCR Audit, Compliance Audit of the 2020 Delivery Capital Recovery (DCR) Riders of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company and Expanded Scope (August 3, 2021); Proffer Tr. Vol. II at 281, Proffer OCC Ex. 7 at 38, 46, 52 (FERC Audit Report).

[41] The necessity of not approving Rider DCR through FirstEnergy's ESP V is further discussed in the Joint Motion for Limited Stay and Joint Reply.

are thoroughly reviewed and audited, including lobbying costs and settlement and bribery payments tied to the HB 6 scandal and/or the admitted bribery of Randazzo.

2. Evidence related to the HB 6 investigations is relevant and material to Rider AMI and the costs embedded therein.

Similar to Rider DCR, Rider AMI is inextricably linked to HB 6 and the bribes that FirstEnergy admitted paying to Randazzo. Specifically, the Grid Mod costs embedded in Rider AMI appear to be part of the scheme to defraud customers for which Randazzo was recently indicted. As discussed above, Randazzo, on behalf of his then-client Industry Group 1, agreed not to oppose the ESP IV settlement in exchange for more favorable treatment as part of the ESP IV. In addition to the provision re-approving and continuing Rider DCR, ESP IV provided that all costs incurred related to Grid Mod would be recovered through Rider AMI. Rider AMI is among the pieces of ESP IV under investigation through the 2020 Rider DCR Audit, which requires the auditor to identify capital additions recovered through Rider AMI in order to exclude those amounts from Rider DCR because the same amounts may have been included in both riders.[42]

As with Rider DCR, the commonality between the HB 6 investigations and audit cases and FirstEnergy's Grid Mod plan is clear. Both Grid Mod cases were filed in accordance with a provision of FirstEnergy's ESP IV settlement, which Randazzo, on behalf of his then-client Industry Group 1, agreed not to oppose seemingly in exchange for more favorable treatment as part of the ESP IV settlement. And mere months after FirstEnergy installed Randazzo as Commission chair, Randazzo himself approved a specific $516 million Grid Mod charge to consumers when resolving four cases—one of which was a tax savings case—that arose in three different years, concerned two completely different subjects, and, without good cause, were

[42] 2020 Rider DCR Audit, Request for Proposal No. RA20-CA-3 at 1 (November 4, 2020).

unjustly and unreasonably consolidated into one proceeding.[43] The reason for this consolidation is revealed in the Order that Randazzo signed, where the Commission noted: "[the Commission] need not address the question of whether the Stipulation would be appropriate even if we found Grid Mod I to have a negative NPV, as suggested by Mr. Volkmann, in light of the committed return to customers of $900 million in tax savings."[44] Stated differently, by consolidating the unrelated tax savings case with the Grid Mod case, the Commission offset the cost of Grid Mod I to ensure that the Stipulation "looked" appropriate even if the Grid Mod I benefits were revealed to be negative.

The findings in the FERC Audit can also be applied to Rider AMI. That FirstEnergy "improperly accounted for and improperly reported lobbying expenses, donations and other costs that lacked proper supporting documentation or were misclassified" applies to Rider AMI as much as Rider DCR, both of which were initially approved in the 2010 ESP case that Randazzo, on behalf of Industry Group 1, supported in exchange for "settlement payments." Moreover, the fact that the Grid Mod program was approved by Randazzo mere months after he was installed at the Commission for the express purpose of "performing official action in his capacity as PUCO Chairman to further FirstEnergy Corp.'s interests relating to . . . regulatory priorities, as requested and as opportunities arose"[45] further demonstrates the connection between Rider AMI charges and the HB 6 investigations and audits, which will likely reveal even more information about the improper costs embedded in Rider AMI.

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[43] *In the Matter of the Filing by Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company of a Grid Modernization Business Plan,* Case Nos. 16-481-EL-UNC, et al., Opinion and Order at 73 (July 17, 2019).

[44] *Id.* at ¶ 117.

[45] *United States of America v. FirstEnergy Corp*., Case No. 1:21-cr-86, Deferred Prosecution Agreement at 18 (July 20, 2021) (emphasis added).

As with Rider DCR, had the Attorney Examiners admitted the above evidence into the record, OMAEG and other intervenors could have more clearly demonstrated the connections and impacts that the various HB 6 audits and investigations, and/or the criminal proceeding could have regarding the accounting of Rider AMI and the legitimacy of the costs charged to customers through Rider AMI. Such a demonstration would have made it clear how imperative it is that the Commission protect customers by denying approval of Rider AMI under ESP V, and/or not modifying or increasing the current Rider AMI until after FirstEnergy's next distribution rate case and/or after the HB 6 audit and investigation cases are resolved and Randazzo's indictment concludes. Considering the facts discussed herein, the Commission should deny approval of the continuation of Rider AMI under ESP V until after the costs embedded in Rider AMI and that have been collected from customers are thoroughly reviewed and audited, including lobbying costs and settlement and bribery payments tied to the HB 6 scandal and/or the admitted bribery of Randazzo.

Therefore, for the reasons discussed above, the Attorney Examiners' rulings excluding all evidence regarding costs associated with HB 6 expenditures or other inappropriate accounting practices were unjust, unreasonable, and improper, and should be reversed.

B. FirstEnergy's Proposed ESP is Unlawful, Unjust, and Unreasonable and Should be Rejected.

1. The Commission should reject FirstEnergy's proposal to continue Rider DCR as such proposal is unlawful, unjust, and unreasonable.

According to the Application and supporting testimony, FirstEnergy currently recovers $390 million annually from customers through Rider DCR.[46] In its ESP V, FirstEnergy seeks to continue Rider DCR under the same terms and conditions established in ESP IV, but with an

[46] Company Ex. 3 at 4 (McMillen Direct).

increase to the revenue caps for Rider DCR by $15–$21 million every year from June 1, 2024 through May 31, 2032.[47] To be clear, any revenue cap increases would be in addition to the $390 million that FirstEnergy already recovers from customers.[48] In other words, over the course of the proposed eight-year term of ESP V, FirstEnergy proposes to collect an additional $120–$168 million from customers through Rider DCR, which could result in charges to customers totaling up to $3.876 billion over eight years.[49]

Despite FirstEnergy's claims to the contrary, FirstEnergy has not adequately demonstrated or reasonably justified that a continuation of Rider DCR, any expansion of the rider, or any increases to the levels of expenditures in connection with the same is necessary or prudent or even just and reasonable. As such, the Commission "should discontinue FirstEnergy's Rider DCR," and "[a]ny distribution-related costs should be recovered through base distribution rates."[50] Other intervenors concurred, arguing that "[a] cost benefit analysis should be required of FirstEnergy to continue Rider DCR," which "should not become a permanent rider for FirstEnergy,"[51] and that "prudently incurred distribution costs should be recovered through base distribution rates, not the proposed expansion of the Rider DCR cost recovery mechanism."[52] Staff also agreed and filed testimony recommending that *if* the Commission approves an extension of Rider DCR, several

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[47] Company Ex. 2 at 11 (Fanelli Direct); Company Ex. 3 at 5 (McMillen Direct); Staff Ex. 8 at 3 (Mackey Direct); Tr. Vol. I at 73 (Fanelli Cross-Examination); Tr. Vol. II at 392 (McMillen Cross-Examination); Tr. Vol. XIV at 2442 (Mackey Cross-Examination); Tr. Vol. XIV at 2564 (Healey Cross-Examination).

[48] Company Ex. 2 at 11 (Fanelli Direct); Company Ex. 3 at 5 (McMillen Direct); Staff Ex. 8 at 3 (Mackey Direct); Tr. Vol. I at 73 (Fanelli Cross-Examination); Tr. Vol. II at 392 (McMillen Cross-Examination); Tr. Vol. XIV at 2442 (Mackey Cross-Examination); Tr. Vol. XIV at 2564 (Healey Cross-Examination).

[49] *See* supra n.2.

[50] OMAEG Ex. 1 at 22 (Seryak Direct).

[51] OCC Ex. 1 at 20 (Direct Testimony of Greg Meyer (Meyer Direct)) (October 23, 2023).

[52] Kroger Ex. 1 at 9 (Bieber Direct).

modifications should be adopted.[53] Additionally, as explained above, information has come to light that may directly impact the charges and accounting practices of Rider DCR. At the very least, the Rider DCR audits, the FERC Audit, other HB 6 audits and investigations, and/or ongoing criminal investigations call into question the legitimacy or prudency of accounting practices and/or costs that may have been passed through and collected through Rider DCR.

Rather than relying on continuous increases to Rider DCR caps, the distribution costs that FirstEnergy wishes to recover in this proceeding should be considered in the overall context of the Companies' total distribution revenues, expenses, and return on distribution rate bases. For this reason, and for all the reasons discussed above, the Commission should reject FirstEnergy's request to continue Rider DCR and increase the amounts collected from customers through Rider DCR.

a. The Commission should reject the proposed continuation of Rider DCR and any proposed increases to the revenue caps as Rider DCR is unjust, unreasonable, and unlawful.

According to FirstEnergy witness McMillen, Rider DCR allows the Companies to earn a return of and on PIS associated with distribution, transmission, general and intangible plant (including allocated plant from FirstEnergy Service Corp. that supports FirstEnergy) that was not included in FirstEnergy's base rates as part of its last rate case, which was filed back in 2007.[54] Per the 2007 rate case, FirstEnergy has been afforded the opportunity to earn a return on equity (ROE) of 10.5%, which is notably higher than the ROEs allowed for distribution investment riders

[53] Staff Ex. 10 at 8–12 (Healey Direct).

[54] Company Ex. 2 at 5 (Fanelli Direct); Tr. Vol. I at 176 (Fanelli Cross-Examination); OMAEG Ex. 1 at 14 (Seryak Direct); Kroger Ex. 1 at 8 (Bieber Direct); Staff Ex. 10 at 5 (Healey Direct).

for other electric distribution utilities (EDUs).[55] Additionally, Rider DCR allows FirstEnergy to recover property taxes, Commercial Activity Tax (CAT), and income taxes associated with these capital additions.[56]

Through ESP V, FirstEnergy seeks to increase the revenue caps on dollars that may be collected from customers under Rider DCR from the levels previously established in its ESP IV case by \$15–\$21 million annually depending on whether the utilities meet their reliability metrics.[57] While the exact amount of each annual increase depends on whether the FirstEnergy utilities meet their reliability metrics,[58] even if all three utilities *fail* to meet their reliability metrics, FirstEnergy is proposing that it be *guaranteed* an annual revenue cap increase of \$15 million, which would mean that FirstEnergy is asking this Commission to approve the collection of at least \$510 million from customers in the eighth year of ESP V, but possibly \$516 million.[59] This increase in revenue caps, as well as the extension of Rider DCR for another eight-year term, could result in charges to customers totaling up to \$3.876 billion over eight years.[60] Further, as admitted by FirstEnergy witness Fanelli, it has been over sixteen years since the Companies' last

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[55] Tr. Vol. I at 144 (Fanelli Cross-Examination); Tr. Vol. II at 391 (McMillen Cross-Examination); Tr. Vol. XI at 1975 (Buckley Cross-Examination); OCC Ex. 5 at 5 (Direct Testimony of Joseph Buckley (Buckley Direct)) (October 23, 2023).

[56] Company Ex. 2 at 5 (Fanelli Direct); Tr. Vol. II at 391 (McMillen Cross-Examination).

[57] Tr. Vol. I at 73 (Fanelli Cross-Examination); Tr. Vol. II at 392 (McMillen Cross-Examination); Tr. Vol. XIV at 2442 (Mackey Cross-Examination); Tr. Vol. XIV at 2564 (Healey Cross-Examination); Company Ex. 2 at 11 (Fanelli Direct); Company Ex. 3 at 5 (McMillen Direct); Staff Ex. 8 at 3 (Mackey Direct).

[58] Tr. Vol. I at 73 (Fanelli Cross-Examination); Tr. Vol. II at 392 (McMillen Cross-Examination); Company Ex. 3 at 5 (McMillen Direct).

[59] Tr. Vol. II at 393 (McMillen Cross-Examination).

[60] Assuming an increase of \$21 million each year with a baseline of \$390, then Rider DCR would have revenue caps of \$411 million in Year 1, \$432 million in Year 2, \$453 million in Year 3, \$474 million in Year 4, \$ million in Year 5, \$516 million in Year 6, \$537 million in Year 7, and \$558 million in Year 8, which totals \$3.876 billion. *See also* Staff Ex. 8 at 5 (Mackey Direct), which performs similar calculations for Years 1–6.

distribution rate case was filed.[61] Continuing collection of incremental distribution costs and incremental increases to distribution rates through single-issue ratemaking, absent a review of those costs through a distribution rate case, is not reasonable or prudent.[62] The Commission has previously explained:

> [W]hile SB 221 may have allowed Companies to include [single-issue ratemaking] previsions in its ESP, the intent could not have been to provide a 'blank check' to electric utilities. In deciding whether to approve an ESP that contains provisions for distribution infrastructure and modernization incentives, Section 4928.143(B)(2)(h), Revised Code, specifically requires the Commission to examine the reliability of the electric utility's distribution system and ensure that customers' and the electric utilities' expectations are aligned, and to ensure that the electric utility is emphasizing and dedicating sufficient resources to the reliability of its distribution system.[63]

As discussed herein, Rider DCR does not satisfy these requirements.

Moreover, FirstEnergy has not justified a $15–$21 million revenue cap increase given that the Companies have admitted that they "have had a strong history of meeting, and in many cases exceeding, their reliability performance standards."[64] In fact, since 2010, FirstEnergy has "never failed to meet [reliability] performance standards for two consecutive years."[65]

The operative statutory provision governing the content of ESPs is R.C. 4928.143. Those provisions which *must* be included in an ESP are established in R.C. 4928.143(B)(1), while

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[61] Tr. Vol. I at 176 (Fanelli Cross-Examination). *See also* Company Ex. 2 at 5 (Fanelli Direct); OMAEG Ex. 1 at 14 (Seryak Direct); Kroger Ex. 1 at 8 (Bieber Direct); Staff Ex. 10 at 5 (Healey Direct).

[62] OMAEG Ex. 1 at 14 (Seryak Direct); OCC Ex. 1 at 20 (Meyer Direct).

[63] *See In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, et al., Opinion and Order at 32 (March 18, 2009) (hereinafter, AEP ESP I Order),

[64] Company Ex. 9 at 2 (Direct Testimony of Amanda Richardson (Richardson Direct)) (April 5, 2023). *See also* Tr. Vol. I at 178 (Fanelli Cross-Examination); Tr. Vol. VII at 1378–79 (Richardson Cross-Examination); Staff Ex. 5 at 4 (Direct Testimony of Jacob Nicodemus (Nicodemus Direct)) (October 30, 2023).

[65] Company Ex. 9 at 8 (Richardson Direct). *See also* Tr. Vol. VII at 1379 (Richardson Cross-Examination); Staff Ex. 5 at 4 (Nicodemus Direct).

provisions or mechanisms that *may* be included in an ESP are set forth in Section 4928.143(B)(2). R.C. 4928.143(B)(2) provides that "[t]he [electric security] plan may provide for or include, without limitation, any of the following . . ." The section then goes on to list nine categories of provisions that may be included in an ESP. Importantly, a rider with a *guaranteed* annual increase that is not conditioned on some action or achievement (i.e., incentive) by a utility is not listed. The Supreme Court of Ohio has previously held that R.C. 4928.143(B)(2) allows an ESP to include *only* "any of the following" provisions enumerated, not "any provision" that the utility might dream up.[66] In other words, "if a given provision does not fit within one of the categories listed 'following' (B)(2), it is not authorized by statute."[67] While R.C. 4928.143(B)(2)(h) states that an ESP may provide for or include "provisions regarding . . . incentive ratemaking,"[68] Rider DCR cannot be deemed an incentive as envisioned under the law. The Court has previously determined that "incentive ratemaking uses rewards and penalties that link utility revenues to various standards or goals."[69] "[I]f the commission awards [a utility] money up front with no meaningful conditions attached," then it cannot be considered an "incentive."[70] As explained above, FirstEnergy's Rider DCR proposal would *guarantee* an amount collected from customers, an amount that will increase by $15 million, even if all three utilities failed to meet their respective reliability metrics.[71] In other words, there is no real penalty to "link [FirstEnergy's] revenues to various standards or

[66] *See In the Matter of the Application of Columbus Southern Power Company, et al*. (2011), 128 Ohio St.3d 512, 520, 947 N.E.2d 655 (internal quotations omitted).

[67] *Id.*

[68] *See, generally*, R.C. 4928.143(B)(2)(h).

[69] *In the Matter of the Application of Ohio Edison Co., Cleveland Electric Illuminating Company, and Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906 at ¶ 17.

[70] *Id.* at ¶ 19.

[71] Tr. Vol. II at 393 (McMillen Cross-Examination).

goals." Moreover, since FirstEnergy has been consistently meeting its reliability performance standards for over a decade, Rider DCR is essentially an award of an additional $21 million "up front with no meaningful conditions attached" because FirstEnergy's behaviors and practices will not change in response to the additional payments. Since Rider DCR is not an "incentive" as envisioned by law and is not entirely incentive-based, it does not fall within any of the categories enumerated in R.C. 4928.143(B)(2). Therefore, on its face, FirstEnergy may not lawfully include such a provision in ESP V.

FirstEnergy's Rider DCR proposal does not constitute an incentive. Rather, it "is an example of single-issue ratemaking, which does not consider FirstEnergy's revenues or any reductions in other expenses that should be offset."[72] Instead, FirstEnergy is recovering all of its distribution infrastructure costs plus a return through a rider mechanism. The kinds of costs being recovered through Rider DCR can and should be recovered through base rates because they are base distribution costs.[73] As explained by OMAEG witness Seryak, "FirstEnergy can make these investments with base distribution revenue," and "if FirstEnergy's distribution costs exceed its base distribution revenue, it should file a new distribution rate case to recover those costs and investments that are used and useful to customers."[74] Other intervenors concurred. OCC witness Meyer stated Rider DCR engages in single-issue ratemaking and that such costs "can be included in FirstEnergy's upcoming rate case."[75] Kroger witness Bieber recommended "that FirstEnergy's

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[72] OMAEG Ex. 1 at 14 (Seryak Direct). *See also* Kroger Ex. 1 at 4 (Bieber Direct); OCC Ex. 1 at 16, 19 (Meyer Direct).

[73] OMAEG Ex. 1 at 13 (Seryak Direct); Kroger Ex. 1 at 8 (Bieber Direct); OCC Ex. 1 at 32 (Meyer Direct); Tr. Vol. II at 391 (McMillen Cross-Examination); Company Ex. 3 at 5 (McMillen Direct).

[74] OMAEG Ex. 1 at 13 (Seryak Direct).

[75] *See* OCC Ex. 1 at 16, 19 (Meyer Direct).

reasonable and prudent distribution infrastructure investment costs *should* be recovered through base rates."[76] FirstEnergy itself even admits that "the costs in Rider DCR would be recoverable even if the rider was not effective."[77]

Clearly, FirstEnergy recognizes that costs recovered through Rider DCR are base distribution costs, and the Commission should require that base distribution costs only be recovered through base distribution rates because rate case filings take into consideration both FirstEnergy's costs and its revenues to determine whether FirstEnergy needs to collect additional funds from customers to provide its services.[78] Several other witnesses share similar positions.[79] For example, Staff witness Healey stated, "Base distribution rate cases provide transparency and are an opportunity for the Commission to holistically assess a utility's operations and finances . . . And while [ESPs] are important regulatory tools, none is a substitute for the openness and thorough review that a base distribution rate case affords."[80] And as further noted by Staff witness Healey at the hearing, "because there has been a long lag since the last rate case, there is a lot we don't know about the Companies' assets," but a full and holistic review of "the Companies' expense, revenues, rate of return, and potentially all those factors and others could inform the Commission's decision on the level of DCR that it believes is appropriate"[81]

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[76] Kroger Ex. 1 at 8 (Bieber Direct) (emphasis added).

[77] Company Ex. 3 at 8 (McMillen Direct).

[78] OMAEG Ex. 1 at 14 (Seryak Direct).

[79] OCC Ex. 18–19 (Meyer Direct); Kroger Ex. 1 at 8–9 (Bieber Direct); Staff Ex. 10 at 7 (Healey Direct).

[80] Staff Ex. 10 at 5–6 (Healey Direct). *See also* Tr. Vol. XIV at 2613 (Healey Cross-Examination).

[81] Tr. Vol. XIV at 2613 (Healey Cross-Examination).

FirstEnergy already spends approximately $400 million[82] each year on its distribution system, and by its own witnesses' admission, it has been successfully meeting its reliability standards for over a decade.[83] FirstEnergy witness Richardson also admitted that, regardless of the outcome of this case, and even if Rider DCR is not extended for another eight years, FirstEnergy is still expected to meet its reliability standards,[84] and FirstEnergy witness McMillen agreed that even without Rider DCR, FirstEnergy is still required to provide adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service.[85] Moreover, FirstEnergy would not be harmed by the discontinuation of Rider DCR because "the costs included in Rider DCR would be recoverable even if the rider was not effective"[86] since these costs are the same kinds of costs that FirstEnergy can and *does* recover through base rates.[87] Were the Commission to not extend Rider DCR, FirstEnergy could immediately file a new base rate case, and file subsequent cases as needed to recover its investments.[88]

From 2012 to 2022, FirstEnergy collected over $2.841 billion from customers through Rider DCR,[89] and now it seeks to collect another $3.666–$3.876 billion over the eight-year term

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[82] Approximately $400 million is recovered through Rider DCR and does not include additional expenditures on grid modernization, vegetation management, or storm restoration. Company Ex. 3 at 4 (McMillen Direct); Tr. Vol. VII at 1380 (Richardson Cross-Examination); Company Ex. 9 at 8 (Richardson Direct).

[83] Tr. Vol. I at 178 (Fanelli Cross-Examination); Tr. Vol. VII at 1378–79 (Richardson Cross-Examination); Company Ex. 9 at 2, 8–9 (Richardson Direct).

[84] Tr. Vol. VII at 1380 (Richardson Cross-Examination) (it is projected that Toledo Edison and CEI may miss their respective CAIDI targets).

[85] Tr. Vol. II at 406 (McMillen Cross-Examination).

[86] Company Ex. 3 at 8 (McMillen Direct); Tr. Vol. II at 409 (McMillen Cross-Examination).

[87] Company Ex. 3 at 3 (McMillen Direct); Tr. Vol. II at 391 (McMillen Cross-Examination).

[88] Tr. Vol. XIV at 2618 (Healey Cross-Examination).

[89] OMAEG Ex. 4 at Attachment 1 (FirstEnergy Response to RESA Set 02-INT-003); Tr. Vol. II at 396 (McMillen Cross-Examination).

of ESP V.[90] Based on the evidence and testimony presented, Rider DCR, as proposed, does not meet statutory requirements, and includes unnecessary, unreasonable, and imprudent rate increases for customers. Accordingly, FirstEnergy has failed to demonstrate that the continuation and expansion of Rider DCR and increased recovery under Rider DCR is reasonable or prudent. Therefore, as a matter of law, policy, and proper ratemaking, the Commission should reject FirstEnergy's proposed Rider DCR and require FirstEnergy to file a base distribution rate case when and if it requests to collect additional funds from customers for distribution investments.[91] Continuing to allow significant cost riders like Rider DCR in an ESP case encourages FirstEnergy and other EDUs to avoid the accountability of a distribution rate case and instead seek to recover distribution investments without a proper review of all financial factors.[92]

Furthermore, R.C. 4928.143(B)(2)(h) also states the following about the burden of proof associated with returns on distribution riders:

> As part of its determination as to whether to allow in an electric distribution utility's electric security plan inclusion of any provision described in division (B)(2)(h) of this section, the commission shall examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned . . .

An EDU and customer expectations about the EDU's distribution system must be aligned if the Commission is to include, for instance, a distribution investment rider in an ESP.[93] Despite this requirement, FirstEnergy did not sufficiently demonstrate, in its Application or through supporting

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[90] *See* Staff Ex. 8 at 5 (Mackey Direct) for calculation of total Rider DCR charges for Years 1–6.

[91] OMAEG Ex. 1 at 14 (Seryak Direct).

[92] OMAEG Ex. 1 at 14 (Seryak Direct); OCC Ex. 1 at 20 (Meyer Direct); Kroger Ex. 1 at 7 (Bieber Direct).

[93] R.C. 4928.143(B)(2)(h).

testimony, that its expectations and the expectations of its customers are aligned as it relates to the reliability of the distribution system.

FirstEnergy witness Richardson testified that the Companies' distribution system is currently reliable and the Companies have consistently met or exceeded Commission-approved reliability standards.[94] However, neither Richardson nor any of the other FirstEnergy witnesses provided evidence that the customer surveys conducted during 2021 specifically addressed whether customers agree with Rider DCR and whether additional charges imposed for improved reliability are warranted or whether customers are satisfied with the cost to serve them.[95] Additional investments for improved reliability, absent research supporting the necessity of such investments, are not prudently incurred costs and should not be recoverable from ratepayers. OCC witness Meyer agreed and "recommend[s] that the Commission perform an extensive review of the necessity for this special infrastructure mechanism and determine if Rider DCR should continue for the entire ESP V planning horizon. A cost benefit analysis should be required of FirstEnergy to continue Rider DCR," but "Rider DCR should not become a permanent rider for FirstEnergy."[96]

Requesting Commission permission to continue Rider DCR and increase caps associated with the rider without conducting an analysis of how or when reliability may diminish, or the cost at which customers would forego paying more for additional distribution reliability, demonstrates a disconnect between the Companies' expectations and customer expectations. Therefore, Rider

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[94] Company Ex. 9 at 2, 8 (Richardson Direct); Tr. Vol. VII at 1378–79 (Richardson Cross-Examination).

[95] *See* Company Ex. 9 (Richardson Direct); Tr. Vol. VII at 1371–85 (Richardson Cross-Examination).

[96] OCC Ex. 1 at 20 (Meyer Direct).

DCR is unable to satisfy yet another statutory requirement contained in R.C. 4928.143(B)(2)(h) (in addition to not being an incentive as envisioned by the law), and should be rejected accordingly.

b. Alternatively, if the Commission does not reject Rider DCR as proposed in ESP V as unlawful and unreasonable, it should modify Rider DCR.

If the Commission does not reject Rider DCR as proposed by OMAEG and others,[97] at a minimum, the Commission should modify Rider DCR in accordance with Staff's proposed modifications, which significantly decreases the costs passed on to customers and collected through Rider DCR. Specifically, Staff proposed, among others, the following modifications:

1. Only allowing Rider DCR to include distribution plant found in FERC Accounts 360–374, which reduces the baseline from $390 million to $339 million;[98]

2. Disallowing FirstEnergy from rolling forward used/unrecovered revenue requirement amounts above the annual cap;[99]

3. Setting Rider DCR to zero on June 1, 2024 if FirstEnergy fails to file a base distribution rate case in May 2024;[100]

4. Only approving charges under Rider DCR for the "bridge period" between the start of ESP V and when new base distribution rates go into effect following the 2024 rate case;[101]

5. Disallowing FirstEnergy's inclusion of projected PIS when calculating Rider DCR;[102] and

6. Requiring FirstEnergy to modify the Rider DCR calculation by calculating each utility's Rider DCR rate as a single percentage of base distribution revenues.[103]

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[97] Kroger Ex. 1 at 5–9; OCC Ex. 1 at 20–37.

[98] Staff Ex. 10 at 9 (Healey Direct). This would result in Rider DCR costing customers between $2.349–$2.475 billion over Staff's proposed term of six years rather than $3.666–$3.876 billion over FirstEnergy's proposed term of eight years. *See* Staff Ex. 8 at 5 (Mackey Direct).

[99] Staff Ex. 8 at 6, 9 (Mackey Direct); Tr. Vol. XIV at 2432–33 (Mackey Cross-Examination).

[100] Staff Ex. 10 at 9 (Healey Direct).

[101] Staff Ex. 10 at 10 (Healey Direct); Tr. Vol. XIV at 2565 (Healey Cross-Examination).

[102] Staff Ex. 8 at 6 (Mackey Direct).

[103] Staff Ex. 8 at 6 (Mackey Direct).

Additionally, Staff's proposal to reduce the term of ESP V from eight years to six (beginning June 1, 2024 and ending May 31, 2030),[104] would further reduce the cost of Rider DCR by $1.011–$1.095 billion over the six-year ESP term.[105] Moreover, by only allowing FirstEnergy to recover for distribution plant found in FERC Accounts 360–374—which is consistent with other EDUs[106]—Staff's proposal decreases the Rider DCR starting amount by $51 million, which in turn decreases the overall cost to customers of Rider DCR by $1.317–$1.401 billion over a six-year ESP term.[107] Not allowing FirstEnergy to roll over unused Rider DCR cap amounts into future years is also consistent with other EDUs' practices, since "FirstEnergy is the only utility" currently allowed to recover "the difference between the revenue collected and the cap" in order to "increase the level of the subsequent period's cap."[108]

Furthermore, Staff's proposal to roll Rider DCR costs into base distribution rates following the 2024 rate case, and/or set Rider DCR to zero should FirstEnergy fail to file its 2024 rate case

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[104] Staff Ex. 10 at 3–4 (Healey Direct); Tr. Vol. I at 173–74 (Fanelli Cross-Examination); Tr. Vol. XIV at 2561 (Healey Cross-Examination). *See also In the Matter of the Application of The Dayton Power and Light Company d/b/a AES Ohio for Approval of Its Electric Security Plan*, Case Nos. 22-900-EL-SSO, et al., Opinion and Order (August 9, 2023) (approving an ESP term of three years) (hereinafter, AES ESP IV Order); *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to 4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Case Nos. 23-23-EL-SSO, et al., Stipulation (September 6, 2023) (hereinafter, AEP ESP V Stipulation) (proposing an ESP term of four years).

[105] Staff Ex. 8 at 5 (Mackey Direct) (this decrease results from lowering the total Rider DCR cost from $3.666–$3.876 billion over eight years to $2.655–$2.781 billion over six years).

[106] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, Opinion and Order at 42 (August 8, 2012) (hereinafter, AEP ESP II Order); AES ESP IV Order at 25; *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case No. 17-1263-EL-SSO, Opinion and Order at ¶ 114 (December 19, 2018) (hereinafter, Duke ESP IV Order).

[107] *See* Staff Ex. 8 at 5 (Mackey Direct) (this decrease results from lowering the total Rider DCR cost from $3.666–$3.876 billion over eight years to $2.349–$2.475 billion over six years).

[108] Tr. Vol. XIV at 2433 (Mackey Cross-Examination); Staff Ex. 8 at 9 (Mackey Direct). *See also* Tr. Vol. VII at 1382 (Richardson Cross-Examination); *In the Matter of the Application of Ohio Power Company for an Increase in Electric Distribution Rates*, Case Nos. 20-585-EL-AIR, et al., Opinion and Order at ¶¶ 53–54 (November 17, 2021) (hereinafter, AEP Rate Case Order); AES ESP IV Order at 26; Duke ESP IV Order at ¶ 113.

recognizes the simple fact that the costs recovered through Rider DCR are distribution costs that ought to be recovered through distribution rates. As discussed more fully above, allowing cost recovery for distribution costs in an ESP through Rider DCR is an example of single-issue ratemaking, which is not just and reasonable as a matter of policy and proper ratemaking.[109]

Rather notably, one of Staff's reasons for recommending that projected PIS no longer be eligible for recovery though Rider DCR is that "Staff has concerns about the accuracy of projections for plant balances included in the DCR."[110] These concerns stem from quarterly DCR filings docketed on October 7, 2021 and January 9, 2023, which revealed that the annual revenue requirement during each quarter was over-estimated by a combined $20.8 million, with all but one quarter over-estimated by at least $3 million.[111] Additionally, in the following quarterly filing filed on April 14, 2023, FirstEnergy overestimated the actual revenue requirement by $13.3 million.[112] Rider DCR allows FirstEnergy to recover capital expenditures and earn a return on distribution system assets almost immediately upon their placement in service,[113] and by including projected PIS in the rider calculation, FirstEnergy can "get [recovery] even sometimes before" the assets are placed in service.[114] Removing projected PIS from the Rider DCR calculation not only

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[109] *See also* OMAEG Ex. 1 at 13–15 (Seryak Direct); Kroger Ex. 1 at 4–9 (Bieber Direct); OCC Ex. 1 at 16, 19 (Meyer Direct).

[110] Staff Ex. 8 at 8 (Mackey Direct).

[111] Staff Ex. 8 at 8 (Mackey Direct).

[112] Staff Ex. 8 at 8 (Mackey Direct).

[113] Tr. Vol. XIV at 2555 (Healey Cross-Examination); Staff Ex. 8 at 8 (Mackey Direct).

[114] Tr. Vol. XIV at 2555 (Healey Cross-Examination).

addresses Staff's concern about the accuracy of projected plant balances, it conforms the Rider DCR calculation to how the other EDUs calculate their respective distribution riders.[115]

Lastly, Staff's proposal to change the Rider DCR allocation and rate design to a percentage of base distribution rates is preferable to FirstEnergy's current methodology for several reasons.[116] FirstEnergy's current methodology is based purely on a volumetric charge, which does not factor in both the fixed and volumetric components of the distribution charge.[117] As explained by Staff, given that Rider DCR allows for recovery of capital investments, "the rate calculation should be similar to their base rate charges."[118] Moreover, modifying the Rider DCR calculation to be a percentage of base distribution rates better aligns with how other utilities calculate similar riders, and "reduces the risk of an error or incorrect projection being made" by simplifying the calculation method.[119] That said, it is important to note that Rider DCR's current revenue requirement is allocated based on stale data and allocation factors that have not been updated since the 2007 rate case.[120] Therefore, while OMAEG supports Staff's proposal to modify the Rider DCR rate calculation—should the Commission allow Rider DCR to continue—it does not support the continued use of stale data for the revenue requirement allocation.

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[115] Staff Ex. 8 at 8–9 (Mackey Direct); AEP ESP II Order at 47; AES ESP IV Order at 25; Duke ESP IV Order at ¶ 113.

[116] Staff Ex. 8 at 11–12 (Mackey Direct).

[117] Staff Ex. 8 at 12 (Mackey Direct).

[118] Staff Ex. 8 at 12 (Mackey Direct).

[119] Staff Ex. 8 at 11–12 (Mackey Direct).

[120] OMAEG Ex. 6 (FirstEnergy's Response to OCC Set 05-INT-024); Tr. Vol. II at 403 (McMillen Cross-Examination).

Overall, Staff's proposed modifications to Rider DCR represent a reduction in charges to customers as compared to FirstEnergy's proposal.[121] As described by Staff witness Healey and Staff witness Mackey, Staff's proposal for Rider DCR would immediately reduce the annual cap on charges by $30–36 million, while, by contrast, the Application would increase the cap by $15–21 million per year.[122] Therefore, if the Commission does not outright reject Rider DCR as proposed as unjust, unreasonable and/or unlawful, then it should adopt Staff's proposed modifications.

2. The Commission should reject FirstEnergy's proposals to establish Riders VMC and SCR as such proposals are unlawful, unjust, and unreasonable.

According to its Application, FirstEnergy's proposed Rider VMC will recover incremental vegetation management expenses in excess of baseline levels recovered in base distribution rates, as well as to fund an eight-year "enhanced" vegetation management program,[123] while the proposed Rider SCR will recover major storm damage expenses *and* storm deferral amounts as of May 31, 2024.[124] As noted by OMAEG, Staff, and others, similar to Rider DCR discussed at length above, Riders VMC and SCR both recover costs that can and should be recovered through base rates,[125] and both will be collecting vegetation management (VM) and storm-related expenses greater than what FirstEnergy already recovers through base rates.[126] the costs FirstEnergy seeks

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[121] Staff Ex. 10 at 28 (Healey Direct).

[122] Staff Ex. 10 at 28 (Healey Direct).

[123] Company Ex. 1 at 9–10 (Application); Company Ex. 3 at 19 (McMillen Direct).

[124] Company Ex. 1 at 9 (Application); Company Ex. 7 at 2 (Lawless Direct). *See also* Tr. Vol. I at 74–5 (Fanelli Cross-Examination); Tr. Vol. II at 443 (McMillen Cross-Examination); Company Ex. 3 at 20 (McMillen Direct).

[125] OCC Ex. 1 at 16 (Meyer Direct); OMAEG Ex. 1 at 10 (discussing Rider VMC); Kroger Ex. 1 at 4 (Bieber Direct) (discussing Rider VMC).

[126] Company Ex. 1 at 9–10 (Application); Company Ex. 3 at 19–20, 22 (McMillen Direct); Company Ex. 7 at 2 (Lawless Direct); Tr. Vol. I at 101 (Fanelli Cross-Examination); Tr. Vol. II at 445 (McMillen Cross-Examination); Tr. Vol. VI at 1279 (Lawless Cross-Examination); Staff Ex. 1 at 4–5, 7 (Messenger Direct); Staff Ex. 2 at 9–10

to recover through Riders VMC and SCR would be recoverable through base rates even if the riders were not in effect.[127] Therefore, approving Riders VMC and SCR through ESP V constitutes single-issue ratemaking, which is not just and reasonable as a matter of policy and proper ratemaking.[128] As noted by OCC witness Meyer, "[g]iven the abundance of riders in FirstEnergy's current portfolio, there is no need to establish a new rider."[129]

Moreover, as with Rider DCR, these riders are ostensibly needed to ensure reliability, but as discussed above, FirstEnergy has been consistently meeting and exceeding its reliability metrics.[130] FirstEnergy witness Standish also testified that FirstEnergy is already currently satisfying all applicable regulatory requirements with respect to its existing vegetation management plan.[131] FirstEnergy witness Standish further admitted during the hearing that, without Rider VMC, FirstEnergy would probably not implement the enhanced VM program, which indicates that the program is not necessary for FirstEnergy to continue providing safe, reliable, and non-discriminatory electric service.[132] Furthermore, regardless of whether these riders are approved, per state law and policy, FirstEnergy still "need[s] to provide safe and reliable service."[133] As such, like Rider DCR, Riders VMC and SCR are not actually "incentives" as

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(Borer Direct); Staff Ex. 10 at 12 (Healey Direct); OMAEG Ex. 1 at 10, 16 (Seryak Direct); Kroger Ex. 1 at 4 (Bieber Direct) (discussing Rider VMC); OCC Ex. 1 at 16 (Meyer Direct).

[127] Company Ex. 3 at 22 (McMillen Direct); Company Ex. 7 at 7 (Lawless Direct); Tr. Vol. I at 101 (Fanelli Cross-Examination); Tr. Vol. II at 445 (McMillen Cross-Examination); Tr. Vol. VI at 1279 (Lawless Cross-Examination).

[128] OMAEG Ex. 1 at 13–15 (Seryak Direct); Kroger Ex. 1 at 9–11 (Bieber Direct); OCC Ex. 1 at 16 (Meyer Direct).

[129] OCC Ex. 1 at 16 (Meyer Direct).

[130] Tr. Vol. I at 178 (Fanelli Cross-Examination); Tr. Vol. VII at 1378–79 (Richardson Cross-Examination); Company Ex. 9 at 2, 8–9 (Richardson Direct).

[131] Company Ex. 8 at 11 (Standish Direct).

[132] Tr. Vol. VI at 1315 (Standish Cross-Examination).

[133] Tr. Vol. VI at 1310 (Standish Cross-Examination).

envisioned by law, since with or without them, FirstEnergy would still be meeting its reliability metrics and providing safe and reliable service. The riders will not incent any new or different behavior from FirstEnergy. Therefore, these riders do not fall within any of the categories enumerated in R.C. 4928.143(B)(2) and cannot be lawfully included in ESP V.

Currently, FirstEnergy spends about $45 million each year on VM costs, and it already recovers approximately $30 million through base rates, an amount that was established in 2009.[134] Over the past three years, FirstEnergy spent between $28.8–$55.4 million on VM O&M.[135] As proposed, Rider VMC would collect about $95 million each year, which represents an increased spend of about $47–$50.[136] In total, FirstEnergy seeks to collect an additional $759.8 million during the proposed eight-year term of ESP V, [137] which, by Kroger witness Bieber's calculations, is about 316% of the current baseline level.[138] Accordingly, even if FirstEnergy needed additional funds in years that it exceeded the amount of vegetation costs that it collected through base rates, FirstEnergy has failed to meet its burden to demonstrate that the amount proposed by FirstEnergy annually is not only necessary, but just and reasonable.[139] As argued by OCC witness Meyer, Rider VMC and the costs FirstEnergy wishes to recover through it "should be addressed in

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[134] Tr. Vol. II at 443 (McMillen Cross-Examination); Tr. Vol. VI at 1330–31 (Standish Cross-Examination); Company Ex. 3 at 19–20 (McMillen Direct); Company Ex. 8 at 3 (Standish Direct); Staff Ex. 1 at 5 (Messenger Direct); OMAEG Ex. 1 at 15 (Seryak Direct); Kroger Ex. 1 at 9 (Bieber Direct).

[135] Tr. Vol. VI at 1333 (Standish Cross-Examination); OMAEG Ex. 16 at Attachment 1 (FirstEnergy's Response to RESA Set 03-INT-039).

[136] Tr. Vol. II at 444 (McMillen Cross-Examination); Tr. Vol. VI at 1334 (Standish Cross-Examination); Company Ex. 3 at 20 (McMillen Direct); Staff Ex. 1 at 5 (Messenger Direct); OMAEG Ex. 1 at 15 (Seryak Direct); Kroger Ex, 1 at 10 (Bieber Direct).

[137] Tr. Vol. II at 444 (McMillen Cross-Examination); Tr. Vol. VI at 1333 (Standish Cross-Examination); Company Ex. 3 at 20 (McMillen Direct); Company Ex. 8 at 12 (Standish Direct); Staff Ex. 1 at 5 (Messenger Direct); Kroger Ex, 1 at 10 (Bieber Direct).

[138] Kroger Ex, 1 at 10 (Bieber Direct).

[139] *See* OMAEG Ex. 1 at 18 (Seryak Direct); Kroger Ex. 1 at 10–11 (Bieber Direct); OCC Ex. 1 at 18–19 (Meyer Direct).

FirstEnergy's next rate case to be filed in May 2024 . . . where all of the factors affecting an enhanced vegetation program can be addressed."[140] Therefore, FirstEnergy's proposal to create Rider VMC should be denied.

Rather notably, FirstEnergy did not propose annual caps, but if the Commission authorizes the creation of Rider VCM (which is should not), annual caps should be required. As recommended by Staff, recovery of VM expenses through Rider VMC should not only be annually capped, but those caps should be revisited and reevaluated "in the Companies' upcoming base distribution rate case."[141] Additionally, the Commission should adopt Staff's other modifications to Rider VCM, which will significantly lower the total amount that can be collected through Rider VMC to $334.6 over six years compared to FirstEnergy's proposal of $759.8 million over eight years.[142] Moreover, the Commission should adopt Staff's recommendation to exclude carrying charges from Rider VMC.[143]

Rider SCR should similarly be rejected or, alternatively, modified. FirstEnergy's proposal is to collect from customers about $35 million each year in actual storm expenses,[144] $29.499 million for five years for existing storm cost deferrals dating back to 2009 (these amounts would not count towards annual caps under FirstEnergy's proposal),[145] *and* carrying charges on

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[140] OCC Ex. 1 at 18 (Meyer Direct).

[141] Staff Ex. 1 at 6 (Messenger Direct).

[142] Staff Ex. 1 at 6 (Messenger Direct).

[143] Staff Ex. 1 at 8 (Messenger Direct).

[144] Tr. Vol. I at 75 (Fanelli Cross-Examination); Company Ex. 2 at Attachment SFL-3 at 10, line 47 (Fanelli Direct); Staff Ex. 10 at 30 (Healey Direct).

[145] Company Ex. 7 at 2, Attachment JL-1 (Lawless Direct); Tr. Vol. VI at 1277–78 (Lawless Cross-Examination); Staff Ex. 2 at 17 (Borer Direct); Staff Ex. 10 at 30 (Healey Direct).

unamortized storm deferral balance.[146] And similar to Rider DCR, FirstEnergy proposes that storm costs not recovered in a given year due to revenue caps roll over into the next year, and that these amounts will be both deferred *and* recoverable under the following year's caps.[147] As explained by OCC witness Meyer, "[w]ith the proposed Rider SCR, FirstEnergy would simply be allowed to record major storm costs without the necessity to determine the impact on its total operations. The SCR Rider essentially becomes an insurance policy for exact storm cost recovery without analyzing the total operations of FirstEnergy."[148] Allowing such a rider "will reduce the incentive for cost control by the utility, to the detriment of consumers,"[149] and the record demonstrates that FirstEnergy has failed to meet its burden to demonstrate that the amount proposed by FirstEnergy for Rider SCR is not only necessary, but just and reasonable. Therefore, FirstEnergy's proposal to create Rider SCR should be denied.

Nonetheless, if the Commission authorizes the creation of Rider SCR (which is should not), the Commission should adopt Staff's proposed modifications to Rider SCR.[150] For example, Staff recommends modifying the definition of "major storm" so that Rider SCR only recovers expenses related to storms considered major events as defined by Ohio Adm.Code 4901-1:1-10-01(T), which would reduce Rider SCR caps and be consistent with the other EDUs' similar storm riders.[151] Staff also recommends that FirstEnergy's existing deferral authority terminate once ESP

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[146] Tr. Vol. VI at 1273 (Lawless Cross-Examination); Company Ex. 7 at 5 (Lawless Direct).

[147] Tr. Vol. VI at 1274 (Lawless Cross-Examination); Tr. Vol. XIII at 2184 (Borer Cross-Examination); Company Ex. 7 at 5 (Lawless Direct).

[148] OCC Ex. 1 at 12 (Meyer Direct).

[149] OCC Ex. 1 at 12 (Meyer Direct).

[150] Staff Ex. 10 at 30 (Healey Direct). *See also* Staff Ex. 2 (Borer Direct).

[151] Tr. Vol. VI at 1272 (Lawless Cross-Examination); Tr. Vol. XIII at 2181 (Borer Cross-Examination); Staff Ex. 2 at 6, 10 (Borer Direct); Staff Ex. 10 at 30 (Healey Direct). *See* AEP ESP II Order, Duke ESP IV Order; *In the Matter*

V becomes effective, and that deferral balances be audited before FirstEnergy begins recovery.[152] And Staff recommends that no carrying charges be applied to the actual storm expenses (the non-deferral amounts) recovered through Rider SCR.[153]

Similar to Rider DCR, and as noted by OMAEG's witness and others, nothing prevents FirstEnergy from requesting to recover VM and storm-related costs through a base distribution rate case.[154] These riders constitute single-issue ratemaking and should be rejected by the Commission, at least until baseline costs are updated and established through a more recent rate case.[155] In fact, as Staff noted, both Riders VMC and SCR will inevitably be "affected by the 2024 Rate Case . . . when new baselines are set for the costs recovered through those riders,"[156] and as noted by Staff witness Messenger, after the 2024 rate case, the "caps are subject to that [*sic*] review . . . to account for a reduction to the caps if we're increasing the baseline."[157]

As noted by OCC witness Meyer, the costs at issue for Rider SCR are "more appropriate [*sic*] addressed in rate cases,"[158] and the enhanced VM "program can be included in FirstEnergy's 2024 upcoming rate case."[159] Moreover, as explained above, neither of these riders is an "incentive" under R.C. 4928.143(B)(2)(h) and therefore cannot lawfully be included in ESP V.

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of the Application of The Dayton Power and Light Company for Authority to Recover Certain Storm-Related Service Restoration Costs, Case Nos. 12-3062-EL-RDR, et al.

[152] Staff Ex. 2 at 18 (Borer Direct); Staff Ex. 10 at 30 (Healey Direct); Tr. Vol. VI at 1278–79 (Lawless Cross-Examination); Tr. Vol. XIII at 2179 (Borer Cross-Examination).

[153] Staff Ex. 2 at 16 (Borer Direct).

[154] OMAEG Ex. 1 at 17 (Seryak Direct); OCC Ex. 1 at 15, 19 (Meyer Direct); Kroger Ex. 1 at 10 (Bieber Direct); Tr. Vol. XIV at 2618 (Healey Cross-Examination).

[155] OMAEG Ex. 1 at 17 (Seryak Direct); OCC Ex. 1 at 15, 19 (Meyer Direct); Kroger Ex. 1 at 10 (Bieber Direct). *See also* AEP ESP I Order at 32.

[156] Staff Ex. 10 at 12–13 (Healey Direct).

[157] Tr. Vol. XI at 2067 (Messenger Cross-Examination); Staff Ex. 1 at 7 (Messenger Direct).

[158] OCC Ex. 1 at 15 (Meyer Direct).

[159] OCC Ex. 1 at 16 (Meyer Direct).

Therefore, the Commission should reject FirstEnergy's proposals to establish Riders VMC and SCR and require FirstEnergy to seek recovery of all VM and storm-related expenses through a rate case filing where the Commission reviews both FirstEnergy's costs and its revenues to determine whether FirstEnergy needs to collect additional funds from customers to provide its services. Alternatively, the Commission should only approve Riders VMC and SCR subject to Staff's proposed modifications.

3. The Commission should reject FirstEnergy's proposal to implement new and costly EE/PDR Programs and recover those costs from customers as such proposal is unlawful, unjust, and unreasonable.

As explained in its Application and supporting testimony, FirstEnergy's proposed EE/PDR Plan consists of five programs—one for commercial and industrial (C&I) customers, and four for residential—that will be created and implemented for half of the proposed eight-year ESP V term.[160] The estimated average annual costs for the EE/PDR Programs are $72.1 million, or $288.5 million in total.[161] Of that annual $72.1 million, only $8.6 million is earmarked for low-income EE programs,[162] while $38.5 million will fund the opt-out C&I program Energy Solutions for Business.[163] As explained by FirstEnergy witness Miller, the costs for the Energy Solutions for Business program are to be recovered from non-residential customers through Rider EEC.[164]

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[160] Company Ex. 5 at 4 (Miller Direct).

[161] Tr. Vol. V at 968 (Miller Cross-Examination); Company Ex. 5 at 4 (Miller Direct); RESA Ex. 16 at 2, 5 (Smith Direct). The total estimated cost of the EE/PDR Plan is $288,512,862. Company Ex. 5 at Attachment ECM-2, Workpaper 2 (Miller Direct); Tr. Vol. V at 1055 (Miller Re-Cross-Examination).

[162] Tr. Vol. V at 970 (Miller Cross-Examination); Company Ex. 5 at Attachment ECM-2 (Miller Direct). *See also* OCC Ex. 4 at 3 (Direct Testimony of Colleen Shutrump (Shutrump Direct)) (October 23, 2023).

[163] Tr. Vol. III at 657–59 (Miller Cross-Examination); Tr. Vol. V at 969 (Miller Cross-Examination); Company Ex. 5 at 22, Attachment ECM-2 (Miller Direct).

[164] Tr. Vol. II at 373 (McMillen Cross-Examination); Tr. Vol. V at 989 (Miller Cross-Examination); RESA Ex. 16 at 2 (Smith Direct).

Despite only spanning four years, the $288.5 million in costs for the EE/PDR Programs will be collected over *eleven years*,[165] meaning that FirstEnergy proposes to collect EE/PDR costs that were incurred during ESP Year 4 *three years after* the termination of ESP V.[166] The mere fact that FirstEnergy's proposed EE/PDR program costs need to be collected over *eleven* years to be considered "reasonable" indicates that the costs of these programs are intrinsically excessive and unjust and unreasonable. As noted by OCC witness Shutrump, the EE/PDR Plan "is bad policy because consumers benefit from energy efficiency in the competitive market without paying charges to support utility energy efficiency programs in the first place."[167]

FirstEnergy attempts to claim that "large customers" will not be harmed by having to pay an aggregate of $154,327,143[168] for involuntary EE/PDR programs because these customers have the ability to opt-out and thus not be charged Rider EEC on a going forward basis. [169] However, this ignores the fact that not all customers can opt out of the excessive charges, and the large customers that can opt out will be required to pay the charges unless or until they affirmatively opt-out through some undefined process that FirstEnergy has not yet officially developed or created.[170] FirstEnergy further claims that it chose an opt-out process rather an opt-in because customers might not be aware of the opt-in period.[171] However, as FirstEnergy witness Miller

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165 Tr. Vol. II at 355 (McMillen Cross-Examination); Tr. Vol. III at 531 (McMillen Cross-Examination). *See also* OCC Ex. 4 at 3 (Shutrump Direct).

166 Tr. Vol. II at 376 (McMillen Cross-Examination).

167 OCC Ex. 4 at 6 (Shutrump Direct). *See also* RESA/IGS Ex. 1 at 15 (Direct Testimony of Matthew White (White Direct)) (October 23, 2023); RESA Ex. 16 at 11–12 (Smith Direct).

168 $34,039,537 is for program administration alone. Tr. Vol. V at 1055 (Miller Re-Cross-Examination); Company Ex. 5 at Attachment ECM-2, Workpaper 2.

169 Tr. Vol. III at 529 (McMillen Cross-Examination); Company Ex. 5 at 8, 25 (Miller Direct).

170 Tr. Vol. V at 990 (Miller Cross-Examination); Company Ex. 5 at 25 (Miller Direct).

171 Company Ex. 5 at 25 (Miller Direct).

admitted during the hearing, customers might not be aware of the opt-out period either, and until a customer affirmatively opts-out of the business program, they are charged through Rider EEC.[172] FirstEnergy witness Miller also admitted that FirstEnergy's methods for eventually informing customers about the opt-out process—direct contact, direct mail, website notifications, etc.—could just as easily be used to inform them of an opt-in process.[173]

Tellingly, FirstEnergy is not proposing to delay charging customers for the EE/PDR Programs through Rider EEC until such time as customers have been made aware of the opt-out option and have had the opportunity to do so.[174] Moreover, while the opt-out process has yet to be officially developed or proposed, FirstEnergy explained that it will likely have customers complete an application form that must then be submitted along with a written opt-out request and provide documentation for FirstEnergy's review.[175] C&I customers not wishing to participate in the EE/PDR Programs and pay for the programs through Rider EEC must do all of that and *hope* that FirstEnergy completes its review prior to the Rider EEC rates go into effect on June 1, 2024, despite the fact that the process would not be created and educational efforts on the opt-out process would not begin until *after* the Commission approved the ESP V proposal, which could leave little time for education or an opt-out process of any kind.[176] More likely than not, numerous large customers wishing to opt-out of the business program will not know about and be able to do so

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[172] Tr. Vol. V at 991–92 (Miller Cross-Examination); OMAEG Ex. 13 at OMAEG-02-INT-021 (FirstEnergy's Responses to OMAEG Set 02 Discovery).

[173] Tr. Vol. V at 996–97 (Miller Cross-Examination); OMAEG Ex. 13 at OMAEG-02-INT-017 (FirstEnergy's Responses to OMAEG Set 02 Discovery).

[174] Tr. Vol. V at 993–94 (Miller Cross-Examination).

[175] OMAEG Ex. 13 at OMAEG-02-INT-019 (FirstEnergy's Responses to OMAEG Set 02 Discovery); Tr. Vol. V at 998–99 (Miller Cross-Examination).

[176] Tr. Vol. V at 994–95 (Miller Cross-Examination).

until *after* they have been charged Rider EEC. This issue could have easily been avoided with an opt-in program.

The Energy Solutions for Business Program—as well as the other EE/PDR programs not related to low-income customers—are unlawful, flagrantly against state policy, unreasonably costly and markedly unjust, and contravene Commission precedent.[177] In 2019, the 133rd General Assembly enacted HB 6, which mandated that electric utilities terminate their previously required EE programs.[178] Mandatory EE/PDR Programs are, therefore, prohibited and an opt-out program where customers are conscripted into the program unless or until they affirmatively opt-out cannot be deemed to be voluntarily as the customers will be required to pay for the programs unless and until they take action otherwise.

Subsequent to HB 6, the Commission ordered the EDUs to wind-down their EE/PDR portfolio plan programs.[179] Since then, the Commission has correctly and consistently found that Ohio law largely limits EE programs to *competitive* and customer-owned initiatives, rather than utility-owned programs, with the exception of certain low-income residential programs.[180] In fact,

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[177] *See* OCC Ex. 4 at 4–5 (Shutrump Direct); RESA/IGS Ex. 1 at 15–17 (White Direct); RESA Ex. 16 at 14 (Smith Direct).

[178] R.C. 4928.66(G)(3).

[179] *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its 2017-2019 Energy Efficiency and Peak Demand Reduction Program Portfolio Plan*, Case Nos. 16-576-EL-POR, et al., Finding and Order at ¶ 1 (February 26, 2020) (hereinafter, Duke EE/PDR Order); *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of the Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2017 through 2019*, Case No. 16-743-EL-POR, Finding and Order at ¶¶ 8, 11 (November 18, 2020).

[180] *See* Duke EE/PDR Order at ¶ 44; *In the Matter of the Commission's Review of the Rules in Ohio Adm.Code Chapter 4901:1-39*, Case No. 22-869-EL-ORD, Finding and Order (November 30, 2022); *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its 2021 Energy Efficiency and Demand Side Management Portfolio of Programs and Cost Recovery Mechanism*, Case Nos. 20-1013-EL-POR, et al., Entry (June 17, 2020) (hereinafter, Duke EE/DSM Entry); *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case Nos. 21-887-EL-AIR, et al., Opinion and Order at ¶¶ 71–72, 173 (December 14, 2022); *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Amend Its Filed Tariffs to Increase the Rates and Charges for Gas Services and Related Matters*, Case Nos. 21-637-GA-AIR, et al., Opinion & Order at ¶ 56 (Jan. 26, 2023) (hereinafter, Columbia Rate Case Order); *In the Matter of the Application of the East Ohio*

the Commission has explicitly stated that "the future for EE programs in this state will be best served by reliance upon market-based approaches such as those available through PJM and competitive retail electric service providers,"[181] and "electric distribution utilities, like AEP Ohio, were directed, pursuant to R.C. 492.661, to file amended plans to re-establish low-income customer energy efficiency programs, which will remain in effect through December 31, 2021."[182] Additionally, as explained by RESA/IGS witness White, in AES' recent ESP IV case, the Commission "approved a Stipulation that removed several proposals from the EDU's application (EV, EE/PDR, and active demand management services) that would have been forced upon customers through monopoly power products and services otherwise available in the competitive marketplace."[183]

R.C. 4928.02(H) also supports the Commission's decision to rely on market-based approaches because this statute provides that it is the state's policy to prohibit anticompetitive subsidies. Accordingly, the Commission should reject FirstEnergy's proposed EE/PDR plan in its entirety as violating Ohio law and Commission precedent.

However, if the Commission does not reject FirstEnergy's proposed EE/PDR Plan in its entirety, it should adopt Staff's proposal to reject all programs that are not related to low-income

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Gas Company dba Dominion Energy Ohio for approval of an alternative form of regulation to continue and to expand its demand-side management and energy efficiency program, Case No. 21-1109-GA-UNC, Opinion & Order at ¶ 49 (October 4, 2023). *See also* OCC Ex. 4 at 3–4 (Shutrump Direct); RESA/IGS Ex. 1 at 12–14 (White Direct).

181 Duke EE/DSM Entry at ¶ 9. *See also* OCC Ex. 4 at 3–4 (Shutrump Direct); RESA/IGS Ex. 1 at 12–14 (White Direct).

182 AEP Rate Case Order at ¶ 128, *citing* Duke EE/DSM Entry at ¶ 9. *See also* OCC Ex. 4 at 3–4 (Shutrump Direct); RESA/IGS Ex. 1 at 12–14 (White Direct).

183 RESA/IGS Ex. 1 at 12–14 (White Direct). *See* AES ESP IV Order.

residential programs and decrease the annual budget to $15.6 million.[184] Staff also proposes decreasing the EE/PDR Plan to three years (in keeping with the proposed six-year term for the ESP) and only allowing FirstEnergy to recover EE/PDR costs during the term of the programs.[185] And similar to Staff's recommendations for the other riders, Staff recommends not allowing FirstEnergy to use projected expenses to calculate Rider EEC, and not allowing FirstEnergy to accrue carrying charges for deferring recovery of expenses.[186] Removing, at minimum, the business program and non-low income residential programs "reduce[s] the costs being recovered through ratepayers"[187] and is "consistent with previous Commission Orders . . . that have provided a framework of what the Commission finds to be appropriate energy efficiency programs."[188]

For all the above reasons, and in keeping with Ohio law, state policy, and its own precedent, the Commission should reject FirstEnergy's proposed EE/PDR Plan. Alternatively, the Commission should adopt Staff's proposed modifications to the EE/PDR Plan.

4. The Commission should reject FirstEnergy's proposal to continue recovering from customers costs associated with Rider AMI as such proposal is unjust, unreasonable, and unlawful.

According to the Application, Rider AMI is intended to recover costs associated with the Ohio Site Deployment of the Smart Grid Modernization Initiative in Case No. 09-1820-EL-ATA

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[184] Staff Ex. 3 at 4 (Direct Testimony of Kristin Braun (Braun Direct)) (October 30, 2023); Staff Ex. 10 at 29–30 (Healey Direct); Tr. Vol. V at 1010 (Miller Cross-Examination); Tr. Vol. XIII at 2301 (Braun Cross-Examination).

[185] Tr. Vol. XIV at 2435–36 (Mackey Cross-Examination); Staff Ex. 4 at 3 (Braun Direct); Staff Ex. 8 at 22–23 (Mackey Direct).

[186] Tr. Vol. XIV at 2435–36 (Mackey Cross-Examination); Staff Ex. 8 at 22–23 (Mackey Direct).

[187] Tr. Vol. XIII at 2321 (Braun Cross-Examination).

[188] Staff Ex. 4 at 5 (Braun Direct). *See also* Tr. Vol. XIII at 2321 (Braun Cross-Examination), stating that the business program was removed because the "Commission has provided a framework of what they felt was an appropriate level of energy efficiency"; AEP Rate Case Order at ¶ 128; Columbia Rate Case Order at 56.

(SGMI), as well as any costs of additional grid modernization programs.[189] As of today, the only "additional grid modernization" costs being recovered through Rider AMI are those associated with phase one of FirstEnergy's grid modernization business plan (Grid Mod I).[190] That said, FirstEnergy intends to begin recovering costs associated with phase two (Grid Mod II) in the near future—as soon as its pending Grid Mod II case is approved,[191] and the specific terms and conditions of the investments that would be eligible to be included in Rider AMI are subject to the Grid Mod II case.[192] If the Commission approves the application and requested recovery amounts for Grid Mod II that are embedded in FirstEnergy's pending Grid Mod II application, the total revenue that FirstEnergy would collect through Rider AMI would increase by an astonishing $626 million,[193] which includes a high ROE of 10.38%.[194]

Even though grid modernization investments are the types of costs that can be and should be recoverable through base rates,[195] FirstEnergy does not propose rolling SGMI or Grid Mod costs into base rates as part of the 2024 rate case.[196] Rather, FirstEnergy intends to continue collecting these costs through Rider AMI for the entire ESP V term in order to continue to collect the high ROE even though it has little risk as it will receive dollar-for-dollar recovery through the rider. According to FirstEnergy McMillen, the Companies expect to collect, in aggregate,

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[189] Company Ex. 1 at 8 (Application); Company Ex. 3 at 9 (McMillen Direct); Tr. Vol. II at 410 (McMillen Cross-Examination). *See also* OCC Ex. 1 at 37 (Meyer Direct).

[190] Company Ex. 3 at 9 (McMillen Direct); OCC Ex. 1 at 37–38 (Meyer Direct).

[191] Company Ex. 3 at 9 (McMillen Direct); OCC Ex. 1 at 37–38 (Meyer Direct).

[192] Tr. Vol. I at 86 (Fanelli Cross-Examination).

[193] Tr. Vol. II at 381–82 (McMillen Cross-Examination).

[194] Tr. Vol. I at 158 (Fanelli Cross-Examination); Tr. Vol. II at 354 (McMillen Cross-Examination).

[195] Tr. Vol. II at 433–34 (McMillen Cross-Examination); OCC Ex. 1 at 38 (Meyer Direct).

[196] Tr. Vol. II at 412, 416 (McMillen Cross-Examination).

"approximately $450 million . . . through Rider AMI through the next five years."[197] Rather notably, this projected $450 million recovery from customers "*does not* include the projected Grid Mod II costs."[198] As a comparison, between 2011 and 2022 (eleven years), FirstEnergy "only" collected $369,632,768 from customers for Grid Mod I and SGMI-related costs.[199]

As stated by Staff and others, because Rider AMI costs are recoverable through base rates, these costs should be rolled into FirstEnergy's base rates in the upcoming 2024 rate case.[200] More specifically, OCC witness Meyer recommended that "Rider AMI should be addressed in the upcoming FirstEnergy rate case,"[201] and Staff testified that all Grid Mod expenses should be rolled into base rates and no longer eligible for recovery thought Rider AMI.[202] Additionally, Staff opposed FirstEnergy's collection of SGMI costs through AMI.[203] Since 2019, Staff has recommended removing SGMI costs from Rider AMI as part of the annual audits,[204] and the Commission recently determined in Case Nos. 16-2166-EL-RDR and 17-2276-EL-RDR that the capital portion of the SGMI costs should not be recovered through Rider AMI.[205] Staff also recommended that projected PIS not be eligible for recovery through Rider AMI for similar reasons as why it should not be included in Rider DCR—"Staff has concerns about the accuracy

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[197] Tr. Vol. II at 423–24 (McMillen Cross-Examination). *See also* OMAEG Ex. 8 (FirstEnergy Response to OCC Set 04-INT-003).

[198] Tr. Vol. II at 423–24 (McMillen Cross-Examination) (emphasis added). *See also* OMAEG Ex. 8 (FirstEnergy Response to OCC Set 04-INT-003).

[199] *See* RESA Ex. 8 (FirstEnergy Response to RESA Set 02-INT-008 Attachment 1); Tr. Vol. II at 386–88 (McMillen Cross-Examination).

[200] Staff Ex. 10 at 12 (Healey Direct); Staff Ex. 8 at 19 (Mackey Direct); OCC Ex. 1 at 38 (Meyer Direct).

[201] OCC Ex. 1 at 38 (Meyer Direct).

[202] Tr. Vol. XIV at 2437 (Mackey Cross-Examination); Staff Ex. 8 at 19 (Mackey Direct).

[203] Tr. Vol. XIV at 2437–38 (Mackey Cross-Examination); Staff Ex. 8 at 18 (Mackey Direct).

[204] Tr. Vol. XIV at 2444 (Mackey Cross-Examination); Staff Ex. 8 at 18 (Mackey Direct).

[205] Tr. Vol. XIV at 2448 (Mackey Cross-Examination).

of projections for plant and expense balances."[206] Given the Commission's precedent, and in the interest of good public policy and proper ratemaking, the Commission should reject FirstEnergy's Rider AMI proposal and order the Companies to roll Grid Mod costs into base rates.

5. The Commission should reject FirstEnergy's proposal to continue its Rider ELR program without expanding eligibility and participation as such proposal is unlawful, unjustly discriminatory, and unreasonable.

As explained by OMAEG witness Seryak, interruptible programs can "improve reliability by reducing demand for electric power when the supply is limited, thereby preventing the electric grid from overloading and failing."[207] Additionally, such programs also make both Ohio and the participants more economically competitive.[208] Unfortunately, "neither FirstEnergy's current or proposed ELR Programs are actually designed for [these] purpose[s]."[209] While the ELR program "has the *potential* to provide additive and unique load reduction during distribution and transmission system emergencies,"[210] as designed, the program "is duplicative of a competitive market service and is anticompetitive."[211] Therefore, if the program is allowed to continue, it should "be modified to be more functional and cost effective for the ratepayers who are funding it."[212]

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[206] Staff Ex. 8 at 18 (Mackey Direct).

[207] OMAEG Ex. 1 at 6 (Seryak Direct). *See also* Nucor Ex. 1 at 7 (Direct Testimony of Dennis Goins (Goins Direct)) (October 23, 2023); OEG Ex. 3 at 3 (Direct Testimony of Kevin Murray (Murray Direct)) (October 23, 2023); OELC Ex. 32 at 38 (Direct Testimony of Matthew Brakey (Brakey Direct)) (October 23, 2023).

[208] OMAEG Ex. 1 at 10–11 (Seryak Direct). *See also* Tr. Vol. VIII at 1656 (Murray Cross-Examination).

[209] OMAEG Ex. 1 at 9 (Seryak Direct).

[210] OMAEG Ex. 1 at 8 (Seryak Direct).

[211] OMAEG Ex. 1 at 12 (Seryak Direct). *See also* Tr. Vol. XII at 2122, 2134 (Seryak Cross-Examination); OMAEG Ex. 1 at 6 (Seryak Direct).

[212] Tr. Vol. XII at 2123 (Seryak Cross-Examination).

Specifically, OMAEG witness Seryak recommends modifying the ELR program to couple load curtailment with transmission and distribution system reliability needs.[213] While there is no need for a distribution utility like FirstEnergy to be involved in PJM's demand response program(s)—since customers can participate in those on their own—"there is not [*sic*] organized demand response and load shedding for transmission system issues, and that has created serious reliability events in Ohio."[214] This gap in using interruptible load and demand response for transmission system issues[215] could be filled if the Commission "order[s] that interruptible load calls be tied to transmission facility overloading, and not PJM demand response calls."[216] For this reason, OMAEG witness Seryak recommends that the ELR program be modified to remove the PJM demand response component, and instead become a program that responds to curtailable events based on transmission facility overloading.[217]

Additionally, OMAEG witness Seryak recommends that any ELR program approved by the Commission should "be available to any commercial or industrial [C&I] customer that can interrupt its load."[218] Ohio Energy Leadership Council (OELC) witness Brakey similarly testified that "[t]his ESP V proceeding is an ideal opportunity to reopen the program to allow entry for customers with curtailment capabilities. There is no good reason to put up an artificial barrier denying these customers program access."[219] Ohio Energy Group (OEG) witness Murray also

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[213] OMAEG Ex. 1 at 5–12 (Seryak Direct); Tr. Vol. XII at 2123 (Seryak Cross-Examination).

[214] Tr. Vol. XII at 2122 (Seryak Cross-Examination).

[215] Tr. Vol. XII at 2134 (Seryak Cross-Examination).

[216] Tr. Vol. XII at 2119 (Seryak Cross-Examination), *quoting* OMAEG Ex. 1 at 21 (Seryak Direct).

[217] Tr. Vol. XII at 2123 (Seryak Cross-Examination).

[218] OMAEG Ex. 1 at 4 (Seryak Direct). *See also* Tr. Vol. XII at 2118 (Seryak Cross-Examination).

[219] OELC Ex. 32 at 54 (Brakey Direct).

agreed that increasing participation in interruptible programs could in turn increase reliability and competitive benefits.[220] That said, OMAEG is not proposing that there be *no* participation caps, only that all C&I customers should be *eligible* to participate.[221] Staff agrees with OMAEG's position that the ELR program should be expanded. Specifically, Staff witness Healey recommended that "the ELR program be increased by 50MW each year for five years, beginning June 1, 2025. It should be open to new participants on a first-come-first-served basis."[222] Given the many benefits that interruptible programs can provide, the Commission should approve continuation of the ELR program subject to OMAEG witness Seryak's recommendations.

Alternatively, if the Commission does not modify the ELR program, then the program should be eliminated because it is duplicative, anti-competitive, and inherently discriminatory.[223] Originally authorized as part of FirstEnergy's ESP I, the ELR program has been in place since 2009.[224] Since 2009, FirstEnergy has discriminatorily restricted ELR eligibility and participation to a few select customers (who were signatory parties on prior ESP settlements),[225] and FirstEnergy intends to continue that discrimination by continuing to limit participation over the proposed eight-

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[220] Tr. Vol. VIII at 1656 (Murray Cross-Examination).

[221] Tr. Vol. XII at 2132 (Seryak Cross-Examination).

[222] Staff Ex. 10 at 26 (Healey Direct).

[223] OMAEG Ex. 1 at 12 (Seryak Direct).

[224] Tr. Vol. II at 297 (McMillen Cross-Examination); Company Ex. 3 at 11 (McMillen Direct); OMAEG Ex. 1 at 11 (Seryak Direct); OELC Ex. 32 at 38 (Brakey Direct); OEG Ex. 3 at 5 (Murray Direct).

[225] OMAEG Ex. 1 at 11 (Seryak Direct); Tr. Vol. VIII at 1657 (Murray Cross-Examination). *See also In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. § 4928.143*, Case No. 08-935-EL-SSO, Stipulation at 12 (February 19, 2009) (hereinafter, FirstEnergy ESP I); FirstEnergy ESP I, Case No. 08-935-EL-SSO, Direct Testimony of Kevin T. Warvell at 22 (July 31, 2008).

year term of ESP V to select customers.[226] In other words, the 24 customers currently participating in the ELR program will be the only participants eligible to participate in ESP V through May 31, 2032, and new and/or existing customers able and willing to interrupt their load will be prohibited from participating.[227] In addition to being flagrantly discriminatory and unreasonable, FirstEnergy's decision to continue restricting participation contradicts its stated goal of using Rider ELR to support demand response and economic development, since limited participation in turn limits those potential benefits.[228]

The ELR program, as proposed, is also unreasonably costly to non-participating customers. In exchange for their commitment to interrupt their load during load shedding events, ELR participants receive monthly credits paid for by non-participating customers through FirstEnergy's Demand Side Management and Energy Efficiency Rider (DSE1) and Economic Development Rider (EDR).[229] Since ESP IV began back in June 2016, FirstEnergy explained that the current ELR credits are more than ten times higher than PJM market capacity prices.[230] Moreover, even with FirstEnergy's proposed phase-down of the ELR credits, the 24 participating customers will still be earning—as paid for by non-participating customers—far more through ELR than they

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[226] Company Ex. 3 at 12 (McMillen Direct); Company Ex. 10 at 7 (Direct Testimony of Edward Stein (Stein Direct)) (April 5, 2023); OMAEG Ex. 1 at 11 (Seryak Direct); Tr. Vol. II at 441 (McMillen Cross-Examination); Tr. Vol. VII at 1394, 1502–03 (Stein Cross-Examination); Tr. Vol. VIII at 1658 (Murray Cross-Examination).

[227] OMAEG Ex. 12 (FirstEnergy's Response to PUCO DR-006); Tr. Vol. II at 327, 439–41 (McMillen Cross-Examination); Tr. Vol. VII at 1394, 1502–03 (Stein Cross-Examination); Tr. Vol. VIII at 1658 (Murray Cross-Examination); Company Ex. 3 at 12 (McMillen Direct); Company Ex. 10 at 7 (Stein Direct); Staff Ex. 8 at 25–26 (Mackey Direct).

[228] Company Ex. 2 at 7 (Fanelli Direct); Company Ex. 3 at 13 (McMillen Direct); Company Ex. 10 at 5 (Stein Direct).

[229] Staff Ex. 8 at 16 (Mackey Direct); Company Ex. 3 at 13 (McMillen Direct); Company Ex. 10 at 6–7 (Stein Direct); Tr. Vol. VII at 1576 (Stein Cross-Examination); RESA Ex. 2 at DSE1 (FirstEnergy Response to RESA Set 02-INT-010 Attachment 1).

[230] Tr. Vol. VII at 1507, 1576 (Stein Cross-Examination); Company Ex. 10 at 6–7 (Stein Direct); OMAEG Ex. 1 at 8 (Seryak Direct).

would through a comparable PJM interruptible program.[231] Consequently, as OMAEG witness Seryak explained "the ELR Program does not primarily procure new interruptible load, but rather offers above-market payments to a select few customers for claimed demand response."[232]

Rather notably, since 2009, under the current program, ELR participants have only had to interrupt their load usage four times in response to load shed calls made by PJM.[233] That PJM was the one to call for load shedding rather than FirstEnergy is telling in that it demonstrates the duplicative nature of the ELR program.[234] As explained by OMAEG witness Seryak, because there exists a competitive market with demand response programs in which customers can participate and shed load, "for the ELR to serve that function is inherently duplicative" and does not provide any unique benefits or load reduction to the system.[235] In fact, one of FirstEnergy's proposed changes is to no longer serve as the curtailment service provider (CSP) for the ELR program,[236] which means current ELR participants will be responsible for their own curtailment activities through a separate CSP or directly with PJM.[237] As such, ELR participants will also be able to participate in PJM interruptible programs on their own.[238]

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[231] Tr. Vol. II at 358 (McMillen Cross-Examination). *See also* Company Ex. 10 at 6–7 (Stein Direct). Staff's alternative proposal would lower the credit amounts to $163 million over six years, or around $27 million per year. Staff Ex. 10 at 27 (Healey Direct).

[232] OMAEG Ex. 1 at 8 (Seryak Direct).

[233] Tr. Vol. VIII at 1666 (Murray Cross-Examination); Company Ex. 3 at 12 (McMillen Direct); Company Ex. 10 at 6 (Stein Direct).

[234] *See* OMAEG Ex. 1 at 5–12 (Seryak Direct).

[235] Tr. Vol. XII at 2122 (Seryak Cross-Examination); OMAEG Ex. 1 at 6 (Seryak Direct).

[236] Company Ex. 10 at 4–5 (Stein Direct); Staff Ex. 8 at 19 (Mackey Direct).

[237] Company Ex. 10 at 5 (Stein Direct); Staff Ex. 8 at 20 (Mackey Direct).

[238] Staff Ex. 8 at 20 (Mackey Direct).

Interruptible programs like ELR have the potential to provide significant reliability and system benefits. But, as proposed, FirstEnergy's ELR program produces few system benefits, is duplicative of a competitive market service, and is anticompetitive. Therefore, if the program is allowed to continue, it should be modified as recommended by OMAEG witness Seryak.

6. The Commission should modify FirstEnergy's ESP V proposal and shorten the ESP term.

As admitted by FirstEnergy, the Commission's precedent is for ESPs to last three to six years.[239] The Commission should not deviate from its own precedent. Staff further explained, FirstEnergy's proposal to continue its ESP for eight years is too long in part because of the billions of dollars that FirstEnergy is requesting to collect from customers and the bill impacts on customers.[240] Specifically, Staff recommended that ESP V be reduced to six years (beginning June 1, 2024 and ending May 31, 2030), arguing that a six-year ESP better aligns with the Commission's previous practice of approving ESP lengths between three and six years.[241] Staff also explained that a shortened ESP will mitigate rate impacts on customers,[242] and allow greater flexibility to

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239 Tr. Vol. I at 173–74 (Fanelli Cross-Examination).

240 *See* Staff Ex. 10 (Healey Direct) (discussing the various decreases to overall ESP costs because of the shortened term); Staff Ex. 1 at 6 (Messenger Direct) (discussing the decrease to Rider VMC costs because of the shortened term); Staff Ex. 4 at 3–5 (Braun Direct) (discussing the decrease to EE/PDR costs because of the shortened term); Staff Ex. 8 at 5 (Mackey Direct) (discussing the decrease to Rider DCR costs because of the shortened term).

241 Staff Ex. 10 at 3–4 (Healey Direct); Tr. Vol. I at 173–74 (Fanelli Cross-Examination); Tr. Vol. XIV at 2561 (Healey Cross-Examination). *See also* AES ESP IV Order at 24 (approving an ESP term of three years); AEP ESP V Stipulation at 3 (proposing an ESP term of four years); AEP ESP II Order at 6 (approving an ESP term of three years); *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case Nos. 16-1852-EL-SSO, et al., Opinion and Order at ¶ 1 (April 25, 2018) (hereinafter, AEP ESP IV Order) (approving an ESP term of six years); Duke ESP IV Order at ¶ 78 9approving an ESP term of six years).

242 Staff Ex. 10 at 28–31 (Healey Direct) (discussing the decrease to Riders DCR, VMC, and SCR, the EE/PDR Plan, and ELR credit costs because of the shortened term); Staff Ex. 1 at 6 (Messenger Direct) (discussing the decrease to Rider VMC costs because of the shortened term); Staff Ex. 4 at 3–5 (Braun Direct) (discussing the decrease to EE/PDR costs because of the shortened term); Staff Ex. 8 at 5 (Mackey Direct) (discussing the decrease to Rider DCR costs because of the shortened term).

account for changes in market conditions.[243] As noted by Staff witness Healey, "[t]here can be substantial changes in the market in an eight-year period, including (but not limited to) geopolitical changes, new and emerging technologies, inflation, recessions, modifications to wholesale market processes, and new laws and regulations. It would be beneficial to reassess the market before eight years to determine what is in the public interest. Thus, I propose a six-year ESP term."[244] During the hearing, FirstEnergy's own witness conceded that "there could be changed in the market" over an eight-year term.[245] Therefore, if the Commission approves the proposed ESP V, it should decrease the ESP term in order to conform with prior precedent, to mitigate the rate impacts on customers, and allow for greater flexibility to account for changing market conditions. OMAEG recommends and proposes a three or four-year term to be consistent with the ESPs recently approved for two other Ohio utilities.[246]

C. FirstEnergy Failed to Demonstrate that the Proposed ESP is More Favorable in the Aggregate than an MRO, as Required by R.C. 4928.143(C)(1).

As stated in R.C. 4928.143(C)(1), before approving an ESP, the Commission must determine that the ESP is more favorable in the aggregate as compared to the expected results that would otherwise apply under an MRO.[247] FirstEnergy has the burden of demonstrating that its proposed ESP V is, in fact, more favorable than an MRO.[248] In support of this requirement, FirstEnergy witness Fanelli claims the following: that ESP V "is *expected* to be more favorable in

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[243] Staff Ex. 10 at 4 (Healey Direct).

[244] Staff Ex. 10 at 4 (Healey Direct).

[245] Tr. Vol. I at 173 (Fanelli Cross-Examination).

[246] *See* AES ESP IV Order at 24 (approving an ESP term of three years); AEP ESP V Stipulation at 3 (proposing an ESP term of four years).

[247] R.C. 4928.143(C)(1); *see also In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 12-426-EL-SSO, Opinion and Order at 48 (September 4, 2013).

[248] *Id.*

the aggregate than an MRO" because "there is no difference related to the resulting SSO pricing between the proposed ESP and an MRO; "there are several provisions of proposed ESP V that are *estimated* to provide benefits that would not be realized under an MRO;" the proposed EE/PDR programs "are *estimated* to result in net benefits to customers of between $139 million and $524 million;" FirstEnergy committed to spending "$52 million on programs designed to support low-income customers and enhance the customer experience, without any cost recovery from customers," and that approving Riders DCR, AMI, SCM, and VCM through an ESP provides qualitative benefits.[249]

FirstEnergy's claims and analysis are flawed and the record is devoid of any record support for such claims. By its own admissions, FirstEnergy's analysis of the proposed ESP V did not consider the effects of the 2024 rate case on bill impacts or revenue requirement allocations,[250] nor did it consider several other pending cases that will inevitably alter the bill impacts of ESP V on customers.[251] For example, Riders DCR, AMI, VMC, and SCR's revenue allocations are/or would be calculated using allocation factors that were determined and have not been updated since the last rate case, which was filed back in 2007.[252] In other words, the revenue requirement allocations are all based on stale data and will inevitably change once new rates are set.[253] Despite this fact, FirstEnergy specifically excluded assumptions related to the 2024 rate case and did not conduct

[249] Company Ex. 2 at 12–13 (Fanelli Direct) (emphasis added)

[250] Company Ex. 4 at 4–5 (Patel Direct); Company Ex. 7 at 11–13 (Lawless Direct).

[251] Company Ex. 4 at 4–5 (Patel Direct); Company Ex. 7 at 11–13 (Lawless Direct).

[252] OMAEG Ex. 6 (FirstEnergy Response to OCC Set 05-INT-024); Tr. Vol. II at 403–05 (McMillen Cross-Examination).

[253] Company Ex. 2 at 5 (Fanelli Direct); Staff Ex. 1 at 7 (Messenger Direct); Staff Ex. 10 at 12–13 (Healey Direct); Tr. Vol. XI at 2067 (Messenger Cross-Examination).

any additional analysis to predict updated bill impacts based on different rate case outcomes.[254] Similarly, assumptions regarding the possible outcomes of the Grid Mod II case were excluded from the overall bill impacts.[255] In fact, the witness responsible for calculating the bill impacts could not even say whether her calculations assumed an annual Rider DCR cap increase of $15 million, $21 million, or some number in between.[256]

FirstEnergy's failure to consider several significant factors affecting the overall financial impacts of ESP V on customers—and therefore the net benefits and/or costs of ESP V as compared to the MRO—make it exceedingly difficult to quantify the supposed benefits of ESP V (but obvious as to the impacts), which is perhaps why FirstEnergy witness Fanelli only offered two quantitative benefits of the proposed ESP V.[257] While FirstEnergy witness Fanelli testified that estimated revenues—which would include the estimated impact of ESP V—would total $35.245 billion during the ESP V term, he admitted that his number could be different depending on the outcome of the 2024 rate case, the Grid Mod II case, whether the utilities meet their reliability metrics, etc.[258] In addition to failing to provide an accurate calculation of the potential rate impacts of ESP V, FirstEnergy failed to demonstrate that the claimed quantitative and qualitative benefits of the proposed ESP V are more favorable in the aggregate than an MRO. And rather tellingly, Staff witness Messenger testified that her conclusion that the proposed ESP is more favorable in the aggregate than an MRO is "*contingent* upon the Commission adopting the modifications

[254] Company Ex. 4 at 4 (Patel Direct); Company Ex. 7 at 6 (Lawless Direct); Tr. Vol. III at 617 (Patel Cross-Examination); Tr. Vol. VI at 1280–81 (Lawless Cross-Examination).

[255] Company Ex. 4 at 4 (Patel Direct); Tr. Vol. III at 619 (Patel Cross-Examination).

[256] Tr. Vol. III at 619–20 (Lawless Cross-Examination).

[257] *See* Company Ex. 2 at 12–13 (Fanelli Direct).

[258] *See* Company Ex. 2 at Attachment SFL-3 at 1–3 (Fanelli Direct); Tr. Vol. I at 79 (Fanelli Cross-Examination).

proposed by Staff."[259] Additionally, OCC argued that, as proposed, "if all factors including rate impacts are considered, the ESP V vs. MRO test fails, contrary to the position of FirstEnergy."[260]

1. FirstEnergy failed to demonstrate that the quantitative benefits of the proposed ESP V are more favorable than an MRO and such a conclusion is not supported by the record.

FirstEnergy witness Fanelli was the only FirstEnergy witness to offer testimony on the MRO Test, and based on that, FirstEnergy seems to be claiming that the quantitative benefits of the proposed ESP V are between \$191–\$576 million.[261] Even assuming that this is a complete and accurate total, this amount does not even offset the potential costs recoverable from customers through Rider DCR alone, which, at its lowest, would recover \$3.876 *billion* over the proposed eight years, or even the \$2.349 billion over six years if the ESP was shortened.[262] Moreover, this estimate includes a \$52 million shareholder funded commitment to fund programs designed to support low-income customers and enhance the customer experience.[263] And while FirstEnergy asserts that this commitment is pursuant to the ESP and would not be made pursuant to an MRO, FirstEnergy admitted that there is no prohibition that would preclude the Companies from making this commitment through an MRO.[264]

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[259] Tr. Vol. XI at 2043 (Messenger Cross-Examination) (emphasis added). *See also* Tr. Vol. XI at 2040 (Messenger Cross-Examination), stating that Staff's "testimony on the ESP MRO test takes into account the modifications that Staff is proposing to the ESP allocation."

[260] OCC Ex. 1 at 42 (Meyer Direct).

[261] Company Ex. 2 at 12–13 (Fanelli Direct). Fanelli testified that the EE/PDR Plan is estimated to result in net benefits to customers of between \$139–\$525 million, and that FirstEnergy will commit to spend \$52 million in shareholder dollars on programs designed to support low-income customers and enhance the customer experience. No other quantifiable benefit dollar amounts were stated in his testimony.

[262] Staff Ex. 8 at 5 (Mackey Direct).

[263] Company Ex. 2 at 12 (Fanelli Direct); Tr. Vol. I at 160–60 (Fanelli Cross-Examination).

[264] *See* Tr. Vol. I at 99–100 (Fanelli Cross-Examination).

Additionally, while FirstEnergy's $52 million commitment, which would not be recoverable from customers, *appears* to be an obvious quantitative benefit, the Companies have made similar commitments in the past that were subsequently not honored in full. Most recently, FirstEnergy committed to spend $3 million a year in shareholder money over the term of ESP IV (for a total of $24 million) to fund energy conservation programs and economic development and job retention programs.[265] However, despite its commitment to spend a total of $24 million in shareholder funds on economic development and energy conservation, as of July 31, 2023, FirstEnergy has only spent $2.1 million on such efforts (in rather stark contrast to all of the other expenditures the Companies have made, which are recoverable from customers).[266] When asked whether FirstEnergy is on track to invest the remaining $21.9 million as agreed to in the ESP IV settlement, FirstEnergy witness Miller confessed that he has no knowledge of whether FirstEnergy will actually uphold this commitment.[267] In her testimony, Staff witness Schaefer highlighted FirstEnergy's failure to follow through on its commitment and recommended that the unused shareholder dollars from ESP IV be credited back to customers.[268]

Considering that FirstEnergy failed to honor its previous commitment to spend $24 million in shareholder funds to benefit customers, one might expect the FirstEnergy witnesses to offer some reassurance that FirstEnergy would actually honor its promise to spend $52 million during ESP V, but such assurance is nowhere to be found. In fact, the entirety of FirstEnergy witness Fanelli's testimony regarding the MRO test is markedly sparse and lacking, spanning only two

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[265] OELC Ex. 7 (FirstEnergy's Response to PUCO DR-005); Tr. Vol. IV at 843–44 (Miller Cross-Examination); Staff Ex. 4 at 8 (Direct Testimony of Krystina Schaefer (Schaefer Direct)) (October 30, 2023).

[266] Tr. Vol. V at 977 (Miller Cross-Examination); Staff Ex. 4 at 8 (Schaefer Direct).

[267] Tr. Vol. V at 985 (Miller Cross-Examination).

[268] Tr. Vol. V at 978 (Miller Cross-Examination); Staff Ex. 4 at 9 (Schaefer Direct).

pages and primarily containing statements rather than detailed analysis. As noted by OCC witness Meyer, in order to satisfy the MRO Test, "one would expect detailed testimony describing benefits that could not be achieved through other regulatory means," but "[i]n this case, there is no such evidence."[269] In fact, all of the "benefits" that FirstEnergy witness Fanelli lists could be realized under an MRO (they could also be accomplished in the upcoming rate case).

Moreover, based on FirstEnergy witness Fanelli's testimony, it does not appear that FirstEnergy witness Fanelli considered the many costs associated with ESP V when he concluded that the proposed ESP was more favorable in the aggregate. For example, the costs associated with Riders DCR, AMI, SCR, and VMC were not considered because "the costs recovered in these riders would be recoverable outside of an ESP," which according to FirstEnergy witness Fanelli means "there is no quantifiable net cost or benefit."[270] This is incorrect. First, FirstEnergy receives more immediate recovery for infrastructure expenditures plus a return on that investment through distribution riders. Second, from a quantitative perspective, if FirstEnergy sought to recover Rider DCR, AMI, VMC, and SCR costs through the 2024 base rate case rather than ESP V, those costs would be subject to a holistic review of all of FirstEnergy's costs and revenues to determine whether FirstEnergy needs to collect additional funds from customers to provide its services. As such, FirstEnergy may not be awarded the totality of those funds, plus additional expenses, plus a return. Further, it has been over sixteen years since the Commission has had an opportunity to take a wholesale look at the totality of FirstEnergy's books in a base rate case, in the amount of

[269] OCC Ex. 1 at 41 (Meyer Direct).

[270] Tr. Vol. I at 143 (Fanelli Cross-Examination); Tr. Vol. II at 436 (McMillen Cross-Examination); Company Ex. 2 at 13 (Fanelli Direct).

base distribution and revenues to be collected will inevitably change following the 2024 rate case.[271]

Because a rate case, unlike an ESP, considers FirstEnergy's revenues and any reductions in other expenses that should be offset, it would also provide the Commission with the opportunity to review FirstEnergy's 10.5% ROE, which was set over a decade ago.[272] As explained by OCC witness Buckley, nationwide, the average ROE granted to distribution only electric utilities is about 9.22%,[273] the average ROE that has been awarded to the other EDUs is between 9.7% and 9.99%.[274] Considering these numbers, FirstEnergy's ROE would likely be lowered in the 2024 rate case. As FirstEnergy witnesses Fanelli noted, the Companies have the opportunity to earn more money with a 10.5% ROE than with a lower ROE.[275] Additionally, recovery through base rates rather than riders better ensures that the costs being recovered are actually used and useful. Riders such as Rider DCR are structured in such a way that as soon as FirstEnergy puts an asset into the rider, the Companies not only recover the investment of that asset, they also recover a return on that asset until such time as there is a possible true-up.[276]

FirstEnergy has failed to appropriately consider all costs associated with the proposed ESP V, including the costs associated with extending many of the ESP riders for an additional eight years and the costs associated with establishing new riders. In fact, as noted above, the true bill impacts of the riders remain unknown because FirstEnergy chose not to factor in potential base

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[271] Tr. Vol. I at 150 (Fanelli Cross-Examination).

[272] Tr. Vol. II at 391 (McMillen Cross-Examination); Tr. Vol. I at 145 (Fanelli Cross-Examination).

[273] OCC Ex. 5 at 8 (Buckley Direct).

[274] Tr. Vol. I at 145 (Fanelli Cross).

[275] Tr. Vol. I at 148 (Fanelli Cross-Examination).

[276] Tr. Vol. XIV at 2555 (Healey Cross-Examination).

distribution assumptions and changes resulting from the rate case. Similarly, FirstEnergy has failed to consider the fact that the benefits enumerated by its witness can be achieved through an MRO, as well as the Companies' upcoming rate case. Taking into consideration all of the quantifiable costs as well as all the unknown costs, the proposed ESP V is not more favorable than an MRO and it should be rejected.

2. FirstEnergy failed to demonstrate that the qualitative benefits of the proposed ESP V are more favorable than an MRO and such a conclusion is not supported by the record.

FirstEnergy's MRO Test, as presented by FirstEnergy witness Fanelli, also fails to provide sufficient non-quantifiable benefits. Not only does FirstEnergy witness Fanelli's testimony not identify any benefits as qualitative, the benefits that he seems to be claiming are qualitative can be achieved through an MRO and/or are not actually as beneficial as FirstEnergy claims. For example, FirstEnergy witness Fanelli seems to claim that revenue caps on the various riders limit bill impacts and thus benefit customers.[277] While it is true that caps *can* limit bill impacts, as discussed above, if all of the costs were collected through base rates, there would be no need for revenue caps on the riders. Additionally, FirstEnergy's proposed caps are outrageously high and thus unjust and unreasonable, as further evidenced by the intervenors' and Staff's numerous arguments and proposed modifications to lower the caps.[278] Rather notably, "if the Commission were to adopt all of Staff's recommendations, then in the first year of ESP V, customers should see around $52 million in annual rate *decreases* compared to current ESP IV rates. In contrast, the Companies are proposing a rate *increase* of more than $110 million in the first year of ESP

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[277] Company Ex. 2 at 13 (Fanelli Direct).

[278] OMAEG Ex. 1 at 15 (Seryak Direct); OCC Ex. 1 at 13, 26, 28 (Meyer Direct); Kroger Ex. 1 at 5–6 (Bieber Direct); Staff Ex. 10 at 28–31 (Healey Direct); Staff Ex. 1 at 6 (Messenger Direct); Staff Ex. 4 at 3–5 (Braun Direct); Staff Ex. 8 at 5 (Mackey Direct).

V."[279] Moreover, given FirstEnergy's failure to consider the impacts of the 2024 rate case and Grid Mod II, the exact bill impacts to different customer classes remains unknown.

FirstEnergy also claims that Riders DCR, SCR, AMI, and VMC support investment in and maintenance of the distribution system, but as discussed above, these same investments could be and should be made regardless of the riders, and the costs incurred are recoverable under an MRO through base rate cases.[280] FirstEnergy has also failed to provide any evidence that *not* having these riders in place will negatively impact system reliability or prevent FirstEnergy from providing safe, reliable, and nondiscriminatory electric service. FirstEnergy has been achieving or exceeding its reliability standards for over a decade, and witnesses' vague allusions to having difficulty continuing to do so are insufficient to demonstrate why the Companies need to spend billions over the next eight years—billions that will be recovered from customers.

Given the above and the lack of evidence to the contrary, the proposed ESP V is not more favorable in the aggregate than an MRO and does not satisfy the MRO Test.[281] FirstEnergy has failed to provide sufficient evidence to show that the purported benefits of some of the provisions contained in the proposed ESP IV outweigh the excessive above-market charges and other costs. And as clarified at hearing, only with Staff's proposed modifications does Staff believe that the ESP could become more favorable in the aggregate than an MRO.[282] Without significant modifications as proposed herein and by OMAEG, Staff, and other intervenors the proposed ESP V should not be approved.

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[279] Staff Ex. 10 at 31 (Healey Direct) (emphasis added).

[280] Tr. Vol. I at 101, 143 (Fanelli Cross-Examination); Tr. Vol. II at 436 (McMillen Cross-Examination); Company Ex. 2 at 12–13 (Fanelli Direct).

[281] OCC Ex. 1 at 41 (Meyer Direct); Staff Ex. 1 at 3 (Messenger Direct); Tr. Vol. XI at 2040, 2043 (Messenger Cross-Examination).

[282] Tr. Vol. XI at 2040, 2043 (Messenger Cross-Examination).

D. FirstEnergy's Proposed ESP Fails to Satisfy the Policy of the State of Ohio Pursuant to R.C. 4928.02.

Among other things, R.C. 4928.02, provides, that it is the policy of the state of Ohio to do the following:

> (A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;[283]
>
> * * *
>
> (N) Facilitate the state's effectiveness in the global economy[.][284]

During this proceeding, FirstEnergy has ignored the cost impacts associated with the multiple above-market charges and other costs proposed and advanced in its proposed ESP V. In fact, FirstEnergy witness Patel even admitted that she specifically excluded "any impacts or changes from the upcoming base distribution rate case," and the pending Grid Mod II case,[285] despite the fact that, as Staff noted, Riders DCR, VMC, SCR, and AMI will be "affected by the 2024 Rate Case . . . when new baselines are set for the costs recovered through those riders."[286] Additionally, not only is it nigh impossible to determine bill impacts on non-shopping customers given FirstEnergy's failure to consider the impacts of future cases on base distribution rates and components such as allocation, ROE, it is *completely* impossible to predict the bill impacts on shopping customers because FirstEnergy admitted that it "didn't estimate the monthly bill impacts of ESP V on shopping customers."[287] FirstEnergy's disregard for cost impacts on customers

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[283] R.C. 4928.02(A).

[284] R.C. 4928.02(N).

[285] Company Ex. 4 at 4 (Parel Direct); Tr. Vol. III at 617–18 (Patel Cross-Examination).

[286] Staff Ex. 10 at 12–13 (Healey Direct).

[287] Tr. Vol. III at 621 (Patel Cross-Examination).

demonstrates that the proposed ESP was not created in alignment with the policy of R.C. 4928.02(A) to ensure the availability of reasonably-priced retail electric service to its customers.

Further, allowing FirstEnergy to continue its flawed and discriminatory ELR program, limiting benefits that could be achieved through a more robust and properly structured interruptible program, is anticompetitive and does not facilitate Ohio's effectiveness in the global economy, violating the policy of the state. As proposed, only 24 customers will be eligible to participate in FirstEnergy's interruptible program and existing and new customers wishing to participate and provide economic development or reliability benefits to the state will be prohibited from doing so.[288] By restricting access and limiting participation, FirstEnergy decreases the ELR program's potential benefits that result from increased reliability for all customers and from making Ohio and ELR participants more economically competitive.[289] Moreover, even with FirstEnergy's proposed phase-down of the ELR credits, those 24 participants will still be earning—as paid for by non-participating customers—far more through ELR than they would through a comparable PJM interruptible program (and also without actually having to interrupt their load). As OMAEG witness Seryak explained, as proposed, "the ELR Program does not primarily procure new interruptible load, but rather offers above-market payments to a select few customers for claimed demand response."[290] Consequently, FirstEnergy's proposed ELR program is contrary to state policy and should be rejected.

[288] Company Ex. 3 at 12 (McMillen Direct); Company Ex. 10 at 7 (Stein Direct); OMAEG Ex. 1 at 11 (Seryak Direct); OMAEG Ex. 12 (FirstEnergy's Response to PUCO DR-006); Tr. Vol. II at 439–41 (McMillen Cross-Examination); Tr. Vol. VII at 1394, 1502–03 (Stein Cross-Examination); Tr. Vol. VIII at 1658 (Murray Cross-Examination); Staff Ex. 8 at 25–26 (Mackey Direct).

[289] Tr. Vol. VIII at 1656 (Murray Cross-Examination).

[290] OMAEG Ex. 1 at 8 (Seryak Direct).

E. Alternatively, the Commission Should Modify FirstEnergy's Proposed ESP V to be Consistent with Ohio law.

As stated above, FirstEnergy's proposed ESP V is unlawful and unreasonable and should be rejected in its entirety by the Commission. If, however, the Commission determines that it is prudent to modify and approve the Company's proposed ESP to render it consistent and compliant with Ohio law, OMAEG submits the following recommendations: the Commission should (1) discontinue Rider DCR, (2) reject Rider VMC, (3) reject Rider SCR, (4) reject Rider EEC, (5) deny FirstEnergy's request to implement new and costly mandatory EE/PDR Programs in contravention to Ohio law, (6) discontinue Rider AMI, (7) modify and expand Rider ELR to be more inclusive and provide more economic development and reliability benefits to the state, and (8) decrease the ESP term to three or four years. As discussed above, each of these modifications addresses important consumer concerns and better aligns the proposed ESP with Ohio law, the state policy, and the Commission's precedent. Accordingly, OMAEG recommends that the Commission adopt the modifications listed herein if it decides to modify the proposed ESP to comply with Ohio law.

V. CONCLUSION

As established in the foregoing arguments, FirstEnergy's proposed ESP is unlawful, unjust, and unreasonable, and it fails to satisfy the statutory MRO Test. Therefore, OMAEG respectfully requests that the Commission reject the proposed ESP. If, however, the Commission sees fit to modify the proposed ESP to render it compliant with Ohio law, OMAEG recommends that the Commission modify the ESP in accordance with OMAEG's recommendations discussed herein.

Respectfully submitted,

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/s/ Kimberly W. Bojko
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