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

REPLY BRIEF OF THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

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TABLE OF CONTENTS

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I. INTRODUCTION

Despite already squandering away *at least* $60 million for the House Bill 6 (HB 6) scandal, the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, FirstEnergy or the Companies) are seeking approval of several above-market, nonbypassable charges, including three new riders, and the collection of billions of dollars from customers over the next eight years through their proposed fifth electric security plan (ESP V). FirstEnergy's rate plan that seeks to collect up to an additional $1.6 billion, which is in addition to what FirstEnergy already collects from customers under ESP IV, is not only unjust, unreasonable, and unlawful under R.C. 4928.143, but it is unconscionable. Therefore, to 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, the Public Utilities Commission of Ohio (Commission) should reject FirstEnergy's ESP V Application in its entirety.

As succinctly stated by the Ohio Manufacturers' Association Energy Group's (OMAEG) expert witness Seryak, "[m]any of FirstEnergy's proposals are, among other things, anticompetitive, unreasonable, imprudent, and not in the best interests of customers."[1] Unsurprisingly, considering how flagrantly unjust, unreasonable, and unlawful FirstEnergy's ESP V proposal is, this same conclusion was reached by nearly all of the twenty-two parties that filed initial briefs on January 19, 2024 in this case. For example, Staff had to offer over a dozen recommendations and modifications in order to "improve" the proposed ESP and "mak[e] it more affordable for ratepayers and more consistent with state policies and Commission precedent,"[2] the Ohio Energy Leadership Council (OELC) declared that "several important aspects of FirstEnergy's ESP V application are critically flawed and unreasonable,"[3] and the Office of the Ohio Consumers' Counsel (OCC) urged the Commission to "reject the [ESP V] proposal and require FirstEnergy to implement a market-rate option."[4]

With the exception of FirstEnergy itself[5] and the Environmental Law & Policy Center[6]—whose brief only addressed *one* of FirstEnergy's proposals (the Energy Efficiency and Peak Demand Reduction (EE/PDR) Programs)—every party's initial brief urged the Commission to either reject ESP V in its entirety, or to significantly modify the various proposals included in ESP V.[7] OMAEG, Staff , The Kroger Co. (Kroger) OCC, OELC, the Ohio Energy Group (OEG),

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

[2] Initial Brief of the Staff of the Public Utilities Commission of Ohio at 1 (January 19, 2023) (hereinafter, Staff Brief). Staff reiterates throughout its brief that its recommendation to approve ESP V is contingent upon the Commission adopting Staff's proposed modifications.

[3] Initial Post-Hearing Brief of Ohio Energy Leadership Council at 1 (January 19, 2023) (hereinafter, OELC Brief).

[4] Initial Brief of Office of the Ohio Consumers' Counsel at 58 (January 19, 2023) (hereinafter, OCC Brief).

[5] Post-Hearing Brief of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (January 19, 2023) (hereinafter, FirstEnergy Brief).

[6] Initial Post-Hearing Brief of Environmental Law & Policy Center (January 19, 2023).

[7] *See* Initial Post-Hearing Brief of The Ohio Manufacturers' Association Energy Group (January 19, 2023) (hereinafter, OMAEG Brief); Staff Brief; Initial Post-Hearing Brief of The Kroger Co. (January 19, 2023) (hereinafter, Kroger Brief); OCC Brief; OELC Brief; Post-Hearing Brief of Ohio Energy Group (January 19, 2023) (hereinafter, OEG Brief); Initial Post-Hearing Brief of Walmart Inc. (January 19, 2023) (hereinafter, Walmart Brief); Initial Post-Hearing Brief of Interstate Gas Supply, LLC (January 19, 2023) (hereinafter, IGS Brief); Initial Post-

Walmart Inc. (Walmart), Interstate Gas Supply, LLC (IGS), Direct Energy Business LLC and Direct Energy Services LLC (collectively, Direct Energy), Retail Energy Supply Association (RESA), Citizens Coalition and Utilities for All, Northwest Ohio Aggregation Coalition (NOAC), Armada Power, LLC (Armada), Nucor Steel Marion, Inc., Ohio Partners for Affordable Energy, Constellation Energy Generation, LLC and Constellation NewEnergy, Inc., One Energy Enterprises, Calpine Retail Holdings, LLC, Citizens Utility Board of Ohio (CUB), and the Ohio Environmental Council (OEC) all provide numerous reasons as to why the Commission should reject the ESP V proposal in part or in whole.

Specifically, various parties urged the Commission to reject FirstEnergy's proposals (1) to collect from customers over $1.6 billion of additional new costs from new riders,[8] (2) to collect up to $3.876 billion from customers over eight years through the Delivery Capital Recovery Rider (Rider DCR),[9] (3) to recover costs related to phase two of its grid modernization plan (Grid Mod

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Hearing Brief of Direct Energy Business LLC and Direct Energy Services LLC and Reliant Energy Northeast LLC (January 19, 2023) (hereinafter, Direct Energy Brief); Initial Brief of Retail Energy Supply Association – Public Version (January 19, 2023) (hereinafter, RESA Brief); Initial Brief of Citizens Coalition and Utilities for All (January 19, 2023); Initial Brief of Northwest Ohio Aggregation Coalition (January 19, 2023) (hereinafter, NOAC Brief); Initial Post-Hearing Brief of Armada Power, LLC (January 19, 2023) (hereinafter, Armada Brief); Initial Brief by Nucor Steel Marion, Inc. (January 19, 2023); Initial Post-Hearing Brief of Ohio Partners for Affordable Energy (January 19, 2023); Initial Brief of Constellation Energy Generation, LLC and Constellation NewEnergy, Inc. (January 19, 2023); Initial Post-Hearing Brief of One Energy Enterprises Inc. (January 19, 2023); Initial Brief of Calpine Retail Holdings, LLC (January 19, 2023); Initial Post-Hearing Brief of the Citizens Utility Board of Ohio (January 19, 2023) (hereinafter, CUB Brief); Initial Post-Hearing Brief of Ohio Environmental Council (January 19, 2023) (hereinafter, OEC Brief).

[8] OMAEG Brief at 2; Kroger Brief at 1. *See also* Staff Brief at 1; OCC Brief at 1; NOAC Brief at 3; 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).

[9] *See* OMAEG Brief at 16–31; Staff Brief at 4–11; Kroger Brief at 7–11; OCC Brief at 20–28; Walmart Brief at 8; NOAC Brief at 13; CUB Brief at 5. 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.

II) through the Advanced Metering Infrastructure / Modern Grid Rider (Rider AMI), which could equal an astonishing $626 million *on top of* the hundreds of millions already being collected through Rider AMI,[10] and (4) to implement new, costly, and involuntary EE/PDR 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.[11] As proposed, over the eight-year ESP V term, FirstEnergy would collect from customers an additional $120–$168 million through Rider DCR,[12] $759.8 million through Rider VMC,[13] at least $425 million through Rider SCR,[14] and $288.5 million through Rider EEC,[15] for a total of $1.59–$1.64 billion. As noted above, 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.[16]

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[10] *See* OMAEG Brief at 42–45; Staff Brief at 42–43; OCC Brief at 25–28.

[11] *See* OMAEG Brief at 37–42; Staff Brief at 23–25; Kroger Brief 17–19; OCC Brief 48–53; OELC Brief at 45–54; IGS Brief at 14–18; Direct Energy Brief at 12–14; RESA Brief 5–21; NOAC Brief at 8–10.

[12] OMAEG Brief at 4; 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).

[13] FirstEnergy Brief at 26; OMAEG Brief at 4; Kroger Brief at 16; OELC Brief at 57; 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). *See also* OCC Brief at 35.

[14] OMAEG Brief at 4. 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).

[15] OMAEG Brief at 4; 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). *See also* Staff Brief at 23; OCC Brief at 49; OELC Brief at 48–49; IGS Brief at 14; RESA Brief at 5

[16] OMAEG Brief at 4; Staff Brief at 6; Kroger Brief at 7; CUB Brief at 5; Company Ex. 3 at 4 (McMillen Direct).

As explained by OMAEG and numerous other parties—including FirstEnergy—the Companies bear the burden of proving that an ESP proposal is just and reasonable and in compliance with Ohio law, *and* that it is more favorable in the aggregate than an alternative market rate offer (MRO).[17] However, as demonstrated by the record evidence and the numerous initial briefs filed in this case, FirstEnergy has not satisfied its burden to demonstrate that ESP V is just and reasonable and in compliance with Ohio law, or that ESP V—including its pricing and all other terms and conditions—is less costly and thus more favorable in the aggregate than an MRO (the MRO Test).[18] Therefore, for the reasons discussed herein and in its initial brief, OMAEG respectfully requests that the Commission reject FirstEnergy's proposed ESP V in its entirety.

Alternatively, if the Commission decides to approve an ESP V for FirstEnergy, the Commission should first modify FirstEnergy's ESP V proposal and explicitly deny FirstEnergy's requests to (1) continue Rider DCR and with significantly increased caps, (2) continue Rider AMI, (3) establish a new Storm Cost Recovery Rider (Rider SCR), (4) establish a new Vegetation Management Cost Recovery Rider (Rider VMC), (5) implement new and costly EE/PDR Programs and a new Energy Efficiency Cost Recovery Rider (Rider EEC) for non-low-income customers, (6) continue the current Economic Load Response Program Rider (Rider ELR) without implementing modifications to the ELR program, including expanding participation eligibility, and (7) implement an ESP term of eight years.

Pursuant to the established procedural schedule in this case, OMAEG filed its initial brief on January 19, 2024, and hereby files its reply brief in the above-captioned proceeding.

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[17] R.C. 4928.143(C)(1); OMAEG Brief at 3; Kroger Brief at 4; OCC Brief at 4–5; OELC Brief at 2; Walmart Brief at 6; IGS Brief at 2; Direct Energy Brief at 3; NOAC Brief at 14.

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

II. RESPONSIVE ARGUMENTS

A. FirstEnergy Failed to Satisfy its Burden of Proof.

1. The Commission should reject FirstEnergy's proposed ESP V because the record is devoid of the requisite evidence demonstrating ESP V is lawful, just, and reasonable.

As noted above, FirstEnergy bears the burden of proof in this case.[19] However, contrary to FirstEnergy's claim,[20] the record evidence does *not* demonstrate that ESP V is lawful, just, and reasonable. In fact, the record is devoid of pertinent and material evidence necessary to demonstrate that FirstEnergy's ESP V Application is lawful, just, and reasonable. To the contrary, the record evidence shows that certain riders and costs are unjust and unreasonable and should not be approved in ESP V as certain costs embedded in those rates or riders were inappropriately and/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.

Although the Attorney Examiners thwarted the intervenors' attempts to include evidence in the record that would have demonstrated how certain costs related to the House Bill 6 (HB 6) scandal were inappropriately and/or unlawfully embedded in the ESP V rates or riders, FirstEnergy failed to demonstrate that its proposed riders and rates (and all the costs included therein) were lawful, just, and reasonable. Pursuant to Ohio Adm.Code 4901-1-15(F), OMAEG's initial brief explained how the Attorney Examiners incorrectly excluded evidence related 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

[19] R.C. 4928.143(C)(1); OMAEG Brief at 3; Kroger Brief at 4; OCC Brief at 4–5; OELC Brief at 2; Walmart Brief at 6; IGS Brief at 2; Direct Energy Brief at 3; NOAC Brief at 14.

[20] FirstEnergy Brief at 6.

that would have likely demonstrated 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.[21]

For example, the Attorney Examiners excluded the Deferred Prosecution Agreement (DPA) entered into by FirstEnergy with the United States Attorney's Office for the Southern District of Ohio, FirstEnergy's SEC Form 10-K for the year 2022, the FERC Audit Report from Docket No. FA19-1-000, and Rider DCR audit reports.[22] 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 from customers for years and now wishes to continue collecting through ESP V.

FirstEnergy bears the burden of proving that the proposals contained in ESP V are lawful, just, and reasonable, and yet while many of the Companies' witnesses *claimed* that ESP V is lawful, just, and reasonable, FirstEnergy failed to provide sufficient supporting evidence of that claim. Even worse, the opposing parties were prohibited from offering contrary evidence. Had the HB 6-related evidence been admitted, OMAEG and the other parties could have used the evidence to demonstrate, among other things, that the ESP V riders were caried over from ESP IV and were subject to improper influence and corruption, the unjustness and unreasonableness of FirstEnergy's Rider DCR proposal, and that the connections and impacts that the various HB 6 audits and investigations, and/or the criminal proceedings could have on various ESP V proposals. All of this evidence would have made it clear that it is imperative that the Commission step in and

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[21] OMAEG Brief at 6.

[22] Note that the Attorney Examiners did take administrative notice of the 2022 Rider DCR Audit Report from Case No. 22-892-EL-RDR.

protect customers by denying approval of FirstEnergy's unlawful ESP V as proposed. To that end, the Commission must reject cost recovery under certain riders under ESP V, deny increases to certain rider caps, and/or modify certain riders 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.[23]

Additionally, the excluded evidence relates directly to OMAEG, OCC, and NOAC's pending Joint Motion for Limited Stay, which the parties discussed in their initial briefs.[24] For example, had the DPA not been incorrectly excluded, OCC stated that it could have offered more detailed discussions and analysis on former Commission Chairman Samuel Randazzo's "new indictment" and the "'settlement payments' received in conjunction with FirstEnergy's ESP proceeding pending before the PUCO in 2010."[25] Had the SEC Form 10-K and FERC Audit Report been allowed on the record, OCC stated that it could have similarly gone into more detail on the "harm [that] has been perpetrated on [customers] by FirstEnergy and Randazzo through their criminal activities," and the importance of ensuring "that FirstEnergy consumers are only being charged just and reasonable rates through Rider DCR and ESP V."[26] As explained in OMAEG's initial brief, the SEC Form 10-K and FERC Audit Report speak about a substantial adjustment of over $100 million made to the plant-in-service (PIS) balance following the FERC audit, which "shows a lack of accuracy in the Companies' accounting practices and allocation practices."[27] Furthermore, as explained by OCC, the continuation of Rider DCR will have a

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[23] *See* OMAEG Brief at 6–16.

[24] OMAEG Brief at 10–13; OCC Brief at 5–6; NOAC Brief at 15.

[25] OCC Brief at 5–6.

[26] OCC Brief at 6.

[27] Proffer Tr. Vol. II at 279–80, Proffer OCC Ex. 6 (FirstEnergy Corp. Form 10-K (Form 10-K)).

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.[28]

It is clear that the excluded evidence could have and would have directly contradicted FirstEnergy's unsupported claim that its ESP V is lawful, just, and reasonable, and it would have further demonstrated that the Companies have *not* met their statutory burden of proof in this case. Therefore, the evidence should not have been excluded, and the Commission should allow it and consider it as part of the record in this case. The Commission should also conclude, based on the preponderance of the evidence, that FirstEnergy has failed to meet its burden of proof to demonstrate that ESP V is lawful, just, and reasonable.

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

Contrary to FirstEnergy's claims that ESP V "puts customers first,"[29] the record evidence demonstrates that ESP V is little more than FirstEnergy's latest attempt to collect billions from customers "without providing . . . meaningful additional services, increasing reliability, or generating safety benefits" in return.[30] While FirstEnergy proudly touts its commitment to spend $52 million in shareholder dollars to protect certain at-risk populations and enhance the customer experience "[a]t no cost to customers,"[31] $52 million pales in comparison to the $1.6 *billion* in new charges that FirstEnergy seeks to impose on customers through ESP V on top of the billions already

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[28] Proffer Tr. Vol. II at 276–80, Proffer OCC Ex. 6 (Form 10-K).

[29] FirstEnergy Brief at 7.

[30] OCC Brief at 58.

[31] FirstEnergy Brief at 6.

being collected from customers.[32] Moreover, considering FirstEnergy's history of failing to uphold its commitments to expend shareholder dollars for the benefit of customers, there is little reason to trust this new pledge.[33]

While FirstEnergy vigorously attempts to defend and justify the continuation of Riders DCR and AMI, and the establishment of Riders SCR and VMC,[34] OCC witness Meyer put it best when he testified that "an excess of riders is more beneficial to shareholders than consumers because it undermines FirstEnergy's incentive to control costs."[35] These four riders are not true "incentives" as envisioned under the statutory provision relied upon by FirstEnergy, and therefore, FirstEnergy may not lawfully include these provisions in ESP V. Other parties concurred.[36] Additionally, OEC asserted that these riders "are more closely associated with regular operation and maintenance costs, costs better suited for a rate case."[37] And CUB argued that "it has been more than 16 years since the Companies last filed a bast distribution rate case. For over a decade and a half, FirstEnergy customers have been paying base rates that are 'stale' and based on a May 31, 2007 date certain and a test year ending in February of 2008 . . . If any utility at any time needed to be brought under the transparency and the holistic investigation brought by a distribution rate case, it is now with these Companies."[38] In short, "two decades of riders 'should not become

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[32] Kroger Brief at 1. *See also* Staff Brief at 1; OCC Brief at 1; NOAC Brief at 3; OMAEG Brief at 2.

[33] OMAEG Brief at 55 (explaining that FirstEnergy failed to honor its commitment in its last ESP case 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); OELC Brief at 51–52; Armada Brief at 4–5.

[34] FirstEnergy Brief at 7–31.

[35] OCC Brief at 31–32, *citing* OCC Ex. 1 at 10 (Direct Testimony of Greg Meyer (Meyer Direct)) (October 23, 2023). *See also* OMAEG Brief at 20–22; Kroger Brief at 2–3.

[36] Kroger Brief at 2–3; OCC Brief at 32. *See also* OMAEG Brief at 20–22.

[37] OEC Brief at 6.

[38] CUB Brief at 4. *See also* OMAEG Brief at 23; Staff Brief at 4; Kroger Brief at 14–15; Walmart Brief at 7.

the primary form of cost recovery for utilities to the exclusion of base distribution rates cases.'"[39] Consequently, OMAEG and multiple other parties "recommend[] denying any such new riders, setting any of these existing riders to zero now, and resetting these expenses under the base rate case."[40]

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

Quite tellingly, every party that discussed Rider DCR in its initial brief—including Staff—either "recommend[ed that] Rider DCR be eliminated,"[41] or, at minimum, urged the Commission to subject the rider to a "full staff investigation of whether FirstEnergy needs Rider DCR."[42] As explained by OMAEG in its initial brief, 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 suggested by OMAEG and many other parties, the Commission should discontinue FirstEnergy's Rider DCR, and any distribution-related costs should be recovered through base distribution rates.[43] OCC similarly argued that the Rider DCR proposal is unjust and unreasonable in part because "FirstEnergy cannot prove that any reliability improvements stem from increased Rider DCR spending."[44]

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[39] CUB Brief at 4, *quoting* Staff Ex. 10 at 7 (Healey Direct). *See also* OMAEG Brief at 26; Kroger Brief at 14–15; OCC Brief at 16; Walmart Brief at 5; NOAC Brief at 13.

[40] OEC Brief at 6. *See also* OMAEG Brief at 22–23, 36–37; Staff Brief at 6–7; Kroger Brief at 5–6; IGS Brief at 4; Walmart Brief at 4–5, 7; NOAC Brief at 13; CUB Brief at 4–5.

[41] NOAC Brief at 13. *See also* OMAEG Brief at 17; Kroger Brief at 6; OCC Brief at 31; OEC Brief at 6.

[42] CUB Brief at 5. *See also* Staff Brief at 8–10; Walmart Brief at 7.

[43] OMAEG Brief at 17. *See also* Staff Brief at 5; Kroger Brief at 6; OCC Brief at 21; Walmart Brief at 7; NOAC Brief at 13; OEC Brief at 6; CUB Brief at 5.

[44] OCC Brief at 21.

FirstEnergy already collects $390 million each year from customers under Rider DCR,[45] and it now seeks to collect an additional $15–20 million each year.[46] Over the proposed eight-year term of ESP V, FirstEnergy stands to collect an additional $120–$168 million through Rider DCR, which could result in charges to customers totaling up to $3.876 billion by the time ESP V ends.[47] As noted by CUB in its initial brief, "it is evident that capital investment riders such as the DCR, which can lock costs in for years, should face scrutiny through the rate case mechanism,"[48] and yet FirstEnergy seeks to avoid/delay such scrutiny by seeking approval for Rider DCR costs through ESP V rather than waiting until its 2024 rate case.

While FirstEnergy argues that Rider DCR is "expressly" authorized by R.C. 4928.143(B)(2)(h),[49] this assertion misconstrues and misrepresents the statute, as was discussed in OMAEG's initial brief, and as touched upon in other briefs.[50] R.C. 4928.143(B)(2) enumerates nine categories of provisions that *may* be included in an ESP,[51] and 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.[52] Therefore, "if a

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[45] OMAEG Brief at 4; Staff Brief at 2; Kroger Brief at 7; CUB Brief at 5. Interestingly, FirstEnergy itself fails to note how much it currently collects through Rider DCR when attempting to defend its proposed $15–$21 million annual increase.

[46] FirstEnergy Brief at 8–9.

[47] OMAEG Brief at 17. *See supra* note 9.

[48] CUB Brief at 5.

[49] FirstEnergy Brief at 10.

[50] OMAEG Brief at 21; Kroger Brief at 16–17; OCC Brief at 22–23.

[51] R.C. 4928.143(B)(2).

[52] *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).

given provision does not fit within one of the categories listed 'following' (B)(2), it is not authorized by statute."[53]

As noted by OCC, "FirstEnergy cannot prove that any reliability improvements stem from increased Rider DCR spending," nor has it demonstrated "why $21 million in annual increases are needed."[54] The rider is not a provision related to distribution infrastructure. Furthermore, the Companies' claim that their proposed caps "require[] them to share in the risk of reliability performance"[55] with customers is patently untrue. FirstEnergy admitted at hearing and in its brief that even if the three utilities fail to meet four of their six reliability metrics—or *all* six of their metrics—that the cap would still increase by $15 million each year.[56] Therefore, there is no "risk" for FirstEnergy, only increasing profit. Consequently, Rider DCR cannot be considered an example of incentive ratemaking either.[57] The Court has previously determined that "incentive ratemaking uses rewards and penalties that *link* utility revenues to various standards or goals,"[58] so "if the commission awards [a utility] money up front with no meaningful conditions attached," then it cannot be considered an "incentive."[59] There has to be an actual tie or link to the money that it receives. Since FirstEnergy is *guaranteed* an annual increase of at least $15 million dollars even if it fails to meet its reliability metrics, there is no real penalty to tie or link FirstEnergy's

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[53] *Id.*

[54] OCC Brief at 21.

[55] FirstEnergy Brief at 12.

[56] Tr. Vol. II at 393 (McMillen Cross-Examination); FirstEnergy Brief at 8.

[57] Incentive ratemaking is another of the enumerated categories under R.C. 4928.143(B)(2).

[58] *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 (emphasis added).

[59] *Id.* at ¶ 19.

revenues to various standards or goals.[60] And as stated by OCC, "tying higher annual increases to meeting the PUCO's reliability standards makes no sense" because FirstEnergy is "already required to meet certain reliability targets" and "FirstEnergy should not be rewarded for doing something which the law already requires it to do."[61] Therefore, since Ride DCR does not fall within one of R.C. 4928.143(B)(2)'s enumerated categories, FirstEnergy may not lawfully include such a provision in ESP V.

In addition to being unlawful, Rider DCR is also unjust and unreasonable and bad policy because it constitutes improper single-issue ratemaking.[62] The kinds of costs being recovered through Rider DCR can and should be recovered through base rates, and allowing FirstEnergy to continue collecting incremental distribution costs and incremental increases to distribution rates absent a review of those costs through a rate case is not reasonable or prudent. Numerous other parties concurred.[63] For example, Staff argued that Rider DCR should only be approved on an interim basis and that "[a]ny further continuation of Rider DCR should be addressed in that rate case."[64] Kroger urged the Commission to "reject the Rider DCR proposal" because "FirstEnergy's reasonable and prudent distribution infrastructure investment costs should be recovered through

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[60] OMAEG Brief at 21. *See also* Kroger Brief at 8; OCC Brief at 22; NOAC Brief at 13.

[61] OCC Brief at 22. *See also* OMAEG Brief at 21–22; Kroger Brief at 8; NOAC Brief at 13.

[62] Kroger Brief at 11. "[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." *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). *See also* OMAEG Brief at 22.

[63] *See* Walmart Brief at 7; Staff Brief at 5; Kroger Brief at 11; OEC Brief at 6; CUB Brief at 5.

[64] Staff Brief at 5.

base rates."[65] Similarly, OEC noted that Rider DCR's costs were "better suited for a rate case,"[66] and CUB argued that the rider "should face scrutiny through the rate case mechanism."[67]

FirstEnergy's various other claims regarding the supposed benefits of Rider DCR should also be dismissed.[68] According to Staff, "the Companies' current Rider DCR is substantially out of line with what the Commission has approved for other Ohio utilities. Rider DCR should be modified to be more consistent with other Ohio utilities' similar riders."[69] Rider DCR's "soft caps," inclusion of investment costs outside of FERC Accounts 360–374, inclusion of projected PIS, and not charging Rider DCR as a percentage of base distribution revenues are all reasons why Rider DCR "is substantially out of line" with Commission precedent and other utilities' practices.[70]

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.'"[71] According to OCC witness Meyer because revenue caps are "intended to mitigate the impact of rising costs in a single year . . . allowing this 'revenue carryover' would harm consumers by

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[65] Kroger Brief at 11.

[66] OEC Brief at 6.

[67] CUB Brief at 5.

[68] *See* FirstEnergy Brief at 7–19.

[69] Staff Brief at 2.

[70] Staff Brief at 8–10; Kroger Brief at 10; OCC Brief at 22–26. *See also* OMAEG Brief at 27–31.

[71] OMAEG Brief at 28, *quoting* Tr. Vol. XIV at 2433 (Mackey Cross-Examination); Staff Ex. 8 at 9 (Mackey Direct). *See also 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); *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 at 26 (August 9, 2023) (hereinafter, AES ESP IV Order); *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 ¶ 113 (December 19, 2018) (hereinafter, Duke ESP IV Order).

eliminating FirstEnergy's incentive to control costs."[72] This disincentive to control costs is why OMAEG and other parties all urged the Commission—*if* it approves Rider DCR—to "impose hard caps for Rider DCR to protect consumers."[73]

Similarly, Rider DCR currently allows FirstEnergy to collect costs in FERC Accounts 350–359 *and* 360–374, even though the capital expense riders for other Ohio utilities are limited to FERC Accounts 360–374.[74] As argued by OCC, "[t]he time has come to align FirstEnergy's Rider DCR with the capital expense riders for the other Ohio electric distribution utilities. It would be unjust and unreasonable for the PUCO to continue giving FirstEnergy special treatment to allow it to collect on transmission-related FERC accounts through Rider DCR."[75]

In addition to being out of line with Commission precedent and other utilities' practices, FirstEnergy's inclusion of projected PIS in Rider DCR contradicts FirstEnergy's claim that Rider DCR ensures "customers are only paying for the Companies' actual costs."[76] By its nature, projected PIS is not "actual costs" because it is *projected* and allows "the Companies [to] recover investments before they are even made."[77] Moreover, as OMAEG explained in its initial brief, including projected PIS is also problematic because "Staff has concerns about the accuracy of projections for plant balances included in the DCR."[78] Staff reiterated this concern in its initial brief, noting that "[q]uarterly updates already allow for near-immediate recovery, and the

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72 OCC Brief at 22–23.

73 OCC Brief at 23. *See also* OMAEG Brief at 28; Staff Brief at 9; Kroger Brief at 10.

74 OMAEG Brief at 28; Staff Brief at 4–5; Kroger Brief at 10; OCC Brief at 24. *See also* AES ESP IV Order at ¶ 77; Duke ESP IV Order at ¶ 114.

75 OCC Brief at 24–25.

76 FirstEnergy Brief at 12.

77 Staff Brief at 8.

78 Staff Ex. 8 at 8 (Mackey Direct). *See also* Staff Brief at 9; Kroger Brief at 10; OCC Brief at 25–26.

Companies' projected plant investments have been inaccurate in the past."[79] No other electric utility enjoys the benefit of recovering projected plant, and "the Commission should end this practice for FirstEnergy."[80]

FirstEnergy's "unnecessarily convoluted" allocation and rate design for Rider DCR should similarly be modified, if the Commission allows the rider to continue.[81] As explained by Staff and OMAEG, the Rider DCR rate should be simplified and charged as a percentage of base distribution revenues, which is more sensible because it mirrors the payment of base distribution revenues and better aligns with how other utilities calculate similar riders.[82]

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 all the reasons discussed above, Rider DCR is unlawful, unjust, and unreasonable. Therefore, the Commission should reject FirstEnergy's request to continue Rider DCR and increase the amounts collected from customers through Rider DCR. Alternatively, if the Commission continues Rider DCR, it should do so subject to the modifications proposed by Staff—including removing projected PIS, only approving Rider DCR on an interim basis, limiting recovery, and not allowing rollover—and as discussed in OMAEG and other parties' briefs.[83]

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[79] Staff Brief at 9.

[80] Staff Brief at 9. *See also* OMAEG Brief at 29–30; Kroger Brief at 10; OCC Brief at 25–26.

[81] Staff Brief at 9. *See also* OMAEG Brief at 30.

[82] Staff Brief at 9. *See also* OMAEG Brief at 30.

[83] OMAEG Brief at 27–31; Staff Brief at 8–10; Kroger Brief at 10.

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

Similar to Rider DCR, the grid modernization costs currently collected through Rider AMI—which include costs associated with the Ohio Site Deployment of the Smart Grid Modernization Initiative (SGMI) and Grid Mod I—are the kind of costs that can be and should be recovered through base rates.[84] And yet, FirstEnergy does not propose rolling SGMI or any Grid Mod costs into base rates as part of the 2024 rate case.[85] Additionally, Staff specifically opposes the continued collection of SGMI costs through Rider AMI.[86] During the hearing, Staff testified that "all Grid Mod expenses should be rolled into base rates and no longer eligible for recovery thought Rider AMI."[87] All of the parties that discussed Rider AMI in their initial briefs agreed that "[l]ike Rider DCR, the Companies should be required to eliminate the use of projected PIS and expenses from the rider. This would increase accuracy and make Rider AMI more like similar riders approved for other utilities."[88] Moreover, as noted by OCC, "FirstEnergy's lack of revenue caps for Rider AMI is inconsistent with PUCO approving revenue caps for other utilities' riders which seek collection of large amounts of capital costs from consumers."[89]

FirstEnergy stated that it expects to collect approximately $450 million over the next five years and will continue the rider to also collect its proposed Grid Mod II costs.[90] Notably, the projected $450 million *does not* include the projected Grid Mod II costs, which have not been

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[84] Staff Brief at 42; OCC Brief at 20–30. *See also* OMAEG Brief at 43.

[85] FirstEnergy Brief at 19. *See also* OMAEG Brief at 43; Staff Brief at 42; OCC Brief at 20–30.

[86] Staff Brief at 42.

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

[88] Staff Brief at 42. *See also* OMAEG Brief at 44–45; OCC Brief at 25–26.

[89] OCC Brief at 28.

[90] FirstEnergy Brief at 19. *See also* Company Ex. 3 at 9 (McMillen Direct).

approved but are expected to total an astonishing $626 million. All of these costs and potential costs should be rolled into base rates where they can be considered holistically with all of FirstEnergy's other costs and revenues or any reductions in other expenses that should be offset.[91] Therefore, the Commission should reject FirstEnergy's proposal to continue Rider AMI as unjust, unreasonable, and unlawful.

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

FirstEnergy failed to establish a need for Rider SCR and Rider VMC because the costs related to vegetation management (VM) and storm-related expenses can be recovered through base rates.[92] Because the costs FirstEnergy seeks to recover through these riders would be recoverable even if the riders were not in effect, approving them through ESP V constitutes single-issue ratemaking, which is not just and reasonable as a matter of policy and proper ratemaking. Staff explained that the "Commission should not adopt the Companies' [VMC] proposal, which would include rider charges averaging $68 million per year," and recommended that *if* Rider SCR was approved, the Commission should not allow FirstEnergy to recover over $147 million in storm deferral until *after* a full audit, limit the number of eligible storms, remove certain labor costs, and disallow carrying charges.[93] Kroger noted that "[a]llowing these costs to be recovered through individual above-market riders rather than through base rates diminishes the incentive for

[91] Staff Brief at 42–43; OCC Brief at 20. *See also* OMAEG Brief at 22.

[92] OMAEG Brief at 37; Kroger Brief at 13–14; OCC Brief at 32, 35; OELC Brief at 1; IGS Brief at 4; Walmart Brief at 4, 7; OEC Brief at 6; CUB Brief at 5.

[93] Staff Brief at 3, 11–14.

FirstEnergy to reduce costs below the level that is necessary to be deemed prudent,"[94] and OCC argued that riders "reduce a company's incentive to aggressively control costs."[95]

Moreover, as explained by OMAEG, FirstEnergy has been consistently meeting and exceeding its reliability metrics since 2010, so FirstEnergy's argument that it *needs* these riders to continue ensuring reliable energy distribution should be dismissed.[96] Several other parties concurred. OELC noted that "although FirstEnergy claims that meeting the reliability standards does not necessarily equate to meeting customers reliability expectations, FirstEnergy's 'reliability performance aligns with customer expectations'" without the rider so there is no need for the riders.[97] As such, OELC urged the Commission to reject Rider VMC "because it seeks excessive reliability improvements at ratepayers' expense."[98] OCC similarly argued that "FirstEnergy failed to demonstrate a need for Rider VMC" or "any need for the [enhanced VM] program."[99] FirstEnergy currently spends roughly $45 million dollars each year on VM, and yet, "[d]espite exceeding reliability metrics, FirstEnergy now seeks to nearly double its [annual] vegetation management expenses to address alleged increases in increased tree-caused outages."[100] FirstEnergy witness McMillen also admitted that the additional $759.8 million that the Companies seek to collect from customers over the proposed ESP V term "do[se] not guarantee the 6-7%

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[94] Kroger Brief at 16.

[95] OCC Brief at 31.

[96] OMAEG Brief at 32; Kroger Brief at 16; OCC Brief at 35; OELC Brief at 58.

[97] OELC Brief at 58, *quoting* Company Ex. 9 at 5–6 (Direct Testimony of Amanda Richardson (Richardson Direct)) (April 5, 2023).

[98] OELC Brief at 58.

[99] OCC Brief at 35.

[100] OELC Brief at 56–58. *See also* OMAEG Brief at 33–34; OCC Brief at 35.

improvement in CAIDI or SAIFI scores" that FirstEnergy cites to justify Rider VMC.[101] Consequently, like Rider DCR, Rider VMC may not lawfully be included in ESP V because it does not constitute an incentive, nor will it necessarily improve distribution system reliability.

Regarding Rider SCR, OCC asserted that the rider "would allow FirstEnergy to charge consumers for storm costs without determining the aggregate impact on operations, essentially serving as an insurance policy."[102] In other words, allowing such a rider "will reduce the incentive for cost control by the utility, to the detriment of consumers."[103] Moreover, FirstEnergy's proposal seeks both deferral *and* recovery authority by proposing that unused annual revenue cap amounts be recoverable in subsequent years.[104] Such soft caps, as discussed above, are improper and should not be approved. FirstEnergy also seeks recovery for existing storm cost deferrals dating back to 2009, which would not count towards annual caps under FirstEnergy's proposal.[105] 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 also just and reasonable. Therefore, FirstEnergy's proposal to create Rider SCR should be denied.

Alternatively, if the Commission does not reject Riders SCR and VMC as recommended by OMAEG and others, it should modify the riders as proposed by Staff. For Rider SCR, Staff argued that "only storms that meet the definition of a 'major event' under the Commission's rules should be eligible for recovery."[106] Additionally, Staff recommended that "the Companies'

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[101] OELC Brief at 59, *citing* Tr. Vol. III at 471 (McMillen Cross-Examination).

[102] OCC Brief at 32.

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

[104] FirstEnergy Brief at 23–24. *See also* OMAEG Brief at 34–35; Kroger Brief at 13.

[105] Staff Brief at 11; Kroger Brief at 13; OCC Brief at 32. *See also* OMAEG Brief at 34–35.

[106] Staff Brief at 3, 12.

existing deferral authority cease at the time ESP V becomes effective,"[107] and that "the Commission should not approve recovery of the Companies' existing storm cost deferral balance until a full audit of all costs incurred through May 31, 2024 is completed."[108] By limiting the number of eligible storms, Staff's analysis predicts a decrease of more than 300% under its definition.[109] This would significantly reduce the costs charged to customers *and* be consistent with what is allowed for other Ohio utilities.[110]

Regarding Rider VMC, Staff argued that the "Commission should not adopt the Companies' proposal, which would include rider charges averaging $68 million per year"[111] and proposed several changes that would reduce the overall Rider VMC recovery by over $425 million during Staff's proposed six-year ESP term.[112] Staff also recommended that carrying charges not be applied to Rider VMC rates, which would further protect customers as compared to FirstEnergy's proposal.[113]

For all the reasons discussed above, the Commission should reject FirstEnergy's proposals to establish Riders SCR and VMC and require FirstEnergy to seek recovery of all storm-related expenses and VM through the upcoming rate case filing where the Commission reviews both FirstEnergy's costs and its revenues to determine whether FirstEnergy needs to collect additional

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[107] Staff Brief at 12. *See also* NOAC Brief at 12, asking "that the Commission immediately stop all collection of interest or carrying costs on the deferrals (set the deferral rate to zero)."

[108] Staff Brief at 3, 11.

[109] Staff Brief at 13.

[110] Staff Brief at 3, 12. *See also* OMAEG Brief at 36.

[111] Staff Brief at 3.

[112] Staff Brief at 16.

[113] Staff Brief at 16–17.

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 proposals to implement new and costly EE/PDR Programs for non-low-income customers and recover those costs from customers through Rider EEC as such proposals are unlawful, unjust, and unreasonable.

Over a dozen of the parties that filed initial briefs discussed FirstEnergy's proposed EE/PDR Programs, and nearly all of them urged the Commission to reject those programs in part or in whole.[114] Simply put, the EE/PDR Programs not related to low-income customers are unlawful, flagrantly against state policy, unreasonably costly and markedly unjust, and contravene Commission precedent.[115]

The proposed Energy Solutions for Business Program for non-residential customers is particularly egregious because it would result in large customers having to pay an aggregate of \$154,327,143 for involuntary EE/PDR programs.[116] Proportionally, this program "comprises ~53% of the total EE/PDR plan budget,"[117] which is a staggering \$288.5 million in total, or \$72.1 million per year. While FirstEnergy attempts to downplay this excessive price tag by offering large customers the option to opt-out,[118] 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

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[114] *See* OMAEG Brief; Staff Brief; Kroger Brief; OCC Brief; OELC Brief; IGS Brief; Direct Energy Brief; RESA Brief; NOAC Brief; Armada Brief.

[115] OMAEG Brief at 40; Staff Brief at 25; Kroger Brief at 17; OCC Brief at 49, 52; OELC Brief at 50–52; IGS Brief at 14–16; Direct Energy Brief at 12–13; RESA Brief; NOAC Brief at 8–9. *See also* Armada Brief at 3.

[116] OELC Brief at 48. *See also* Tr. Vol. V at 1055 (Miller Re-Cross-Examination); Company Ex. 5 at Attachment ECM-2, Workpaper 2.

[117] OELC Brief at 48–49.

[118] FirstEnergy Brief at 51–52.

yet officially developed or created.[119] As stated by OELC, "FirstEnergy's proposed opt-out process is also unjustified and unreasonable."[120]

None of FirstEnergy's offered justifications for an opt-out system rather than an opt-in system are supported by the record evidence, including the Companies' own witnesses. During the hearing, FirstEnergy witness Miller 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.[121] Similarly, the hearing revealed that FirstEnergy did not conduct any comparative analysis justifying an opt-out process, as opposed to an opt-in process, nor did it conduct any studies to ascertain whether an opt-out model would, in fact, serve as a better option than an opt-in process.[122] And because customers who fail to opt-out will be charged through Rider EEC even if they are not actually participating in the program, "[n]onresidential customers that do no [*sic*] opt out, therefore, would be subsidizing the rebates and audits obtained by other nonresidential customers."[123] As such, OELC concluded that the opt-out model "exploits nonresidential customers who fail to opt-out of the program."[124]

The Energy Solutions for Business Program, which conscripts customers into it unless or until they affirmatively opt-out cannot be deemed voluntarily because the customers will be required to pay for the programs unless and until they take action otherwise, and as explained by

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[119] OELC Brief at 50. *See also* OMAEG Brief at 38.

[120] OELC Brief at 50.

[121] OELC Brief at 50. *See also* Tr. Vol. V at 991, 996–97 (Miller Cross-Examination).

[122] OELC Brief at 50.

[123] OELC Brief at 51.

[124] OELC Brief at 51.

OMAEG and other parties, HB 6 mandated that electric utilities terminate their previously required EE programs, meaning that mandatory EE/PDR programs are now prohibited.[125] Therefore, the Energy Solutions for Business Program, as well as the other involuntary non-low-income programs are not lawful and "encroach[] on a space reserved for competitive markets, not monopolistic utilities."[126]

Commission precedent similarly supports rejecting the proposed EE/PDR Programs—or at least limiting them to low-income programs. Multiple parties cited to recent cases wherein the Commission 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.[127] OMAEG explained that 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," and "electric distribution utilities . . . were directed, pursuant to R.C. 4928.661, to file amended plans to re-establish low-income customer energy efficiency programs, which will remain in effect through December 31, 2021."[128] Similarly, OELC noted that the Commission recently held that "'in this state, the market should drive innovation and determine how such concepts as demand-response will ultimately surface and be implemented, consistent with prior decisions, guided by

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[125] OMAEG Brief at 40; Kroger Brief at 18; OCC Brief at 50; OELC Brief at 53; RESA Brief at 7. FirstEnergy attempts to claim that R.C. 4928.143(B)(2)(h) and (i) allow EE programs, but this argument ignores the fact that such programs must be *voluntary*, and the Commission has consistently been limiting those programs to low-income customers. *See* FirstEnergy Brief at 52–53.

[126] OELC Brief at 54.

[127] OMAEG Brief at 40; Staff Brief at 4; Kroger Brief at 18–19; OELC Brief at 52–53; IGS Brief at 14–16; Direct Energy Brief at 12; RESA Brief at 7; NOAC Brief at 8–9.

[128] OMAEG Brief at 41. *See also* Staff Brief at 4; Kroger Brief at 18–19; OELC Brief at 52–53; IGS Brief at 14–16; Direct Energy Brief at 12; RESA Brief at 7; NOAC Brief at 8–9.

R.C. 4928.02.'"[129] OELC went on to argue that "the Ohio legislature has already recognized the harm of utility monopolies participating in competitive offerings—and accordingly prohibited this practice."[130]

The market can and *does* drive innovation, but it will only do so if not stifled through unfair competition with subsidized monopoly product offerings.[131] Allowing FirstEnergy to leverage its status as a monopoly utility to then offer competitive products in the market would "push other energy efficiency and demand response products out of the market, unnecessarily harming competition to the detriment of customers."[132] Therefore, in keeping with Ohio law, state policy, and its own precedent,[133] the Commission should reject FirstEnergy's proposed EE/PDR Plan and eliminate the proposed non-low-income EE/PDR Programs. Alternatively, the Commission should adopt Staff's proposed modifications to the EE/PDR Plan, which include removing the Energy Solutions for Business Program and decreasing the annual budget to about $15.7 million per year.[134]

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[129] OELC Brief at 52, *quoting In the Matter of the Commission's Investigation into the Implementation of the Federal Infrastructure Investment and Jobs Act's Demand Response PURPA Standard*, Case No. 22-1024-AU-COI, Finding and Order at ¶ 25 (November 1, 2023). *See also* IGS Brief at 16.

[130] OELC Brief at 54.

[131] RESA Brief at 12.

[132] OELC Brief at 54, *quoting* RESA/IGS Ex. 1 at 15 (Direct Testimony of Matthew White (White Direct)) (October 23, 2023). *See also* IGS Brief at 14.

[133] The Supreme Court of Ohio has held on multiple occasions that the Commission should "respect its own precedents in its decisions to assure the predicability [*sic*] which is essential in all areas of the law, including administrative law." *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 431, 330 N.E.2d 1 (1975). *See also Ohio Consumers' Counsel v. Pub. Util. Comm.*, 125 Ohio St.3d 57, 2010-Ohio-134 at ¶ 15 (reaffirming that "the commission should respect its own precedents in its orders to assure predictability in the law"); *In the Matter of the Complaint of Suburban Nat. Gas Co. v. Columbia Gas of Ohio, Inc.*, 162 Ohio St.3d 162, 2020-Ohio-5221, 164 N.E.3d 425 at ¶ 29 (noting that the Court has previously "instructed the commission to respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law").

[134] Staff Brief at 23–25. *See also* OMAEG Brief at 42; Kroger Brief at 19.

4. **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 in OMAEG's initial brief, interruptible programs such as ELR have the potential to improve reliability by reducing demand for electric power when the supply is limited and make both Ohio and the participants more economically competitive.[135] However, contrary to FirstEnergy's assertions,[136] the current and proposed ELR programs are not actually designed for these purposes. 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."[137]

A modified ELR program as suggested by OMAEG witness Seryak would couple load curtailment with transmission and distribution system reliability needs. While FirstEnergy does not serve a unique function in PJM's demand response programs, it *could* serve such a role in an organized demand response and load shedding program for transmission system reliability needs. As such, OMAEG recommended modifying the ELR program to remove the PJM demand response component and become instead a program that responds to curtailable events based on transmission facility overloading.[138]

Staff's initial brief also urged the Commission to modify the ELR program and "reject the Companies' [ELR] proposal because it unfairly limits the program to only those who currently participate in the program, and current participants' eligibility was based on a stipulation in ESP IV."[139] Similarly, OCC asserted that "Rider ELR is also unjust and unreasonable because it is

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[135] OMAEG Brief at 45. *See also* OCC Brief at 39–40.

[136] FirstEnergy Brief at 48. *See also* OELC Brief; OEG Brief; Nucor Brief.

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

[138] OMAEG Brief at 46.

[139] Staff Brief at 22.

discriminatory."[140] And while OELC and OEG both supported the continuation of the ELR program more or less as is, they also agreed that expansion of some kind was desirable.[141]

FirstEnergy's proposal to continue limiting the ELR program to 24 participants should be rejected.[142] Additionally, FirstEnergy's claims that benefits of ELR have been demonstrated on multiple occasions via interrupted load[143] ignores the fact that 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. As noted by OCC, "Rider ELR might be worthwhile if FirstEnergy ever needed to actually interrupt service to these 24 large industrial customers in the event of an emergency," but this has not been the case.[144]

Moreover, while FirstEnergy does intend to lower the ELR credits received by participants, the program as proposed remains unreasonably costly and ineffective. As explained previously, FirstEnergy's proposed phase-down of the ELR credits would still result in participants earning far more through the ELR program than they would through a comparable PJM interruptible program.[145]

While interruptible programs like ELR have the potential to provide significant reliability and system benefits, 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 restructured and modified as recommended by OMAEG witness

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[140] OCC Brief at 42. *See also* NOAC Brief at 8.

[141] OELC Brief at 44; OEG Brief at 18.

[142] FirstEnergy Brief at 45–48.

[143] FirstEnergy Brief at 47–48; OELC Brief at 28; OEG Brief at 7–11.

[144] OCC Brief at 39–40. *See also* NOAC Brief at 8.

[145] OMAEG Brief at 48–49.

Seryak. 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.[146]

5. 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.[147] For example, as noted by OELC, "the Commission recently approved a three-year term for AES Ohio's ESP IV. Under a pending settlement, AEP Ohio's ESP V is only proposed to last for four years. And, notably, FirstEnergy's own ESP IV was originally three-years long."[148] As such, OMAEG and several other parties—including Staff—urged the Commission not to deviate from its own precedent[149] and to modify the ESP term to be less than the proposed eight years if the Commission approves an ESP for FirstEnergy.[150] OMAEG's recommendation of a three or four-year term to be consistent with the ESPs recently approved for two other Ohio utilities was echoed by OCC.[151] OCC argued that the ESP "duration should be limited to no longer than four years,"[152] and OEG "propose[d] a four-year term."[153] Staff, OELC, and NOAC all recommended

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146 Staff Brief at 22; OCC Brief at 42; NOAC Brief at 8. *See also* OMAEG Brief at 47.

147 Tr. Vol. I at 173–74 (Fanelli Cross-Examination). *See also* Staff Brief at 30–31; OELC Brief at 6.

148 OELC Brief at 6, *citing* Tr. Vol. I at 170–75 (Fanelli Cross-Examination).

149 *See supra* note 133, explaining that the Supreme Court has previously instructed the Commission to respect its own precedents in its decisions to assure predictability which is essential in all areas of the law, including administrative law.

150 *See* OMAEG Brief at 51; OCC Brief at 7; OEG Brief at 2; Staff Brief at 3; OELC Brief at 1, 5; NOAC Brief at 16.

151 OMAEG Brief at 51, *citing* AES ESP IV Order at 24 (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 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). *See also* Staff Brief at 30–31; OELC Brief at 6.

152 OCC Brief at 7.

153 OEG Brief at 2. Alternatively, OEG supports Staff's proposed six-year term.

a term of six years.[154] And while Kroger did not offer a specific recommendation, it also agreed that "if the Commission approves a version of the proposed ESP V, it should decrease the ESP term."[155]

An eight-year term, as proposed by FirstEnergy, "would be unjust and unreasonable" for several reasons.[156] In addition to contravening Commission precedent, an eight-year term has a much higher rate impact on customers, would make FirstEnergy's earnings subject to "a relaxed significantly excessive earnings test,"[157] would "lock[] in the terms of ESP V for an unduly long time,"[158] and provides less flexibility than a shorter term length.[159] As explained by Staff, a shorter ESP term "allows greater flexibility to account for changes in market conditions" and would "allow the utilities and Commission to reassess the SSO based on the most current information and monthly data."[160] Therefore, if the Commission approves the proposed ESP V, it should decrease the ESP term to conform with prior precedent, mitigate the rate impacts on customers, and allow for greater flexibility to account for changing market conditions.

B. 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 recognized by FirstEnergy, "[t]he touchstone for the Commission's approval of an ESP is whether the ESP, including its pricing and all other terms and conditions, is more favorable in

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154 Staff Brief at 3; OELC Brief at 1, 5; NOAC Brief at 16.

155 Kroger Brief at 21.

156 OCC Brief at 7.

157 OCC Brief at 7.

158 Staff Brief at 3. *See also* NOAC Brief at 16.

159 Staff Brief at 3; OELC Brief at 6, *referencing* Tr. Vol. I at 172 (Fanelli Cross-Examination).

160 OELC Brief at 6, *citing* Staff Ex. 10 at 4 (Healey Direct); Tr. Vol. I at 172 (Fanelli Cross-Examination). *See also* OMAEG Brief at 50–51; Staff Brief at 3; Kroger Brief at 21; OCC Brief at 7; OEG Brief at 2; NOAC Brief at 16.

the aggregate as compared to the expected results of a[n MRO]."[161] But contrary to FirstEnergy's claims,[162] the record evidence demonstrates that, as proposed, the benefits of ESP V are not more favorable in the aggregate than a hypothetical MRO.[163] FirstEnergy's claims and analysis are flawed and the record is devoid of any record support for such claims. OCC asserted that "FirstEnergy's assessment of the "MRO versus ESP" test is faulty because FirstEnergy overlooks many areas where an electric security plan would be *less favorable* than a market-rate option."[164]

FirstEnergy further claims that there is no quantitative net cost or benefit of distribution riders because costs of distribution investments can also be recovered through base distribution rates,[165] but this is incorrect. FirstEnergy receives more immediate recovery for infrastructure expenditures plus a return on that investment through distribution riders as opposed to a base rate case.[166] And 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 actually needs to collect additional funds from customers to provide its services.[167] Consequently, FirstEnergy may not be awarded the totality of those funds, plus additional

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[161] FirstEnergy Brief at 1, *citing* R.C. 4928.143(C)(1).

[162] FirstEnergy Brief at 1, 62–64.

[163] *See* OMAEG Brief at 51–60; Staff Brief at 46; Kroger Brief at 4–6; OCC Brief at 54–58; OELC Brief at 1; RESA Brief at 16; NOAC Brief at 15–16.

[164] OCC Brief at 55–57.

[165] FirstEnergy Brief at 63.

[166] Staff Brief at 8. *See also* OMAEG Brief at 56.

[167] Kroger Brief at 5; OCC Brief at 56; OEC Brief at 1, 6; CUB Brief at 3–5. *See also* OMAEG Brief at 56.

expenses, plus a guaranteed return. Additionally, recovery through base rates rather than riders better ensures that the costs being recovered are actually used and useful.[168]

As noted by OMAEG and other parties, 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, and the amount of base distribution and revenues to be collected will inevitably change following the 2024 rate case.[169] According to CUB, the "great amount of disclosure and scrutiny of rates, costs and other information from the Companies, and a full report conducted by the Commission staff [during a rate case] provides the most transparent way to determine if customer rates are fair. The ESP, however, does not have such a deep review."[170] Consequently, approving rider rates through an ESP is not truly comparable to approving rates in a base rate case because the amount, depth, and standard of review differ so markedly. Relatedly, FirstEnergy seeks to continue/establish its riders using "stale" data based on a May 31, 2007 date certain and a test year ending in February of 2008.[171] This fact alone skews the potential impacts of these riders on customers, but even worse, FirstEnergy's analysis of the proposed ESP V specifically *excluded* the effects of the 2024 rate case on bill impacts and revenue requirement allocations, so what data FirstEnergy did offer to support ESP V is inaccurate and flawed.

FirstEnergy claims that the proposed EE/PDR Programs create quantitative and qualitative benefits for customers,[172] but as discussed above, these programs are unlawful, against Commission precedent, and unreasonably costly to customers. Similarly, FirstEnergy's claimed

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[168] OCC Brief at 26, 29. *See also* OMAEG Brief at 56.

[169] OMAEG Brief at 56–57; Kroger Brief at 17; OCC Brief at 13; CUB Brief at 3–5.

[170] CUB Brief at 3–4.

[171] CUB Brief at 4. *See also* OMAEG Brief at 52.

[172] FirstEnergy Brief at 63.

benefits of recovering distribution-related costs through Riders DCR, AMI, SCR, and VMC should also be discounted.[173] As discussed above, the caps on these riders are not true caps because they allow for rollover into future years. Moreover, the "timely audits" do not actually ensure customers are only paying actual costs because under FirstEnergy's proposals, projected PIS would be included, and for riders such as Rider DCR, as soon as FirstEnergy places 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.

As for FirstEnergy's third claimed benefit regarding the $52 million in shareholder dollars pledged to support low-income customers and enhance the customer experience,[174] as noted above, there is ample reason to distrust such a promise. As explained previously, as part of ESP IV, FirstEnergy committed to spending a total of $24 million in shareholder funds on economic development and energy conservation, but 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).[175] Considering FirstEnergy's failure to honor its previous commitment to spend $24 million in shareholder funds to benefit customers, one might expect some reassurance that FirstEnergy would actually honor its promise to spend $52 million during ESP V, but such assurance is nowhere to be found.[176] And even if FirstEnergy had provided such assurance, as noted above, $52 million is negligible compared to the *billions* FirstEnergy will collect from customers over the proposed ESP term.

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[173] FirstEnergy Brief at 64.

[174] FirstEnergy Brief at 64.

[175] OMAEG Brief at 55. *See also* OELC Brief at 51–52; Armada Brief at 4–5.

[176] *See* FirstEnergy Brief.

Under 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.[177] FirstEnergy has the burden of proof in this instance, but it has utterly failed to provide sufficient evidence to show that the purported benefits of some of the provisions contained in the proposed ESP V outweigh the excessive above-market charges and other costs. Therefore, as a matter of law, OMAEG urges the Commission to reject the proposed ESP V as it is not more favorable in the aggregate than an MRO, as required by R.C. 4928.143(C)(1).

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

FirstEnergy's claims regarding how ESP V advances state policy should also be rejected.[178] Riders DCR, AMI, SCR, and VMC do not by themselves promote or incentivize the availability of adequate, safe, reliable, and efficient retail electric service, and FirstEnergy has failed to provide any evidence that not having these riders in place will negatively impact system reliability or prevent FirstEnergy from providing safe and adequate service.[179] In fact, FirstEnergy witness Standish admitted that, regardless of whether these riders are approved, per state law and policy, FirstEnergy still "need[s] to provide safe and reliable service."[180] FirstEnergy has also displayed a disregard for the cost impacts of the proposed ESP, as evidenced by flawed bill impacts, a failure to consider the impacts of future cases on base distribution rates and components such as

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[177] 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).

[178] FirstEnergy Brief at 65–67.

[179] OCC Brief at 21. *See also* OMAEG Brief at 59.

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

allocation, ROE, and the decision not to "estimate the monthly bill impacts of ESP V on shopping customers."[181] Such disregard 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.

Moreover, as explained above, the proposed EE/PDR Programs are inconsistent with Ohio energy policy, anticompetitive, and problematic for non-low-income consumers,[182] and the ELR program—as proposed—also violates state policy. FirstEnergy's intention to limit the 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. Therefore, FirstEnergy has failed to demonstrate that its proposed ESP V advances the state policies enumerated in R.C. 4928.02.

III. CONCLUSION

FirstEnergy seeks to recover billions from customers over the proposed eight-year term of ESP V—the proposed Rider DCR alone would collect up to $3.876 billion. As demonstrated herein and in numerous other parties' briefs, FirstEnergy has utterly failed to meet its burden of demonstrating that the provisions of its proposed ESP are lawful, and that ESP V is more favorable in the aggregate than a hypothetical MRO. Therefore, for all the reasons stated herein, as well as those articulated in OMAEG's initial brief, the Commission should reject FirstEnergy's proposed ESP V because it is unlawful, unjust, and unreasonable, and not in the public interest. If, however, the Commission sees fit to modify the proposed ESP to render it compliant with Ohio law,

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

[182] OMAEG Brief at 40. *See also* Staff Brief at 25; Kroger Brief; OCC Brief at 49, 52; OELC Brief at 50–52; IGS Brief at 14–16; Direct Energy Brief at 12–13; RESA Brief; NOAC Brief at 8–9. *See also* Armada Brief at 3.

OMAEG recommends that the Commission modify the ESP in accordance with OMAEG's recommendations discussed herein and in its initial brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document also is being served via electronic mail on February 9, 2024 upon the parties listed below.

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