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 FOR CONSUMER PROTECTION BY OFFICE OF THE OHIO CONSUMERS' COUNSEL

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February 9, 2024

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I. INTRODUCTION

FirstEnergy's proposed electric security plan ("ESP V") would impose astronomical charges on Ohioans. The cost to consumers for ESP V alone (without FirstEnergy's proposed riders) is approximately ***$1.4 billion*** over eight years.[1] When FirstEnergy's other proposed riders (the Delivery Capital Recovery Rider, Advanced Metering Infrastructure Rider, and Vegetation Management Rider) are included, the total consumer charges balloon to an astounding ***$6.2 billion***.[2] This would be devastating for FirstEnergy' consumers, many of whom have already been decimated by inflation, the financial fallout from the coronavirus pandemic, and rising charges for other utility services. The PUCO Staff, OCC, and other intervenors generally agree that FirstEnergy's as-filed electric security plan should be rejected.

[1] FirstEnergy Ex. 2, Direct Testimony of Santino L. Fanelli ("Fanelli Testimony") at SLF-1 (April 5, 2023).

[2] *See* Section II(A), below.

FirstEnergy mistakenly claims that "(t)he evidentiary record shows that ESP V benefits customers more than an MRO."[3] But FirstEnergy incorrectly applied the "ESP versus MRO" test.

The PUCO Staff and some intervenors proposed various changes to the electric security plan in order to satisfy the "ESP versus MRO" test. These changes are insufficient to overcome the electric security plan's flaws. Even with the proposed changes, the electric security plan would still fail the "ESP versus MRO" test. The PUCO should therefore reject the electric security plan and order FirstEnergy to submit a market-rate option plan.

II. RECOMMENDATIONS

A. FirstEnergy failed to sustain its burden of proof that the $6.2 billion in electric security plan and rider charges would be just and reasonable to charge its consumers.

FirstEnergy has the burden of proof to establish that its electric security plan and rider charges are just and reasonable.[4] FirstEnergy has failed to justify charging its consumers a total of $6.2 billion as it proposes under its filing.

Under FirstEnergy's proposal, the electric security plan alone would impose $1.4 billion in new charges on consumers.[5] FirstEnergy's Delivery Capital Recovery Rider ("Rider DCR") proposal would then impose on consumers *an additional* $3.876 billion in

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[3] *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, Post Hearing Brief of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company ("FirstEnergy Initial Brief") at 1 (Jan. 19, 2024).

[4] R.C. 4905.22.

[5] Fanelli Testimony at SLF-1 (April 5, 2023).

charges.[6] FirstEnergy proposes to use its Advanced Metering Infrastructure ("Rider AMI") to collect Grid Mod II costs (even though FirstEnergy cannot even demonstrate the benefits from Grid Mod I investment).[7] That would add *an additional* $626 million in costs.[8] FirstEnergy also proposes to charge consumers approximately *an additional* $300 million in new costs for vegetation management.[9]

These total costs to consumers of FirstEnergy's ESP V are summed below:

Table 1: Sum of New ESP V and Rider Charges

Description	Amount
New ESP V Charges	$1.400 billion
New Rider DCR Charges	$3.876 billion
New Rider AMI Charges	$0.626 billion
New Veg. Mgmt. Charges	$0.300 billion
Total:	$6.202 billion

FirstEnergy claims that the $6.2 billion in new charges under the electric security plan are necessary to improve reliability.[10] Yet FirstEnergy already meets its reliability targets, as OELC pointed out in its Initial Brief:

> Since 2010, FirstEnergy has calculated its reliability performance using the System Average Interruption Frequency Index (SAIFI) and Customer Average Interruption Duration Index (CAIDI). Against these metrics, FirstEnergy 'has mostly outperformed (i.e. been lower than) their reliability standards from 2016 through 2022' with only one exception—Ohio Edison in 2019. And although FirstEnergy claims that meeting the reliability standards does not necessarily equate to meeting customers

[6] Staff Ex. 8, Direct Testimony of Devin Mackey at 2-5 ("Mackey Testimony") (Oct. 30, 2023).

[7] *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 No. 16-481-EL-UNC, Audit Report (Nov. 14, 2023).

[8] Hearing Transcript, Vol. II, pp. 381–82 (Nov. 22, 2023).

[9] FirstEnergy Ex. 8, Direct Testimony of Shawn T. Standish ("Standish Testimony") at 11-12 (April 5, 2023).

[10] Application at 1 (April 5, 2023).

> [sic] reliability expectations, FirstEnergy's 'reliability performance aligns with customer expectations.' Specifically, FirstEnergy's 'SAIFI standards and performance thereunder exceed (i.e. are lower than) customer expectations.' And FirstEnergy's 'CAIDI standards and performance thereunder are also well within the range of customer expectations[.]'[11]

FirstEnergy is required by law to provide reliable service.[12] FirstEnergy's reliability performance is already acceptable. FirstEnergy utterly failed to prove how charging consumers an additional $6.2 billion is necessary in order to provide adequate electric distribution service. The PUCO should reject FirstEnergy's electric security plan because FirstEnergy failed to sustain its burden of proof to establish that the $6.2 billion in new charges would be just and reasonable.

B. FirstEnergy's proposed eight-year electric security plan is not just and reasonable for charging consumers. If, however, the PUCO approves an electric security plan, the PUCO should limit the electric security plan's duration to four years.

OCC's Initial Brief explained that an eight-year electric security plan would be unjust and unreasonable and inconsistent with recent PUCO precedent limiting plans to four years.[13] As OCC noted, the electric security plan would subject First Energy to a relaxed "significantly excessive earnings" test.[14] The electric security plan (if approved) should be limited to no longer than four years. FirstEnergy should be required to file a new distribution base rate case at the end of that term.

[11] Initial Post-Hearing Brief of Ohio Energy Leadership Council ("OELC Initial Brief") at 58 (Jan. 19, 2024) (quoting testimony of FirstEnergy witnesses Standish and Richardson) (citations omitted).

[12] R.C. 4905.22.

[13] OCC Initial Brief at 7-8 (Jan. 19, 2024).

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

The PUCO Staff and other intervenors support shortening the term of FirstEnergy's ESP as well. The' PUCO Staff' recommends a reducing the electric security plan to six years.[15] Other intervenors supported a shorter plan, in alignment with OCC's recommendation. For example:

- OEG recommended reducing the electric security plan term to four years.[16]
- "OMAEG recommends and proposes a three or four-year term."[17]
- Kroger stated: "[t]herefore, if the Commission approves a version of 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."[18]

OCC's Initial Brief explained that in recent cases, the PUCO has approved electric security plans with shorter durations. In the pending AEP electric security plan, PUCO Staff supports the settlement agreement calling for a four-year electric security plan.[19] The PUCO approved a three-year electric security plan for AES Ohio.[20] If the PUCO approves an electric security plan for FirstEnergy, the PUCO should follow the recommendations of OCC and other intervenors, and its own past precedent, to limit the electric security plan (if approved) to four years.

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[15] Public Utilities Commission of Ohio Initial Post-Hearing Brief ("Staff Initial Brief") at 30-31 (Jan. 19, 2024).

[16] Post-Hearing Brief of Ohio Energy Group ("OEG Initial Brief") at 26 (Jan. 19, 2024).

[17] OMAEG Initial Brief at 51 (Jan. 19, 2024).

[18] Initial Post-Hearing Brief of The Kroger Co. ("Kroger Initial Brief") at 21 (Jan. 19, 2024).

[19] *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 No. 23-23-EL-SSO, et al., Stipulation and Recommendation (Sept. 6, 2023).

[20] *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*, Opinion and Order, at 24 (Aug. 9, 2023).

C. FirstEnergy's SSO auction proposal is unjust and unreasonable because it does not provide for separate SSO auctions for residential consumers.

OCC's Initial Brief argued that holding separate auctions for different consumer classes would make the SSO auctions more efficient and would benefit consumers by eliminating subsidies to higher-cost consumer classes.[21] This approach has been utilized for many years in other states such as New Jersey, Maryland, the District of Columbia, and Illinois. These states hold SSO auctions with a separate class for residential and small commercial consumers.[22] Pennsylvania, Delaware and Massachusetts also hold separate auctions, but for a class comprised of residential consumers only.[23]

Constellation New Energy supports this approach, correctly noting that "class-based auctions will result in better prices for customers by properly allocating risks and costs."[24] Constellation New Energy has wide experience with SSO auctions in several states over many years. Separating the SSO auctions by consumer class would also be consistent with the following Ohio energy policies:

- "Ensure the availability to consumers of … efficient … and reasonably priced retail electric service;"[25]

- "Ensure the availability of … retail electric service that provides consumers with the … price, terms, [and] conditions, … they elect to meet their respective needs;"[26]

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[21] OCC Initial Brief at 9 (Jan. 19, 2024).

[22] *Id.*

[23] *Id.*

[24] Constellation Energy Generation, LLC and Constellation NewEnergy, Inc. Initial Brief ("Constellation Initial Brief") at 28 (Jan. 19. 2024).

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

[26] R.C. 4928.02(B).

- "Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers;"[27]

- "Encourage innovation and market access for cost-effective supply- and demand-side retail electric service;"[28]

- "Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;"[29]

- "Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies….;"[30]

- "Ensure retail electric service consumers protection against … market deficiencies, and market power;"[31] and

- "Protect at-risk populations…."[32]

The PUCO should protect customers and eliminate subsidies to higher-risk consumer classes by requiring FirstEnergy to hold separate SSO auctions for different consumer classes.

D. The sheer number of riders proposed by FirstEnergy is excessive, which harms consumers by reducing the incentive for FirstEnergy to control costs. The PUCO should therefore reject FirstEnergy's proposals to establish new riders or expand existing riders.

FirstEnergy argues throughout its Initial Brief that its proposed riders provide "customer protections that would not otherwise be available" because of annual audits which review the costs for reasonableness.[33] However, OCC witness Meyer testified that

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[27] R.C. 4928.02(C).

[28] R.C. 4928.02(D).

[29] R.C. 4928.02(G).

[30] R.C. 4928.02(H).

[31] R.C. 4928.02(I).

[32] R.C. 4928.02(L).

[33] FirstEnergy Initial Brief at 11 (Jan. 19, 2024).

riders can harm consumers because the charges to consumers receive less regulatory scrutiny.[34]

Mr. Meyer testified that utilities often benefit from the decline in legacy rate base once rates are established in a rate case, and it is imperative to capture this decline in rate base if other aspects of the rate base are to be singled out for recovery outside the context of a rate case.[35] If such offsets are not captured, the utility's profits would be greatly enhanced with no corresponding benefit provided to consumers.[36] This is exactly what would happen under FirstEnergy's proposed electric security plan.

Mr. Meyer further explained how an excessive number of trackers, riders and other special regulatory mechanisms decreases a utility's incentive to manage all aspects of its business in a cost-effective manner.[37] FirstEnergy has an average of 54 riders and nine tariff provisions for each of its Ohio utilities and proposes to add three additional new riders in ESP V.[38] According to Mr. Meyer, this large number of riders is more beneficial to shareholders than consumers because it undermines FirstEnergy's incentive to control costs.[39]

Other intervenors also recommend restricting FirstEnergy's proposed riders, as follows:

- OMAEG stated: "[I]f 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

[34] OCC Initial Brief at 31 (Jan. 19, 2024).

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

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."[40]

- NOAC recommended: "[c]ustomer affordability is NOAC's primary goal. That is best achieved through an MRO/base rate case. This approach would eliminate all the riders to include Rider ELR, a non-distribution rider."[41]

- Kroger argued that "Riders DCR, VMC, and SCR… would result in significant above-market charges being imposed on customers without the protections offered by a base rate case."[42]

- Wal-Mart recommended that "[t]he Commission should take steps to reduce the number of riders employed by the companies."[43]

Given the excessive number of FirstEnergy's existing riders, and the charges to consumers under the riders, it would be unjust and unreasonable for the PUCO to approve FirstEnergy's proposed new riders or expand any existing riders.

E. FirstEnergy's proposal to continue and expand the Rider DCR charges to consumers is unjust and unreasonable.

FirstEnergy's Rider DCR proposal is unjust and unreasonable. As OCC pointed out in its Initial Brief, FirstEnergy proposes to include inappropriate costs and to use projected plant-in-service amounts.[44] FirstEnergy seeks approval for higher spending in exchange for meeting reliability standards which FirstEnergy is already required to meet

[40] OMAEG Initial Brief at 3 (Jan. 19, 2024).

[41] NOAC Initial Brief at 15 (Jan. 19, 2024).

[42] Kroger Initial Brief at 5 (Jan. 19, 2024).

[43] Wal-Mart Stores Post-Hearing Brief ("Wal-Mart Initial Brief") at 3 (Jan. 19, 2024).

[44] OCC Initial Brief at 20-28 (Jan. 19, 2024).

and which it in fact does meet under current spending levels.[45] Finally, FirstEnergy seeks to remove protective rate caps by rolling any excess spending forward into future rate periods.[46] This would harm consumers.

FirstEnergy argues in its Initial Brief that Rider DCR should continue in its current form, which includes charges from specific accounts classified as transmission, general, and intangible plant.[47] However, excluding these accounts would reduce the total amount of Rider DCR revenue by $51 million annually.[48] This is another good reason why the PUCO should *eliminate* these FERC accounts from Rider DCR.

In addition, PUCO Staff Witness Mackey testified that these accounts do not directly relate to maintaining the reliability of the distribution grid, which is the purpose of Rider DCR.[49] OCC's Initial Brief explained that equipment is classified based on the equipment's primary purpose, so equipment classified under these other accounts would not be primarily related to distribution. OMAEG[50] and Kroger[51] join OCC in asking the PUCO to exclude these accounts from Rider DCR.

FirstEnergy's electric security plan would also allow it to earn excess profits because projected plant-in-service balances are used to determine the Rider DCR revenue requirement and Rider DCR fails to include a depreciation offset. Using projected plant-in-service balances allows FirstEnergy to recover investments almost immediately, and in

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[45] *Id.*

[46] *Id.*

[47] FirstEnergy Initial Brief at 15 (Jan. 19, 2024).

[48] FirstEnergy Initial Brief at 14 (Jan. 19, 2024).

[49] Mackey Testimony at 7 (Oct. 30, 2023).

[50] OMAEG Initial Brief at 27 (Jan. 19, 2024).

[51] Kroger Initial Brief at 10 (Jan. 19, 2024).

some cases before the investment is even placed in service (*i.e.,* used and useful) and systematically over-estimates revenue requirements for Rider DCR.

PUCO Staff Witness Mackey's testimony supports OCC's position. He explained that using projected plant-in-service balances violates PUCO precedent and should be prohibited.[52] He noted that eliminating the projected plant-in-service balances is necessary to "conform the [FirstEnergy] DCR calculation to similar distribution riders that the Commission has approved for AEP Ohio, AES Ohio, and Duke Energy Ohio, which only recover actual, not projected, plant balances in their riders."[53] The PUCO Staff's Initial Brief discusses Mr. Mackey's testimony and is consistent with OCC's position on these points.[54]

FirstEnergy argues that "Rider DCR supports distribution investments to maintain safe and reliable service to customers as well as the Companies' continuing ability to meet customer expectations regarding reliability."[55] Electric distribution utilities, however, are already required to meet these specific standards, the customer average interruption duration index ("CAIDI") and the system average interruption frequency index ("SAIFI") under PUCO rules.[56] FirstEnergy's proposal that higher levels of Rider DCR spending are needed to meet standards which FirstEnergy is already required to meet *(and is already meeting under current spending levels)* is unjust and unreasonable.

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[52] Mackey Testimony at 7.

[53] *Id.*

[54] Staff Initial Brief at 4-11 (Jan. 19, 2024).

[55] FirstEnergy Initial Brief at 13 (Jan. 19, 2024).

[56] O.A.C. 4901:1-10-10.

FirstEnergy's proposed Rider DCR spending "caps" would also allow it to carry forward any excess Rider DCR spending and collect the excess revenue in the following year or in the next rate case. That is unreasonable and harmful to consumers because the so-called "caps" do not function as actual hard caps on the amount consumers must pay. OCC's Initial Brief explained that the PUCO prohibits other utilities from carrying revenue into the following year or the next rate case.[57] The PUCO should follow its own precedent and impose an effective hard cap on FirstEnergy's Rider DCR revenue.

PUCO Staff's Initial Brief also proposed hard caps for Rider DCR:

> Currently, if the Companies are under the cap in one year, they can roll the unused cap space over to the next year, thereby increasing the next year's cap. Likewise, if the Companies go over their approved cap, they can carry the overage to the next year and recover it if it falls under the next year's cap. None of Ohio's other electric utilities are allowed to do either of these things. The Companies' Rider DCR should therefore be modified. If the Companies are under their cap in one year, it should have no impact on the following year's cap. And if the Companies are over the cap, the amount over the cap should not be rolled forward and should be excluded from the DCR.[58]

Accordingly, the PUCO should adopt OCC's recommendations regarding Rider DCR.

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[57] *See, e.g., 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 No. 22-900-EL-SSO, et al., Opinion and Order at ¶ 77 (Aug. 9, 2023).

[58] Staff Initial Brief at 9 (Jan. 19, 2024).

F. FirstEnergy's Rider AMI proposal is unjust and unreasonable because FirstEnergy would collect excessive profits without the constraint of a revenue cap, to the detriment of FirstEnergy consumers.

FirstEnergy proposes to continue Rider AMI in its current form until all costs of FirstEnergy's Grid Modernization I and II business plan are fully collected.[59] FirstEnergy's Initial Brief asserts that Rider AMI includes consumer protections and benefits.[60] FirstEnergy's argument should be rejected. To begin, FirstEnergy can't even demonstrate actual benefits from Grid Mod I,[61] so continuing to charge consumers under Rider AMI is unreasonable. In addition, as explained in OCC's Initial Brief, the lack of a revenue cap is inconsistent with FirstEnergy's own Rider DCR proposal and also inconsistent with PUCO precedent for other utilities' capital expense riders.[62]

Other aspects of the Rider AMI are also unfair to consumers. For example, similar to Rider DCR, FirstEnergy again proposes to use projected plant-in-service balances to determine the rider's revenue requirement.[63] FirstEnergy also seeks to earn a return on stranded assets.[64] PUCO Staff Witness Mackey recommended that the PUCO reject FirstEnergy's proposal to use projected plant-in-service balances in calculating the revenue requirement for Rider AMI, based on the same reasons why it is inappropriate

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[59] FirstEnergy Initial Brief at 20 (Jan. 19, 2024).

[60] *Id.*

[61] *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 No. 16-481-EL-UNC, Audit Report (Nov. 14, 2023).

[62] *In re AES Ohio ESP IV Case,* Case No. 22-900-EL-SSO, et al., Opinion & Order at ¶ 77 (Aug. 9, 2023); *In re Duke ESP IV Case,* Case No 17-1263-EL-SSO, Opinion & Order (Dec. 19, 2018) (approving revenue caps for Rider DCI); *In re AEP ESP IV*, Case No. 16-1852-EL-SSO, Opinion & Order (April 25, 2018) (approving revenue caps for Rider DIR).

[63] OCC Initial Brief at 18-30 (Jan. 19, 2024).

[64] *Id.*

for Rider DCR.[65] OCC Witness Meyer testified that FirstEnergy proposes to earn a return on meters and equipment that is taken out of service and thus is not "used and useful."[66]

FirstEnergy's proposal to continue Rider AMI is unjust and unreasonable as explained in OCC's Initial Brief. The PUCO should adopt OCC's recommendations concerning FirstEnergy's Rider AMI proposal.

G. FirstEnergy's Storm Cost Recovery Rider ("Rider SCR") proposal to charge consumers charges is unjust and unreasonable.

The PUCO should reject FirstEnergy's proposal to implement Rider SCR. FirstEnergy's arguments in favor of Rider SCR ignore the fact that FirstEnergy can establish an updated level of storm restoration expenses in its upcoming rate case, due to be filed later this year.

FirstEnergy's vague definition of "major storms" would allow it to charge consumers unreasonably all sorts of different storm events. According to the PUCO Staff, FirstEnergy's vague definition of "major storms" under Rider SCR would expand the number of storms FirstEnergy could charge consumers for by more than 300%, from those classified as "major events" under O.A.C. 4901:1-10-01(T).[67] FirstEnergy's Rider SCR proposal is therefore unjust and unreasonable, and it should be rejected.

PUCO Staff's Initial Brief recommended approval of Rider SCR, subject to major changes proposed by Staff.[68] Multiple intervenors, including OMAEG[69] and Kroger,[70]

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[65] Mackey Testimony at 18.

[66] OCC Initial Brief at 29 (Jan. 19, 2024).

[67] Staff Initial Brief at 13 (Jan. 19, 2024).

[68] *Id.*

[69] OMAEG Initial Brief at 31 (Jan. 19, 2024).

[70] Kroger Initial Brief at 6 (Jan. 19, 2024).

argue for rejection of Rider SCR, while supporting Staff's recommended changes if Rider SCR is adopted. Further, OMAEG's Initial Brief explains that approving Rider SCR through the electric security plan should be rejected as single-issue ratemaking.[71] OCC joins these other parties in urging rejection of Rider SCR, but recommending the adoption of PUCO Staff's proposed changes if Rider SCR is approved.

The better approach, however, would be to reject Rider SCR in its entirety. The PUCO should follow this logic used by the Pennsylvania Public Utility Commission in rejecting a similar storm rider proposed by FirstEnergy subsidiaries Metropolitan Edison Company (Met-Ed) and Pennsylvania Electric Company:

> The Commission has long approved inclusion of normal storm damage expense in base rate cases. Abnormal storm damage expense, such as that occasioned by a hurricane for instance, is dealt with by filing a petition with the Commission for deferred accounting and subsequently seeking recovery of the expense in the utility's next base rate filing. Traditional ratemaking permits a utility the opportunity to recover reasonable and [*316] prudently incurred expenses, but does not permit the utility a return on those expenses. The Companies' [sic] have not proven by a preponderance of the evidence that the Commission's past practices should be abandoned. Specifically, the Companies have not established that adoption of their proposed SDR is just or reasonable or in the public interest.[72]

H. FirstEnergy's Vegetation Management Cost Rider ("Rider VMC") proposal is unjust and unreasonable.

FirstEnergy's Rider VMC proposal is unjust and unreasonable because it is unnecessary and fails to pass cost-savings to consumers. First-Energy failed to

[71] OMAEG Initial Brief at 32 (Jan. 19, 2024).

[72] *In re FirstEnergy and GPU Merger Savings Remand Proceeding,* Case No. R-00061366, et al., Opinion and Recommended Decision, 2006 Pa. PUC LEXIS 116, * 315-316 (Oct. 31, 2006).

demonstrate the need for Rider VMC.[73] More troubling, FirstEnergy identifies cost-savings attributable to the program, achieved by reducing regulatory lag,[74] yet the proposal does not pass the cost savings along to consumers.

Several other parties also oppose Rider VMC for good reason:

- OMAEG argued that Rider VMC is improper single-issue ratemaking and is unneeded because FirstEnergy is already meeting its reliability targets;[75]

- Kroger points out: "[a]s with Rider DCR, FirstEnergy has failed to demonstrate the need for these increased expenditures, or the benefits to customers/improvements to reliability as a result of these increased expenditures;"[76] and

- OELC argues that "[t]he Commission should reject FirstEnergy's Enhance Vegetation Management Rider proposal because it seeks excessive reliability improvements at ratepayers' expense."[77]

FirstEnergy's Rider VMC is unjust and unreasonable because it increases consumer charges without providing corresponding benefits. It is also unnecessary because FirstEnergy is already meeting the PUCO's reliability standards. The PUCO should therefore reject FirstEnergy's Rider VMC proposal.

I. FirstEnergy's Economic Load Response Program ("Rider ELR") proposal is unjust and unreasonable.

FirstEnergy's Rider ELR proposal is unjust and unreasonable because it forces all consumers, including residential consumers, to subsidize large industrial customers for interruptible service – even though FirstEnergy may never actually interrupt their service. It is the responsibility of PJM, not FirstEnergy, to curtail service in the event of electric

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[73] OCC Initial Brief at 35 (Jan. 19, 2024).

[74] FirstEnergy Initial Brief at 31 (Jan. 19, 2024).

[75] OMAEG Initial Brief at 31-32 (Jan. 19, 2024).

[76] Kroger Initial Brief at 11 (Jan. 19, 2024).

[77] OELC Initial Brief at 58 (Jan. 19, 2024).

emergencies. Duke and AES Ohio consumers are similarly situated to FirstEnergy consumers because all three utilities belong to PJM; however, Duke and AES Ohio consumers are not required to pay subsidies to large industrial customers under an interruptible service tariff. The PUCO should reject FirstEnergy's Rider ELR proposal.

Rider ELR pays rate credits of $10 per kW in exchange for curtailing service when emergency events are called by PJM or FirstEnergy.[78] Rider ELR is limited to 24 large industrial customers.[79] They received massive rate credits ($437 million during the past seven years of ESP IV)[80] *even though FirstEnergy never declared an emergency*.[81]

The fact that FirstEnergy never declares an emergency shows that Rider ELR is unnecessary. Even so, there were two plausible reasons why Rider ELR could be justified under ESP IV. FirstEnergy, however, proposes to eliminate both of these justifications for Rider ELR. This would render Rider ELR totally superfluous and eliminate any possible reason for implementing the tariff – other than to force consumers to continue paying unjust and unreasonable subsidies to 24 large industrial companies.

FirstEnergy's first proposed Rider ELR change is to no longer require participating industrial customers to commit their peak demand response capabilities to FirstEnergy.[82] FirstEnergy claims this change would improve administrative efficiency and promote customer choice (for the large industrial customers, who already have robust

[78] FirstEnergy Initial Brief at 46 (Jan. 19, 2024).

[79] PUCO Staff Ex. 10, Direct Testimony of Christopher Healey ("Healey Testimony") at 17 (Oct. 30, 2023).

[80] *Id.*

[81] OCC Initial Brief at 37 (Jan. 19, 2024); Hearing Transcript, Vol. VII, p. 1495 (Dec. 6, 2023).

[82] *Id.* at 12.

customer choice options).[83] In fact, this requirement is no longer needed. This provision was related to peak demand reduction targets, formerly required by Ohio law. These requirements were effectively repealed by H.B. 6 in 2019. So, this reason for having an interruptible tariff no longer exists.[84]

The second proposed Rider ELR change is to eliminate FirstEnergy's role as a Curtailment Service Provider.[85] FirstEnergy once again claims this change would promote customer choice.[86] But this change would result in FirstEnergy no longer earning capacity market revenues to help offset the cost of Rider ELR.[87] So this reason for having an interruptible tariff no longer exists.

With these two grounds for Rider ELR eliminated, FirstEnergy now proposes a new rationale for Rider ELR – to allow FirstEnergy to interrupt service in the event of a "distribution emergency" or "local emergency."[88] FirstEnergy's argument is that PJM handles electric emergencies on the so-called "grid," while FirstEnergy could handle emergencies in the event of a "distribution emergency" or a "local emergency."[89] This is pure fantasy. There is no such thing as a "distribution emergency" or a "local emergency" which would allow FirstEnergy to declare an electric emergency independently from PJM. This is clear from PJM's governing documents.

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[83] FirstEnergy Initial Brief at 46 (Jan. 19, 2024).

[84] OCC Initial Brief at 38 (Jan. 19, 2024).

[85] FirstEnergy Ex. 10, Direct Testimony of Edward B. Stein ("Stein Testimony") at 4 (April 5, 2023).

[86] FirstEnergy Initial Brief at 46 (Jan. 19, 2024).

[87] *Id.*

[88] Hearing Transcript, Vol. VII, p. 1389 (Dec. 6, 2023) (emphasis added).

[89] *Id.*

FirstEnergy explained this fictional concept of a "distribution emergency" or "local emergency" in Mr. Stein's testimony, as follows:

> Q. Okay. Under your proposal, if there was a *distribution system emergency*, you would give notice to the ELR customer, and they would be required to get to the firm baseline level within two hours, correct?
>
> A. I would term it more as a *local emergency* but, yes.[90]

Mr. Stein admitted that FirstEnergy is subject to the PJM Reliability Assurance Agreement.[91] He further admitted that FirstEnergy must take direction from PJM in the event of an electric emergency.[92] But when questioned on PJM's definition of an "emergency," he couldn't explain it – as shown below:

> Q. Do you know generally whether load-serving entities like the Ohio utilities are required to take direction from PJM during an electric emergency?
>
> A. Can you -- can I have that question again, please?
>
> MR. FINNIGAN: Sure. Could you read it back, please?
>
> EXAMINER ADDISON: Please. (Record read.)
>
> A. So PJM does issue direction. I think one of the most recent cases was where PJM was requesting customers of the distribution companies' curtail load, if that's what you are alluding to with -- with direction.
>
> Q. Okay. And do the PJM-governing documents define what an emergency is?

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[90] *Id.*

[91] *Id.* at 1466.

[92] *Id.* at 1472.

A. I -- again, without specifics, I don't know.[93]

As a matter of fact, the PJM Reliability Assurance Agreement states:

> ARTICLE 1 – DEFINITIONS
>
> * * *
>
> Emergency:
>
> "Emergency" shall mean (i) *an abnormal system condition* requiring manual or automatic action to maintain system frequency, or to prevent loss of firm load, equipment damage, or tripping of system elements *that could adversely affect the reliability of an electric system* or the safety of persons or property; or (ii) a fuel shortage requiring departure from normal operating procedures in order to minimize the use of such scarce fuel; or (iii) a condition that requires implementation of emergency procedures as defined in the PJM Manual.[94]

The PJM Reliability Assurance Agreement defines "emergency" as "any *abnormal system condition …that could adversely affect the reliability of the electric system.*"[95] PJM's definition of an emergency could not possibly be any broader. By defining "emergency" as "*any abnormal system condition … that could adversely affect reliability*," this rules out any possibility that there could be any such thing as a "distribution emergency" or a "local emergency" that affects electric system reliability, which would not be under PJM's control. ***Every possible abnormal system condition that could adversely affect the reliability of the electric system is under PJM's control – not the local utility's control.*** Imagine the chaos which would ensue if every electric

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[93] *Id.* at 1472.

[94] OCC Ex. 13, PJM Reliability Assurance Agreement at Article I, Definitions (emphasis added).

[95] *Id.* (emphasis added).

distribution utility started shedding load on their own in response to some perceived event within their service area.

PJM's all-encompassing definition of "emergency" leaves no daylight for FirstEnergy's fictional concept of a "distribution emergency" or "local emergency." This also probably explains why FirstEnergy never called an electric emergency during ESP IV – because FirstEnergy was not authorized to do so under the PJM Reliability Assurance Agreement.

From a logical standpoint, FirstEnergy's concept of a "distribution emergency" or "local emergency" cannot be reconciled with PJM's broad definition of "emergency" in the Reliability Assurance Agreement. If FirstEnergy argues that a so-called "distribution emergency" or "local emergency" would "***adversely affect the reliability of the electric system,***" then (per the Reliability Assurance Agreement) such emergency event is within PJM's sole control and PJM would be solely authorized to decide whether to interrupt service in response to the emergency. Hence there would be no need for Rider ELR. On the other hand, if FirstEnergy argues that a so-called "distribution emergency" or "local emergency" is an event that does not "***adversely affect the reliability of the electric system,***" then there would be no need for FirstEnergy to interrupt anyone's service and hence no need for Rider ELR.

As a result of the foregoing discussion, FirstEnergy's proposed rationale for Rider ELR should be rejected. In addition, Rider ELR is discriminatory. It would improperly cause FirstEnergy's consumers to be treated differently from consumers of Duke and AES Ohio. Duke and AES Ohio do not have any interruptible tariff.[96] All three utilities

[96] Hearing Transcript, Vol. XIV, pp. 2543-2544 (Dec. 13, 2023).

are members of PJM. PJM is the reliability coordinator for its member utilities, meaning that PJM is the entity responsible for balancing supply and load and managing emergency electric events.[97]

The PUCO should also reject Rider ELR because the tariff is applied in a totally arbitrary manner. We know that the tariff is limited to 24 large industrial customers who enrolled in the tariff during ESP IV. No evidence was presented as to the customers' energy profile and operating characteristics, FirstEnergy's avoided cost, priority of service, whether the customers have back-up generation, how an interruption would impact their operations, how quickly an interruption could be implemented or how many megawatts would be subject to interruption. Other similarly situated industrial customers have no opportunity to participate in the tariff.

Approving interruptible service through Rider ELR for this select group of 24 industrial customers instead of requiring them to apply for a reasonable arrangement under R.C. 4905.31 also violates PUCO precedent.[98] For example, the PUCO approved interruptible service for AK Steel in Duke's service area through a reasonable arrangement.[99] Requiring industrial customers to seek approval of interruptible service through a reasonable arrangement would at least allow the PUCO to scrutinize whether

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[97] Hearing Transcript, Vol. VII, p. 1472:6-20 (Dec. 6, 2023).

[98] *In the Matter of the Application of AK Steel Corporation for Approval of a Reasonable Arrangement with Duke Energy Ohio,* Case No. 18-450-EL-AEC, Opinion and Order (June 28, 2018); *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service,* Case No. 17-1263-EL-SSO, Opinion and Order (Dec. 19, 2018); *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 No. 22-900-EL-SSO, et al., Opinion and Order (Aug. 9, 2023).

[99] *In the Matter of the Application of AK Steel Corporation for Approval of a Reasonable Arrangement with Duke Energy Ohio,* Case No. 18-450-EL-AEC, Opinion and Order (June 28, 2018). *See also, In the Matter of the Joint Application for Approval of an Economic Development Arrangement between Ohio Power and Acero Junction Inc.,* Case No. 17-2132-EL-AEC, Opinion and Order (May 2, 2018).

any need exists for the service and whether the applicant can fulfill the need. Using a reasonable arrangement approach would also level the playing field in that any industrial customer would have an equal opportunity to apply for a reasonable arrangement.

Finally, the PUCO should also reject Rider ELR because it appears to be an integral part of FirstEnergy's corrupt H.B. 6 bribery scheme – an "interruptible tariff" limited to 24 certain large industrial companies which pays them $437 million in exchange for the right of FirstEnergy to interrupt their electrical service during an emergency – even though their service never actually gets interrupted. The PUCO noted the connection between the H.B. 6 bribery scheme and FirstEnergy's ESP IV settlement when it opened an investigation in Case No. 20-1629-EL-RDR regarding whether FirstEnergy improperly failed to disclose a "side deal" with Mr. Randazzo's consulting firm in the ESP IV case.[100] OCC and other stakeholders have been barred from investigating this issue for the past 18 months due to stays of the H.B. 6 investigation cases requested by the U.S. Attorney.[101] FirstEnergy actively supported the stay orders,[102]

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[100] *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 (Dec. 15, 2021).

[101] *In the Matter of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company's Compliance with R.C. 4928.17 and the Ohio Adm. Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC, Entry (Aug. 24, 2023); *In the Matter of the Review of the Distribution Modernization Rider of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company,* Case No. 17-2474-EL-RDR, Entry (Aug. 24, 2023); *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company,* Case No. 20-1502-EL-UNC, Entry (Aug. 24, 2023); *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 (Aug. 24, 2023).

[102] *See, e.g., In the Matter of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company's Compliance with R.C. 4928.17 and the Ohio Adm. Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC, FirstEnergy's Memorandum Contra Office of the Ohio Consumers' Counsel's Application for Rehearing (Oct. 10, 2023).

but it continues seeking to collect billions of dollars in new revenues under ESP V and other cases.

FirstEnergy's Rider ELR proposal is unjust and unreasonable. The PUCO should therefore reject this proposal.

J. FirstEnergy's Rider NMB proposal is unjust and unreasonable because it would improperly shift costs to the residential class and is contrary to the PUCO-appointed auditor's recommendation to eliminate the program.

FirstEnergy's Rider NMB proposal is unjust and unreasonable because it would improperly shift transmission costs to residential consumers. A PUCO-appointed auditor determined that FirstEnergy's Rider NMB pilot program, which allows certain industrial consumers to opt-out of paying transmission costs under Rider NMB, improperly shifted about $1 million to residential consumers who have no choice but to pay Rider NMB. The auditor recommended eliminating the Rider NMB pilot program. FirstEnergy, however, now proposes to expand it. Exeter Associates, Inc. (the PUCO-appointed auditor) concluded that the pilot Rider NMB program shifts costs to residential customers who cannot participate, including "a $107.7 million cost shift paid by non-participants [of all customer classes] over seven years."[103] Per Exeter's audit report, Rider NMB is "unlikely to provide direct reliability benefits" and that the pilot program "does not resolve the typical causes of grid stress" and should thus be eliminated.[104]

As explained in OCC's Initial Brief and in Exeter's Audit Report, FirstEnergy's Rider NMB proposal is unjust and unreasonable due to the improper shifting of

[103] OELC Ex. 27, Exeter Audit Report, Case No. 22-391-EL-RDR at 2-4, 39 (July 17, 2023).

[104] *Id.*

transmission costs. The PUCO should therefore reject FirstEnergy's Rider NMB proposal.

K. FirstEnergy's Energy Efficiency Cost Recovery Rider ("Rider EEC") proposal is unjust and unreasonable because it unlawfully imposes costs on customers who do not enroll and charges customers for non-low-income programs.

First Energy's Initial Brief argues that Rider EEC benefits consumers by charging them for energy efficiency and demand response programs.[105] FirstEnergy is wrong. In fact, the programs do not benefit consumers, are less preferable than market-driven programs and are unlawful, unjust and unreasonable.[106] The PUCO should therefore reject FirstEnergy's Rider EEC proposal.

Rider EEC is unnecessary because it interferes with programs offered by the competitive market. Major chain retailers "offer non-subsidized energy efficient products and services where only the participant pays."[107] As explained by OCC Witness Shutrump, FirstEnergy's proposal is inconsistent with recent PUCO rulings which have rejected utility proposals for non-low-income energy efficiency/demand response programs.[108]

FirstEnergy's Initial Brief argues that Rider EEC would yield $637.9 million in benefits over the life of the program[109] and reduce overall PJM capacity prices for all

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[105] FirstEnergy Initial Brief at 45-57 (Jan. 19, 2024).

[106] OCC Initial Brief at 48-52 (Jan. 19, 2024).

[107] OCC Initial Brief at 51 (Jan. 19, 2024).

[108] *See, e.g., In the Matter of the Application of Ohio Power Company for Approval of Its Energy Efficiency and Peak Demand Reduction Programs,* Case No. 16-574-EL-POR, Opinion & Order (Feb. 24, 2021) (finding that the statewide collective benchmark of 17.5 percent has been met and AEP's energy efficiency rider must terminate).

[109] FirstEnergy Initial Brief at 54 (Jan. 19, 2024).

consumers.[110] This argument has little merit. First, "non-participating consumers will not benefit because 100% of the EEC charge on their bill goes to support only those consumers who participate in the program."[111] Second, as RESA's Initial Brief explains, the analysis used by FirstEnergy to arrive at the lifetime benefits is flawed and speculative.[112] FirstEnergy's use of existing resource capability to calculate benefits means that any demand reductions from Rider EES would do little to impact PJM prices and reliability.[113] With little to no consumer savings, Rider EEC would not "add net demonstrable costs to the overall costs of the ESP."[114]

FirstEnergy's Rider EEC proposal is inconsistent with PUCO precedent and is unjust and unreasonable due to FirstEnergy's flawed financial analysis. The PUCO should therefore reject FirstEnergy's Rider EEC proposal.

L. The PUCO should reject FirstEnergy's proposed electric security plan and approve a market-rate option because the electric security plan fails to meet the "more favorable in the aggregate" standard.

The PUCO should reject FirstEnergy's electric security plan because it is less favorable in the aggregate than a market-rate option.

FirstEnergy's Initial Brief tries to characterize the electric security plan's riders as consumer-protection measures because they are accompanied by frequent audits.[115] FirstEnergy's Initial Brief also argues that the electric security plan benefits consumers

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[110] *Id.* at 56.

[111] OCC Initial Brief at 51 (Jan. 19, 2024).

[112] Retail Energy Supply Association Initial Brief ("RESA Initial Brief") at 12-14 (Jan. 19, 2024).

[113] *Id.* at 14.

[114] *Id.*

[115] FirstEnergy Initial Brief at 11 (Jan. 19, 2024).

because it eliminates eighteen existing riders and tariff provisions while only adding three new riders.[116]

Once again, FirstEnergy's analysis is fatally flawed. Whether the electric security plan is reasonable should be decided based on the amount of quantifiable and qualitative benefits and costs, not the number of riders. As noted in Section II(A) above, the electric security plan and riders would add $6.2 billion in new charges without providing corresponding benefits. OCC agrees with Kroger that "the fact that FirstEnergy ignored the costs of its above-market riders in its analysis for the MRO test is both telling and glaring."[117]

Many other intervenors agreed that FirstEnergy's electric security plan failed the "ESP versus MRO" test:

- OMAEG stated: "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, nor did it consider several other pending cases that will inevitably alter the bill impacts of ESP V on customers."[118]

- Kroger explained: "In short, as noted by OCC witness Meyer, 'if all factors including rate impacts are considered, the ESP V vs. MRO test fails, contrary to the position of FirstEnergy.'"[119]

- NOAC argued: "The MRO/base rate case also would provide an enormous qualitative/quantitative benefit by stopping FE Corp/Companies abuse of the ESP/rider system."[120]

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[116] *Id.* at 4.

[117] Kroger Initial Brief at 6 (Jan. 19, 2024).

[118] OMAEG Initial Brief at 52 (Jan. 19, 2024).

[119] Kroger Initial Brief at 6 (Jan. 19, 2024).

[120] NOAC Initial Brief at 15 (Jan. 19, 2024).

PUCO Staff and some intervenors proposed various modifications to the electric security plan. However, the electric security plan will fail the "ESP versus MRO" test regardless of the proposed changes.

A market-rate offer would comply with the PUCO's mission of assuring "all residential and business consumers access to adequate, safe and reliable utility services at fair prices, while facilitating an environment that provides competitive choices."[121] A market-rate offer would fairly balance all parties' interests as well as the public interest.

III. CONCLUSION

The PUCO should protect consumers by rejecting FirstEnergy's proposed ESP V. FirstEnergy's electric security plan is unlawful, unjust and unreasonable and inconsistent with PUCO precedent. The electric security plan and riders would increase the cost of consumers' electric service by $6.2 billion and the benefits to consumers are entirely unclear.

In addition, FirstEnergy has failed to demonstrate that its proposed ESP V is more favorable to consumers than a market-rate offer. The PUCO should reject the electric security plan proposal and require FirstEnergy to implement a market-rate option.

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[121] PUCO web page/About Us/Mission and Commitments, available at: https://puco.ohio.gov/about-us/resources/mission-and-commitments.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply Brief for Consumer Protection was served on the persons stated below via electronic transmission, this 9th day of February 2024.

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