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 KROGER CO.

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I. INTRODUCTION

On April 5, 2023, the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, "FirstEnergy" or "the Companies") filed an application ("Application") for authority to establish a standard service offer ("SSO") pursuant to R.C. 4928.143 in the form of its fifth electric security plan ("ESP V").[1] In its Application, FirstEnergy sought approval from the Public Utilities Commission of Ohio ("Commission") of an eight-year ESP term beginning June 1, 2024 and ending May 31, 2032, as well as authorization to, among other things, (1) continue its Delivery Capital Recovery Rider ("Rider DCR"), (2) establish a new Vegetation Management Cost Recovery Rider ("Rider VMC") and a new Storm Cost Recovery Rider ("Rider SCR"), and (3) implement an Energy Efficiency and Peak Demand Reduction ("EE/PDR") Plan and associated Energy Efficiency Cost Recovery Rider ("Rider EEC").[2] Numerous parties, including The Kroger Co. ("Kroger"), intervened and participated in

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[1] Companies Ex. 1 at 1 (FirstEnergy Application ("Application")) (April 5, 2023).

[2] *See* Companies Ex. 1 (Application).

an evidentiary hearing on FirstEnergy's proposed ESP V, which commenced on November 7, 2023 and concluded on December 6, 2023.

Pursuant to the briefing schedule adopted on the last day of the evidentiary hearing,[3] Kroger and a number of other parties, including FirstEnergy, Commission Staff ("Staff"), the Office of the Ohio Consumers' Counsel ("OCC"), the Ohio Manufacturers' Association Energy Group ("OMAEG"), Walmart Inc. ("Walmart"), the Ohio Energy Leadership Council ("OELC"), Interstate Gas Supply, LLC ("IGS"), Retail Energy Supply Association ("RESA"), Northwest Ohio Aggregation Coalition ("NOAC"), Citizens Utility Board of Ohio ("CUB"), the Ohio Environmental Council ("OEC"), Direct Energy Business LLC and Direct Energy Services LLC ("Direct Energy"), Armada Power, LLC ("Armada"), Ohio Partners for Affordable Energy ("OPAE"), One Energy Enterprises ("One Energy"), Calpine Retail Holdings, LLC ("Calpine"), the Ohio Energy Group ("OEG"), Constellation Energy Generation, LLC and Constellation NewEnergy, Inc. ("Constellation"), Nucor Steel Marion, Inc. ("Nucor"), Citizens Coalition and Utilities for All ("Citizens"), and the Environmental Law & Policy Center ("ELPC") submitted initial briefs regarding the Companies' proposed ESP V.[4]

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[3] Tr. Vol. XIV at 2664.

[4] *See* Initial Post-Hearing Brief of The Kroger Co. (January 19, 2023) (hereinafter, "Kroger Brief"); Post-Hearing Brief of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (January 19, 2023) (hereinafter, "FirstEnergy Brief"); Initial Brief of the Staff of the Public Utilities Commission of Ohio (January 19, 2023) (hereinafter, "Staff Brief"); Initial Brief of Office of the Ohio Consumers' Counsel (January 19, 2023) (hereinafter, "OCC Brief"); Initial Post-Hearing Brief of The Ohio Manufacturers' Association Energy Group (January 19, 2023) (hereinafter, "OMAEG Brief"); Initial Post-Hearing Brief of Walmart Inc. (January 19, 2023) (hereinafter, "Walmart Brief"); Initial Post-Hearing Brief of Ohio Energy Leadership Council (January 19, 2023) (hereinafter, "OELC Brief"); Initial Post-Hearing Brief of Interstate Gas Supply, LLC (January 19, 2023) (hereinafter, "IGS Brief"); Initial Brief of Retail Energy Supply Association – Public Version (January 19, 2023) (hereinafter, "RESA Brief"); Initial Brief of Northwest Ohio Aggregation Coalition (January 19, 2023) (hereinafter, "NOAC Brief"); 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"); Initial Post-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 Post-Hearing Brief of Armada Power, LLC (January 19, 2023) (hereinafter, "Armada Brief"); Initial Post-Hearing Brief of Ohio Partners for

FirstEnergy seeks to collect from customers over $1.6 billion of additional costs over the course of the proposed eight-year term of ESP V.[5] This $1.6 billion would be *in addition* to the billions of dollars that FirstEnergy currently charges customers. Not only are these current costs collected from customers through riders unreasonable and excessive, the proposed additional charges are unreasonable and unlawful. As such, FirstEnergy's proposed ESP V should be rejected by the Commission. Nothing in FirstEnergy's initial brief changes this conclusion.

Moreover, as discussed by Kroger and several other parties,[6] FirstEnergy's proposed ESP V fails to satisfy the statutory requirement that an ESP be more favorable in the aggregate as compared to the expected results of a market rate offer ("MRO").[7] Specifically, R.C. 4928.141(A) requires electric distribution utilities to provide consumers with a "standard service offer of all competitive retail electric services necessary to maintain essential electric service to customers, including a firm supply of electric generation service." A utility may provide the offer in one of two ways: through an MRO under R.C. 4928.142 or through an ESP under R.C. 4928.143. The ESP statute permits numerous rate components, but says very little about rate calculations.[8] The

Affordable Energy (January 19, 2023) (hereinafter, "OPAE Brief"); Initial Post-Hearing Brief of One Energy Enterprises Inc. (January 19, 2023) (hereinafter, "One Energy Brief"); Initial Brief of Calpine Retail Holdings, LLC (January 19, 2023) (hereinafter, "Calpine Brief"); Post-Hearing Brief of Ohio Energy Group (January 19, 2023) (hereinafter, "OEG Brief"); Initial Brief of Constellation Energy Generation, LLC and Constellation NewEnergy, Inc. (January 19, 2023) (hereinafter, "Constellation Brief"); Initial Brief by Nucor Steel Marion, Inc. (January 19, 2023) (hereinafter, "Nucor Brief"); Initial Brief of Citizens Coalition and Utilities for All (January 19, 2023) (hereinafter, "Citizens Brief"); Initial Post-Hearing Brief of Environmental Law & Policy Center (January 19, 2023) (hereinafter, "ELPC Brief").

[5] *See* Staff Brief at 1; OCC Brief at 1; OMAEG Brief at 2; 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) (October 30, 2023); Company Ex. 5 at Attachment ECM-2, Workpaper 2 (Direct Testimony of Edward Miller) (April 5, 2023).

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

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

[8] *See* R.C. 4928.143(B)(2).

only substantive requirement is that the ESP must be more favorable in the aggregate as compared to the expected results of an MRO.[9] That substantive requirement is not met here. And, FirstEnergy's arguments in its initial brief that the proposed ESP V is more favorable are belied by Commission precedent and the facts of this matter. On this basis alone, FirstEnergy's ESP V Application should be rejected.

Accordingly, for the reasons set forth in its initial brief and herein, Kroger requests that the Commission reject FirstEnergy's proposed ESP V.

II. ARGUMENT

A. <u>FirstEnergy has not demonstrated that ESP V, as filed, is more favorable in the aggregate than an MRO, as required under R.C. 4928.143(C)(1).</u>

As noted above and as explained more thoroughly in Kroger's initial brief, FirstEnergy has not sustained its burden to demonstrate that the proposed ESP V is more favorable in the aggregate than an MRO.[10] R.C. 4928.143(C)(1) sets forth the following standard of review, which applies to ESP cases:

> The burden of proof in the proceeding shall be on the electric distribution utility. Subject to division (D) of this section, the commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code.

Pursuant to this standard, before approving an ESP, the Commission must determine that the ESP is more favorable in the aggregate as compared to the expected results arising from an MRO ("the

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

[10] Kroger Brief at 4. *See also* OCC Brief at 55; OMAEG Brief at 51; NOAC Brief at 4; Staff Brief at 1; OELC Brief at 59; Armada Brief at 3.

MRO test").[11] Evaluation of whether an ESP is more favorable in the aggregate than an MRO (the MRO test) includes both a quantitative comparison and a qualitative comparison.[12]

As noted by OCC, "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."[13] OMAEG similarly argued that "FirstEnergy's claims and analysis are flawed and the record is devoid of any record support for such claims."[14] For example, in its initial brief, FirstEnergy claimed 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."[15] However, this argument fails to take into account the costs of key components of FirstEnergy's proposed ESP, including Riders DCR, VMC, and SCR. These riders would result in significant above-market charges being imposed on customers without the protections offered by a base rate case, which Kroger and multiple other parties opposed.[16] As explained by OEC, these "riders . . . are more closely associated with regular operation and maintenance costs, costs better suited for a rate case."[17] OMAEG urged the Commission to roll the costs FirstEnergy seeks to collect through these riders into base rates because "recovery through base rates rather than

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[11] 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) (hereinafter, "AES ESP II Order").

[12] FirstEnergy Brief at 62; Staff Brief at 46–47; OMAEG Brief at 53. *See also* AES ESP II Order at 50 ("By statute, our analysis does not end with the quantitative analysis, however, as we must consider the qualitative benefits of the . . . ESP, in order to view the proposed plan in the aggregate").

[13] OCC Brief at 55.

[14] OMAEG Brief at 52.

[15] FirstEnergy Brief at 63.

[16] Kroger Brief at 5; OCC Brief at 56; OMAEG Brief at 56; OEC Brief at 1, 6; CUB Brief at 3–5.

[17] OEC Brief at 6.

riders better ensures that the costs being recovered are actually used and useful."[18] And, OCC argued that "[m]any of the numerous and varied riders are improper charges to customers, and their sheer number further contributes to rendering ESP V unjust and unreasonable."[19]

FirstEnergy also claims that there is no quantitative net cost or benefit for these riders because costs of distribution investments can also be recovered through base distribution rates.[20] However, this argument is likewise flawed. It simply ignores the time value of money, since riders allow the Companies to begin immediately recovering asset investments and earning a return on those assets even if said the assets are later disallowed after being deemed not used or useful by the Commission.[21] Moreover, as noted by Staff, because some of FirstEnergy's riders include projected plant-in-service (PIS), the Companies are allowed to recover investments before they are even made.[22] This is in sharp contrast to base rate cases where utilities only have an opportunity to earn the rate of return that is established in that rate case on a total basis.[23] Thus, quantitatively, the cost of service under the proposed ESP V will actually be greater than it would be under an MRO.

Additionally, FirstEnergy attempts to claim that the benefits associated with its proposed EE/PDR plan make the ESP more favorable in the aggregate than an MRO. Many parties responded that this argument is similarly flawed as it completely ignores the fact that the law no longer allows mandatory EE/PDR programs, and the Commission has consistently determined that

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[18] OMAEG Brief at 57.

[19] OCC Brief at 58–59. *See also* Walmart Brief at 3.

[20] FirstEnergy Brief at 63.

[21] OMAEG Brief at 56.

[22] Staff Brief at 8.

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

voluntary programs run by electric distribution utilities should be limited to low-income customers.[24] As explained more fully below and in multiple initial briefs, the EE/PDR plan should be rejected as unlawful and against Commission precedent. Therefore, any potential benefits should not be considered when determining whether ESP V is more favorable in the aggregate.

As for FirstEnergy's other enumerated benefit—the $52 million of shareholder dollars for programs designed to support low-income customers and enhance the customer experience[25]—this benefit does not even begin to outweigh the cost of Rider DCR, which will collect a total of $3.666– $3.876 billion over the eight-year term of ESP V.[26] Moreover, as noted by OMAEG and others, "FirstEnergy failed to honor its previous commitment to spend $24 million in shareholder funds to benefit customers."[27]

In short, as stated by OCC, "[w]hen considering all applicable factors, the only reasonable conclusion is that consumers would be much better off under a market-rate option."[28] Therefore, FirstEnergy's proposed ESP V should be rejected because it fails to pass the statutory MRO test.

B. <u>The Commission should reject FirstEnergy's proposals for Rider DCR, Rider VMC, and Rider SCR as unreasonable and unlawful.</u>

In the event the Commission is considering approving some version of FirstEnergy's ESP V proposal, Kroger again submits that Riders DCR, VMC, and SCR should be rejected as

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

[25] FirstEnergy Brief at 64.

[26] OMAEG Brief at 2.

[27] OMAEG Brief at 55. *See also* Staff Brief at 1; OCC Brief at 1; OELC Brief at 51–52; Armada Brief at 4–5; NOAC Brief at 3.

[28] OCC Brief at 55.

unreasonable and unlawful, or—at minimum—modified in accordance with the proposals put forth by Kroger in its initial brief.

FirstEnergy's justifications for these three riders can be distilled into the same three arguments: (1) the riders support system reliability, (2) they are authorized by R.C. 4928.143(B)(2)(h), and (3) they provide customer protections not available in a base rate case.[29] However, as explained by the parties, each of these arguments does not hold up under scrutiny.

1. Riders DCR, VMC, and SCR are not necessary to support continued system reliability.

As proposed, Riders DCR, VMC, and SCR will recover excessive amounts from customers over the proposed eight-year ESP V term ostensibly to provide increased grid reliability.[30] However, FirstEnergy has failed to adequately demonstrate or reasonably justify its proposed expansion of Rider DCR and/or its proposed establishment of Riders VMC and SCR.[31] FirstEnergy currently collects $390 million annually from customers through Rider DCR,[32] $45 million dollars for vegetation management through base rates,[33] and has *fourteen years'* worth of deferred storm-related costs totaling over $140 million.[34] Under ESP V, FirstEnergy seeks to

[29] FirstEnergy Brief at 7–31.

[30] FirstEnergy Brief at 7, 22, 26.

[31] Staff Brief at 6–7; OCC Brief at 31–32; OMAEG Brief at 22–23, 36–37; IGS Brief at 4; Walmart Brief at 4–5, 7; NOAC Brief at 13; CUB Brief at 4–5.

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

[33] OELC Brief at 56; OMAEG Brief at 33.

[34] Staff Brief at 12; OMAEG Brief at 34–35.

collect an additional $120–$168 million through Rider DCR,[35] $759.8 million through Rider VMC,[36] at least $425 million through Rider SCR.[37]

Contrary to FirstEnergy's claims, these significant increases in costs to customers are not necessary for continued reliability. FirstEnergy itself admitted that "the Companies have a strong track record of delivering reliable service,"[38] and since 2010, FirstEnergy has "never failed to meet [reliability] performance standards for two consecutive years."[39] While FirstEnergy is entitled to recover prudently incurred costs related to distribution system investments, the Companies should not be allowed to rely on ever-expanding cost recovery mechanisms to recover those investments. FirstEnergy "cannot prove that any reliability improvements stem from increased Rider DCR spending,"[40] and based on the record evidence, FirstEnergy failed to demonstrate a need to establish Riders VMC and SCR.[41] According to OCC, "an excess of riders is more beneficial to shareholders than consumers because it undermines FirstEnergy's incentive to control costs."[42] And as noted by OMAEG, "regardless of whether these riders are approved, per state law and policy, FirstEnergy still 'need[s] to provide safe and reliable service.'"[43]

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[35] OMAEG Brief at 4.

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

[37] OMAEG Brief at 4.

[38] FirstEnergy Brief at 13.

[39] Company Ex. 9 at 8 (Direct Testimony of Amanda Richardson) (April 5, 2023). *See also* Staff Brief at 41; OMAEG Brief at 20; OELC Brief at 58.

[40] OCC Brief at 21. *See also* Kroger Brief at 9–10; OMAEG Brief at 17.

[41] Kroger Brief at 11, 14; OCC Brief at 32, 35; OMAEG Brief at 32.

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

[43] OMAEG Brief at 32, *quoting* Tr. Vol. VI at 1310 (Standish Cross-Examination). *See also* OCC Brief at 21.

Whatever prudent and necessary investments FirstEnergy may need to make in its distribution system and/or related to vegetation management and storm damage can and should be recovered through base rates.[44] As noted by multiple parties, it has been over sixteen years since FirstEnergy has been scrutinized via a rate case.[45] Most intervenors agree that the upcoming May 2024 rate case provides the best and most appropriate forum for consideration of the costs FirstEnergy seeks to recover through these riders.[46] Rather than relying on continuous increases in Rider DCR and the introduction of new distribution Riders VMC and SCR, these costs should be considered in the overall context of the Companies' total distribution revenues, expenses, and return on distribution rate base.[47]

2. Riders DCR, VMC, and SCR are not authorized by R.C. 4928.143(B)(2)(h).

As explained above, Riders DCR, VMC, and SCR are not necessary to support continued distribution system reliability. Moreover, approving these riders as part of ESP V constitutes single-issue ratemaking that does not address a compelling public interest or meet the generally accepted criteria for this type of regulatory ratemaking treatment, which is contrary to long-

[44] OCC Brief at 32, 35; OMAEG Brief at 20–24, 37; OELC Brief at 1; IGS Brief at 4; Walmart Brief at 4, 7; OEC Brief at 6; CUB Brief at 5. *See also* Kroger Brief at 6.

[45] CUB Brief at 5. *See also* Kroger Brief at 17; OCC Brief at 13; OMAEG Brief at 56–57.

[46] Staff Brief at 4; OMAEG Brief at 23; Walmart Brief at 7; OEC Brief at 6; CUB Brief at 4. *See also* Kroger Brief at 17.

[47] OCC Brief at 35; OMAEG Brief at 36. *See also* Kroger Brief at 17.

standing Commission precedent and policy.[48] Other parties raised similar arguments.[49] While the Commission has previously determined that R.C. 4928.143(B)(2)(h) allows utilities to include single-issue ratemaking provisions in their ESPs, "the intent could not have been to provide a 'blank check' to electric utilities."[50] As such, when deciding whether to approve ESP V, which contains provisions for distribution infrastructure and modernization incentives, R.C. 4928.143(B)(2)(h) 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."[51] As explained by OMAEG, approving these riders "without conducting an analysis of how or when reliability may diminish, or the cost at which customers would forego paying more for additional distribution reliability, demonstrates a disconnect between the Companies' expectations and customer expectations."[52]

These riders also do not constitute incentives under R.C. 4928.143(B)(2)(h) because, by their nature, such riders "decrease[] a utility's incentive to manage all aspects of its business in a cost effective manner."[53] Moreover, as explained by OMAEG, the Supreme Court of Ohio has

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

[49] OMAEG Brief at 22, 31–37; OCC Brief at 16; Walmart Brief at 5; NOAC Brief at 13; CUB Brief at 4.

[50] AEP ESP I Order at 32. *See also* OMAEG Brief at 20.

[51] *Id.*

[52] OMAEG Brief at 26.

[53] OCC Brief at 28. *See also* Kroger Brief at 16; OMAEG Brief at 20–22.

previously determined that "incentive ratemaking uses rewards and penalties that link utility revenues to various standards or goals."[54] Therefore, "if the commission awards [a utility] money up front with no meaningful conditions attached," then it cannot be considered an "incentive."[55] Since FirstEnergy has been consistently meeting its reliability performance standards for over a decade, Riders DCR, VMC, and SCR are essentially "money up front with no meaningful conditions attached" because FirstEnergy's behaviors and practices will not change in response to the additional payments.[56] Even if these riders were not in effect, FirstEnergy could still invest in its distribution system and then recover those costs through base rates. Therefore, with or without these additional rider collections from customers, FirstEnergy will continue to provide safe and reliable electric service to its customers. In light of FirstEnergy's failure to demonstrate a need for expanding Rider DCR and establishing Riders VMC and SCR, the Commission should not approve these riders and thereby give FirstEnergy a "blank check."

3. Riders DCR, VMC, and SCR do not provide customer protections unavailable in a base rate case.

As explained by CUB, "[u]nlike ESPs, full rate cases require the PUCO staff to perform an investigation of the facts and issues raised in the utility's application . . . conduct infrastructure inspections, review[] plant and financial records and assess the quality of service provided to customers. This great amount of disclosure and scrutiny of rates, costs and other information from the Companies, and a full report conducted by the Commission staff provides the most transparent way to determine if customer rates are fair. The ESP, however, does not have such a deep

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[54] *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.

[55] *Id.* at ¶ 19.

[56] *See* OMAEG Brief at 21.

review."[57] This in-depth, holistic, transparent review of FirstEnergy is sorely needed and ought to take place *before* the Commission allows any costs to be recovered through Riders DCR, VMC, and SCR.

Contrary to FirstEnergy's claims, the riders do not ensure that customers are only paying for the Companies' actual costs, and the proposed caps and annual audits are insufficient to protect customers more as compared to the rigorous review FirstEnergy would receive through a base rate case. For example, Rider DCR currently includes projected PIS, meaning that "the Companies can recover investments before they are even made."[58] When that happens, FirstEnergy begins immediately recovering asset investments and earning a return on those assets even if said assets are later disallowed after being deemed not used or useful. In contrast, base rate cases only allow for the recovery of investments that are actually used and useful to customers. FirstEnergy's ability to overcharge customers, earn a return, and use those over-collected funds until an audit reveals the overcollection underscores why annual audits are insufficient to protect customers.

As for the caps, FirstEnergy is proposing to recover "'the difference between the revenue collected and the cap'" to "'increase the level of the subsequent period's cap'" for Rider DCR.[59] Currently, it is the *only* utility with a rollover provision,[60] and as explained by OCC, "allowing

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[57] CUB Brief at 3–4. *See also* Kroger Brief at 7; Staff Brief at 4; OCC Brief at 35; OMAEG Brief at 23, 36; Walmart Brief at 7; OEC Brief at 6.

[58] Staff Brief at 8.

[59] OMAEG Brief at 28, *quoting* Tr. Vol. XIV at 2433 (Mackey Cross-Examination). *See also* Staff Ex. 8 at 9 (Mackey Direct).

[60] *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) (hereinafter, "AEP Rate Case Order"); *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*

this 'revenue carryover' would harm consumers by eliminating FirstEnergy's incentive to control costs."[61] Rider DCR's "soft caps" are not sufficient to protect customers, and FirstEnergy proposes allowing Rider SCR to have similar soft caps. Even worse, FirstEnergy seeks to exclude the collected deferred storm costs from the caps, meaning that the annual $29.499 million being charged to customers will be on top of the $35 million FirstEnergy seeks to collect each year in actual storm expenses. And, Rider VMC does not even *have* annual caps. Plainly, the "caps" proposed by FirstEnergy do not provide enough protection for customers, as compared to a rate case.

The forthcoming 2024 base rate case will better protect customers from unreasonable and unlawful charges than FirstEnergy's proposed riders—which are themselves unreasonable and unlawful—by ensuring that customers are only paying for assets deemed used and useful and completing a full review of all of FirstEnergy's costs and revenues to determine whether FirstEnergy needs to collect additional funds from customers to provide its services. CUB said it best: "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."[62]

For all the reasons discussed above, the Commission should reject FirstEnergy's Riders DCR, VMC, and SCR. Alternatively, if the Commission approves these riders, then, as explained by Kroger and multiple other parties in their initial briefs, the riders should be modified per Staff's

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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).

[61] OCC Brief at 22–23.

[62] CUB Brief at 4. *See also* Walmart Brief at 7.

recommendations.[63] For example, the Commission should "impose hard caps for Rider DCR to protect consumers,"[64] impose annual caps on Rider VMC,[65] and not allow Rider SCR to recover costs for storms not defined as a "major event" by Ohio Adm.Code 4901-1:1-10-01(T).[66]

C. **The Commission should reject FirstEnergy's proposal to establish new EE/PDR programs and the associated Rider EEC not related to low-income programs.**

As explained by Kroger and nearly every party that discussed FirstEnergy's proposal to establish costly EE/PDR programs and the associated Rider EEC to recover the costs of those programs, the Commission should reject these proposals. The law no longer allows mandatory EE/PDR programs, and the Commission has consistently determined that voluntary EE programs run by electric distribution utilities should be limited to low-income customers.[67]

Contrary to FirstEnergy's assertions, the kinds of programs that it proposes are *not* authorized by statute because the 2019 House Bill 6 ("HB 6") mandated that electric utilities terminate their previously required EE programs, prohibiting mandatory EE/PDR programs.[68] While FirstEnergy attempts to sidestep this law by making the program for commercial customers opt-out, as OELC noted, "FirstEnergy's proposed opt-out process is also unjustified and

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[63] Staff Brief; OCC Brief; OMAEG Brief; OELC Brief, OEG Brief, NOAC Brief at 12. *See also* Kroger Brief at 10, 12, 14.

[64] OCC Brief at 23. *See also* Kroger Brief at 10; Staff Brief at 9; OMAEG Brief at 28.

[65] Staff Brief at 15–16; OCC Brief at 33; OMAEG Brief at 34. *See also* Kroger Brief at 12.

[66] Staff Brief at 3, 11. *See also* Kroger Brief at 14.

[67] Staff Brief at 25; OCC Brief at 49, 52; OMAEG Brief at 40; 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; *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of its 2021 Energy Efficiency and Demand Side Management Portfolio of Programs and Cost Recovery Mechanism*, Case Nos. 20-1013-EL-POR, et al., Entry at ¶ 9 (June 17, 2020) (hereinafter, "Duke EE/DSM Order"); AEP Rate Case Order at ¶ 128; *In the Matter of the Application of Columbia Gas Ohio, Inc. for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Gas Services and Related Matter*, Case Nos. 21-637-GA-AIR, et al., Opinion & Order at 56 (January 26, 2023) (hereinafter, "Columbia Rate Case Order").

[68] R.C. 4928.66(G)(3); OCC Brief at 50; OMAEG Brief at 40; OELC Brief at 53; RESA Brief at 7.

unreasonable."[69] A program that automatically enrolls customers without their consent or necessarily even knowledge, and then charges them for that program until they affirmatively opt-out cannot be deemed to be voluntarily.[70] Moreover, only one of FirstEnergy's proposed EE/PDR programs is for low-income customers, which contradicts Commission precedent.

Multiple parties agreed with Kroger, citing to how the Commission has limited EE/PDR programs to *competitive* and customer-owned initiatives, rather than utility-owned programs, except for certain low-income residential programs.[71] For example, OELC noted that "[t]he Commission has repeatedly highlighted the importance of reserving energy efficiency issues for the competitive markets,"[72] and OMAEG argued that "R.C. 4928.02(H) also supports the Commission's decision to rely on market-based approaches because this statute provides that it is the state's policy to prohibit anticompetitive subsidies."[73] RESA asserted that "[s]ustainability offerings, whether EE/PDR products and services, EVs, renewable generation, or otherwise, are readily available in the competitive marketplace without the need for expensive one-sized fits all monopoly programs that force all customers to pay for the benefits a select few get to enjoy."[74]

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[69] OELC Brief at 50.

[70] OELC Brief at 50–52; OMAEG Brief at 38–41.

[71] *See In the Matter of the Application of Ohio Power Co. for Approval of its Energy Efficiency and Peak Demand Reduction Program Portfolio Plan for 2017 through 2020*, Case No. 16-574-EL-POR, et al., Finding and Order at ¶ 44 (February 26, 2020); *In the Matter of the Commission's Review of the Rules in Ohio Adm.Code Chapter 4901:1-39*, Case No. 22-869-EL-ORD, Finding and Order (November 30, 2022); Duke EE/DSM Order; *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case Nos. 21-887-EL-AIR, et al., Opinion and Order at ¶¶ 71–72, 173 (December 14, 2022).

[72] OELC Brief at 52, *citing* Columbia Rate Case Order at ¶ 56; *In the Matter of the Application of the East Ohio Gas Company dba Dominion Energy Ohio for approval of an alternative form of regulation to continue and to expand its demand-side management and energy efficiency program*, Case No. 21-1109-GA-UNC, Opinion & Order at ¶ 49 (October 4, 2023); AEP Rate Case Order at ¶ 128 (November 17, 2021). *See also* OCC Brief at 49, 52; IGS Brief at 16; NOAC Brief at 9.

[73] OMAEG Brief at 41.

[74] RESA Brief at 5.

Additionally, the EE/PDR programs are *not* cost-beneficial to customers, as evidenced by the mere fact that the costs for four years of programs have to be spread out over *eleven* years in order to be considered "reasonable."[75] The proposed EE/PDR programs for commercial customers would cost customers $38.5 million every year for all eight years of the proposed ESP V,[76] and those costs would be recovered through Rider EEC from every customer that fails to opt-out of the program.[77] And, similar to Rider DCR, Rider EEC would include projected costs. Staff specifically recommended that the Companies only be allowed to recover expenses that are already incurred, known, and measurable. Staff does not believe the Companies should utilize projected expenses in the calculation of the rider."[78]

As succinctly stated in RESA's initial brief, "[t]he EE/PDR portfolio plan is anticompetitive, extremely costly, limits customer choice, limits customer participation, lacks record support, fails the ESP v. MRO test, and violates the spirit of state energy policy and the corporate separation requirements."[79] Therefore, in accordance with the law, state policy, and Commission precedent, the Commission should reject FirstEnergy's proposed EE/PDR plan and only implement the low-income residential programs, which would decrease the annual budget to $15.6 million.[80] As explained by Staff, removing, at a minimum, the non-low-income programs both "reduce[s] the costs being recovered [from] ratepayers" through Rider EEC, and is "consistent

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[75] OMAEG Brief at 38, *citing* Tr. Vol. II at 355, 376 (McMillen Cross-Examination); Tr. Vol. III at 531 (McMillen Cross-Examination); OCC Ex. 4 at 3 (Direct Testimony of Colleen Shutrump) (October 23, 2023).

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

[77] Kroger Brief at 18–19; OMAEG Brief at 40; OELC Brief at 52–53.

[78] Staff Brief at 24.

[79] RESA Brief at 1. *See also* Kroger Brief at 17; OCC Brief at 48–52; OMAEG Brief at 41; IGS Brief at 14.

[80] Staff Brief at 4; OMAEG Brief at 41–42; OELC Brief at 1; RESA Brief at 8.

with previous Commission Orders . . . that have provided a framework of what the Commission finds to be appropriate energy efficiency programs."[81]

D. The Commission should shorten FirstEnergy's proposed ESP V term.

As explained by several parties, including FirstEnergy, the Commission's precedent is for ESPs to last three to six years.[82] The Commission should adhere to its own precedent and decrease the term of FirstEnergy's ESP—if one is approved—by at least two years. Staff, OELC, and NOAC all recommended a term of six years,[83] while OMAEG, OCC, and OEG proposed a term of four years.[84] In addition to Commission precedent, a shorter term is more beneficial to customers because it will mitigate rate impacts on customers, allows for flexibility for changes in market conditions and would allow the Commission to reassess the SSO based on the most current information and monthly data available.[85] In contrast, an "eight-year duration would be unjust and unreasonable because FirstEnergy's earnings would be subject to a relaxed 'significantly excessive earnings' test during this time."[86] Therefore, if the Commission approves a version of the proposed ESP V, it should decrease the ESP term in order to conform with prior precedent, mitigate the rate impacts on customers, allow for flexibility for changing market conditions, and allow the

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[81] Tr. Vol. XIII at 2321 (Braun Cross-Examination). *See also* Staff Ex. 4 at 5 (Direct Testimony of Kristin Braun) (October 30, 2023). *See also* Staff Brief at 23–24; OCC Brief at 52; OMAEG Brief at 42; Direct Energy Brief at 12; NOAC Brief at 8.

[82] Tr. Vol. I at 173–74 (Fanelli Cross-Examination); Staff Brief at 30–31; OCC Brief at 7; OMAEG Brief at 50; OELC Brief at 6.

[83] Staff Brief at 3; OELC Brief at 1, 5; NOAC Brief at 16.

[84] OMAEG Brief at 51; OCC Brief at 7; OEG Brief at 2 (alternatively, OEG supports Staff's proposed six-year term).

[85] OELC Brief at 6, *citing* Staff Ex. 10 at 4 (Direct Testimony of Christopher Healey (Healey Direct)) (October 30, 2023); Tr. Vol. I at 172 (Fanelli Cross-Examination). *See also* Kroger Brief at 21; Staff Brief at 31; OCC Brief at 7; OMAEG Brief at 50–51; OEG Brief at 2; NOAC Brief at 16.

[86] OCC Brief at 7. *See also* Kroger Brief at 20; Staff Brief at 3; OMAEG Brief at 50; OELC Brief at 6; NOAC Brief at 16.

Commission to revisit FirstEnergy's SSO based on the most current information available at the time and make changes that are in the public interest.

III. CONCLUSION

As explained above and in Kroger's initial brief, as proposed, FirstEnergy's ESP V is not more favorable in the aggregate than an MRO. If the proposed ESP is maintained in its current form, Kroger recommends that it be rejected by the Commission as unreasonable and unlawful. However, in the event that the Commission decides to modify and subsequently approve the proposed ESP, Kroger recommends that the Commission, at a minimum, reject the continuation and expansion of Rider DCR, reject the newly created Riders VMC and SCR, and reject the EE/PDR plan not associated with low-income customers, as well as Rider EEC. In addition, Kroger respectfully requests that the Commission shorten the duration of the proposed ESP V from the eight years sought by FirstEnergy.

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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