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

APPLICATION FOR REHEARING OF THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

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Pursuant to R.C. 4903.10 and Ohio Adm.Code 4901-1-35, the Ohio Manufacturers' Association Energy Group (OMAEG) hereby respectfully requests rehearing of the Public Utilities Commission of Ohio's (Commission) May 15, 2024 Opinion and Order (Order) issued in the above-captioned case regarding the fifth electric security plan (ESP V) proposed by Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company (collectively, FirstEnergy or the Companies).

Specifically, OMAEG contends that the Order is unlawful, unjust, and unreasonable in the following three respects:

ASSIGNMENT OF ERROR NO. 1: The Commission erred by unjustly, unreasonably, and unlawfully excluding evidence related to costs associated with HB 6, which was relevant and material to the ESP V case as costs associated with HB 6 were embedded in the numerous riders and charges that FirstEnergy proposed to collect from customers through ESP V.

ASSIGNMENT OF ERROR NO. 2: The Commission erred by unjustly, unreasonably, and unlawfully approving the Non-Market Based Services Rider (Rider NMB) without modifications and failing to implement network service peak load (NSPL) billing for qualifying customers.

ASSIGNMENT OF ERROR NO. 3: The Commission erred by unjustly, unreasonably, and unlawfully approving the Economic Load Response (ELR)

program without modifications to eliminate its discriminatory and anti-competitive effects.

The reasons in support of this application for rehearing are set forth in the accompanying Memorandum in Support. The Commission should grant rehearing and abrogate or modify its Order as requested herein by OMAEG.

Respectfully submitted,
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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Despite unlawfully and unreasonably spending at least $60 million for the House Bill 6 (HB 6) scandal, on April 5, 2024, FirstEnergy filed an application (Application) seeking approval of several above-market, non-bypassable charges, including three new riders, and the collection of billions of dollars from customers over eight years, from June 1, 2024 through May 31, 2032.[1] In order to protect the interests of its members who are customers with facilities located in FirstEnergy's service territories and to limit the amount of above-market charges that will be collected from them—including any costs associated with HB 6 that are embedded in the numerous riders and charges that FirstEnergy proposed—OMAEG sought intervention on May 3, 2023, which was granted on October 11, 2023.

During the hearing on the proposed ESP V, which commenced on November 7, 2023, and ended on December 6, 2023, OMAEG and numerous other parties presented evidence supporting their positions that the Commission should reject FirstEnergy's ESP V Application in part and/or in whole. However, the Administrative Law Judges (ALJs) incorrectly excluded evidence relating

[1] Company Ex. 1 at 1 (FirstEnergy Application) (April 5, 2023). The ESP term was subsequently modified to a five-year term from June 1, 2024 through May 31, 2029. Opinion and Order at ¶ 38 (May 15, 2024) (hereinafter, ESP V Order).

to HB 6, FirstEnergy's involvement and expenses related to the passage of HB 6, and the resulting criminal and civil investigations, audits, deferred prosecution agreement, SEC filing, and other documents that may have demonstrated that costs associated with HB 6 were included and are embedded in the riders and other charges currently being collected and that will continue to be collected from customers through FirstEnergy's ESP V.

On May 15, 2024, the Commission issued an Order modifying and approving FirstEnergy's proposed ESP V, including the continuation of the Delivery Capital Recovery Rider (Rider DCR) and the Advanced Metering Infrastructure / Modern Grid Rider (Rider AMI), which have been linked to the HB 6 scandal, the continuation of Rider NMB without modification, and the continuation of the ELR program without substantial modification.[2] Specifically, the Commission unjustly, unreasonably, and unlawfully upheld the ALJs' incorrect ruling excluding evidence that would have demonstrated how certain costs related to the HB 6 scandal were inappropriately and/or unlawfully embedded in the ESP V rates or riders; rejected proposed modifications to Rider NMB that would have allowed commercial and industrial customers with advanced or interval meters to be billed based on their network service peak load (NSPL) rather than monthly billing demand; and approved the continuation of the ELR program without implementing necessary modifications such as expanding participation eligibility.[3]

FirstEnergy bore the burden of proof in this case.[4] However, the record evidence did not demonstrate that ESP V is lawful, just, and reasonable. In fact, the record was devoid of pertinent

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[2] *See* ESP V Order.

[3] *Id.* at ¶¶ 129, 198, 260

[4] R.C. 4928.143(C)(1); Initial Post-Hearing Brief of The Ohio Manufacturers' Association Energy Group at 3 (January 19, 2023) (hereinafter, OMAEG Brief); Initial Post-Hearing Brief of The Kroger Co. at 4 (January 19, 2023); Initial Brief of Office of the Ohio Consumers' Counsel at 4–5 (January 19, 2023) (hereinafter, OCC Brief); Initial Post-Hearing Brief of Ohio Energy Leadership Council at 2 (January 19, 2023) (hereinafter, OELC Brief); Initial Post-

and material evidence necessary to demonstrate that FirstEnergy's ESP V Application is lawful, just, and reasonable. To the contrary, the record evidence showed that certain riders and costs were unjust and unreasonable and should not have been approved in ESP V as certain costs embedded in those rates or riders were inappropriately and/or unlawfully included in furtherance of a crime or that simply were not authorized to be collected as a type of cost eligible for recovery under a particular rider or rate. The ALJs' decision to exclude HB-6 related evidence was improper and should have been reversed. However, the Commission failed to do so.

Additionally, the record evidence demonstrated the benefits of modifying Rider NMB as proposed by FirstEnergy and supported by several parties. The Commission's decision to approve Rider NMB without modification to the rate design was therefore in error because it was against the manifest weight of the evidence. Lastly, the decision not to further modify the ELR program was against both the manifest weight of the evidence and contrary to state policy. All three of these decisions were unjust, unlawful, and unreasonable. Therefore, in accordance with R.C. 4903.10 and Ohio Adm. Code 4901-1-35, OMAEG hereby files this application for rehearing of the Commission's May 15, 2024 Order.

II. ASSIGNMENTS OF ERROR

A. ASSIGNMENT OF ERROR NO. 1: The Commission erred by unjustly, unreasonably, and unlawfully excluding evidence related to costs associated with HB 6, which was relevant and material to the ESP V case as costs associated with HB 6 were embedded in the numerous riders and charges that FirstEnergy proposed to collect from customers through ESP V.

In its Order, the Commission erroneously failed to reverse the ALJs' ruling to exclude evidence related to HB 6 and FirstEnergy's involvement in "the largest bribery, money laundering

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Hearing Brief of Walmart Inc. at 6 (January 19, 2023); Initial Post-Hearing Brief of Interstate Gas Supply, LLC at 3 (January 19, 2023) (hereinafter, IGS Brief); Initial Post-Hearing Brief of Direct Energy Business LLC and Direct Energy Services LLC and Reliant Energy Northeast LLC at 3 (January 19, 2023) (hereinafter, Direct Energy Brief); Initial Brief of Northwest Ohio Aggregation Coalition at 14 (January 19, 2023) (hereinafter, NOAC Brief).

scheme ever perpetrated against the people of the state of Ohio."[5] The conclusion that "this Application is completely unrelated to H.B. 6," and therefore that evidence related to the scandal is irrelevant was unjust, unreasonable, and unlawful, and contrary to the Commission's own prior findings.[6]

As explained in OMAEG's initial and reply briefs,[7] the excluded evidence included the Deferred Prosecution Agreement (DPA) entered into by FirstEnergy with the United States Attorney's Office for the Southern District of Ohio,[8] FirstEnergy's "Form 10-K for the fiscal year ended December 31, 2022,"[9] and the FERC Audit Report from Docket No. FA19-1-000.16.[10] All of this evidence contains important information regarding the costs associated with HB 6 that have been embedded, or will be embedded, in the various riders and other charges that FirstEnergy has been collecting for years and now wishes to continue collecting from customers through ESP V. At a minimum, this excluded evidence should have been admitted into the record so that affected customers and other intervening parties could have more fully argued that certain riders or costs are unjust and unreasonable and should not have been approved in ESP V as certain costs embedded in those rates or riders were inappropriately or unlawfully included in furtherance of a

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[5] OCC Brief at 1, quoting Teo Armus, "GOP Ohio House speaker arrested in connection to $60 million bribery scheme," THE WASHINGTON POST (July 22, 2020), available at https://www.washingtonpost.com/nation/2020/07/22/ohio-house-speaker-arrested-republican/ (internal quotations omitted).

[6] ESP V Order at ¶ 23.

[7] *See* OMAEG Brief at 6–16; OMAEG Post Hearing Reply Brief FirstEnergy ESP V at 6–9 (February 9, 2024) (hereinafter, OMAEG Reply Brief).

[8] Proffer Tr. Vol. II at 236, Proffer NOAC Ex. 1 (Deferred Prosecution Agreement) (July 20, 2021) , from *United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-86.

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

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

crime or that simply were not authorized to be collected as a type of cost eligible for recovery under a particular rider or rate.

Moreover, the Commission's decision contravenes its prior findings on the connection between Rider DCR (a rider that the Commission has now authorized to continue in this proceeding) and various ESP proceedings. On December 15, 2021, the Commission issued an Entry in the ongoing 2020 Rider DCR Audit case to expand the scope of the audit—for the third time—to determine whether FirstEnergy violated its obligations under R.C. 4928.145 to disclose a "side agreement" during the ESP IV Case.[11] This expansion was on the Commission's "own initiative" and in direct response to new information revealed by the very DPA that the ALJs and Order deemed "completely unrelated to H.B. 6."[12] Notably, the prior two expansions of the audit's scope were also in response to more information regarding FirstEnergy's illegal dealings coming to light.[13] In this same Entry, the Commission laid out the history of Rider DCR and its connections to the ongoing HB 6 investigations. As stated by the Commission, Rider DCR was first established in 2010 as part of FirstEnergy's ESP II,[14] was extended in 2012 by FirstEnergy's ESP III settlement,[15] and was then extended yet again through FirstEnergy's ESP IV settlement.[16]

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

[12] *Id.* at ¶¶ 8–12; ESP V Order at ¶ 23.

[13] 2020 DCR Audit, Case No. 20-1629-EL-RDR, Entry at ¶¶ 6–8.

[14] *Id.* at ¶ 4, *citing In the Matter of the Ohio Edison Co., The Cleveland Elec. Illum. Co., and the Toledo Edison Co. for Authority to Establish a Std. Serv. Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Security Plan*, Case No. 10-388-EL-SSO, Opinion and Order (August 25, 2010) (hereinafter, ESP II Case).

[15] *Id.* at ¶ 4, *citing In the Matter of the Ohio Edison Co., The Cleveland Elec. Illum. Co., and the Toledo Edison Co. for Authority to Establish a Std. Serv. Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order (July 18, 2012) (hereinafter, ESP III Case).

[16] *Id.* at ¶ 4, *citing In the Matter of the Ohio Edison Co., The Cleveland Elec. Illum. Co., and the Toledo Edison Co. for Authority to Establish a Std. Serv. Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Security Plan*, Case No. 14-1297-EL-SSO, Opinion and Order (March 31, 2016) (hereinafter, ESP IV Case).

But for that ESP IV settlement and extension, Rider DCR would not still be in place, and FirstEnergy would not have requested its expansion and continuation through ESP V.

In its Entry, the Commission noted that during the ESP IV case, a supplemental stipulation was filed on May 28, 2015.[17] That same day, former Commission Chair Samuel Randazzo (Randazzo), on behalf of his then-client Industrial Energy Users-Ohio (IEU-Ohio), filed a letter stating that it "shall not oppose either the settlement package described in the Stipulation or the Commission's approval of such settlement package."[18] As recognized by the Commission in this Entry, "[t]hese dates are consistent with the facts set forth in the [DPA] and with payments made to IEU-Ohio Administration Company and Sustainability Funding Alliance (SFA), which were disclosed as part of the expanded scope of this case."[19] According to the Commission's Entry, "[t]hese payments were part of $13,441,982 paid to SFA under the original agreement and the agreement as amended in 2015."[20] The Commission went on to add that it "is aware that records of communications and other documents from the Companies provide additional corroboration that there was a side agreement between the Companies and parties to this proceeding."[21]

As the Commission recognized in this Entry, the procedural posture of Rider DCR, which was extended once more under the Commission's recent ESP V Order, is directly related to the cases that are investigating the HB 6 costs that were illegally charged through riders paid for by customers. In fact, many of the same facts stated and accepted by the Commission in the 2020 Rider DCR Audit Entry were cited by OMAEG and other parties arguing that the DPA and other

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[17] *Id.* at ¶ 10.

[18] *Id.*, *quoting* ESP IV Case, IEU-Ohio Letter (May 28, 2015).

[19] *Id.*, *citing* Audit Report, Expanded Scope at 11, 30, 38 (August 3, 2021).

[20] *Id.*, *citing* Audit Report, Expanded Scope at 9.

[21] *Id.*, *citing* Audit Report, Expanded Scope at 30.

HB 6-related evidence should be admitted into the record, or at least administrative notice taken.[22] As explained by OMAEG and other parties, Randazzo's criminal indictment revealed that his alleged criminal behavior was tied to a scheme to defraud customers, which may be related to "settlement payments" received in conjunction with FirstEnergy's ESP II proceeding, which—as explained by the Commission in its Entry—created Rider DCR. Consequently, in addition to the uncontested facts provided in the DPA admitting that FirstEnergy Corp. "paid $4.3 million dollars to [Randazzo] through [SFA] in return for [Randazzo] performing official action in his capacity as PUCO Chairman to further FirstEnergy Corp.'s interests . . . as requested and as opportunities arose,"[23] additional evidence has come to light that the corruption runs deeper and is the basis of inappropriate charges to customers through Rider DCR.[24]

Given all of these facts, the Order's finding that the DPA does not meet the standard for administrative notice because the facts are subject to reasonable dispute was erroneous, unjust, and unreasonable. These very same facts were relied upon by the Commission when it expanded the 2020 Rider DCR Audit because the known dates of the ESP IV settlement and Randazzo's non-opposition to the settlement "are consistent with the facts set forth in the Deferred Prosecution Agreement and with payments made to IEU-Ohio Administration Company and Sustainability Funding Alliance (SFA)."[25] Moreover, as explained in OMAEG's initial brief in this case, the

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[22] *See, e.g.*, OMAEG Brief at 6–16; OCC Brief at 5–6; NOAC Brief at 15; Proffer Tr. Vol. II at 236–37, Proffer NOAC Ex. 1 (Deferred Prosecution Agreement).

[23] Proffer Tr. Vol. II at 236–37, Proffer NOAC Ex. 1 at 17 (Deferred Prosecution Agreement).

[24] According to the Auditor's findings in the 202 DCR Audit Report, Expanded Scope, at least $6,487,604 of the total $13,441,982 paid to SFA/Randazzo was included in the Rider DCR revenue requirement from 2014–2018. The remaining $6,954,378 was included in FirstEnergy's Pole Attachment rates. 2020 DCR Audit, Case No. 20-1629-EL-RDR, Compliance Audit of the 2020 Delivery Capital Recovery (DCR) Riders of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company and Expanded Scope at 19 (August 3, 2021) (hereinafter, Audit Report, Expanded Scope).

[25] 2020 DCR Audit, Case No. 20-1629-EL-RDR, Entry at ¶ 10.

facts contained in the DPA's Statement of Facts—including those about Randazzo and FirstEnergy's corrupt actions related to Rider DCR—are not in dispute because FirstEnergy agreed to them and the DPA prohibits FirstEnergy from raising a defense or asserting affirmative claims in regulatory proceedings relating to these matters that "contradict in whole or in part, a statement contained in the Statement of Facts."[26] Since a subsidiary cannot take an action that is adverse to what the parent company has agreed to, FirstEnergy also could not raise such defenses or claims in its regulatory proceedings. Additionally, the admissions and actions of the parent company were clearly in furtherance of its subsidiary as many of the resulting benefits of the admissions accrued directly to the regulated entities. And while the names in the DPA were redacted, the possibility of "confusion or prejudice" is low given that the identities of the officials involved in the scandal, including Randazzo, are well known and can be easily identified by such information as "the dates that he served as Chairman."[27]

Similarly, Form 10-K and the FERC Audit Report were relevant to the ESP V hearing because they demonstrated the connection between HB 6, Rider DCR, and FirstEnergy's improper accounting practices. For example, FirstEnergy made "an adjustment of over $100 million in the plant in service [PIS] balance as a result of the FERC audit," which was "addressed in the 10-K"[28] and will impact amounts collected under Rider DCR because the adjusted PIS balance was part of the rider's revenue requirement. A substantial adjustment like the one revealed in Form 10-K "shows a lack of accuracy in the Companies' accounting practices and allocation practices for that large of an adjustment to be made as a result of the FERC Audit, and it calls into question whether

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

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

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

the Companies should be allowed to simply come in with periodic rider updates where there is no thorough review of the Companies' accounts as would happen in a base distribution rate case."[29] The inclusion of these costs and the continuation of Rider DCR through ESP V will have a significant impact on FirstEnergy's customers, and presenting evidence demonstrating the unjustness and unreasonableness of FirstEnergy's Rider DCR proposal was exceedingly relevant to this proceeding. While, as the Order noted, parties will have the opportunity to submit arguments about the approximately $108 million accounting reclassification in the 2022 Rider DCR review, this is insufficient to address the continuation of the Rider DCR through ESP V and how the adjustment demonstrates the unjustness and unreasonableness of FirstEnergy's Rider DCR proposal.

Similar to Rider DCR, Rider AMI is inextricably linked to HB 6 and the bribes that FirstEnergy admitted paying to Randazzo. Specifically, the Grid Mod costs embedded in Rider AMI appear to be part of the scheme to defraud customers for which Randazzo was indicted. As discussed above, Randazzo, on behalf of his then-client IEU-Ohio, agreed not to oppose the ESP IV settlement in exchange for more favorable treatment as part of the ESP IV. In addition to the provision re-approving and continuing Rider DCR, ESP IV also provided that all costs incurred related to FirstEnergy's Grid Mod plan would be recovered through Rider AMI.[30] Rider AMI is part of ESP IV under investigation through the 2020 Rider DCR Audit, which requires the auditor to identify capital additions recovered through Rider AMI in order to exclude those amounts from Rider DCR because the same amounts may have been included in both riders.[31] Although the

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

[30] ESP IV Case, Case No. 14-1297-EL-SSO, Opinion and Order at 69.

[31] 2020 DCR Audit, Case No. 20-1629-EL-RDR, Request for Proposal No. RA20-CA-3 at 1 (November 4, 2020).

ALJs asserted that no charges directly authorized by HB 6 are included in ESP V, the excluded evidence tells a different story as it contains important information regarding the costs associated with HB 6 that have been embedded, or will be embedded, in the various riders and other charges that FirstEnergy has been collecting for years and will now continue collecting through ESP V. And contrary to the Order's finding, this evidence was "relevant and material to the MRO versus ESP test in that it [. . .] shows that the Compan[ies previously] abused the Electric Security Plan process."[32] The Commission's Order failed to appropriately address all of these arguments and provide record evidence that supports its decision in violation of Ohio law.[33] R.C. 4903.09, "require[s] the commission to explain its decision and identify, in sufficient detail to enable review, the record evidence upon which its orders are based."[34] Therefore, the ruling to uphold the ALJs' rulings was unjust, unreasonable, and unlawful.

The commonality between the HB 6 investigations, the Rider DCR audits, FirstEnergy's Grid Mod plan, the FERC Audit, and FirstEnergy's request to continue Rider DCR and Rider AMI through ESP V case is clear. As recognized by the Commission itself, Rider DCR was first created by ESP II wherein "settlement payments" were paid by FirstEnergy to Randazzo's then-client, IEU-Ohio, in exchange for IEU-Ohio's support for the settlement.[35] Rider DCR was later reapproved in ESP IV per a provision of FirstEnergy's ESP IV settlement that Randazzo, on behalf

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

[33] *In re Comm. Rev. of Capacity Charges of Ohio Power Co.*, Slip Opinion No. 2016-Ohio-1607.

[34] *Id.* at 17. *See also e.g.*, *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St. 3d 306, 312, 513 N.E.2d 337 (1987) (stating R.C. 4903.09 requires the commission to set forth the reasons for its decision and prohibits summary rulings and conclusions that do not develop the supporting rationale or record); *Indus. Energy Users-Ohio v. Pub. Util. Comm., 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195*, ¶ 30 (stating the commission abuses its discretion if it decides an issue without record support).

[35] Motion for Limited Stay of FirstEnergy's Distribution Riders and Memorandum in Support by Northwest Ohio Aggregation Coalition, Ohio Manufacturers' Association Energy Group and Office of the Ohio Consumers' Counsel at 2 (December 6, 2023) (hereinafter, Joint Motion for Limited Stay), *citing United States of America v. Samuel Randazzo*, Case No. 1:23-cr-114, Indictment at 17 (November 29, 2023).

of IEU-Ohio, agreed not to oppose seemingly in exchange for more favorable treatment as part of the ESP IV.[36] Not even four years later, with FirstEnergy's support, Randazzo became the Commission's Chairman to "perform[] official action for the benefit of [FirstEnergy], as requested and as opportunities arose."[37] These "official actions" included eliminating FirstEnergy's requirement to file a new base rates case in 2024 at the end of ESP IV,[38] which would have allowed FirstEnergy to avoid reducing its rates due to reduced operating costs in other areas of its business—referred to in the indictment as "the Ohio hole."[39] And while it remains unclear how much of the public corruption involved in the passage of HB 6 was at the expense of FirstEnergy's consumers, various audit proceedings have revealed that at least some charges passed through Rider DCR were related to lobbying expenses and expenses for Randazzo's affiliated company, SFA.[40]

As for Rider AMI, FirstEnergy filed its Grid Mod I and II applications in accordance with a provision of FirstEnergy's ESP IV settlement, which Randazzo, on behalf of his then-client IEU-Ohio, agreed not to oppose in exchange for more favorable treatment as part of the ESP IV settlement. And mere months after FirstEnergy installed Randazzo as Commission Chair, Randazzo himself approved a specific $516 million Grid Mod I charge to consumers when resolving four cases—one of which was a tax savings case—that arose in three different years,

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[36] Joint Reply to Ohio Energy Group's Memorandum Contra Motion for Limited Stay of Rider DCR in ESP V Distribution Riders by Northwest Ohio Aggregation Coalition, Office of the Ohio Consumers' Counsel and Ohio Manufacturers' Association Energy Group at 3 (December 26, 2023) (hereinafter, Joint Reply). On behalf of IEU-Ohio, Randazzo filed a letter with the Commission on May 28, 2015 stating IEU-Ohio's non-opposition mere hours after FirstEnergy filed a supplemental stipulation naming IEU-Ohio as one of the few groups eligible to participate in the Rider NMB Pilot.

[37] *Id.* at 4, *quoting United States of America v. Samuel Randazzo*, Case No. 1:23-cr-114, Indictment at 6.

[38] *Id.* at 11–12.

[39] *Id.*

[40] *See* 2020 DCR Audit, Case No. 20-1629-EL-RDR, Audit Report, Expanded Scope; Proffer Tr. Vol. II at 281, Proffer OCC Ex. 7 at 38, 46, 52 (FERC Audit Report).

concerned two completely different subjects, and, without good cause, were unjustly and unreasonably consolidated into one proceeding.[41] The reason for this consolidation is revealed in the Order that Randazzo signed, where the Commission noted: "[the Commission] need not address the question of whether the Stipulation would be appropriate even if we found Grid Mod I to have a negative NPV, as suggested by Mr. Volkmann, in light of the committed return to customers of $900 million in tax savings."[42] Stated differently, by consolidating the unrelated tax savings case with the Grid Mod I case, the Commission offset the costs of Grid Mod I, which meant the Stipulation "looked" appropriate even if the Grid Mod I benefits were revealed to be negative. The fact that Grid Mod I was approved by Randazzo mere months after he was installed at the Commission for the express purpose of "performing official action in his capacity as PUCO Chairman to further FirstEnergy Corp.'s interests relating to . . . regulatory priorities, as requested and as opportunities arose"[43] further demonstrates the connection between Rider AMI charges and the HB 6 investigations and audits and improper costs embedded in Rider AMI.

The HB 6-related evidence should have been admitted in the record so that OMAEG and other intervenors could have more clearly demonstrated the connections and potential impacts that the various HB 6 audits and investigations, and/or criminal proceedings could have regarding the accounting of Riders DCR and AMI and the legitimacy of the costs charged to customers through those riders. Such a demonstration would have made it clear how imperative it is that the Commission protect customers by denying approval of Riders DCR and AMI under ESP V, and/or

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

[42] *Id.* at ¶ 117.

[43] Proffer Tr. Vol. II at 236–37, Proffer NOAC Ex. 1 at 17 (Deferred Prosecution Agreement).

not modifying or increasing the current Riders DCR and AMI until after FirstEnergy's next distribution rate case and/or after the HB 6 audit and investigation cases are resolved.[44]

Considering the above, the Commission's decision to exclude evidence related to the HB 6 scandal was unreasonable, unjust, and unlawful and should be reversed on rehearing.

B. ASSIGNMENT OF ERROR NO. 2: The Commission erred by unjustly, unreasonably, and unlawfully approving the Non-Market Based Services Rider (Rider NMB) without modifications and failing to implement network service peak load (NSPL) billing for qualifying customers.

In its Order, the Commission rejected FirstEnergy's proposal to (1) create two different rate designs for commercial and industrial customers within Rider NMB and (2) eliminate the Rider NMB Pilot.[45] The first rate design (NMB 1) would retain the current Rider NMB rate allocations and rate design, while the second rate design (NMB 2) would apply to commercial and industrial (C&I) customers with an interval or advanced meters, and those customers would be billed based on their NSPL.[46] Despite this proposal having the support of OMAEG, Staff, Direct Energy, Nucor Steel Marion, Inc. (Nucor), Retail Energy Supply Association, the Ohio Energy Leadership Council (OELC, f/k/a IEU-Ohio), Ohio Energy Group (OEG), Interstate Gas Supply,

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

[45] ESP V Order at ¶ 237. The Rider NMB Pilot allows certain select customers to opt out of Rider NMB and obtain all transmission and ancillary services from a certified retail electric service (CRES) provider to determine if those customers who opt out will benefit.

[46] *Id.*

and FirstEnergy,[47] the Commission decided to continue Rider NMB in its current form without any changes proposed by various parties.[48]

Additionally, while the Commission ordered a "modest expansion" to the Rider NMB Pilot, it failed to eliminate the discriminatory application of the original Pilot, which is limited to members of OELC (f/k/a IEU-Ohio), OEG, Nucor, and Material Sciences Corporation—all of whom were Signatory Parties or agreed to not contest the ESP IV Stipulation, a settlement that has been challenged in light of the HB 6 scandal and unfair and improper side deals, nefarious dealings, and a scheme to defraud customers.[49] FirstEnergy's improper charges and improper accounting practices related to the HB 6 scandal impact FirstEnergy's inclusion of certain improper costs and its calculation of the ESP V riders and charges billed to and collected from customers.

The Order's failure to eliminate the discriminatory application of the original Pilot to these select groups means that the Pilot's design continues to allow for potential unjust, unreasonable, and unlawful abuse. Furthermore, a Commission-approved pilot program that entices customers to join one trade association over another violates important regulatory policies or practices.

In contrast, the proposal to eliminate the Pilot and effectively replace it with the NMB 2 rate design would be more reasonable, just, and non-discriminatory, since whether a C&I customer

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[47] *See* OMAEG Ex. 2 at 5, 7 (Direct Testimony of Ryan Schuessler (October 23, 2023); Initial Brief of the Staff of the Public Utilities Commission of Ohio (January 19, 2023) (hereinafter, Staff Brief); Post-Hearing Brief of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (January 19, 2023) (hereinafter, FirstEnergy Brief); Direct Energy Brief; Initial Brief by Nucor Steel Marion, Inc. (January 19, 2023); Initial Brief of Retail Energy Supply Association - Public Version (January 19, 2023). *See also* OELC Brief; Post-Hearing Brief of Ohio Energy Group (January 19, 2023) (hereinafter, OEG Brief); IGS Brief (agreeing that transmission billing based on NSPL should be expanded, but not necessarily supporting the total elimination of Rider NMB).

[48] ESP V Order at ¶ 260.

[49] *See* OMAEG Brief at 10, n. 28. Portions of FirstEnergy's ESP IV are presently under investigation, through Case No. 20-1629-EL-RDR, where the Commission expanded the audit scope to include an investigation of whether FirstEnergy violated R.C. 4928.145, which governs FirstEnergy's obligation to disclose "side agreements" during the ESP IV case.

will be billed based on NSPL rather than monthly billing demand depends upon the type of meter they have rather than a finite number of participants who agreed to a prior settlement in a prior case from almost ten years ago. As explained by FirstEnergy, NMB 2 would better align costs with cost causers and help customers better manage and control their transmission service charges, which is consistent with both the audit report filed by Exeter Associates in Case No. 22-391-EL-RDR (audit of the Rider NMB Pilot), and with other transmission cost recovery mechanisms approved for other Ohio electric distribution utilities (EDUs).[50] Despite spending pages discussing the many arguments made by numerous parties in favor of modifying the Rider and/or Pilot, the Commission inexplicably determined that "the weight of the evidence in the record does not support any modification to the current Rider NMB."[51] This conclusion is against the manifest weight of the evidence, and is contrary to prior Commission decisions in other ESP cases where EDUs modified their transmission riders and/or their transmission rider pilots to better align costs with cost causers.[52] The Commission also failed to provide record evidence to support its decision in violation of Ohio law.[53] Therefore, the Commission should, on rehearing, approve FirstEnergy's proposed changes to Rider NMB and the Pilot, or, alternatively and at a minimum, modify the Rider and Pilot as proposed by Staff.

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[50] ESP V Order at ¶ 238.

[51] *Id.* at ¶ 259.

[52] *See In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case Nos. 23-23-EL-SSO, et al., Order and Order at 41–46 (April 3, 2024); *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 40 (August 9, 2023).

[53] *In re Comm. Rev. of Capacity Charges of Ohio Power Co.*, Slip Opinion No. 2016-Ohio-1607 at 17. *See also e.g.*, *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St. 3d 306, 312, 513 N.E.2d 337 (1987) (stating R.C. 4903.09 requires the commission to set forth the reasons for its decision and prohibits summary rulings and conclusions that do not develop the supporting rationale or record); *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195, ¶ 30 (stating the commission abuses its discretion if it decides an issue without record support).

C. ASSIGNMENT OF ERROR NO. 3: The Commission erred by unjustly, unreasonably, and unlawfully approving the Economic Load Response (ELR) program without modifications to eliminate its discriminatory and anti-competitive effects.

The Commission's approval of the Rider ELR program without expanding eligibility and participation does not benefit ratepayers and is not in the public interest given the costs associated with the ELR program, as well as the poor design of the program. Furthermore, the Rider ELR program is discriminatory and anticompetitive among numerous customers who are not provided with the opportunity to participate. Therefore, the Commission's decision to approve the program with only minor modifications to the credits and FirstEnergy's role as a curtailment service provider (CSP) was unlawful, unjustly discriminatory, and unreasonable. The ELR program should be modified to be more functional and cost effective for the customers who are funding it.

As explained in OMAEG's initial and reply briefs, interruptible programs can "improve reliability by reducing demand for electric power when the supply is limited, thereby preventing the electric grid from overloading and failing."[54] Additionally, if designed properly, such programs also make both Ohio and the participants more economically competitive.[55] Unfortunately, "neither FirstEnergy's current or proposed ELR Programs are actually designed for [these] purpose[s]."[56] While the ELR program "has the *potential* to provide additive and unique load reduction during distribution and transmission system emergencies,"[57] as designed, the program "is duplicative of a competitive market service and is anticompetitive."[58] Therefore,

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[54] OMAEG Brief at 45. *See also* Nucor Ex. 1 at 7 (Direct Testimony of Dennis Goins) (October 23, 2023); OEG Ex. 3 at 3 (Direct Testimony of Kevin Murray) (October 23, 2023); OELC Ex. 32 at 38 (Direct Testimony of Matthew Brakey) (October 23, 2023).

[55] OMAEG Brief at 45. *See also* Tr. Vol. VIII at 1656 (Murray Cross-Examination).

[56] OMAEG Brief at 45.

[57] *Id.*

[58] *Id.*

OMAEG urges the Commission to modify the program on rehearing to be more functional and cost-effective for the customers who are funding it.[59]

Specifically, OMAEG recommends that the ELR program be modified to remove the PJM demand response component, and instead become a program that responds to curtailable events based on transmission facility overloading.[60] While PJM provides many demand response programs that customers can participate in without FirstEnergy's involvement, there is no organized demand response and load shedding for transmission system issues, which has created serious reliability events in Ohio.[61] Additionally, OMAEG and several other parties recommend expanding participation in the ELR program, which has unfairly limited participation to only a few select customers who were part of customer groups that signed prior settlements.[62] More specifically, OMAEG recommends that any ELR program approved by the Commission should be expanded and "be available to any commercial or industrial [C&I] customer that can interrupt its load."[63] Staff agrees with OMAEG that the ELR program should be expanded and recommends an expansion of the program by 50 MW each year for five years, beginning June 1, 2025.[64]

Alternatively, OMAEG recommends that the ELR program be eliminated because it is duplicative, anti-competitive, and inherently discriminatory.[65] Since 2009, FirstEnergy has discriminatorily restricted ELR eligibility and participation to a few select customers (who were

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[59] *Id.* at 46.

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

[61] *Id.*

[62] OMAEG Brief at 46; OMAEG Reply Brief at 27; Staff Brief at 22. *See also* OELC Brief at 44; OEG Brief at 18; NOAC Brief at 8.

[63] OMAEG Brief at 45, *citing* OMAEG Ex. 1 at 4 (Direct Testimony of John Seryak) (October 23, 2023) and Tr. Vol. XII at 2118 (Seryak Cross-Examination).

[64] Staff Brief at 21.

[65] OMAEG Brief at 45; OMAEG Reply Brief at 27; OCC Brief at 39–40; NOAC Brief at 8.

signatory parties on prior ESP settlements),[66] and as approved by the ESP V Order, FirstEnergy will continue to limit participation to the 24 customers currently participating in the ELR program.[67] In addition to being flagrantly discriminatory and unreasonable, FirstEnergy's proposal—and the Commission's approval of that proposal—to continue restricting participation contradicts the stated goal of using Rider ELR to support demand response and economic development, since limited participation limits those potential benefits.[68]

As with Rider NMB and the Pilot, the Commission failed to adequately address the arguments advanced by OMAEG and others specific to Rider ELR in its Order and failed to provide record evidence upon which its Order was based, in violation of Ohio law.[69] Therefore, the Commission's decision to continue the ELR program without substantial modifications or expansion was unreasonable, unjust, and unlawful and against the manifest weight of the evidence. On rehearing, the Commission should either modify the program in accordance with OMAEG's recommendations or deny continuation of the discriminatory and anti-competitive Rider ELR program.[70]

III. CONCLUSION

OMAEG respectfully requests that the Commission grant its application for rehearing of the issues set forth herein and find that ESP V is unjust, unreasonable, and unlawful, does not

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[66] OMAEG Reply Brief at 28.

[67] FirstEnergy Brief at 45–48.

[68] ESP V Order at ¶ 205.

[69] *In re Comm. Rev. of Capacity Charges of Ohio Power Co.*, Slip Opinion No. 2016-Ohio-1607 at 17. *See also e.g.*, *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St. 3d 306, 312, 513 N.E.2d 337 (1987) (stating R.C. 4903.09 requires the commission to set forth the reasons for its decision and prohibits summary rulings and conclusions that do not develop the supporting rationale or record); *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195, ¶ 30 (stating the commission abuses its discretion if it decides an issue without record support).

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

benefit customers, and is not in the public interest. Therefore, for all the reasons stated herein, as well as those articulated in OMAEG's initial and reply briefs, the Commission should allow HB 6-related evidence in the record, modify and/or eliminate Rider NMB and the Pilot and implement NSPL billing, and significantly modify or eliminate the Rider ELR program because those rulings were unlawful, unjust, and unreasonable, not in the public interest, and not supported by the evidence in the record.

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 June 14, 2024 upon the parties listed below.

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Summary: Application OMAEG Application for Rehearing FirstEnergy ESP V (23-301-EL-SSO) electronically filed by Mrs. Kimberly W. Bojko on behalf of The Ohio Manufacturers' Association Energy Group.