

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**INITIAL BRIEF OF RETAIL ENERGY SUPPLY ASSOCIATION**

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The Retail Energy Supply Association (“RESA”) recommends that the Public Utilities Commission of Ohio (“Commission and/or PUCO”) modify and approve FirstEnergy’s electric security plan (“ESP”) application (“ESP V”).<sup>1</sup> The main issues RESA recommends be approved or modified as are follows:

- SSO Auctions: The Commission should approve FirstEnergy’s proposal to continue the use of competitive bid process (“CBP”) SSO auctions.
- Volumetric Risk Cap: If the Commission approves a volumetric risk cap proposal, it should reject FirstEnergy’s proposal that it be the entity to secure power at market-based prices for the SSO. Instead, the Commission should direct that SSO Suppliers procure market-priced generation above the risk cap for the SSO.
- EE/PDR Portfolio Plan: The Commission should reject FirstEnergy’s proposal to implement a new portfolio of energy efficiency and peak demand reduction (“EE/PDR”) programs. The 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.

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<sup>1</sup> As used herein, ‘FirstEnergy’ refers collectively to The Cleveland Electric Illuminating Company, The Toledo Edison Company and Ohio Edison Company.

- *UFE/Resettlement*: The Commission should modify and approve FirstEnergy's proposal to help address billing errors through the Unaccounted for Energy ("UFE") and Resettlement proposals.
- *Supplier Tariff*: The Commission should modify and approve FirstEnergy's proposed addition to the items that are defined as an Event of Breach of the Supplier Tariff to exclude minor technical issues.
- *Rider NMB/NSPL Billing*: The Commission should approve FirstEnergy's proposal to align its allocation and recovery of transmission costs under Rider NMB with how the costs are billed by PJM Interconnection, LLC ("PJM"). Staff's proposal for additional review and a potential transition process should be addressed this Summer instead of next Winter. The Commission should also make clear that the additional review Staff requested is limited to the timeline to implement FirstEnergy's proposal and not relegation of the Rider NMB issues from this case.
- *Allocating PUCO/OCC Assessment Fees to SSO*: The Commission should require that the portion of these fees attributable to the SSO be allocated to the SSO.
- *EV Charging*: Because the Commission lacks jurisdiction of electric vehicle ("EV") charging the Commission should modify FirstEnergy's EV related proposal to limit FirstEnergy's activities "to those directly related to providing distribution service.

## I. ARGUMENT

### A. The Commission Should Approve FirstEnergy's Proposal for a SSO Auction Structure and Should Ensure that SSO Suppliers Procure all Generation for the SSO.

A fundamental component of FirstEnergy's ESP is the use of the competitive bid process ("CBP") auctions to secure generation service for customers served under the Standard Service Offer ("SSO"). FirstEnergy proposes the continuation of CBP auction framework as part of its ESP V Application, and no party presented any testimony opposing the continuation of an auction framework (though some parties are advocating to use the auction framework, but to hold auctions by customer class). Utilization of a

competitive process to secure SSO generation service is consistent with Ohio energy policy and benefits customers and the public interest.

While FirstEnergy proposes to continue the existing CBP structure, it also proposes an alternative concept that could, under some circumstances, permit FirstEnergy rather than the competitive market to secure generation supply for SSO customers. FirstEnergy's proposal to potentially secure some generation under the Volumetric Risk Cap ("VRC") concept should not be adopted. Having transitioned all of the electric distribution utilities ("EDU") to a competitive framework, and in some instances required customers to pay significant nonbypassable charges to facilitate the transition, allowing the incumbent EDUs to take priority over competitive suppliers in securing generation supply for the SSO is a step backwards and inconsistent with the years' long process to separate generation procurement responsibilities from the wires company function of the EDUs.

FirstEnergy witness Lee indicated that FirstEnergy was proposing to secure the power above the VRC itself because of a need to undertake manual calculations and due to the risk of ancillary services costs for this load. However, Mr. Lee conceded on cross-examination that he "was not that familiar with the actual mechanics of PJM invoicing"<sup>2</sup> that he "was not familiar" with "[a]nything that happens kind of downstream of the auction mechanics"<sup>3</sup> and that he "probably shouldn't be commenting because . . . once the auctions close and the SSO suppliers sign their agreements, I'm not really involved" in FirstEnergy's processes to collect revenue from SSO customers and pay SSO suppliers.<sup>4</sup>

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<sup>2</sup> Tr. at 746.

<sup>3</sup> Tr. at 746.

<sup>4</sup> Tr. at 739.

While Mr. Lee was unable to substantiate the claim that some type of manual process justified FirstEnergy securing the generation, Constellation witness Indukuri testified that the calculation would be the same regardless of supplier.<sup>5</sup> Accordingly, there is no evidence that the calculations that would need undertaken if the VRC was triggered to support FirstEnergy procuring the generation over SSO suppliers.

Mr. Indukuri also testified that from a supplier perspective, “the risk associated with changes in the ancillary services obligation for the load above the cap would be negligible.”<sup>6</sup> On cross-examination, Mr. Lee largely confirmed this point, testifying that ancillary costs are “a small component” of the SSO Supplier’s obligation.<sup>7</sup> Accordingly, FirstEnergy’s two justifications for it securing generation above the VRC is unsupported by the record.

While there is no benefit to having FirstEnergy secure the power there is certainly potential harm from FirstEnergy’s proposal. According to Constellation witness Indukuri, there were at least two issues with FirstEnergy’s proposal:

First, it is not as simple as FE Ohio simply being charged by PJM for that load. If FE Ohio were to take on the obligation, they would be required to provide daily day-ahead bids, which is something that only SSO suppliers do (and should do) today. Second, the costs associated with serving SSO load reside in the PJM sub-accounts for SSO suppliers. FE Ohio seems to be suggesting that all costs for serving SSO load would reside in FE Ohio’s account.<sup>8</sup>

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<sup>5</sup> Indukuri Direct at 24.

<sup>6</sup> Indukuri Direct at 24.

<sup>7</sup> Tr. at 746.

<sup>8</sup> Indukuri Direct at 24 (*citing* Lee direct at 7).

RESA supports the continued reliance on the CBP auctions to secure generation for SSO customers. FirstEnergy potentially serving load above the VRC runs afoul of utilizing the auctions to secure 100% of SSO generation supply. Should the Commission adopt the VRC proposal, it should reject FirstEnergy's proposal to be the entity to secure the generation and instead that requirement should remain with SSO Suppliers.

**B. The Commission Should Reject FirstEnergy's Anticompetitive Proposal to Implement an EE/PDR Portfolio Plan.**

The Commission should reject FirstEnergy's 4-year \$375M portfolio of energy efficiency and demand reduction programs, that FirstEnergy admits could be considerably more costly should it seek to continue its programs beyond the initial 4-year EE/PDR program proposal.<sup>9</sup> Sustainability 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. Reliance on the competitive marketplace to provide sustainability product offerings is consistent with the law, Commission precedent, and the fact that not all customers can afford additional nonbypassable charges to which they will receive no direct benefit.

As originally drafted in Ohio Senate Bill ("SB") 221 in 2008, the energy efficiency mandate was adopted through 2025 and the peak demand reduction mandate was adopted through 2018, both of which were later extended by 2 years under SB 310 in 2014. The peak demand reduction mandate expired on its own in 2020 and pursuant to

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<sup>9</sup> The EE/PDR program has a price tag of approximately \$72.4M per year of costs that FirstEnergy proposes to defer at a weighted average cost of capital and collected over an 11-year period. Miller Direct at 4; McMillen Direct at Attachment BSM-2.

the 2019 revisions to the mandates, the mandated cumulative energy efficiency savings were found to be met and exceeded as of 2020. Customers fulfilled the mandatory EE/PDR requirements by funding expensive programs over more than a decade of nonbypassable charges.

And these charges were considerable. Between 2011 and 2022, FirstEnergy's customers paid \$990,625,199 through Rider DSE2 to meet the EE/PDR mandates.<sup>10</sup> Of this total, \$563,391,605 was collected from residential customers.<sup>11</sup>

The costs for the EE/PDR program, both historic and proposed, do not occur in a vacuum either. Customers have funded other programs that go beyond traditional distribution grid investment such as compliance with state renewable portfolio standard ("RPS") requirements, funding for interruptible credits, and funding for grid modernization initiatives. Funding for historic ELR credits (which counted towards the peak demand reduction mandate) from 2009 through May 31, 2023, totaled \$608,725,027 (this amount is in addition to the amount identified above that was collected through Rider DSE2).<sup>12</sup> FirstEnergy's proposal for ELR credits under this ESP amounts to another \$340M to-be-collected from customers.<sup>13</sup> The Grid Mod 1 costs, though incurred, have not all been collected from customers yet. The Rider AMI revenue requirement between 2011 and 2022 totaled \$369,632,768, of which \$215M was collected from residential customers.<sup>14</sup>

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<sup>10</sup> RESA Ex. 2 at page 1 (labeled DSE2 at bottom of page) (summing total row in the table labeled 'Total'); see *also* Tr. at 362-362.

<sup>11</sup> RESA Ex. 2 at page 1 (labeled DSE2 at bottom of page) (summing RS row in the table labeled 'Total'); see *also* Tr. at 362-362.

<sup>12</sup> RESA Exs. 3, 4, & 5.

<sup>13</sup> Tr. at 357-358.

<sup>14</sup> RESA Ex. 8.

Grid Mod 1 costs collected through Rider AMI were capped at \$516M of capital costs plus O&M but have not all been collected from customers. Notably, the 2022 Rider AMI revenue requirement alone was \$117M.<sup>15</sup> FirstEnergy's pending request for Grid Mod 2 comes with a price tag of \$626.4M of capital and \$144.1M of O&M. Totaling up just these three programs (EE/PDR mandates, ELR credits, and grid modernization) customers have paid \$1.97B over approximately the past decade. The price tag for the ELR program and grid modernization during the ESP term will add many hundreds of millions more in discretionary costs to-be-collected from customers.

In rejecting Dominion's energy efficiency and demand side management program, the Commission explicitly noted affordability as a key reason for denying non-mandatory EE/PDR programs.<sup>16</sup> The Commission noted the current "landscape of Ohio's economy" which saw customers enduring a pandemic, spiking inflation, and increases in the cost of electric and natural gas supply.<sup>17</sup> "In these difficult times, the Commission is acutely mindful of the range of residential household budgets, particularly Dominion's low-income customers and moderate income customers whose income is above the eligibility requirements for various income assistance programs."<sup>18</sup> The Commission concluded that the "subsidization of the costs of these programs across Dominion's footprint acts as a burden on the Company's ratepayers."<sup>19</sup> In this same vein, the record in this case

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<sup>15</sup> RESA Ex. 8.

<sup>16</sup> *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 Programs*, Case No 21-1109-GA-ALT, Opinion and Order at 18 (Oct. 4, 2023) ("Dominion Alt. Reg.").

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*



demonstrates that there are many FirstEnergy customers that unfortunately cannot afford central air conditioning ("AC"), and by extension do not have a thermostat to control a central AC.<sup>20</sup> These low-income customers, however, would be required to subsidize smart thermostat programs for those not only lucky enough to be able to afford central AC, but with the disposable income to purchase a smart thermostat.<sup>21</sup> Saddling all customers with nonbypassable charges that do not meet their individual needs is unreasonable. While the Commission has approved weatherization initiatives for low-income customers, they are more akin to the bill payment assistance programs already in place, such as PIPP. As RESA/IGS joint witness White testified, if the Commission approves anything, it should be limited to the low-income weatherization program.<sup>22</sup>

In the Dominion case, the Commission also noted it was not convinced of a “need for expansive, utility-sponsored DSM/EE programs” as customers were sufficiently aware and knowledgeable of EE/PDR products and services and could explore the availability and benefits of specific offerings through the competitive marketplace.<sup>23</sup> The record here demonstrates that customers have a plethora of sources outside of a utility EE/PDR plan to obtain information on EE/PDR products and services and the record further indicates that a variety of options, including EE/PDR products and services, exist in the market place to meet customers individual sustainability choices. <sup>24</sup>

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<sup>20</sup> Tr. at 1045-1046.

<sup>21</sup> Tr. at 1045-1046.

<sup>22</sup> White Direct at 17.

<sup>23</sup> *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 Programs*, Case No 21-1109-GA-ALT, Opinion and Order at 18 (Oct. 4, 2023).

<sup>24</sup> Tr. at 874-875, 878-879.

While the Commission should not approve the very expensive EE/PDR portfolio plan, that does not mean customers cannot obtain products and services to meet their individual sustainability goals. Initially, competitive retail electric service ("CRES") providers and other market participants are best suited to deliver products and services to individual customers, and in fact, are delivering many different types of sustainability choices to customers today.<sup>25</sup> RESA members alone are offering customers energy efficiency services like energy audits.<sup>26</sup> RESA members offer their customers energy efficient products like LED lighting and combined heat and power systems to customers.<sup>27</sup> RESA members offer 100% renewable electricity supply contracts to customers.<sup>28</sup> RESA members offer demand response products and services to their customers.<sup>29</sup> In other states where CRES providers have ready access to residential customer interval data (an issue discussed elsewhere in this brief), RESA members offer residential smart thermostat demand response programs entirely funded through market revenue.<sup>30</sup> RESA members offer customers onsite solar and battery solutions.<sup>31</sup> RESA members offer their customers EV related programs including rate offerings and dynamic EV load management services.<sup>32</sup> EE products are also available through retailers like Home Depot and other online channels as well as countless other market participants.<sup>33</sup> Energy

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<sup>25</sup> White Direct at 13-15; Smith Direct at 6, 8-11; Tr. at 1797, 1801.

<sup>26</sup> Smith Direct at 8-9.

<sup>27</sup> Smith Direct at 8-9; White Direct at 13.

<sup>28</sup> White Direct at 13.

<sup>29</sup> Smith Direct at 9; Tr. at 1801.

<sup>30</sup> Smith Direct at 10-11.

<sup>31</sup> White Direct at 13; Smith Direct at 8-10.

<sup>32</sup> Smith Direct at 10.

<sup>33</sup> White Direct at 16; Tr. at 875.

efficiency information is further available through numerous federal and state programs.<sup>34</sup> Sustainability products and service offerings, including EE/PDR product and service offerings, and EE/PDR information is readily available to customers in the FirstEnergy service area without the need for a monopoly “wires” company to undertake the activities.

Just as important as the availability of sustainability products in the marketplace, is the discipline the competitive forces place upon market delivered products and services. RESA witness John Smith testified that “[u]nlike FirstEnergy’s proposed method of delivering products to customers, CRES providers and other market participants can deliver sustainable products and services, including EE/PDR, to customers who value the product, can utilize the product, and can afford the specific product or service they desire.”<sup>35</sup> But, CRES providers and “[m]arket participants must demonstrate value to residential customers to obtain their business, and competitive market forces will require market participants to continually better themselves and identify the products and services residential customers desire, provide value, and are affordable.”<sup>36</sup> As an example on CRES provider offered smart thermostat demand response programs, RESA witness Smith testified on the efforts undertaken to ensure that the competitive market program met customers’ expectations:

In the competitive space, Vistra and other market participants must strive to deliver products and services to customers based on actual demand of customers and to implement and run the programs in a manner that customers’ actually value. For example, as part of our BYOT smart thermostat program we have done extensive research and analysis regarding the degree to which participating customers notice temperature adjustments on their thermostats and are willing to tolerate the temperature adjustment. All else equal, on a 110 degree Summer day in Texas we might

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<sup>34</sup> Tr. at 874-75.

<sup>35</sup> Smith Direct at 7.

<sup>36</sup> Smith Direct at 7.

not adjust the thermostat as much as we would on a 90 degree day. Variations in the amount of degree change on a thermostat are also driven by the time of day we might call upon the enrolled thermostats.<sup>37</sup>

FirstEnergy's program, however, "eliminates residential customer choice over the type of products and services they would like to receive as they would be forced to participate in the program."<sup>38</sup> For customers that have the means and desire to undertake steps to further their individual sustainability goals they may not want to do so through one of the EE/PDR measures FirstEnergy proposes to offer. Ohio's customer choice centric structure should allow customers to choose the product or service that best meets their individual needs without being forced to subsidize a utility-run program that might not meet their needs. This is especially true because residential customers have already funded more than half a billion in costs related to past EE/PDR programs they were involuntarily conscripted into.

Furthermore, if FirstEnergy is permitted to reimplement a subsidized EE/PDR portfolio program there is a risk that FirstEnergy will push competitive products out of the market and prevent other products and services from entering the market. As explained by RESA/IGS joint witness White, "when you have an entity [with] subsidized [] rates, or it has some other competitive advantage like easier access to customer data, it significantly decreases the incentive of other companies to invest in those products."<sup>39</sup> RESA witness Smith also explained how FirstEnergy's smart thermostat demand management program could conflict with similar programs offered in the market.<sup>40</sup> While

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<sup>37</sup> Smith Direct at 12.

<sup>38</sup> Smith Direct at 6.

<sup>39</sup> Tr. at 1826..

<sup>40</sup> Smith Direct at 13-14.

energy efficient and peak demand reduction products and services are a good thing, allowing a monopoly like FirstEnergy to offer no risk subsidized products will harm competition and likely lead to less EE/PDR products and services overall being offered to FirstEnergy's customers.<sup>41</sup> The market can and does drive innovation, but will only do so if not stifled through unfair competition with subsidized monopoly product offerings. Accordingly, the Commission should deny FirstEnergy's proposed EE/PDR program.

**C. FirstEnergy's EE/PDR Program Suffers from Many Other Issues and Flaws.**

In addition to the legal and policy arguments set forth above, there are a host of other issues and flaws with FirstEnergy's proposed EE/PDR portfolio plan that each individually warrant the rejection of the plan. Collectively, these issues and flaws overwhelmingly demonstrate that the EE/PDR program must be rejected.

FirstEnergy claims its \$375M EE/PDR program will provide customers benefits based on FirstEnergy's assumed level of savings largely causing avoided future energy and capacity market costs.<sup>42</sup> However, FirstEnergy admitted that its witness sponsoring the energy and capacity market forecasts was not an expert in either energy or capacity price forecasting.<sup>43</sup> FirstEnergy's witness sponsoring the forecasts also admitted that he was not personally involved in compiling the forecasts.<sup>44</sup> FirstEnergy's energy price forecast was a combination of energy price forwards from a specific day in February 2023 and a natural gas forecast at a trading point in Louisiana that FirstEnergy applied specific

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<sup>41</sup> Tr. at 1827.

<sup>42</sup> See Miller Direct at Attachment ECM-4. Workpapers 2-3.

<sup>43</sup> Tr. at 946-947.

<sup>44</sup> Tr. at 947.

methodologies in an attempt to convert that natural gas price forecast from Louisiana into an electrical energy price forecast applicable to northeastern Ohio.<sup>45</sup> The witness, however, was also not an expert on converting gas forecasts at one trading hub to a price at another hub in Ohio, and then converting a gas price to an electrical energy price.<sup>46</sup> The witness sponsoring the energy price forecast also had not reviewed the forward prices subsequent to the singular date that they were pulled for his testimony to verify their accuracy.<sup>47</sup>

Because FirstEnergy witness Miller was an admitted non-expert on energy and capacity price forecasting (conceded at hearing and in response to Requests for Admission), RESA moved to strike the portions of his testimony that relied on this information.<sup>48</sup> In another recent proceeding, an ALJ struck a RESA witness' testimony on grounds that the witness was just acting as a pass-through of company information without having actual knowledge or expertise on the fact at issue in his testimony, which was upheld by the Commission.<sup>49</sup> The facts here are similar as FirstEnergy witness Miller was acting as a conduit for FirstEnergy's non-witness expert's market price forecasts. The Commission should reverse the ALJ's ruling and strike the testimony that is based on unsupported energy and capacity price forecasts, or in the alternative give the price forecasts no weight.

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<sup>45</sup> Tr. at 947-948.

<sup>46</sup> Tr. at 947-948.

<sup>47</sup> Tr. at 947-948.

<sup>48</sup> Tr. at 865-870.

<sup>49</sup> *In the Matter of the application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates*, Case Nos. 14-375-GA-RDR, *et al.*, Opinion and Order at 19-20 (Apr. 20, 2022).

Another flaw with FirstEnergy's smart thermostat active demand management program is the assumption that it could help reduce PJM capacity prices. The record demonstrates that there is overall an excess of capacity in PJM that is available but did not clear in the latest PJM base residual auction: 160,873.6MW of capacity resources were offered into the base residual auction ("BRA") for the 2023/24 delivery year with 144,870.6MW clearing the BRA.<sup>50</sup> With respect to demand response, for the 2015/16 PJM delivery year a high of 19,243MW of demand response was offered into the BRA.<sup>51</sup> For the 2023/24 PJM delivery year, 9,282.2MW of demand response resources was offered into the BRA with 8,096.2MW clearing.<sup>52</sup> There is nearly 1,200MW of demand response capabilities already existing in the marketplace and which sought to participate in the BRA for the current delivery year, and much more that has historically sought to participate. FirstEnergy projects that its nearly \$100M/year EE/PDR program will generate an annual peak demand reduction of 111.3MW, broken down between 43.7MW for residential programs and 67.6MW for C&I programs.<sup>53</sup> With 16,000MW already being offered into the BRA above what cleared, FirstEnergy's EE/PDR plan will have no demonstrable effect on the PJM capacity auction clearing price.

Moreover, the record further demonstrates that within the ATSI zone, there is also an excess of capacity resources available to PJM to support reliability in the FirstEnergy footprint. For the BRA associated with the current PJM delivery year, 1,100.1MW of

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<sup>50</sup> RESA Ex. 17 at 18-19.

<sup>51</sup> RESA Ex. 17 at 18.

<sup>52</sup> RESA Ex. 17 at 19.

<sup>53</sup> Miller Direct at Attachment ECM-2.

capacity in the ATSI zone was offered into PJM with PJM only clearing 851.5MW.<sup>54</sup> This difference of 248.6MW of existing capacity resources is again 2.5 times greater than what the EE/PDR program would generate, more than 5 times greater than the entirety of residential programs, and more than 12 times greater than the demand reduction FirstEnergy projects it will achieve from the residential smart thermostat demand response program. Accordingly, the record demonstrates that the EE/PDR program is not going to have any measurable effect on PJM reliability, reliability in the ATSI zone, or PJM capacity prices.

FirstEnergy also conceded that the residential smart thermostat demand response program is not designed to address distribution peak issues. To this end, FirstEnergy testified that it intended to design the program for PJM peak days.<sup>55</sup> FirstEnergy also conceded that it had undertaken no studies or analysis regarding the reliability impact that the smart thermostat program would have generally<sup>56</sup> or on any distribution circuit.<sup>57</sup> FirstEnergy also testified that it had not called the ELR program participants for any distribution level events during the term of ESP IV.<sup>58</sup> No other witness introduced any studies or analysis demonstrating that the smart thermostat demand response program would provide any reliability benefits.

The lack of record support for avoided energy/capacity costs and the lack of record support for reliability benefits of the EE/PDR program and the smart thermostat program

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<sup>54</sup> RESA Ex. 17 at 10.

<sup>55</sup> Tr. at 901, 903-904.

<sup>56</sup> RESA Ex. 11.

<sup>57</sup> RESA Ex. 12.

<sup>58</sup> Tr. at 371.



yield quantifiable costs but non-demonstrable benefits. The EE/PDR program and the smart thermostat demand response component add net demonstrable costs to the overall costs of the ESP. Because the EE/PDR program would not be recoverable through base rates, unlike other distribution investment riders, Rider EEC would add net costs to the ESP side of the ESP v. MRO statutory test. Without demonstrable net savings compared to an MRO from some other aspect of the ESP, authorizing FirstEnergy's proposed EE/PDR program and its smart thermostat demand response program would cause the ESP to fail the ESP v. MRO test.

Finally, the manner in which FirstEnergy prepared its EE/PDR proposal as well as its planned implementation conflicts with the spirit of the corporate separation requirements and state energy policies that support robust and fair competition. R.C. 4928.17 prohibits an EDU from providing an undue preference or advantage to any division of its own business including, but not limited to, "customer and marketing information" and "billing and mailing systems." The statute also requires all EDUs to ensure they are operating under a corporate separation plan that "satisfied the public interest in preventing unfair competition." The statute further requires a wires company to provide nonelectric products and services through a fully separated affiliate. The statutory state energy policies require the Commission to "ensure diversity of supplies and suppliers," and "ensure effective competition."

The Commission's rules also support CRES providers being able to fairly compete. Commission Rule 4901:1-37-04(D)(1), O.A.C., provides that an EDU cannot release any proprietary customer information, including customer load information to affiliates. Rule 4901:1-37-04(D)(2)-(3), O.A.C., speaks to EDUs providing information to its affiliates and

nonaffiliated companies on a nondiscriminatory basis, and prohibits an EDU from providing information to an affiliate unless the information is contemporaneously provided in the same form and manner to nonaffiliated competitors. Rule 4901:1-37-04(D)(10), O.A.C., provides that an EDU shall provide comparable access to products and services. For purposes of these Commission rules, “affiliate” includes a division of an EDU offering competitive services.<sup>59</sup> With the removal of the mandatory obligation that EDUs provide an EE/PDR portfolio plan to meet statutorily mandated goals, an offering of energy efficient products and services by an EDU should be treated the same as any other competitive or nonelectric product and service and allow the market to compete on a level playing field.

The structure of FirstEnergy’s development of its EE/PDR plan, as well as the proposed operation, create an unlevel playing field where FirstEnergy and its vendor have unequal access to customer data to develop programs. The structure of the proposed Home Energy Report component of the EE/PDR portfolio will have FirstEnergy transfer or “make-available” the AMI interval data for all of FirstEnergy’s residential customers with AMI meters to an implementation vendor.<sup>60</sup> FirstEnergy would also transfer or make available other data in its customer information system, such as whether a customer is low-income, to the implementation vendor.<sup>61</sup> This data will then be used by an implementation vendor to design programs that generate the greatest savings. In other words, FirstEnergy’s implementation vendor will have unique access to data to target the most profitable customers to offer EE/PDR products and services to, while CRES

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<sup>59</sup> Rule 4901:1-37-01(A), O.A.C.

<sup>60</sup> Tr. at 881-883.

<sup>61</sup> Tr. at 882-883.

providers and other market participants are denied access to the same data on the same terms and conditions.<sup>62</sup>

Digging deeper, confidential discovery and the confidential hearing transcript further highlight the anticompetitive nature of the EE/PDR program development and proposed implementation. **[Begin Confidential]** [REDACTED]

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<sup>62</sup> Tr. at 943-944.

<sup>63</sup> Tr. at 952.

<sup>64</sup> Tr. at 955.

<sup>65</sup> See Tr. at 956.

<sup>66</sup> Tr. at 953.

<sup>67</sup> Tr. at 952, 964-965.

[REDACTED]

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<sup>68</sup> Tr. at 954-957.

<sup>69</sup> Tr. at 954-955.

<sup>70</sup> Tr. at 953-954.

<sup>71</sup> Tr. at 956-958.

<sup>72</sup> Tr. at 956-958.

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[REDACTED]

[REDACTED] **[End Confidential]**

Furthermore, on the issue of residential customers' having the choice to participate in the EE/PDR program or not, FirstEnergy witness Miller testified that FirstEnergy would need to engage in an education campaign and face customer experience challenges regarding explaining to customers about the alleged benefits of the program.<sup>73</sup> These are the same items that every market participant must work through in order to convince a customer to purchase a given product, and to remain a repeat customer. In fact, CRES providers and governmental aggregators engage in these types of education activities day-in and day-out around the state to convince their customers about the benefits of their programs and offerings.

This uneven data access allows FirstEnergy and its implementation vendors to both stand to profit from the deployment of EE/PDR products and services. At the same time, CRES providers are not provided the same type of access to residential customer interval data, and may not even have any access to other information (such as low-income status) that FirstEnergy provided, or will provide, to its vendors working on and standing to profit from the deployment of FirstEnergy's EE/PDR portfolio plan. This anticompetitive outcome is inconsistent with the pro-competition spirit of the corporate separation

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<sup>73</sup> Tr. at 924-925.

requirements and state energy policies. While RESA recommends that the Commission not approve the EE/PDR program, any data utilized by FirstEnergy or provided to its third party vendors should be provided to CRES providers in the exact same manner to ensure that CRES providers can development products and services on an equal footing.

**D. The Commission Should Modify and Approve FirstEnergy’s Unaccounted for Energy and Resettlement Proposal.**

To assist in correcting billing errors the Commission should adopt FirstEnergy's proposed change to collection of Unaccounted for Energy (“UFE”)<sup>74</sup> costs and its resettlement proposal. Under the former, FirstEnergy proposed to remove responsibility for UFE, a PJM line-item cost, from suppliers and instead collect the costs through Rider NMB.<sup>75</sup> Under the latter, FirstEnergy proposes to add a provision to the supplier tariff that obligates all suppliers to agree to resettlement.<sup>76</sup> However, RESA recommends that there be a temporal limitation on how much time suppliers have to agree to resettlement. RESA also recommends that the Commission add clarification to the resettlement language FirstEnergy proposes to ensure that CRES providers are only required to agree to mandatory resettlement with others that have a reciprocal mandatory resettlement

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<sup>74</sup> In addition to meter/billing errors, other contributors to UFE include: profiled loads, including weather/conditions pushing profiles beyond statistical accuracy, use of a fixed annual loss factor even though losses vary hourly, and other issues such as broken meters and theft. Stein Direct at 8.

<sup>75</sup> Stein Direct at 8-9.

<sup>76</sup> Stein Direct at Attachment EBS-1:

**C. Consent for Settlement, Resettlement, or Reconciliation**

If PJM policies require the Company to obtain consent from the Certified Supplier for initiation of a PJM settlement process, the execution of the Supplier Coordination Agreement shall be deemed as affirmative consent by the Certified Supplier for the settlement or resettlement or reconciliation; and if PJM requires any additional indicia of consent, the Certified Supplier shall provide affirmative consent within ten (10) calendar days of the Company’s request.

obligation. Finally, while RESA would be agreeable to consenting to the resettlement process, the language FirstEnergy proposes needs clarified to ensure that CRES providers still have an opportunity to dispute FirstEnergy's calculation of the amounts to be resettled.

When a billing error occurs, FirstEnergy needs to engage in several retail and wholesale processes to ensure that the customer is billed correctly, the customer's supplier (either SSO supplier or CRES provider) is appropriately billed, and other SSO suppliers/CRES providers are correctly billed. In its Application, FirstEnergy proposes two changes designed to help correct billing errors predominantly caused by incorrect meter reads.<sup>77</sup> The first part of FirstEnergy's proposal is to move PJM line item responsibility for UFE to Rider NMB.<sup>78</sup> The second part of FirstEnergy's proposal is a change to its supplier tariff to require all CRES providers to agree to resettlements.<sup>79</sup> Absent approval of FirstEnergy's UFE proposal, FirstEnergy has to approach all load serving entities ("LSE") in its zone, approximately 140 entities, to fix incorrect bills. If the bill error is not discovered in time, approximately 60 days, then resettlement under PJM's rules is voluntary. It is unlikely that all 140 suppliers would agree to correct a billing error, especially in circumstances where it would result in additional costs being assigned to them. Moreover, even if all 140 suppliers agreed, there is still a complex process to correct the UFE allocations (an allocation unique to every hour<sup>80</sup>). FirstEnergy's proposed UFE changes will streamline the process to correct billing errors.

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<sup>77</sup> Tr. at 1404.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> UFE "is the difference between the wholesale load for the entire zone and the aggregate load of all competitive retail electric service ("CRES") providers and the Companies at the generation level including

FirstEnergy witness Stein and RESA witness Rodriguez also identified additional transparency, market-alignment, and cost-savings benefits from the proposed UFE change. FirstEnergy witness Stein testified that the proposed change to UFE will create transparency as FirstEnergy would settle the UFE monthly with PJM and include the monthly charge or credit valued at LMP against the monthly costs reflected in Rider NMB.<sup>81</sup> Making the UFE change as FirstEnergy proposes will also align UFE with another similar non-market-based charge, Meter Error Corrections, a PJM line item already included in Rider NMB.<sup>82</sup>

RESA witness Rodriguez echoed the transparency sentiment.<sup>83</sup> Mr. Rodriguez further explained that UFE charges “are non-market based which inherently makes them very difficult for SSO Suppliers and CRES providers to predict and manage. If SSO Suppliers and CRES providers, rather than EDUs, are responsible for these unknown and unpredictable costs, then in order to account for such risk, all suppliers need to factor a premium into their offers. Suppliers have to consider the potential costs that they *could* incur.”<sup>84</sup> “By having FirstEnergy recover these costs from all customers through a rider that imposes a reconcilable, non-bypassable charge, all customers should benefit.”<sup>85</sup> Mr. Rodriguez’s testimony on this issue was not challenged by any party on cross-examination.

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losses to the FE Ohio Zone load, less non-retail load (e.g., load for municipal and co-operative utilities), for each respective hour.” Stein Direct at 8. In plain English, FirstEnergy has a target load for settlement and aggregate load for each hour that has to be scaled up or down to the target level. Tr. at 1410.

<sup>81</sup> Stein Direct at 8-9.

<sup>82</sup> Stein Direct at 9.

<sup>83</sup> Rodriguez Direct at 5.

<sup>84</sup> Rodriguez Direct at 5.

<sup>85</sup> Rodriguez Direct at 5.



While the resettlement language FirstEnergy proposes will help facilitate correcting billing errors, FirstEnergy seeks to place an unreasonable temporal obligation on suppliers to be forced to resettle to address FirstEnergy errors.<sup>86</sup> Specifically, FirstEnergy witness Stein indicated he proposed that suppliers would be required to agree to resettlement for however long FirstEnergy had to rebill the customer with the billing error.<sup>87</sup> RESA proposes that CRES providers only be required to consent to resettlement for 12 months from the time of relevant service to the customer. It would be unreasonable to require CRES providers to be unable to financially close out their books for years on end due to the endless possibility of resettlement obligations for FirstEnergy from years prior. FirstEnergy should be expected to engage in reasonable diligence to prevent, and catch, billing errors. RESA believes that one-year, which is much longer than what PJM requires, is more than ample time to provide FirstEnergy to catch billing errors.

The Commission should also adopt several clarifications on the resettlement language provided by FirstEnergy witness Stein at hearing. Specifically, on cross-examination, Mr. Stein testified that it was his belief that the resettlement requirement would only apply in circumstances where all other parties would also have an equal resettlement obligation.<sup>88</sup> As drafted, the proposed resettlement provision would require a CRES provider to consent to any PJM settlement process initiated by FirstEnergy, and it is not clear from Mr. Stein's testimony or the proposed language if there are or could be other situations where a CRES provider would have to consent to resettlement to a third party that would not be required to provide a reciprocal consent. For example,

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<sup>86</sup> Tr. at 1420.

<sup>87</sup> Tr. at 1420.

<sup>88</sup> Tr. at 1417 to 1420.

FirstEnergy is in charge of reporting load of municipalities and rural co-ops in its zone to PJM, and Mr. Stein believes in their interconnection agreements there would be a resettlement requirement. However, there is no evidence in the record confirming this is correct with respect to all third parties. Accordingly, the Commission should modify the resettlement provision to require mandatory resettlement by a CRES provider only with other parties that similarly have a mandatory resettlement obligation with CRES providers.

One additional clarification that needs made is to ensure that CRES providers have an avenue to challenge the amount of resettlement. The language FirstEnergy proposes provides that a CRES provider signing the Supplier Agreement shall be treated as affirmative consent to resettlement. This should be read as consent to the resettlement process. FirstEnergy's proposed language should be modified to make clear that should a CRES provider dispute the amount of the resettlement they have a right to informally dispute the amount with FirstEnergy, that FirstEnergy has an obligation to work in good faith to try to informally resolve the issue, and that if informal attempts do not resolve the amount in dispute that a CRES provider can seek formal Commission intervention through the complaint process.

To reflect RESA proposed changes, the Commission should adopt the modified change to the supplier tariff as set forth below:

**C. Consent for Settlement, Resettlement, or Reconciliation**

If PJM policies require the Company to obtain consent from the Certified Supplier for initiation of a PJM settlement process, the execution of the Supplier Coordination Agreement shall be deemed as affirmative consent by the Certified Supplier for participation in the settlement or resettlement or reconciliation for a period of 12 months beyond the month where service was provided but not correctly metered/measured/reported; and if PJM requires any additional indicia of consent, the Certified Supplier shall

provide affirmative consent within ten (10) calendar days of the Company's request. A Certified Supplier's consent to settlement, resettlement, or reconciliation under this provision shall be required of a Certified Supplier under this provision only in instances where all other parties engaged in the settlement, resettlement, or reconciliation also have a mandatory requirement to consent to settlement, resettlement, or reconciliation. The consent provided herein only applies to participation in the process but does not represent consent as to the amount a Supplier either owes or is to be credited. A Certified Supplier that disputes an amount of settlement, resettlement, or reconciliation under this provision shall first raise the issue informally with FirstEnergy, FirstEnergy shall work in good faith to try to informally resolve the issue, and if informal attempts do not resolve the amount in dispute a Certified Supplier make seek formal resolution from the Commission through a complaint process.<sup>89</sup>

**E. The Commission Should Narrow FirstEnergy's Proposal to Expand the Definition of Events of Breach of the Supplier Tariff to Include Default of any PJM Requirement to Only Failure to Pay PJM.**

FirstEnergy's witness Stein is the FirstEnergy witness responsible for sponsoring changes to the Supplier Tariff, however, with respect to the Company's proposed expansion of the definition of Events of Breach, Mr. Stein offered no direct testimony explaining or supporting the change.<sup>90</sup> On cross-examination, Mr. Stein explained that in the current environment PJM was sending CRES providers more notices of default for failure to pay PJM.<sup>91</sup> And, "if you can't buy wholesale power, you can't serve a customer retail. That's the intent."<sup>92</sup> As drafted however, a CRES provider could be considered in breach of the Supplier Tariff with FirstEnergy for "default of any agreement with, or requirement of PJM."<sup>93</sup> However, Mr. Stein clarified on cross-examination that

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<sup>89</sup> The underlined portion of this passage is RESA's proposed edit. The remainder of the text is not currently in the supplier tariff, but is an addition proposed by FirstEnergy in this proceeding.

<sup>90</sup> Stein Direct at 12.

<sup>91</sup> Tr. at 1435.

<sup>92</sup> Tr. at 1436.

<sup>93</sup> Stein Direct, Attachment EBS-1 at 39.

FirstEnergy would not treat issues other than non-payment as an Event of Breach of the Supplier Agreement:

Q. And, however, if for some reason PJM did make you aware of that and it was unrelated to customers' ability to serve -- or I guess I should say unrelated to the CRES provider paying their bills, would you still find that as an event of breach under this supplier tariff at the retail level?

A. I would say unlikely not, but it sure would elicit a conversation as to what's going on with -- with the supplier to ensure they can meet their obligations under the tariff going forward.<sup>94</sup>

As the PJM requirements change from time-to-time, and many agreements and requirements provide a party an opportunity to cure the error, it would be an uneven and unjustified remedy to consider minor issues with PJM that are in the process of being cured as an Event of Breach of the Supplier Agreement that could allow FirstEnergy to terminate the Coordination Agreement with the Supplier. While RESA does not believe there is a need for FirstEnergy to intervene in enforcement of minor issues under PJM agreements, RESA does not object to FirstEnergy treating non-payment to PJM and FirstEnergy's receipt of such a default notice from PJM as an Event of Breach under the Supplier Agreement.

To reflect RESA's proposed change, RESA requests that the Commission apply the language edits reflected below to FirstEnergy's proposed language:

2. a Certified Supplier's default ~~of any agreement with, or requirement of, the with respect to any payment obligation to~~ Transmission Provider;

**F. The Commission Should Approve FirstEnergy's Rider NMB/NSPL Billing Proposal with a Few Modifications.**

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<sup>94</sup> Tr. at 1438.

The Commission should approve FirstEnergy’s proposal to utilize Network Service Peak Load (“NSPL”) for allocating and billing transmission costs to customers through Rider NMB.<sup>95</sup> Specifically, FirstEnergy proposes that beginning in April 2025, non-residential customers with an interval or AMI meter would have costs allocated and billed to them on the basis of an NSPL. As nonresidential customers obtain interval or AMI meters, they would then be moved from the current rate design to an NSPL-based rate. Because the outcome of the Rider NMB pilot is to allow participants to be billed for transmission service on an NSPL basis, FirstEnergy’s proposed modification to Rider NMB would achieve the outcome of the pilot. Accordingly, FirstEnergy proposes to terminate the pilot and move those participating customers to NSPL billing under Rider NMB. Moreover, FirstEnergy testified that the current pilot requires a lot of manual calculations and verifications that inject an inherent risk of human error in the monthly calculations. Further, FirstEnergy testified that the manual process is not conducive to expanding the pool of customers.

RESA believes this proposal is a good outcome. As RESA witness Rodriguez testified, “[r]etail billing for non-market-based services based on NSPL improves the alignment of costs with cost causers.”<sup>96</sup> Because “PJM assigns most transmission service costs based on NSPL demand, designing retail rates for these services that are also charged on NSPL would promote cost causation principles.”<sup>97</sup> “If markets do not adhere to cost causation principles, skewed market signals can occur at the retail level, which

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<sup>95</sup> Lawless Direct at 7-12.

<sup>96</sup> Rodrigues Direct at 6.

<sup>97</sup> Rodrigues Direct at 6.

contribute to inefficiencies.”<sup>98</sup> “[U]ltimately,” Mr. Rodriguez continued, retail customers will “pay the price of such inefficiencies (e.g., failing to reduce demand at times of system peak will generally require additional transmission investment to meet higher levels of peak demand).”<sup>99</sup> With ever increasing amounts of nonresidential customers having interval or AMI meters, and FirstEnergy’s inability to greatly expand access to NSPL billing under the pilot construct, “nonresidential accounts should not continue to be charged based on their monthly noncoincident demand measured under the tariff definition of Monthly Billing Demand.”<sup>100</sup> “By expanding access to NSPL billing for nonresidential customers as FirstEnergy proposes, the Commission would ensure that costs and benefits are properly allocated to the customer based on cost-causation principles.”<sup>101</sup>

The ultimate outcome will be price signals to nonresidential customers to curtail usage during periods of peak-demand, without the need for unreasonable and costly utility run programs that seek to achieve the same outcome (e.g. transparent price signals can achieve the same results as the demand reduction aspects of the EE/PDR program). As the auditor of Rider NMB noted, NSPL billing “directionally aligns with the ratemaking objective of cost causation by promoting accurate allocation of costs among participants” and “induces customers to respond to otherwise opaque and non-immediate price

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<sup>98</sup> Rodrigues Direct at 6.

<sup>99</sup> Rodrigues Direct at 6.

<sup>100</sup> Rodrigues Direct at 6.

<sup>101</sup> Rodrigues Direct at 6.

signals.”<sup>102</sup> The presence of transparent price signals that translate into cost savings, may foster the development of new market capacities for load management.<sup>103</sup>

Another benefit of FirstEnergy’s approach is that it achieves transparent price signals without introducing a new risk premium that would be borne by customers. “The costs that flow through Rider NMB are predominately related to Network Integration Transmission Service, or NITS. NITS is not tied to supply and demand fundamentals and transparent market outcomes.”<sup>104</sup> “In recent years, the ATSI zone NITS rate has increased dramatically, which FirstEnergy has identified as significantly being driven by replacing aging infrastructure at the end of its useful life.”<sup>105</sup> “The end-of-life driven NITS rate increases are accordingly untethered to market fundamentals such as demand or demand growth.”<sup>106</sup> “Another way that the NITS rate is detached from market fundamentals is that the NITS rate is updated each year based on FirstEnergy’s internal projection of costs with an after-the-fact true-up.”<sup>107</sup> “Comparing annual NSPL to annual changes in NITS rates identifies that there is no correlation let alone one that is market based.”<sup>108</sup> “If transmission costs, which are predominantly the non-hedgeable NITS costs, were made the responsibility of each SSO Supplier and CRES provider then the SSO

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<sup>102</sup> Rodrigues Direct at 7.

<sup>103</sup> Rodriguez Direct at 7.

<sup>104</sup> Rodriguez Direct at 7.

<sup>105</sup> Rodriguez Direct at 7.

<sup>106</sup> Rodriguez Direct at 7.

<sup>107</sup> Rodriguez Direct at 7.

<sup>108</sup> Rodriguez Direct at 7.

Supplier and CRES providers will include additional risk premium in offers given the uncertainty and unpredictable annual changes in NITS rates.”<sup>109</sup>

Staff witness Baas also testified on the risk premium issue agreeing with RESA’s conclusion. In response to a question as to why Staff did not adopt the Rider NMB auditor’s primary recommendation, Staff witness Baas testified that “[t]he primary recommendation was to eliminate NMB in totality. With discussion and review with Staff, we felt that there would be risk premiums added to the transmission cost if they were solely through CRESs. With that in mind, we wanted to keep the lowest cost possible for customers, so we went an alternate route.”<sup>110</sup>

While supporting FirstEnergy’s proposal overall, Staff witness Baas indicated that there were issues with the bill impacts provided in discovery supporting the proposal.<sup>111</sup> The bill impacts were flawed in that they developed rates as if all nonresidential customers were under the Rider NMB 1 rate (current methodology) or everyone was under the Rider NMB 2 (NSPL methodology) even though no rate schedule has 100% deployment of interval or AMI meters. The bill impacts were further flawed because they assumed each customer had an NSPL demand exactly equal to their monthly billing demand. However, a customer’s monthly billing demand will likely vary and can be greater or less than NSPL demand on any given month. In the aggregate, NSPL demand is generally much lower than NSPL demand as reflected in the following chart:<sup>112</sup>

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<sup>109</sup> Rodriguez Direct at 9.

<sup>110</sup> Tr. at 2470.

<sup>111</sup> Baas Direct at 10.

<sup>112</sup> OEG Ex. 4 (Staff DR 10 Attachment 2).



<b>Typical Bill Impacts</b>							
	<b>4/1/2023</b>	<b>NSPL</b>					
<b>OE</b>	<b>Current</b>	<b>Proposed</b>		<b>Demand</b>	<b>NSPL</b>	<b>% NSPL</b>	<b>Calculated %</b>
Rate GS	\$ 4.1913	\$ 6.1096		22,495,831	15,313,258	100.0%	68.1%
Rate GP	\$ 5.0926	\$ 6.1096		6,489,905	5,423,624	100.0%	83.6%
Rate GSU	\$ 4.2893	\$ 6.1096		2,349,908	1,525,178	100.0%	64.9%
Rate GT	\$ 5.2857	\$ 6.1096		9,868,439	7,070,327	100.0%	71.6%
<b>CEI</b>	<b>Current</b>	<b>Proposed</b>					
Rate GS	\$ 5.4978	\$ 6.1096		19,391,958	16,411,054	100.0%	84.6%
Rate GP	\$ 6.2020	\$ 6.1096		1,179,978	1,236,960	100.0%	104.8%
Rate GSU	\$ 6.2676	\$ 6.1096		7,727,718	7,352,155	100.0%	95.1%
Rate GT	\$ 3.6491	\$ 6.1096		7,145,997	2,293,137	100.0%	32.1%
<b>TE</b>	<b>Current</b>	<b>Proposed</b>					
Rate GS	\$ 4.2498	\$ 6.1096		6,648,318	3,861,748	100.0%	58.1%
Rate GP	\$ 5.0980	\$ 6.1096		2,806,669	3,794,404	100.0%	135.2%
Rate GSU	\$ 4.3287	\$ 6.1096		236,216	138,326	100.0%	58.6%
Rate GT	\$ 5.0831	\$ 6.1096		11,531,724	9,449,731	100.0%	81.9%

Due to the flawed bill impacts, Staff witness Baas proposed that FirstEnergy be required to prepare new bill impacts and work with Staff to undertake an additional review. Witness Baas indicated that she thought that this review could occur as part of the annual Rider NMB rate update next year for rates effective April 2025. Based on Staff's review of the updated bill impacts, Staff indicated that they might propose some transition mechanism, but at the time of the hearing did not know if a transition mechanism would be needed or what it might look like.

RESA supports Staff's request for an additional review. However, RESA recommends that the review begin well in advance of the annual Rider NMB update process next Winter so that all affected stakeholders have an opportunity to review and respond to any change in the implementation timeline proposed by FirstEnergy. Further, even with this additional review, the Commission should make clear in its order that the additional review is to address the implementation timeline and not revisit the structure of Rider NMB (e.g., whether it should be eliminated).

### **G. PUCO and OCC Assessments Should be Unbundled.**

The Commission should require that the portion of FirstEnergy's collection of PUCO and OCC assessment fees attributable to the SSO be properly allocated to the SSO. Currently, FirstEnergy collects these fees completely through distribution rates. Ohio law and Commission precedent require a portion be recovered on a bypassable basis.

Ohio law requires that costs to serve the SSO be borne by SSO customers. In applying this principle, the Ohio Supreme Court in *Elyria Foundry Co. v. PUC* found that it was unlawful to recover generation cost-components (fuel costs) through distribution rates.<sup>113</sup> Specific to the PUCO and OCC assessment fees, the Commission previously held it was appropriate to recover the portion allocable to the SSO in bypassable SSO rates. The Commission also held that an ESP is the appropriate proceeding to address the issue.<sup>114</sup>

RESA/IGS joint witness White testified that there is a direct link between FirstEnergy's electric default service revenue and the amount that FirstEnergy is assessed.<sup>115</sup> That is, the two assessments are allocated to public utilities on the basis of gross intrastate revenue, of which SSO revenue is a component. "Without an allocation to bypassable SSO rates, distribution rates that are greater than they should be, and the SSO price is lower than it should be."<sup>116</sup> In general, "subsidizing the SSO leads to less

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<sup>113</sup> *Elyria Foundry Co. v. PUC*, 114 Ohio St. 3d 305 at 315 (August 29, 2007).

<sup>114</sup> *In re the Dayton Power and Light Company*, Case No. 15-1830-EL-AIR, *et al.*, Opinion and Order, ¶ 31 (Sept. 26, 2018).

<sup>115</sup> Direct Testimony of Matthew White at p. 6, lines 3-5.

<sup>116</sup> White Direct at 5.

competition in the FirstEnergy service territory and fewer products being available to customers.”<sup>117</sup>

To effectuate the proper allocation, the relative ratio of SSO revenue to total gross intrastate revenue should be utilized to allocate the amounts current into distribution rates to a bypassable SSO rate.<sup>118</sup> An equal amount should then be credited to a distribution rider.<sup>119</sup> Furthermore, the total amount split between distribution rates and SSO rates should be updated based on the results of the upcoming distribution rate case.

#### **H. The Commission Should Approve Staff’s Proposed Modifications and Limitations Regarding FirstEnergy’s Spending on EV-Related Issues.**

FirstEnergy proposed to use \$16M of shareholder funds to EV related initiatives, including subsidizing the cost of EV chargers. The Commission should modify the proposal because the Commission lacks jurisdiction over EV charging and therefor has no authority to consider or approve the proposal. Commission Staff agreed and proposed modifications in their testimony.

The Commission has jurisdiction over public utilities. An electric light company is a public utility subject to the Commission’s jurisdiction when in the business of supplying electricity for light, heat, or power purposes to consumers.<sup>120</sup> Applying this statutory definition to EV charging, the Commission held that EV charging is outside of its jurisdiction.<sup>121</sup> The Commission further held that these sorts of “behind-the-meter”

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> R.C. 4905.03 (C).

<sup>121</sup> *In re The Commission’s Investigation into Electric Vehicle Charging Service in the State*, Finding and Oder, Case No. 20-434-EL-COI ¶27 (July 1, 2020).

services are meant to operate within the competitive marketplace and outside of their statutory jurisdiction.<sup>122</sup>

Staff agreed that the Commission lacked the necessary jurisdiction to consider and approve FirstEnergy's EV related proposal and proposed modifications. Specifically, Staff witness Schaefer testified that the Commission should limit FirstEnergy's proposed EV activities "to those directly related to providing distribution service, e.g., customer education about rate options for EVSE site hosts, shareholder funded credits to encourage charging during times of low localized distribution system demand, or improvements to the siting and interconnection process for EVSE."<sup>123</sup> RESA supports limiting FirstEnergy's spending on EV-related issues to only those directly related to providing distribution service, which RESA believes at this time should be limited to educating customers about rate offerings or improvement of other internal processes. Alternatively, the Commission could completely refuse to consider or take into account the shareholder funded proposal as part of this proceeding.

## II. CONCLUSION

For the reasons described herein, the Commission should modify and approve FirstEnergy's ESP application.

Respectfully submitted,

*/s/ Matthew R. Pritchard*

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<sup>122</sup> *In re The Commission's Investigation into Electric Vehicle Charging Service in the State*, Finding and Oder, Case No. 20-434-EL-COI ¶27 (July 1, 2020).

<sup>123</sup> Schaefer Direct at 6.

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## **CERTIFICATE OF SERVICE**

In accordance with Ohio Adm.Code 4901-1-05, the Commission's e-filing system will electronically serve notice of the filing of this document upon the interested parties, this 19th day of January, 2024. The following parties were provided by electronic mail a copy of this document:

*/s/ Matthew R. Pritchard*  
**Matthew R. Pritchard**

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