



OFFICE OF THE SECRETARY OF STATE

ALEXIS GIANNOULIAS ● Secretary of State

October 24, 2023

Ira M. Levin
Jolisa J. Warmack
Burke, Warren, MacKay & Serritella
330 N. Wabash Ave., 21st Floor
Chicago, IL 60611

John W. Forehand
Kurkin Forehand Brandes, LLP
1089 W. Morse Blvd., Suite D
Winter Park, FL 32789

Louis S Chronowski
Brandon C. Prosansky
Barack Ferrazzano Kirschbaum & Nagelberg LLP.
200 West Madison Street Suite 3900

Christopher A. Mair
Greenberg Traurig, LLP.
77 West Wacker Drive, Suite 3100
Chicago, IL 60601

RE: File 337-22

To Whom It May Concern:

Enclosed please find the Recommended Decision of the Hearing Officer, Mark Kuchler relating to the above captioned files.

Pursuant to Statute you have ten (10) calendar days within receipt of the Recommended Decision to file exceptions and present a brief to the Board if you so choose. If you do, same should be filed with this office. Please send the original and one (1) copy.

If no exceptions are submitted within the ten (10) day period, the matter will be submitted to the Board which will then issue its final Order.

Respectfully,

A handwritten signature in black ink that reads "Toyéal S. Rice".

Toyéal S. Rice
MVRB Secretary
Administrative Hearings/Room # 200 Howlett Building
Springfield, IL 62756

CERTIFICATE OF MAILING

The undersigned, an employee of the Secretary of State, of the State of Illinois, hereby certifies that on the 24th day of October, A.D., 2023, I deposited in the United States Mail at the Capitol Post Office, Springfield, Illinois, a true and correct copy of the foregoing recommended decision, in a sealed envelope with postage prepaid, addressed to each of the below named persons at his/her address as shown by the records of the Office of the Secretary of State, pursuant to Sections 30 and 31 of the Illinois Motor Vehicle Franchise Act.



Clerk of the Illinois Motor Vehicle Review Board

Mailed certified to:

Ira M. Levin
Jolisa J. Warmack
Burke, Warren, MacKay & Serritella
330 N. Wabash Ave., 21st Floor
Chicago, IL 60611

John W. Forehand
Kurkin Forehand Brandes, LLP
1089 w. Morse Blvd., Suite D
Winter Park, FL 32789

Louis S Chronowski
Brandon C. Prosansky
Barack Ferrazzano Kirschbaum & Nagelberg LLP.
200 West Madison Street Suite 3900

Christopher A. Mair
Greenberg Traurig, LLP.
77 West Wacker Drive, Suite 3100

Steven M. Kelso
Green Traurig, LLP.
1144 15th Street, Suite 3300
Denver, CO 80202

James Powell Feeney
Robert H. Ellis
Dykema Gossett PLLC
39577 Woodward Ave, Suite 300
Bloomfield Hills, MI 48304

Elizabeth A. McNellie
Baker & Hostetler, LLP
200 Civic Center Dr, Suite 1200
Columbus, Ohio 43215

Sean Marotta
Hogen Lovells US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004

E-Mailed to:

All MVRB Member

Mark Kuchler

Dean Maragos

Ted Gibbs

Peter Gonzalez

**IN THE STATE OF ILLINOIS
MOTOR VEHICLE REVIEW BOARD**

AL PIEMONTE FORD SALES, INC.)	
d/b/a AL PIEMONTE FORD et al.,)	
)	
Complainants,)	
)	MVRB No. 337-22
v.)	
)	Hearing Officer Mark A. Kuchler
FORD MOTOR COMPANY,)	
)	
Respondent.)	

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
RECOMMENDED DECISION**

This matter coming before the Motor Vehicle Review Board and its duly appointed hearing officer, Mark A. Kuchler, **IT IS HEREBY RECOMMENDED** as follows:

INTRODUCTION

1. Complainants are twenty-six (26) new motor vehicle dealers operating Ford-franchised dealerships located in Illinois (collectively "*Complainants*"). The following dealers joined this protest as Complainants: Al Piemonte Ford Sales, Inc. d/b/a Al Piemonte Ford ("*Al Piemonte Ford*"); Anderson Dealerships, Inc., d/b/a Anderson's Rock River Ford ("*Rock River Ford*"); Anderson Ford of Clinton, Inc., d/b/a Anderson Ford of Clinton ("*Ford of Clinton*"); Auffenberg Ford, Inc. d/b/a Auffenberg Ford Belleville ("*Auffenberg Bellville*"); Auffenberg Ford North, Inc. d/b/a Auffenberg Ford North ("*Auffenberg North*"); Buss Ford Sales, LLC d/b/a Buss Ford ("*Buss Ford*"); Dan Pilson Auto Center, Inc. d/b/a Pilson Ford Lincoln ("*Pilson Ford*"); Diepholz Auto Group d/b/a Northside Ford ("*Northside Ford*"); Fraternal Enterprises L.P. d/b/a Bredemann Ford ("*Bredemann Ford*"); Freeway Ford Truck Sales, Inc. d/b/a Freeway Ford ("*Freeway Ford*"); Gillespie Automotive LLC d/b/a Gillespie Ford ("*Gillespie Ford*"); Greenway Motors, LLC d/b/a Greenway Motors Ford ("*Greenway Ford*"); Haggerty

Ford, Inc. d/b/a Haggerty Ford ("*Haggerty Ford*"); Highland Park Ford Lincoln, Inc. d/b/a Highland Park Ford ("*Highland Park Ford*"); Jack Schmitt Ford, Inc. d/b/a Jack Schmitt Ford ("*Jack Schmitt Ford*"); Jansen Ford of Breese, LLC d/b/a Jansen Ford ("*Jansen Ford*"); Mangold Ford, Inc. d/b/a Mangold Ford ("*Mangold Ford*"); Prescott Brothers Ford, Inc. d/b/a Prescott Brothers Ford of Rochelle ("*Ford of Rochelle*"); Prescott Brothers Ford of Princeton, Inc. d/b/a Prescott Brothers Ford of Princeton ("*Ford of Princeton*"); Riverview Ford, Inc. d/b/a Riverview Ford ("*Riverview Ford*"); Ron Tirapelli Ford, Inc. d/b/a Ron Tirapelli Ford ("*Tirapelli Ford*"); Terry's Ford/Lincoln-Mercury Of Peotone, Inc. d/b/a Terry's Ford Of Peotone ("*Ford of Peotone*"); United Auto Sales, Inc. d/b/a Iron Ford ("*Iron Ford*"); Watseka Ford Lincoln, Inc. ("*Watsseka Ford*"); Bill Kay Ford, Inc. ("*Bill Kay Ford*"); and Kunes Country Ford Of Antioch, Inc. d/b/a Kunes Ford Of Antioch ("*Ford of Antioch*"). The protest was originally filed by twenty-seven dealers. By unopposed motion filed on December 15, 2022, two additional dealers, Bill Kay Ford, Inc. and Kunes of Antioch, joined this protest, bringing the total to twenty-nine dealers. Since the protest was filed and prior to the hearing, three dealers, Morrow Brothers, Inc., Court Street Ford, Inc., and Marion Ford, Inc. voluntarily dismissed their claims against Ford without objection, leaving twenty-six (26) dealers protesting in this action.

2. Respondent is Ford Motor Company ("*Ford*"), an Illinois licensed motor vehicle manufacturer and distributor ("*OEM*"). [Ex. R-27.] In the United States, Ford sells its vehicles through a network of franchised automobile dealers. [*Id.*; May 22, 2023 Tr., 28:7–13; May 19, 2023 Tr., 248:7–15.] At the time of the Hearing, Ford had 2,968 dealers in the United States. [May 22, 2023 Tr., 101:14–15.]

3. On December 2, 2022, Complainants commenced this action by filing a Notice of Protest with the Illinois Motor Vehicle Review Board (the "*Board*"), an administrative body established by the Illinois Secretary of State pursuant to the provisions of the Illinois Motor Vehicle Franchise Act, 815 ILCS 710/1 *et seq.* ("*IMVFA*"). The Notice of Protest challenged

Ford's "Model e EV (Electric Vehicle) Certification Program" (hereinafter, "*Model e Program*") alleging violations of Sections 4(b), 4(c)(1), 4(c-5), 4(d)(1), 4(d)(3), 4(d)(4), 4(d)(5) and 4(d)(6) of the Motor Vehicle Franchise Act. 815 ILCS 710 The Complainants withdrew claims under Sections 4(d)(3) and 4(d)(5). Accordingly, those claims are not addressed. Generally speaking, the Dealers contend that the Model e Program violates the Act because it supposedly compels them to purchase unneeded charging equipment, training, software, and adherence to unreasonable practices in the sale and pricing of electric vehicles.

4. In the Protest, Complainants allege that in or around September, 2022, Ford advised them, and all other Ford dealers throughout the country, that each dealer would need to enroll in Model e to continue to sell and service Ford Electric Vehicles ("*EVs*") after December 31, 2023. [Protest at 3-4.] This included models of Ford EVs that Complainants were already selling and servicing, such as the Mustang Mach-E ("*Mach-e*"), the Ford F-150 Lightning ("*Lightning*") and the e-Transit Cargo Van ("*e-Transit*"), as well as new EVs that Ford may produce. [*Id.* at 7-8.]

5. On May 17, 2023, the parties commenced a Hearing before the Hearing Officer. Due to the availability of witnesses and counsel, the Hearing ran on consecutive and non-consecutive dates throughout the months of May, June, July and August, 2023. Eighteen days of Hearing were held, and one hundred and forty-seven (147) exhibits were introduced into evidence.

6. The Hearing Officer heard testimony from twenty-four (24) witnesses for Complainants, including the Dealer Principal or a senior manager for each of the Complainants. In addition, Complainants presented testimony from expert witness, Ted Stockton of the Fontana Group, an economic consulting firm that focuses on matters affecting the automotive industry.

7. The credibility of the witnesses of both parties has been considered in reaching the following Findings of Fact. Generally, and unless specifically stated, the Hearing Officer found the witness to be credible.

8. Complainants further allege that, as part of Model e, Ford is requiring them to install, by December 31, 2023, several expensive charging stations (including three high-powered direct current (“DC”) fast chargers) at their dealerships, at each dealer’s sole cost and expense. [*Id.*] Complainants allege that Ford had no expectation that Complainants would actually see a return on these charging investments from EV sales during the three-year life of Model e. [*Id.*] In support of this, Complainants allege that Ford provided them with proforma financial statements reflecting they would all incur substantial financial losses as a result of the program. [*Id.*] Complainants allege that the charging requirements are unnecessary to adequately sell and service EVs, particularly in their market areas, where EV demand is modest or minimal. [*Id.* at 4-5.] Complainants allege that the charging requirements are the same for all Ford dealers throughout the country, regardless of the strength or needs of the EV market in that dealer’s geography. [*Id.*]

9. Complainants also allege that, as part of Model e, Ford is requiring them to conduct unnecessary training on EV products at a cost of \$40,000 per year for each Complainant, purchase an unnecessary/redundant software product from Ford called “Guest XP” at a cost of \$30,000 per year, and to conduct all sales of EV products through Ford’s own e-commerce website, Ford.com, which is fundamentally different than how Complainants had previously acquired Ford vehicles at wholesale and sold them to retail consumers. [*Id.* at 5-6.] Complainants allege that under Model e, Ford is going to restrict the amount of EV inventory that dealers elect to carry on their lots. Again, Complainants alleged that if they did not enroll in Model e and adhere to these and other

terms, their ability to sell Ford EVs would be terminated after 2023 for at least three years. [*Id.* at 3.]

10. The Respondent, Ford, presented six (6) witnesses: Michael O'Brien, Ford's Director of Sales and Network Development—Model e, Heidi Schaffer, Ford's (then) Director of Sales—Model e, Dr. Marin Gjaja, Ford's Chief Customer Officer—Model e, Bradford Wilson, a Ford Network Development Manager, and expert witnesses, Brian Gaspardo of O'Neill & Gaspardo, LLC and David Smith of Analysis Group, Inc.

11. The credibility of the witnesses of both parties has been considered in reaching the following Findings of Fact. Generally, and unless specifically stated, the Hearing Officer found the witness to be credible.

12. The Respondent witnesses testified that the electric vehicle market is growing very, very fast. May 19 Tr. 39:16. The Respondents further stated that consumers that drive electric vehicles like their quieter operation, their enhanced performance, and their better acceleration. *Id.* at 45:24-46. There is also regulatory pressure on both the demand and supply sides of electric vehicles. *Id.* at 43:6-11. The Environmental Protection Agency is mandating increased fuel efficiency for ICE vehicles that will raise the cost of those vehicles significantly, making electric vehicles more-attractive to consumers. *Id.* at 43:15-44:4. The recent Inflation Reduction Act, too, also provides incentives and suppliers to participate in the electric-vehicle market. *Id.* at 44:5-7.

13. Ford further alleges that it faces significant challenges in building a successful electric-vehicle business. Some are due to the broader electric-vehicle market. Consumers have "charge anxiety"—a fear that a safe, reliable, and fast chargers will not be available when their vehicles need it. Some challenges are unique to Ford. Consumers give Ford average-to-below-

average marks in areas like purchasing, financing, and owner experience, making the company “marginally competitive at best.” May 19 Tr. 101:7-9; *see also id.* at 99:17-100:19. And Ford allegedly has \$2,000 worth of additional cost in every vehicle that it needs to cut down in order to stay competitive with other electric-vehicle manufacturers like Tesla. *See id.* at 84:16-85:13.

14. Tesla is currently Ford’s biggest competitor in the electric vehicle marketplace. Tesla has 65% of market share, May 18 Tr. 21:23-22:3, May 19 Tr. 327:22-24, and its Model Y vehicle is a direct competitor with the Mustang Mach-E, May 18 Tr. 28:3-11. Dealers, too, see Tesla as Ford’s competitor in the electric-vehicle market. *See* May 24 Tr. 100:15-18 (Jack Schmitt Ford); June 5 Tr. 287:23-288:2 (Bredemann Ford). Tesla opts for an online-driven process, May 18 Tr. 21:16-22:7, May 19 Tr. 254:8-9, and direct-to-consumer sales in the United States with minimal inventory, *id.* at 72:12-19. Ford, by contrast, relies on a largely in-person shopping experience with dealerships that are used to keeping extensive inventory on the lot, which can result in increasing costs on both Ford and the dealership network. *See id.* at 72:17-72:2.

15. Ford acknowledges that its dealer network is its competitive advantage over Tesla. May 18 Tr. 22:3-7; *id.* at 25:14-18; *id.* at 27:7-11; May 19 Tr. 88:4-89:1-12. While Tesla must rely on mobile vans for service or haul vehicles to centralized service centers, Ford has a nationwide network of thousands of dealers that can provide convenient, local support and service for consumers. May 22 Tr. 28:16-29:4

16. Ford introduced evidence that it is committed to spending \$50 billion in capital to work on electric vehicles. May 19 Tr. 57:7-9. Specifically, Ford has begun construction on Blue Oval City, a complex in Tennessee that will consist of both an assembly plant and a battery-production plant. *Id.* at 57:10-58:9. Ford has also invested in a nearby Kentucky battery plant, with the \$11 billion in Blue Oval City and the Kentucky battery plant together marking “the single

biggest investment by an automaker ever.” *Id.* at 57:17-21. Ford is also investing in the Rouge Electric Vehicle Center, adjacent to its Dearborn truck plant, and has announced expansion around the world, which will allow Ford to eventually produce 200,000 Mustang Mach-E and 150,000 F-150 Lightning vehicles a year. *Id.* at 59:7-60:6. By 2026, Ford’s goal is to produce 2 million electric vehicles a year. *Id.* at 60:19-21.

17. On March 2, 2022, Ford publicly announced that it was splitting the company into three separate business units. [May 22, 2023 Tr., 25:8–11.] The “Ford Blue” business unit would operate Ford’s traditional ICE retail business; “Ford Pro” would operate Ford’s commercial and government fleet business; and “Ford Model e” would operate Ford’s EV retail business. [May 18, 2023 Tr., 61:19-62:8; May 19, 2023 Tr., 36:5–38:8.]

18. Ford explained that the Model e Program “is designed to help ensure that Ford and its Dealers can meet guest expectations and demands in an increasingly dynamic and competitive EV marketplace,” and is “designed and developed with a guest-first mentality so that guests receive an unparalleled purchase and ownership experience.” Ex. R-179 at 1. The Respondents’ witnesses testified that the Model e Program rests on five pillars:

1. Training and specialized teams, meaning that certified dealers “will have knowledgeable sales and service personnel to increase guest confidence and build a trusted relationship with guests.” *Id.* at 2.
2. Charging, meaning that participating dealers will “charge electric vehicles for guests while also providing public-charging offerings.” *Id.*
3. Single e-Commerce system with transparent, non-negotiated pricing.” *Id.*
4. Excellence in the physical ownership experience, meaning that

participating dealers will “build confidence and excitement through the entire ownership journey by empowering guests with choice while providing support and service on their terms.” *Id.*

5. Breakthrough in the digital ownership experience, meaning that Ford and its participating dealers will “support our guests trial, purchase, adoption, usage, and upgrade of digital and software services and products.” *Id.*

19. The Model e Program requires existing dealers to become either a “Certified Elite” or a “Certified” dealer or to elect not to be part of the Model e Program for three years. *See id.* at 1; Ex. R-180 at 1; *see also* Ex. R-179 at 4. Certified Elite dealers need to install two Level 3 fast chargers at their dealership, one of which is public-facing, by January 1, 2024. Ex. R-179 at 4. Certified Elite dealers will then be required to install a third fast charger for new vehicle delivery by January 1, 2026. *Id.*

20. Certified Elite dealers will also be required to participate in the EV Ford Guest Experience training curriculum, which involves both in-dealership, online, and offsite training. Ex. R-179 at 6. The annual training cost is \$40,000 for Certified Elite dealers and \$15,000 for Certified dealers. May 19 Tr. 48:9-11, Ford witnesses testified that the training addresses that dealers “have a lot of work to do” with respect to their electric vehicle knowledge, even though “[e]very dealer is different in terms of where they’re at on EVs and their journey.” May 18 Tr. 47:24-48:3.

21. Certified Elite dealers will also be required to offer consumers non-negotiated pricing using the Ford.com eCommerce Platform. Ex. R-179 at 7.

22. The Respondent also testified that Certified Elite dealers will be required to use

Ford's service scheduling application, "GuestXP" Ford witnesses testified that GuestXP is essential to have seamless integration between Ford and its dealers on the service experience to give Ford "visibility into the service world" where it "can see what's happening with these vehicles." Aug. 10 Tr. 190:3-5. And a seamless experience ultimately enhances the consumer experience because, for instance, if a customer contacts Ford to discuss a service issue, GuestXP allows that issue to be tracked for its dealers, whereas existing third-party programs do not. *See id.* at 190:21-191:8.

23. Certified dealers will follow standards similar to Certified Elite dealers, however, one difference is that they "only" need to install one public facing Level 3 charger, not three. *See Ex. R-180* at 5-10.

24. A Certified Elite dealer can offer a full range of electric vehicle sales and warranty service to the public. *See Ex. R-179* at 3. Certified dealers, by contrast, are severely limited regarding who they can sell to and "focus[] on post-purchase ownership and charging with limited sales capabilities." *See Ex. R-180* at 4. Certified dealers can sell "build-to-order" Model e vehicles to dealership employees and to loyal customers, which the Model e Program defines as a member of a household that has purchased or leased at least two new Ford vehicles from the Certified dealer within the last 7 years. *Id.* at 2.

25. Dealers that do not enroll in the Model e Program will not be able to sell or service electric vehicles including the vehicles that they have or are currently selling. *See Ex. R-179* at 1.

26. Dealers that elect to participate in the Model e Program may drop out at any time for any reason. *See May 22 Tr.* 114:9-15.

27. After Hearing, the parties presented proposed findings of fact, conclusions of law, and post-hearing briefs, and the Hearing Officer held oral closing arguments on October 10, 2023. The Hearing having now concluded, the Hearing Officer submits the following proposed decision.

FINDINGS OF FACT

A. The Sales and Service Agreement

28. The Complainants sell and service Ford-manufactured vehicles under the terms of a “Sales and Service Agreement” (“SSA”) between the dealer and Ford. [Exs. R-27; R-68; R-69; R-70; R-71; R-72; R-73; R-75; R-76; R-77; R-78; R-79; R-80; R-81; R-82; R-83; R-84; R-94; R-85; R-86; R-87; R-88; R-89; R-90; R-91; R-92.]

29. Each of the SSAs incorporate a document, called the “Ford Sales and Service Agreement Standard Provisions,” which sets forth standard terms and conditions between Ford and its dealers. [*Id.*, at Standard Provisions pg. 1]

30. The SSA authorizes each of the Complainants to sell all “Company Products.” [*Id.* at Preamble ¶ 1.] Company Products are defined in the agreement as:

(1) new passenger cars, (2) new trucks and chassis, excluding all trucks and chassis of 850 or higher designations, and (3) parts and accessories therefor, as from time to time are offered for sale by [Ford] to all authorized Ford dealers as such for resale, plus such other products as may be offered for sale by [Ford] to the Dealer from time to time.

[*Id.* at Standard Provisions ¶ 1(a).]

B. Ford Electric Vehicles and Vehicle Charging.

31. Although many of Ford’s new passenger cars and trucks use a traditional, gas-powered internal combustion engine (known as an “ICE” vehicle), Ford also manufactures EVs. Ford defines an EV as a vehicle that derives propulsion from electric energy stored in a battery.

[C-1 at 1; C-3, n.1.] Battery Electric Vehicles (“*BEVs*”), *i.e.*, vehicles that derive all of their propulsion energy from an electric battery, are EVs under Ford’s programs. [*Id.*]

32. Ford witnesses acknowledged that the SSA covers EV sales and service operations and, further, that EVs are “Company Products” under the SSA. [May 22, 2023 Tr., 168:19–169:10; 171:6–11.] Dealers are expected to meet the terms and conditions of the SSA with respect to the sale and servicing of EV products. [*Id.* at 169:3–10.]

33. Unlike ICE vehicles, BEVs need to be charged. How quickly a vehicle’s battery charges depends on several factors, but primarily the size or capacity of the battery and the type of charger being used. [May 19, 2023 Tr., 143:1-14.]

34. There are at least three categories of chargers involved in Ford’s EV programs, with a further degree of variability within each category. The most basic level of chargers under Ford’s EV programs are essentially specialized power cords that are plugged into high-voltage NEMA 14-50 wall outlets, which pull alternating current (“*AC*”) electricity directly through the outlet into the vehicle, albeit at a higher voltage (240v) than a standard 120v wall outlet. [Ex. R-7, at 17.]

35. The next level of chargers are known as “Level 2” chargers. [May 22, 2023 Tr., 73:19-76:12.] Level 2 chargers also rely on AC power, but use specialized equipment to do so at a much higher amperage and kilowatt output than lower level chargers. [R-5.] The cost of a Level 2 charger can be several thousand dollars. [June 12, 2023 Tr., 241:9-242:1.] Level 2 chargers can have different levels of amperages and kilowatt outputs, which result in differing charge times. [C-12, pg. 3.] The more powerful the amperage and kilowatt output, the quicker the charge. [*Id.*] Level 2 chargers can be purchased for at home charging and are also often found at various retail and public locations. [Aug. 12, 2023 Tr., at 211:10 – 12.]

36. Ford's documents suggest that Level 2 chargers are "[i]deal for new vehicle delivery, service, and customer parking areas," at Ford dealerships. [R-5.] At the Hearing, however, Ford witnesses testified that customers won't wait overnight to take a test drive on a demonstrator vehicle. *See Tr.*, at 74:24-75:1-11 (attempting to explain why existing Level 2 chargers at dealerships will not meet guest expectations). However, no witness testified that any dealer has yet to have a problem charging vehicles nor why, in the future, a level 2 charger will be insufficient for maintaining cars for test drives. In fact, many Dealers testified that they have never had a problem charging vehicles for delivery to customers or for taking test drives.

37. The third type of charger is called a "Level 3" charger or sometimes, simply a "DC fast charger." Unlike the NEMA and Level 2 chargers, Level 3 chargers use direct current ("DC") electricity to deliver very high amperage and kilowatt outputs to a vehicle. A DC fast charger can charge most EVs to 80% capacity in under an hour and, depending on the level of kilowatt output, even a matter of minutes. [June 5, 2023 Tr., 38:14-39:9.] Whereas it takes two hours for a Level 2 charger to add 58 miles of range to a Mustang Mach-E, a Level 3 charger can add charge "much faster." May 22 Tr. 74:5-23.

38. Level 3 chargers are substantially more expensive than Level 2 chargers, often costing upwards of \$80,000 for a single charger alone, without installation costs, which are often more expensive. [C-11, at 4.] Because of their powerful output, Level 3 DC fast chargers also often require substantial electrical upgrades and additional infrastructure to install, particularly for older construction. [7/18 Tr. at 56:13 – 16; 6/7 Tr. at 189:8-11.]

39. While it is without dispute that Level 3 chargers are substantially faster than Level 2 chargers, Ford failed to introduce evidence that supports its conclusion that two or three Level 3 charges are necessary to sell or service Ford vehicles.

C. The Next-Gen EV Certification Agreement.

1. In 2020, Ford implemented the “Next-Gen Electric Vehicle Certification Agreement” (hereinafter, “*Next-Gen*”) in connection with new models of EVs that Ford was introducing, including the Mach-e and Lightning. [May 22, 2023 Tr., 91:18–92:4; Ex. C-1.] Dealers were required to agree to the terms of Next-Gen in order to sell and service new Ford EVs being manufactured by Ford. [May 19, 2023 Tr., 119:16–24; 161:10–19.]

2. Each of the Complainants enrolled in Next-Gen at some point in time between 2020 and 2022. [May 24, 2023 Tr. 21:15–17, 188:2–4; June 5, 2023 Tr., 33:8–10, 114:12–21, 238:18–23; June 6, 2023 Tr., 19–22:4, 129:24–130:1, 219:15–16; June 7, 2023 Tr., 13:16–14:5, 106:19–23, 185:17–19; June 12, 2023 Tr., 19:14–16, 148:2–3, 226:18–19; June 13, 2023 Tr., 19:22–20:6, 82:22–83:1, 210:19–21; June 14, 2023 Tr., 13:6–8, 111:16–18, 223:6–11; June 15, 2023 Tr., 17:3–8, 69:3–5, 216:21–217:3; July 18, 2023 Tr., 18:14–16; R. 30, 42–67.] Each of the Complainants is currently authorized by Ford to sell and service all EVs that Ford currently manufactures, including the Mach-E, the Lightning, and the E-Transit, under the terms of Next-Gen. [May 24, 2023 Tr., 21:15–22:15, 186:11–188:4; June 5, 2023 Tr., 32:6–33:10, 114:8–21, 238:5–23; June 6, 2023 Tr., 82:1–83:1, 129:7–130:1, 219:8–16; June 7, 2023 Tr., 13:10–14:5, 106:1–106:23; 185:9–19; June 12, 2023 Tr., 18:4–19:13; 147:18–148:4, 226:18–228:19; June 13, 2023 Tr., 19:10–20:6, 82:1–83:11, 210:19–211:7; June 14, 2023 Tr., 12:17–13:14, 111:9–112:3, 222:11–223:11; June 15, 2023 Tr., 16:14–17:8, 68:7–69:12, 213:10–217:5; July 18 2023 Tr., 16:19–18:13.]

3. Next-Gen also authorizes Complainants to sell future EVs that Ford produces. To enroll in Next-Gen, Complainants were required to agree to the terms and conditions of a document called the “Next-Gen Ford Electric Vehicle Certification Agreement” (hereinafter, the “*Next-Gen Agreement*”). [Ex. C-1.] The Next-Gen Agreement provides that dealers who enter into the

agreement are then authorized to sell and service “Ford Electric Vehicles.” [*Id.* at 1.] The Next-Gen Agreement defines “Ford Electric Vehicle” as “a Ford branded vehicle that is factory configured to have at least some vehicle propulsion energy derived from batteries capable of being recharged from an external electrical power supply and include [sic] both Ford Battery Electric (BEV) and Ford Plug-in Electric (PHEV) vehicles.” [*Id.*]

4. Under Next-Gen Agreement, Dealers were required to install only two Level 2 chargers at the dealership (one in service and one in sales), purchase special tools and equipment for servicing EVs, and conduct training of dealership staff on EVs. [*See* C-1]. Dealers testified that their cost of complying with Next-Gen’s requirements for chargers and special tools and equipment was approximately \$30,000 to \$60,000. [5/24 Tr., 30:7–12, 190:16–191:6; 6/5 Tr., 33:23–34:4, 114:22–115:2, 238:24–239:16; 6/6 Tr., 20:20–211, 130:3–7, 219:22–220:12; 6/7 Tr., 13:16–14:5, 107:13–17; 6/12 Tr., 20:1–3, 148:5–20, 227:14–17; 6/13 Tr., 20:9–20, 83:12–15, 211:12–19; 6/14 Tr., 13:15–20, 112:4–7, 223:18–22; 6/15 Tr., 17:9–14, 69:6–7, 216:21–217:11.]

5. The Next-Gen Agreement remained in effect perpetually “from the date of its execution.” [Ex. C-1, at 6.] Ford reserved the right to terminate the Next-Gen Agreement on 90-days’ notice and to unilaterally make changes to the Agreement at any time. [*Id.*] A dealer that is not in compliance with the Next-Gen Agreement could be suspended or terminated. [*Id.*]

6. In November 2021, Ford instructed dealers in an “Electronic Field Communication” (“*EFC*”) that “[f]ailure to become EV Certified [under Next-Gen] may *jeopardize* a dealer’s ability to fulfill its responsibilities to Ford under the Ford Sales and Service Agreement.” [Ex. C-22, pg. 8; May 22, 2023 Tr., 179:1-180:25; May 18, 2023 Tr., 72:20–74:16.] (emphasis added)

7. It is undisputed that none of the Complainants filed a protest regarding Next-Gen

when they were required to enroll to sell EVs.

8. With respect to training, under Next-Gen, Ford provided training to dealers through its “STARS” online training platform. [7/17 Tr., 20:3–13.] Dealership personnel are required to log into the program and complete the online classes to become certified in EVs sales and service. [6/6 Tr., 21:7–23:5.] STARS training is the same platform Ford uses to train dealership personnel on non-EV products, including ICE vehicles. [*Id.*] Dealers already pay Ford for STARS training, which ranges from approximately \$600 - \$1,200 per month, depending on the dealer, but this cost includes training on both ICE and EV products, as well as other aspects of dealership operations. [See 6/6 Tr., 22:17–23, 220:20–22; 6/7 Tr., 14:12–15:11; 6/13 Tr., 216:14–217:6; 6/14 Tr., 14:11–24, 113:8–24, 223:23–224:12.] Dealers do send service technicians to off-site live training classes conducted by Ford, although the training sites have all been within a few hours’ drive of the dealership and there does not appear to be any substantial additional cost associated with this live training. [5/24 Tr., 25:4–20, 250:1–15.] Ford also provides some live in-dealership training on its products, again, without any additional cost to dealers. [6/6 Tr., 21:7–23:5.]

9. Each of the Complainants in this case testified that the EV certification standards and training under Next-Gen are sufficient to meet the dealer’s need for EV service, training and charging. [May 24, 2023 Tr., 34:18–436:5, 191:10–193:11; June 5, 2023 Tr., 36:21–37:19, 116:9–118:7, 239:2–241:22; June 6, 2023 Tr., 26:19–27:24, 132:13–133:15, 221:3–223:15; June 7, 2023 Tr., 15:15–17:19, 108:12–16, 111:6–113:6, 188:3–189:17, June 12, 2023 22:5–23:1, 149:4–151:22, 226:18–228:10; June 13, 2023 Tr., 21:23–24:13, 85:1–86:12, 217:15–221:18; June 14, 2023 Tr., 15:1–20, 113:21–114:18, 230:16–232:12; June 15, 2023 Tr., 18:7–21:3, 71:8–72:19, 250:12–251:7; July 18, 2023 Tr., 20:3–23:21.] [*See id.*] Many dealers are currently selling and servicing EVs, and none of them reported any instances where a dealership employee lacked

knowledge or training about an EV product. [*See id.*] For its part, Ford did not provide any contrary evidence, either in its case in chief or in rebuttal, that any of the Complainants were deficient in terms of expected EV sales, EV training, EV service, or EV charging, under the existing requirements of Next-Gen. While Ford did present evidence that customers give Ford average to below average marks in areas relating to dealer interactions, none of the evidence specifically pertained to the Complainants.

10. Ford presented evidence that consumers were frustrated by the time it took to negotiate a price with a dealer; negotiations over 30 minutes were associated with negative “net promoter” scores that Ford uses to measure consumer satisfaction. May 19 Tr. 102:11-103:8. Indeed, Ford’s overall net promoter score for the sales process is a “47- or 57-point gap,” meaning that customers are less likely to recommend Ford and a dealer to others. May 18 Tr. 37:16-38:8. And the negatives “can really hurt your brand,” May 19 Tr. 136:18-21, because they represent “detractors who might go online and post nasty things about your brand,” *id.* at 99:5-7. Again, Ford failed to introduce evidence that specifically pertained to the Complainants.

11. EVs are included in Ford’s evaluation of “dealer performance,” “dealer effectiveness,” “sales effectiveness,” or “sales efficiency.” [May 22, 2023 Tr., 169:21-170:5.] Ford did not present evidence that any of the Complainants were lacking in those performance criteria with respect to EVs in their market areas.

12. Although each of the Complainants’ dealerships are evaluated for customer satisfaction, none of the Complainants are aware of any instances where their dealerships have been negatively evaluated by a customer for lack of knowledge about EV products, inability to service EVs, or a lack of adequate charging facilities. [May 24, 2023 Tr., 38:20–39:13, 196:12–197:10; June 5, 2023 40:19–41:20, 121:6–21, 254:20–256:6; June 6, 2023 Tr., 35:7–36:19,

137:23–138:18, 221:3–223:21; June 7, 2023 Tr., 22:5–24; 114:1–24; 197:20–198:21; June 12, 2023 Tr., 24:19–25:20, 156:21–157:14; June 13, 2023 Tr., 24:14–25:13, 89:11–90:8, 222:1–22; June 14, 2023 Tr., 17:14–18:17, 115:23–116:17, 224:18–225:19; June 15, 2023 Tr., 22:20–23:4, 76:9–79:12, 250:19–251:7; July 18, 2023Tr., 25:22–27:10.]

D. The EV Market in Illinois.

13. At Hearing, both sides presented evidence that, while the EV market is expected to grow, no one can predict how quickly it will grow or how it may grow in different geographies. [May 19, 2023 Tr., 39:22-23, 42:22 – 43:1; *see also* May 24, 2023 Tr., 248:19–249:1.] Ford’s witnesses admitted that dealers are in the best position to gauge how the EV market will grow in their respective market areas. [May 19, 2023 Tr., 317:19-24; May 22, 2023 Tr., 49:19-50:17.]

14. Certain areas of the United States have adopted EVs more quickly than others. California and other west-coast states were mentioned several times by both parties as having a faster rate of EV adoption than midwestern states like Illinois. [May 18, 2023 Tr., 86:2–87:4; May 19, 2023 Tr., 44:8-49:22; May 22, 2023 Tr., 125:19-25; June 5, 2023 Tr., 132:3-10.] Ford’s Chief Customer Officer for Model e Program, Dr. Marin Gjaja described California as the “epicenter” of the EV market. [5/19 Tr., 124:10–16.] Certain states (including California) have also implemented mandates that require a certain percentage of a manufacturer’s vehicles sales within the state to be zero emission vehicles (“ZEVs”). [May 18, 2023 Tr., 86:2-87:4; May 19, 2023 Tr., 44:8-49:22.] Not surprisingly, EV adoption in “ZEV states” has occurred faster than in non-ZEV states, like Illinois, which Dr. Gjaja, described as “a little slower.” [May 19, 2023 Tr., 49:19 – 24.]

15. EV adoption has also been slower in rural markets, generally speaking, than in major metropolitan markets. [See June 5, 2023 Tr., 112:20-113:2; June 7, 2023 Tr., 11:8-13:12, *but see* June 5, 2023 Tr., 330:4-10; June 12, 2023 Tr., 147:6-20.] This is evident even within

Illinois based on EV registration data presented at Hearing and data that is made publicly available by the Illinois Secretary of State. [*See* C-8, at 11.]

16. There appear to be several factors that have contributed to slower EV adoption in outside of major metropolitan markets. While Ford presented evidence that one such factor may be a lack of rapid charging infrastructure, Complainants also introduced evidence that cost of EVs was a significant factor. [5/19 Tr., p. 50:1-6; 6/5 Tr., p. 31:15-19; 6/12 Tr., p. 228:4-10.] EVs, and specifically Ford EVs like the Mach-e and F-150 lightning, tend to be more expensive than similar ICE products. [6/5 Tr., p. 145:13 - 20; 6/15 Tr., p. 15:2-16.] Other factors, including consumer preference for ICE vehicles or the limited range of EVs, particularly when used for towing or transporting cargo, may also impose barriers to adoption in rural markets. [*Id.*; 6/5 Tr., 144:9-145:20, 227:22-228:6, 237:8-13; *see also* Ex. C-77, at .]

40. Ford's CEO, Jim Farley, has publicly acknowledged that EV sales are not likely to grow as rapidly in some areas as in others. [*See, e.g.* Ex. C-77.] As Mr. Farley acknowledged, "[I]f you're pulling a fifth wheel in Wyoming, you probably don't want to own an electric vehicle." [*Id.*, at 2:15 - 21.] Mr. Farley acknowledged that EVs are a better car for customers that "have three cars in your household, and one's for, you know, short distances, running around town . . ." [*Id.*]

41. Notwithstanding the above, the Hearing Officer finds that the EV market throughout Illinois is likely to grow and that the rate of growth is likely to accelerate.

42. The competitive landscape of the EV market is also rapidly changing. Tesla Motors ("*Tesla*") has led, and still does lead, automotive OEMs in EV sales. [5/18 Tr., 21:21-22:7.] Unlike legacy OEMs like Ford, Tesla does not use franchised motor vehicle dealerships and sells its products directly to consumers. [5/19 Tr., 256:4-257:12.] Tesla customers can also purchase their

vehicles online directly through Tesla's website. [*Id.* at 254:8-9.] Tesla has also established a network of Tesla "branded" superchargers throughout the U.S., primarily along major travel routes and in metropolitan areas. [Ex. C-63; Ex. C-24, at 38; Ex. C-41, at 19-20.]

43. Ford considers Tesla one of its primary competitors in the EV space. Both Dr. Gjaja and Ford CEO Farley referenced Tesla as a major motivation for the Model e Program when it was announced to dealers in Las Vegas, in September, 2022. [Ex. C-41, at 19-20; Ex. C-39, at 10-12.] Internal notes for Farley's presentation at the Vegas meeting reflected that he told dealers he was "obsessed with Tesla." [Ex. C-39, at 10, 12.]

44. Although Tesla leads all other automotive OEMs in EV sales by wide margins, other OEMs are making gains in EV sales. Although Ford was the number two seller of EVs in 2022, General Motors, Volkswagen, Hyundai and Kia have all surpassed Ford in terms of EV market share, putting Ford in fifth place in terms of market share. [8/10 Tr., 101:3-13.] In addition, there are numerous OEMs in China that manufacture EV'S and they may export to the United States in the future.

E. Ford's Draft 2023 EV Certification Standards.

45. Michael O'Brien and his "team," presented a draft of proposed standards that were contemplated to take effect in 2023 (hereinafter, the "*2023 Draft EV Standards*"). [5/22 Tr., 265:13-66:14; Ex. C-12.] The 2023 Draft EV Standards outlined different requirements for EV certification, particularly with respect to dealership charging, that were directly tied to a dealer's expected EV sales volume, as reflected in the following charts:

Redacted-Under Seal

46. Under the 2023 Draft EV Standards, the majority of Ford dealers fall into the lowest tier (1,500 of nearly 3,000 dealers), with the least onerous charging standards. [Ex. C-12, pg. 2-3.]

Dealers in that lowest tier would only be required to install four Level 2 chargers—only two more than had originally been required under Next-Gen. [*Id.*]

47. Complainants' sales data, reflects that the opportunity for dealers is not the same in each market area. [Ex. R-8, pg. 13.] Some dealers sell thousands of ICE vehicles per year because they are located in markets where such opportunity exists, for example the Chicago metropolitan area. [*See id.*] Other dealers, for example, those in rural communities, may sell a small fraction of that amount. [*See id.*]

48. Such a variance exists with respect to EV sales, as well. Ford witnesses acknowledged that some of the biggest Ford EV dealers in the country might sell 600 Mach-Es for the year, while other Ford dealers sell 20 or 30, and some may sell zero. [5/19 Tr., 142:16 – 24.]

49. Using market size, *i.e.* expected sales volume, to establish appropriate facility standards for dealers in different markets is not a new concept in the automotive industry. Ford, itself, has used a “tiered” approach to establish other facility related standards, such as those for facility design and layout. [8/2 Tr., 77:1-20.] Under these standards, small volume dealers are required to have smaller, less-expensive facilities than larger volume dealers, and vice versa. Both parties referred to this concept as “scaling” or “scalability.” [5/22 Tr., 42:4 – 14; 6/5 Tr., 131:12–132:2; 6/7 Tr., 156:7–10.]

50. For example, one of the Complainants, Jansen Ford of Breese, Illinois, is completing renovation of an existing facility—a project they agreed to undertake before Ford announced Model e. [6/13 Tr., 202:18–207:13.] Ford witness, Bradford Wilson confirmed that Jansen Ford is expected to meet Ford's “Small Volume Signature Design” standards, because Jansen Ford is a “small volume” dealer in downstate, Illinois. [8/2 Tr., 77:1-78:7.]

51. Ford contended that it would be impossible to evaluate each dealer's market and come up with unique EV standards for each of its nearly 3,000 dealers. [May 22, 2023 Tr., 49:10-50:7.] Ford acknowledged that it considered having four tiers of certification based on historical vehicle-sales volumes. Ford witnesses testified that they came to understand that "historical volumes [were not] actually germane" because a dealer's ICE volume does not correlate to a dealer's electrical vehicle volume. May 19 Tr. 244:1-18. As a result, Ford argued that the Model e Program as designed-with its options for certified Elite, certified or not enrolling at all-were sufficiently scaleable. Moreover, Ford argued that any different system where dealers were "scaled in" "becomes a nightmare" and a "total disaster." Aug-10 Tr. 288:24-289:1 But Ford failed to introduce any evidence to support the conclusion that another alternative would fail. As evidenced by the 2023 Draft EV Standards, and Ford's other facility design and layout programs, Ford is capable of grouping dealers into categories based on projected sales volume and tailoring facility standards to the expected opportunity of those markets. [See C-12.]

52. In addition to being scaled by market size, 2023 Draft EV Standards also gradually introduced the new charging standards over a five-year period from 2023 to 2028. [C-12, pg. 2.] Although small dealers would eventually need to install some 50kw DC fast chargers, this would not occur until 2026, and even then, at a substantially lower cost than installing the more powerful 120kw Level 3 chargers required under Model e Program. [Id.] Only the two largest tiers of dealers would ever need to install a 120kw Level 3 charger, and not until 2026, several years from now. [Id.] Under the 2023 Draft EV Standards, no Ford dealer would be required to install more than a single 120kw Level 3 charger between 2023 and 2028. [Id.]

F. The Model e Requirements are Developed.

53. Dr. Marin Gjaja was appointed “Chief Customer Officer” of the Model e division, with responsibilities across North America and Europe. [May 19, 2023 Tr., 38:11–39:6.] Ford’s CEO, Jim Farley, personally named himself President of Ford’s Model e business unit.

54. The Respondent introduced evidence of Ford’s “Net Promoter Scores” (“NPS”) prepared by Bain & Company. [R-4, May 18, 2023 Tr., 37:16-38:8; May 19, 2023 Tr., 98:5-101:19.]

55. The Bain study measures how likely customers are to recommend Ford versus a competitor. [R-4, pg. 2.] The Bain study looked at several customer issues, such as whether customers preferred to shop digitally or how they felt about the dealership purchase experience, including negotiated prices. [*Id.* at 2-8.] Although the study compared Ford’s NPS scores to Tesla’s NPS scores, there were no aspects of the study that specifically evaluated EV sales or service, or specifically examined EV-unique issues such as charging or vehicle range. [*Id.*]

56. Ford discussed the Model e Program with Ford dealers and Ford’s “Dealer Council.” [May 18, 2023 Tr., 18:5-22; May 19, 2023 Tr., 30:4-31-13; May 22, 2023 Tr., 124:1-125:21] Ford met with about 400 dealers from different regions, including rural dealers, metro dealers, and minority-owned dealers. May 22 Tr. 30:4-31:8; May 19 Tr. 124:7-129:6. Ford also interacted with its Dealer Council, the formal body that Ford uses to interface with its dealer network, involving selected representatives of the dealer body. And Dealer Council formed a Model e subcommittee of the Dealer Council to engage even-more-intensely on Model e Program issues. See May 19 Tr. 125:22-126:18; May 18 Tr. 33:24-34:3.

57. The parties dispute how much impact the dealers and Dealer Council had on the Model e Program. For example, while Ford witnesses recalled providing dealers with a list of “ten” items related to EV certification, none of Ford’s witnesses could recall what was on this list.

[May 18, 2023 Tr., 137:3–141:7; May 19, 2023 Tr., 123:17–125:21; May 22, 2023 Tr., 30:32–9.] Dealers were not provided with any information prior to these sessions. [May 18, 2023 Tr., 137:19–22.] Dealers were also not asked to provide any written feedback after these sessions or complete any written surveys about how they felt about the proposed standards. [*Id.* at 137:19–138:16.]

58. Steve Buss, the Dealer Principal of Complainant Buss Ford, was asked questions on cross examination about why he had not contacted anyone on Ford’s Dealer Council to discuss his concerns about Model e. [May. 24, 2023 Tr., 299:5–7.] In response, Buss, who had previously served on Ford’s Dealer Council, testified that the Dealer Council does not have much impact on Ford policies and strategy, which are really set by Ford in advance. [*Id.* 299:5–300:7.] As Buss put it “[Ford] tells us what [Ford is] doing. You say some things, but its not Dealer Council that gets to make the decision.” [May. 24, 2023 Tr., 299:24–300:7.]

59. But Ford did agree to defer—that is, postpone—several program standards, including remote delivery, May 18 Tr. 53:3-6; and dealers having a 55-inch display for guest interactions, *id.* at 54:8-10. Ford further modified its 24/7 public-charging standard so that public chargers only need be available when a dealership is open for business. See May 19 Tr. 211:7-212:21. Ford doing that this was a “pretty big concession” for Ford given that dealerships are closed on Sunday, when 15% of all fast charges occur, and another 10% occur between 8 p.m. and 8 a.m. when dealerships are often closed. *Id.* at 212:5-12. But Ford witnesses failed to explain why they ever thought it was appropriate to require the dealers to provide any service during non-operating hours.

G. Model e is Announced.

60. Six months after the Model e business unit of Ford was announced, Ford held its annual dealer meeting in Las Vegas, Nevada in mid-September 2022. [May 18, 2023 Tr., 140:12-

141:10.] At the dealer meeting, Ford announced that the Next-Gen Agreement was ending and that Ford was implementing new EV certification requirements under Model e, which would replace Next-Gen. [*Id.*] Dealers were told that if they did not enroll in Model e, they would no longer be able to sell Ford EVs after December 31, 2023. [C-40, pg. 39.] Several Ford employees presented at the meeting, including O'Brien, Shaffer, Gjaja and Farley. [C-39; C-40; C-41.]

61. Ford gave the dealers extensive materials to understand, using their own business judgment, whether they wanted to enroll in the Model e Program, including a playbook, a website, a dealer readiness planner, and copies of all of the Ford communications and the Certified Elite and Certified standards documents. See May 22 Tr. 35:3-7, 35:24-36:17. Ford also created a “pro forma” for dealers that provided them a framework for attempting to estimate their return on investment in the Model e Program, including some prepopulated assumptions regarding electric vehicle growth and estimates of charger costs, including associated infrastructure—all of which were customizable inputs by the dealer. See *id.* at 120:18-133:6; see also Exs. C-10-11, R-29.

62. Ford CEO, Jim Farley, has referred to the standards of the Model e Program as being “brutal” for dealers. [C-71]

63. When Ford announced Model, Ford told dealers there would be a cost to enrolling in the program, whether at the Certified or Certified Elite level, as reflected below:

Redacted-Under Seal

[C-2, pg. 10.]

H. Model e Charging Requirements

64. Under Model e, Dealers are required to meet Ford's new charging standards at their dealerships by January 1, 2024, with an additional requirement by January 1, 2026 (hereinafter, the "*Charging Standards*"). [C-3, pg. 4-5.] The Charging Standards under Model e substantially increased the number of chargers needed under Next-Gen. [May 22, 2023 Tr., 96:5-15.] While Complainants challenge many aspects of Model e, the Charging Standards, and in particular, the lack of a likely return on investment on the chargers, is one of the primary issues raised in the Protest. [See June 5, 2023 Tr., 48:6-22, 257:17-258:1; June 6, 2023 Tr., 47:12-48:6; June 7, 2023 Tr., 211:14-212:13; June 12 Tr., 235:20-237:7; June 13, 2023 Tr. 28:14-29:22; 230:8-18.]

65. The below diagram outlines the Charging Standards that both Certified and Certified Elite dealers must meet under the Model e Program:

Redacted-Under Seal

[Ex. C-2, pg. 18.]

66. Under the Model e Charging Standards, all Ford dealers need to install at least one 120kw DC fast charger at their dealerships by 2024. [Ex. C-3, pg. 4-5.] Most significantly, Certified Elite dealers are required to install three 120kw DC fast chargers, two of which need to be installed by 2024. [*Id.*] The Model e Program also requires dealers to install several additional Level 2 chargers, and many additional NEMA 14-50 outlets. [*Id.*]

67. 120 kw Level 3 DC fast chargers are very expensive to install, particularly compared to Level 2 chargers. [May 22, 2023 Tr., 142:10-12.] When Ford launched Model e, Ford estimated the cost of complying with the Charging Standards to be approximately \$1,120,000 for a Certified Elite dealer, alone. [Ex. C-2, pg. 18.] Certified dealers, who could not sell EVs to most retail customers, would still be required to spend approximately \$450,000. [*Id.*]

68. Ford's Charging Standards were established by Model e Director of Charging, Bill Crider. [May 18, 2023 Tr., 66:22-67:10.]

69. Ford called the following witnesses in support of its Charging Standards; witnesses O'Brien, Gjaja, and Shaffer. [May 18, 2023 Tr., 92:18-24; May 19, 2023 Tr., 299:11-21; May 22,

2023 Tr., 79:6-80:4.] These Ford witnesses worked with Mr. Crider and explained that Crider looked at various models, analysis, and “math” to establish the Charging Standards. [*Id.*] However, none of these witnesses explained specifically what type of analysis or “math” went into establishing the Charging Standards.

70. Ford had looked at total units in operation (“*UIO*”) at a national level to develop these numbers, but not at individual dealership levels. [May 18, 2023 Tr., 91:1-94:19.] However, Ms. Shaffer could not recall what math Crider used or what data he reviewed to develop these Charging Standards. [*Id.*] Ms. Shaffer could also not recall whether Ford had given any consideration to dealers having less than three DC fast chargers, or whether those chargers could be less powerful, for example, a 50kw DC fast charger. [*Id.*]

71. In Ford’s case in rebuttal, Mr. O’Brien claimed that Ford had looked at the total number of EVs that it was going to sell and the number of vehicles that were going to come back for service to establish the Charging Standards. [August 10, 2023 Tr., 93:1-94:9.] Mr. O’Brien testified that based on the expectation that vehicles be returned to customers with a full state of charge, Ford developed the number of Level 3, Level 2, and NEMA outlets that dealers would need to meet that expectation. [*Id.*] However, Mr. O’Brien did not identify the numbers that were used in those calculations or explain how they were derived. [*Id.*] Moreover, Mr. O’Brien failed to apply the Charging Standards to any specific dealer.

72. It is undisputed that more EVs are sold in states like California, than in Illinois. [May 18, 2023 Tr., 44:8-15, 49:17-50:21.] Requiring a dealer in rural Clinton, Illinois, for example, to install three Level 3 chargers—the same number as a California dealer is required to have—is unlikely to help Ford accomplish its objective of returning vehicles fully charged in all markets nor is it fair to the rural dealer.

73. Ford never explained why it did not look at charging needs of dealers on a more local level when developing Model e Program. Notably, the 2023 Draft EV Standards estimated the total number of BEV units in operation for each of the four tiers of dealers, not only in 2023, but also in 2026 and 2028. [C-12.] Those estimates varied significantly from tier to tier, suggesting that a tiered or scaled approach to Charging Standards was not only possible, but appropriate. [*Id.*]

74. Mr. O'Brien testified that a "tiered" analysis was initially done for Model e, but there were too few dealers in the lowest and highest tiers to justify a scaled approach. [May 22, 2023 Tr., 44:20-45:20.] Ford, however, introduced no documents reflecting that such an analysis was performed, much less explain how this could be the case. In the 2023 Draft EV Standards, prepared less than a year earlier, nearly 1,500 Ford dealers (approximately half) fell in the smallest tier of EV dealer. [C-12, pg. 3.] It is unclear how Ford decided that prior analysis was no longer applicable.

75. Ford witnesses also suggested that Level 3 chargers would be necessary for dealers to charge service loaners, *i.e.*, vehicles lent to service customers while vehicles are being repaired, or "demos," *i.e.*, vehicles used by Ford dealers for test drives and employee vehicles. [May 19, 2023 Tr., 153:19-154:15; May 22, 2023 Tr., 74:15-75:11.] However, no evidence was presented by Ford to reflect that dealer's existing Level 2 chargers were not sufficient for these purposes.

76. To the contrary, each of the Complainants testified that they were able to adequately charge EVs now using their Level 2 chargers. [May 24, 2023 Tr., 34:18-36:5, 193:12-194:8; June 5, 2023 Tr., 37:11-40:8, 116:23-118:7, 241:13-241:11; June 6, 2023 Tr., 27:17-28:14, 132:7-133:23, 221:6-223:12; June 7, 2023 Tr., 15:19-18:10, 111:17-114:8, 187:24-189:17, June 12, 2023 Tr., 22:22-24:15, 149:4-22, 229:8-24, 232:14-233:14; June 13, 2023 Tr., 22:16-24:5, 85:20-

89:9, 218:2–11; June 14, 2023 Tr., 15:21–17:22, 114:19–115:14, 230:8–232:12; June 15, 2023 Tr., 20:11–22:15, 72:10–73:12, 249:12–250:18; July 18, 2023 Tr., 22:–24:19.]

77. While the Charging Standards are a mandatory requirement of Model e Program, returning service vehicles to customers fully charged is *not*. Instead, under Model e, dealers only need to return service vehicles in a *higher* state of charge than when they are brought in to qualify for the MeCP incentives under Model e. [C-3, pg. 9.] This calls into question why dealers are required to meet the Charging Standards as a condition of selling and servicing EVs, when they are not even required to deliver vehicles to consumers fully charged under Model e Program.

78. The chargers required under Model e Program are by far the most substantial cost of the program to dealers. Ford suggested that dealers will earn returns on these investments eventually, even if not within the initial three-year period of the program. [May 19, 2023 Tr., 170:19-172:4.] However, the Model e Charging Standards are only set for a three-year period and are subject to change. [May 18, 2023 Tr., 98:20–99:17.] Ford has not determined what the charging standards will be after 2026. [*Id.*]

79. Under Model e Program, every Ford dealer is required to have at least one of its Level 3 DC fast chargers available for public use by December 31, 2023. [C-3, pg. 4-5.] This public charger will need to be located in an accessible area of the dealership lot so that any member of the public (Ford customer or otherwise) can use that charger. [*Id.*] Dealers will be allowed to charge for use of the charger, which will be publicly advertised as part of Ford’s Blue Oval Charge Network (“*BOCN*”). [*Id.*; August 10, 2023 Tr., 106:8-107:5.]

80. Ford offered several justifications for public facing chargers. Ford contends that a public facing DC fast charger at all Ford dealerships will help improve the adoption of EV vehicles by consumers. [5/19 Tr., 144:15-147:19.] Ford has contended that 90% of the U.S. population

lives within 20 miles of a Ford dealership, and therefore having a public charger at Ford dealerships will increase charging access. [*Id.* at 146:1-147:19.]

81. The Hearing Officer agrees that it is logical that requiring Model e Program dealers to install public facing charges will increase the number of charges. But it is speculative, to suggest that requiring Ford dealers to install a public DC fast charger will increase Ford EV sales. Moreover, it is beyond speculative to suggest that an individual dealer will definitely see an increase in sales. While it is surely possible that consumers may want to use public chargers, Ford presented no evidence that consumers are likely to utilize public fast chargers located on dealership lots as a frequent source of charging. As many dealers testified, most of their customers charge their vehicles at home. [June 5, 2023 Tr., 242:12-243:6; June 6, 2023 Tr., 136:9-137:3; June 7, 2023 Tr., 196:12-197:3 June 12, 2023 Tr., 233:3-14; June 13, 2023 Tr., 220:15-221:9; June 14, 2023 Tr., 227:6-228:12; June 15, 2023 Tr., 22:5-15.] Moreover, many of the public DC fast chargers in dealers' markets are located in retail parking lots, like supermarkets or shopping malls, where consumers can charge their vehicles while shopping, dining, or doing other things. [June 6, 2023 Tr., 34:11-20; June 15, 2023 Tr., 75:19-4, 222:14-223:22.] Even 120 kw fast chargers may take upwards of 15 or 20 minutes to bring an EV within 80 % capacity. [Ex. R-6.] Ford presented no evidence that consumers want to sit on dealership lots to charge their vehicles during this time, when they could be charging while running errands, dining or shopping.

82. For example, one of Complainants' witnesses testified that a Target retail store, which is immediately adjacent to Highland Park Ford, currently offers 14 fast chargers to the public. [June 12, 2023 Tr. 152:10-153:1.] While several of these are Tesla brand "Superchargers," at least 3 were general fast chargers open to all EV brands. [*Id.* 152:10-155:7.] The witness testified, and provided demonstrative photos to support his testimony, that the fast chargers are

infrequently used by drivers. [*Id.*] Particularly given that Ford customers will soon have access to the Tesla chargers, too, [*infra*, ¶¶ 98-99,] it does not appear that an additional public charger on Highland Park Ford's lot will meaningfully increase access to charging in that market.

83. A recent grant of charging incentives from the Illinois EPA went to companies that operate similar retail and travel businesses, such as gas stations, travel centers, hotels, and retail outlets. [C-65.] None of these funds went to car dealerships of any brand. [*Id.*]

84. One of Ford's stated reasons for requiring dealers to install a public charger was to compete with Tesla's own network of superchargers. [May 19 2023 Tr., 144:15-147:19.] This has been reflected in material that Dr. Gjaja presented to dealers at the September 2022 dealer meeting, as well as to Ford's Board of Directors in July 2022. [C-41, pg. 18-21; C-24, pg. 38.]

85. On May 25, 2023, Ford announced that it had reached an agreement with Tesla that will allow all Ford customers to start using Tesla superchargers beginning in 2024. [Ex. C-63; August 10, 2023 Tr., 69:19-71:17, 73:6-74:10.] Having reached that agreement, there is no longer a reason to conclude that public chargers on Ford dealership lots promotes competition with Tesla.

86. In addition, evidence was presented of more charging options being added throughout the United States, including Illinois. [See C-65.] Several manufacturers, including BMW, General Motors, Honda, Hyundai/Kia, Mercedes Benz, and Stellantis, also recently announced an alliance to build charging stations throughout the United States that will be open to EV drivers. [August 10, 2023 Tr., 308:5-19.] Dealers of these brands will not be paying for that charging network. [*Id.*] Rather than participating in that alliance, Ford is requiring its dealers to provide the charges.[*Id.*]

87. Ford's witnesses argued that dealers meeting the Model e Program standards relating to Level 3 charges serves two purposes. First, it ensures that Ford electric-vehicle dealers

have standards that Ford will enforce. Id. at 135:1-6. In other words, standards ensure that dealers are held accountable for working together with Ford to grow the brand and business. Id. at 135:8-10. Second, it prevents free riders, where “there will be some dealers . . . who won’t observe the standards and [are] getting a chance to build the business on the backs of other dealers who are then essentially making money by avoiding making investments either in people or training or charging, whatever it might be.” Id. at 135:13-19. And that “hurt[s] the brand because the customer experience isn’t as consistent or as good as it can be.” Id. at 135:20-22.

Dr. Smith, Ford’s expert economist, testified about the free-rider problem, “some people might put in investments that have spill-over effect onto others and that other people may not put in . . . their own investments and free ride off of it.” May 23 Tr. 170:22-171:2. So, in the context of the Model e Program, the free riding concern is that “some dealers would put in fast charging networks and that some dealers would put in investments into trained specialized EV salespeople” that “would improve the Ford brand and . . . other dealers would be able to undercut those dealers by avoiding those investments, free riding off of the brand and able to take market share.” Id. at 171:5-15. Without the Model e Program requirements, some dealers would invest in Level 3 chargers and trained sales staff, raising the overall impression of the Ford brand, which will inure to the benefit of all dealers, including those that did not make similar investments. Id. at 172:13-173:21.

88. The Charging Standards of Model e are objectively high compared to the EV certification requirements of other automotive OEMs. General Motors (Chevrolet, Buick, GMC, Cadillac) and Stellantis (Chrysler, Dodge, Jeep, Ram) are two particular examples that were cited by Complainants at the Hearing.

89. General Motors is currently number 2 for EV market share in the United States, second only to Tesla. [August 10, 2023 Tr., 101:3–13.] Unlike Ford, General Motors is expected to release several new models of EVs in the next year. [June 6, 2023 Tr., 298:10 – 299: 6; R-164.] General Motors’s relatively recent EV certification program requires dealers to install at least one DC fast charger, but unlike Ford’s program, that DC fast charger only has to be a 50kw charger. [R-164; June 6, 2023 Tr., 247:12–249:7.] This charger is substantially less expensive than the 120kw fast chargers required by Model e. [May 24, 2023 Tr., 65:20-66:14; June 6, 2023 Tr., 294:12-295:11; Jun 14, 2023 Tr., 37:1-22; June 14, 2023 Tr., 261:6-626:8.] Further, these chargers satisfy GM’s requirements for several of its line makes. [July 18, 2023 Tr., 63:14.] Dealers who do not enroll in the GM program have not been told that they will lose the ability to sell EVs they are currently selling. [June 6, 2023 Tr., 300:14–21.]

90. Stellantis (Chrysler, Jeep, Dodge, Ram) is also domestic manufacturer of non-luxury vehicles. Although Stellantis does not currently offer EVs, Stellantis is anticipated to come out with several new models of EVs over the next several years. [June 12, 2023 Tr., 64:21–65:13.] Stellantis’s EV certification program requires dealers to install a single 180kw DC fast charger. [See C-45.] This is a more powerful charger than Ford is requiring under Model e, although it does not appear that the additional kilowatts make that DC fast charger substantially more expensive than the 120kw charger Ford requires. [*Id.* at 4. See also June 6, 2023 Tr., 158:13-23; June 23, 2023 Tr., 64:21-66:11.] However, Stellantis’s program is different than Ford’s in many respects. First, dealers are only required to install *one* such charger, as opposed to the three required by Ford. [June 6, 2023 Tr., 157:5-23]. Second, with respect to the other charging standards, Stellantis has placed dealers into tiers based on their market potential. [*Id.*] Third, Stellantis is not requiring dealers to make this charger publicly available, even though some may choose to do so. [*Id.*]

Fourth, Stellantis dealers who do not meet the March 31, 2024 deadline to install charging hardware “may still elect to participate at a later date.” [C-45, pg. 2.]

91. Neither the GM program nor the Stellantis program require dealers to sell their EV vehicles through an eCommerce website operated by the manufacturer. [6/6 Tr., 158:24-159:4; 6/14 Tr., 90-91:4; 6/12 Tr., 65:14–66:21; 6/18 Tr., 65:11–66:2.] Neither program requires dealers to purchase software from those manufacturers to schedule service appointments. [*Id.*]

2. Model e Training and Retail Environment

92. Model e Program requires that dealers participate in certain training programs at the dealer’s cost, set up specialized teams of EV staff, and purchase certain furniture, displays and “technology” (namely tablets) that will facilitate Ford’s marketing of EVs and the use of its e-Commerce platform. [R-180, pg. 7.]

93. Many of the details of the Model e Program training were not set at the time dealers were required to enroll and when this Protest was filed. Dealers were told that they were required to appoint a team of staff dedicated to the sale of EV and attend certain training, including offsite “intensive training.” [C-3, pg. 6.] Dealers were told their annual cost of training was \$40,000. [C-2, at 10.] Dealers were told that training would be conducted annually, and that this was not a one-time cost. [C-2, at 12, 14.] This amount was much greater than the approximately \$10,000 per year that Dealers had been paying for training on *all* Ford products through Ford’s STARS program. [*Supra*, ¶31.]

94. Dealers who enrolled in Model e, including Complainants, have been charged by Ford for training starting in June 2023, regardless of whether they had actually signed up for or attended the live training. [June 12, 2023, p. 166:15–20; C-66, C-68.] Ford has started charging dealers \$5,700 per month. [*Id.*]

95. The only EVs that Ford currently sells have been on the market for several years. [May 19, 2023 Tr., 118:18-120:21.] While Ford does intend to release new models of EVs in the future, none have been announced or are available for sale. [*Id.*]

96. Ford dealers are currently selling and servicing EVs in their dealerships. [*Supra*, ¶26.] Again, each Complainant testified that existing Ford training is sufficient to meet the dealership's needs for training on EVs. [*Id.*] Ford produced no evidence that additional training was needed to correct any deficiency at any of the Complainants' dealerships.

3. E-Commerce, The Online Trade-In Tool, Non-Negotiable Pricing and Inventory Restrictions

97. As part of Model e Program, dealers were told they will be required to use Ford's e-Commerce platform on Ford.com as the "single entry *and exit*" point for all EV transactions. [C-3, pg. 7.] This means that dealers must complete all EV sales through Ford's website, Ford.com, even if customers are purchasing vehicles in person at the dealership. [*Id.*]

(i) Use of Ford.com

98. Customers will be able to complete all purchases of EVs directly through Ford.com with minimal interaction with the dealership, other than to obtain delivery of the vehicle. [May 18, 2023 Tr., 36:13-37:15.] These transactions would "close" through Ford.com, and customers would receive a standardized closing statement from Ford. [May 19, 2022 Tr., 282:4-284:12.]

99. Dealers do not currently use Ford.com to complete sales of vehicles. [*See* June 6, 2023 Tr., 232:14-234:8.] While dealers do use Ford systems for ordering inventory and some other dealership operations, dealers use their own internal systems and forms for retail sales. [*See* June 12, 2023 Tr. 98:17-22.] For example, dealers have different "Dealer Management Systems" ("*DMS*") and "Customer Relation Management" ("*CRM*") programs that are offered by various

third-party vendors. [6/14 Tr., 117:3–118:9.] Dealers are presently free to select from a variety of options and systems to manage the sales process. [*Id.*]

100. Dealers maintain their own individual websites for their dealerships. [May 24, 2023 Tr. 58:6–10, 60:2–4; 149:13–150:6.] Through these websites, customers can browse inventory and even interact with dealership staff with respect to specific questions or transactions. [*Id.*; *see also* July 18, 2023 Tr. 32:20–33:14.]

101. Ford presented evidence that there is a growing trend of customers using the internet to shop for vehicles, but that does not mean that dealers lack the technology or processes to meet this trend. [May 18, 2023 Tr., 36:13–37:15.] Complainants repeatedly testified that they presently have means that allow customers to purchase vehicles and complete sales all without ever setting foot in a dealership. [*See* May 24, 2023 Tr., 57:22–60:4; June 6, 2023 Tr., 50:3–53:4; 232:14–234:8; June 7, 2023 Tr. 128:1–129:13.] Some dealers even allow a customer to complete the entire purchase online without having to speak with the dealership. [*Id.*]

102. Complainants testified why maintaining direct interaction with the customer is important to their business. *First*, not every customer wishes to purchase a vehicle online through Ford.com. [May 24, 2023 Tr., 164:8–165:11.] Unlike many items that are available for purchase online, vehicles are expensive, complex machines that are usually not returnable after a sale is completed. [*Id.*] Customers often like to see, touch and drive vehicles at a dealership lot before purchasing them. [*Id.*; May 24, 2023 Tr., 201:22–202:14; June 7, 2023 Tr., 110:10–19.]

103. Dealerships also offer consumers other products and services, including financing options, warranty and service packages, and other features that may not be clear to consumers shopping online through Ford's website. [June 15, 2023 Tr. 141:18–142:15.] Complainants

expressed concern about being unable to discuss financing and insurance options with customers who purchase vehicles online. [*Id.*]

104. Under the e-Commerce platform, customers will be able to finance with Ford Credit online. However, customers will not see other financing options online without actually contacting the dealer. [August 10, 2023 Tr., 222:6-14, 301:13-302:19.]

105. Ford contends that its e-Commerce platform does not prevent customers from purchasing vehicles at the dealership if they want to or if they have questions; however, Ford presented no evidence of how in-dealership sales will work if they must be completed through Ford.com. [August 10, 2023 Tr., 156:8–17.] In fact, most of the details of the e-Commerce standard were still “under development” when dealers were told by Ford they had to enroll in Model e last year. [C-3, pg. 7.] Either way, dealership employees still need to process the sale through Ford’s website and not through the dealers’ own retail systems. [May 19, 2022 Tr., 282:4-284:12.] Complaints testified that this unnecessarily placed barriers between the dealership and its retail customers. One Complainant’s witnesses, John Hennessy of Riverview Ford, expressed concern that Ford.com would impose additional hurdles if it is the exclusive point-of-sales for EVs:

Every time there's a hurdle -- It's tough enough to sell a car today and to do it properly. To set us up -- Again, if Ford has the good intentions -- I think it's based on what Tesla does. Tesla doesn't have dealers. We do it, and it's what we've been doing for hundreds of years. I think it's a stumbling block.

[June 15, 2023 Tr. 144:10 – 145:6.]

106. Second, many Complainants had concerns about the performance of Ford’s prior e-Commerce systems. Those systems allowed customers to place “reservations” and “orders” for vehicles through Ford.com., although the actual retail sale was still completed by the dealership. [June 15, 2023 Tr., 90:10–91:21; June 6, 2023 Tr. 37:6–24.] In many cases, the delivery of Ford

EVs took much longer than Ford originally indicated to customers online, resulting in customers canceling orders before they could be delivered. [June 7, 2023 Tr., 198:22–200:5] This placed the dealer in the position of being “stuck” with the canceled order in the dealer’s inventory. [June 6, 2023 Tr., 18:16–19:10; 227:12 - 228:13.]

107. Complainants also had other concerns with Ford’s e-Commerce website, including technical and payment processing issues. [June 14, 2023 Tr., 120:9–125:19; June 6, 2023 Tr. 37:6–24.] Complainants testified that if a customer had a problem with the Ford.com website, they may come to the dealership to resolve the issue, but the dealer would have no ability to assist the customer without directing them to Ford, who operated the website. [*Id.*]

(ii) The Online Trade-In Tool.

108. Complainants also expressed concern about Ford’s online trade in tool, which is part of Ford’s e-Commerce platform on Ford.com. [June 13, 2023 Tr., 97:6–98:4; 234:2–235:5.] This tool allows a customer to get a price for a trade-in vehicle from Ford online even before the vehicle is seen by anyone from the dealership. [C-3, pg. 9.] If a customer uses this tool instead of having the vehicle appraised at the dealership, the dealer has no input in the valuation of the trade-in set by Ford through the online tool. [May 22, 2023 Tr., 85:1-86:3.]

109. Eventually, the customer must bring their trade-in vehicle to a Ford dealer to complete the sale. At that time, the Ford dealer may either: (a) accept the trade in at the value provided by Ford; or (b) reject the trade-in, in which case the vehicle will be sent to auction and the dealer will receive a check from Ford for the value. [*Id.*]

110. Dealers are not free from risk in this process. If a customer misreports the condition of their vehicle online, the dealer is responsible for explaining that to the customer and declining

the offer that Ford had provided online. [August 10, 2023 Tr., 209:20-211:14.] Essentially, the dealer has to break a deal with the consumer that the dealer never agreed to in the first place. This could lead to disputes with the customer that would not have come up if the dealer had appraised the vehicle in the first instance.

111. Moreover, if the vehicle is sent to auction, the dealer may be financially exposed to Ford if the vehicle auctions for less than the price agreed to by Ford due to the condition of the vehicle. [August 10, 2023Tr., 209:20-211:14.] Again, this puts the dealer in a position of having to take on risk that would have been unnecessary without the trade-in tool.

112. Ford argued that the online trade in tool presently exists under the terms of Ford's existing e-Commerce standards, to which the dealers have already agreed. [May 22, 2023 Tr., 86:4-87:5.] However, presently dealers are not *required* to sell vehicles through Ford.com. That will be changing under Model e.

113. Only a few days before the end of the hearing, Ford announced that it had decided to make the online trade in tool "optional" for Model e dealers. [August 10, 2023 Tr., 207:10-208:19.] Although it appears that Ford will still provide customers with an estimated value for their vehicle online, dealers do not have to accept that value. [*Id.* at 315:3-317:21.]

(iii) "Non-Negotiable Pricing"

114. As part of Ford's e-Commerce standard under Model e Program, dealers were initially told that they would need to agree to only use "non-negotiable, transparent pricing" on Ford.com [C-3, pg. 6.] None of the Complainants take issue with price transparency, but the definition of "non-negotiable pricing" implied that dealers would be unable to change the price of a vehicle once it was initially set online. This, Complainants believed, would put them at a competitive disadvantage if a customer wanted to purchase the vehicle for less, or if a competitor

was selling the same vehicle for less. [May 24, 2023 Tr., 60:12-61:11, 305:14-306:9; June 5, 2023 Tr., 53:21-54:23, 141:21-142:18, 262:9-263:1; June 6, 2023 Tr., 54:12-55:19, 151:8-152:14, 231:1-22; June 7, 2023 Tr., 36:2-13, 129:19-130:2, 214:16-215:18; June 12, 2023 Tr., 33:11-34:24, 212:14-22, 242:14-245:6 ; June 13, 2023 Tr., 33:3-12, 100:4-23, 237:11-238:1; June 14, 2023 Tr., 43:10-16, 135:16-22, 256:20-257:15; June 15, 2023 Tr., 32:4-19, 76:9-78:22, 244:10-246:9; July 18, 2023 Tr., 67:12-12-18.]

115. At hearing, Ford witnesses conceded that they were still discussing the definition of “non-negotiable pricing,” but that Ford intended to allow dealers to lower their prices for customers, even after they were set through Ford.com. [May 19, 2023 Tr., 139:23-141:3.]

116. However, the initial Model e Program materials that Ford provided to Complainants support their original interpretation of “non-negotiable pricing” when this protest was filed. [C-3, pg. 6.] From these materials, it appears that Ford did originally intend to prohibit dealers from lowering their prices or “negotiating” with consumers, but has since revised that position.

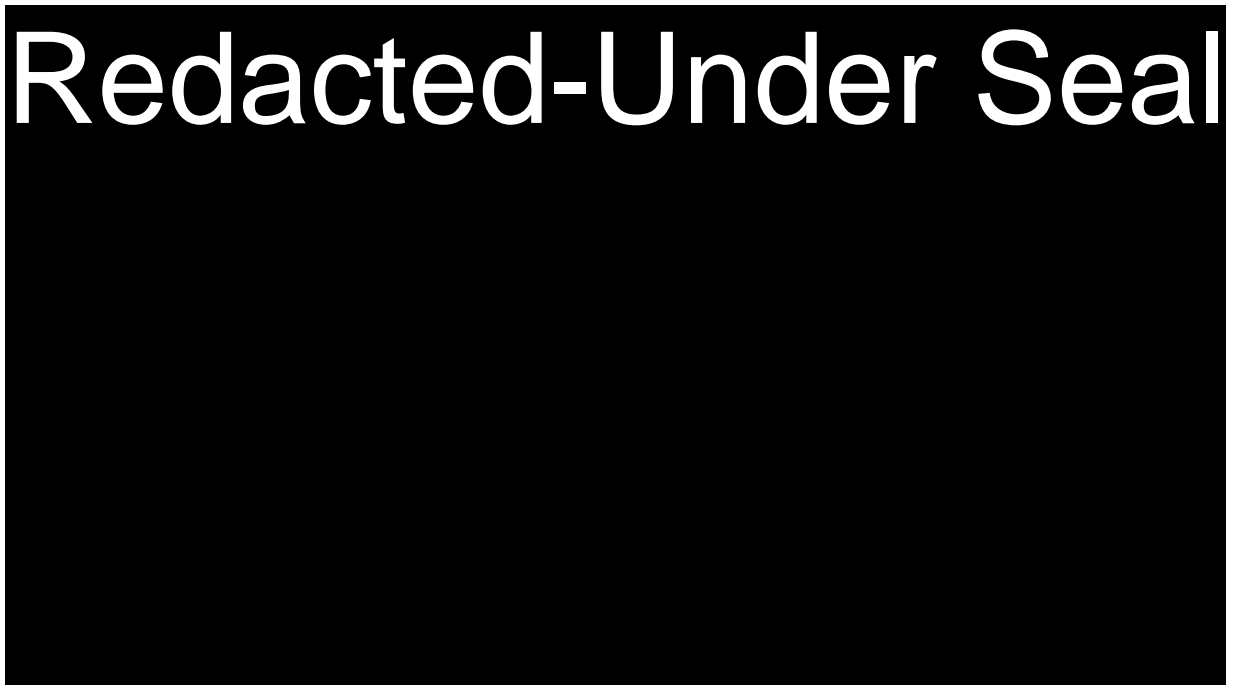
(iv) Limited Inventory and Changes in Distribution

117. Traditionally, motor vehicle dealers have purchased inventory from the manufacturer at wholesale and held that inventory on dealership lots for retail to consumers. [May 18, 2023 Tr., 45:4-11.] The COVID-19 pandemic created widely reported new car inventory shortages in recent years. However, prior to the pandemic, it was not uncommon for dealers to store around 100–400 vehicles on their lots for consumers to choose from. [June 12, 2023 Tr. 27:2–8; 159:20–160:4, 224:16–19; June 15, 2023 Tr., 192:6–14.]

118. Under Model e Program, Certified dealers will not be able to carry any EV inventory on their lots. [C-4, pg. 2.] Certified Elite dealers will be able to carry some inventory, however, Ford has provided little clarity to dealers about how many vehicles they will be able to

carry in inventory. [May 18, 2023 Tr., 45:4-11.] In the initial Model e Program materials distributed to dealers vaguely states that Certified Elite dealers will have a “limited number of ground stock available for sale.” [C-2, pg. 9.] However, Ford witnesses admitted that Ford had not yet determined how many EVs dealers will be able to carry in inventory under Model e Program. [*Id.* at 113:19-22.]

119. Model e’s requirement that dealers use Ford.com, and the restrictions on inventory, appear to have less to do with consumer preference and more to do with Ford trying to cut costs from its business model. In a presentation that Dr. Gjaja gave to Ford’s Board of Directors in July, 2022, before Model e Program was announced, Ford had considered the profitability of direct-sale models such as those used by new OEMs like Tesla, and the “agency” model Ford uses in Europe, where dealers are agents of the manufacturer, and not independent franchised retailers. [Ex. C-26, at 57.]



120. Ford noted that the Direct and Agency distribution models resulted in significant OEM profit retention compared to a traditional franchised dealer model in the United States. [*Id.*

at 6.] However, Ford also concluded that state franchise laws “generally pose challenges to changes to the existing dealer model” in the United States. [*Id.*, at 7.]

121. Jim Farley has also expressed that Model e is based on a “radical redesign of Ford’s customer experience,” and that dealers will be required to sell EVs under the program with “virtually no inventory.” [C-72]. Mr. Farley has acknowledged that Ford must “really change fundamentally the cost of our distribution for retail EVs.” [C-73.] Jim Farley has expressed his preference to go “100% online” with EV sales and “go directly to consumers.” [C-71.] Mr. Farley has also expressed his desire to get “rid of all” public advertising for EVs. [*Id.*]

122. Dr. Gjaja’s presentation also reflected Ford’s intent to utilize “rapid replenishment centers” (“**RRC**”) for distribution of EVs under Model e. [See Ex. C-24, C-26.] These “RRCs” are effectively regional holding centers owned by Ford that will house new car inventory rather than allow dealers to purchase and store the inventory on their lots. [May 18, 2023 Tr., 42:24-43:10; May 19, 2023 Tr., 289:1-10.]

123. Inventory stored at RRCs will be owned by Ford, not by dealers, but the inventory will be visible to consumers for purchase through Ford.com. [May 18, 2023 Tr., 43:16-45:11, 127:16-129:20.] The details and logistics of these RRCs have not been fully established by Ford, much less explained to dealers by Ford. [June 12, 2023 Tr., 43:11-22; June 13, 2023 Tr., 101:7-22; June 14, 2023 Tr., 25:9-18. See also May 18, 2023 Tr., 117:7-23.] In fact, RRCs were not expressly part of the Model e standards, and only something that dealers learned in discovery in this Protest. However, from the testimony at hearing, it appears that customers will be able to purchase EVs directly from the RRCs on Ford.com even before they are delivered to dealership lots. [5/18 Tr., at 117:24-119:9.] Although the sale can be completely transacted online, the order

will be “fulfilled” by a local dealer of the customer’s choice, which will eventually receive and deliver the vehicle. [5/18 Tr., 127:16-129:20.]

124. The use of RRCs is intended to reduce Ford’s cost of inventory and to allow Ford to “dynamically price” vehicles, *i.e.*, adjust the price of inventory based on market conditions. [5/19 Tr., 284:18-287:19, 343:6-348:4.] This is not something that Ford can do currently if vehicles are purchased by dealers and stored on dealership lots. [*Id.* at 287:20-289:22.] This was borne out on materials that Dr. Gjaja presented to the Ford Board of Directors in July, 2022:



Redacted-Under Seal

[C-26, pg. 15.]

125. Complainants have legitimate concerns about Ford’s intent to permanently reduce dealership inventory levels. [6/12 Tr., 25:21–27:1, 224:16–225:14.] Complainants testified that carrying inventory on their lot is important to be able to offer customers choices and stay competitive. [May 24, 2023 Tr., 40:19-41:4, 201:20-202:14; June 5, 2023 Tr., 42:15-43:24, 121:22-122:15, 266:2-20; June 6, 2023 Tr., 38:3-39:22, 138:19-140:6; June 7, 2023 Tr., 23:1-23, 130:3-20, 190:22-191:12; June 12, 2023 Tr., 25:21-27:1, 157:15-158:14, 224:16-225:14; June

13, 2023 Tr., 25:14-18, 96:3-97:2, 222:23-223:8; June 14, 2023 Tr., 18:8-19:17, 303:19-304:5; June 15, 2023 Tr., 24:12-25:7, 79:13-80:24; July 18, 2023 Tr., 28:9-30:19.] Carrying inventory also allows dealers to deliver vehicles to customers day of purchase, instead of having to wait days or weeks for vehicles to be delivered. [June 6, 2023 Tr., 38:3-39:22, 138:19-140:6; June 7, 2023 Tr., 130:3-20; June 12, 2023 Tr., 224:16-225:14; June 14, 2023 Tr., 18:8-19:17, 303:19-304:5 July 18, 2023 Tr., 28:9-30:19.] Moreover, the Complainants are in the best position to determine the size of their inventory.

126. Complainants' expert economist, Ted Stockton, presented evidence that the e-Commerce aspect of Model e was likely to have the effect of transferring profitability away from dealers and to Ford through the loss of dealer's market power. [Ex. C-8; July, 20, 2023 Tr., 121:12-124:1.]

127. Ford presented no evidence that other manufacturers are requiring dealers to sell vehicles through a manufacturer's website. As noted above, none of the other manufacturer EV programs discuss at Hearing include a requirement to complete online sales through a manufacturer's website. [June 6, 2023 Tr., 158:24-159:4; June 14, 2023 Tr., 90-91:4; June 12, 2023 Tr., 66:15-17.] While GM does have an e-Commerce system, called Shop, Click, Drive, unlike Ford's e-Commerce program, the sale is still ultimately placed through the dealership and the dealership's website, not GM. [May 24, 2023 Tr., 66:21-67:19; June 6, 2023 Tr., 251:9-13; June 14, 2023 Tr., 38:2-4, 262:9-12; July 18, 2023 Tr., 82:22-83:7.] This fact reflects that other manufacturers do not see online sales as necessary to be competitive in an EV marketplace. **J.**

4. Guest XP

128. Ford is also requiring dealers to use its Guest XP software as a foundational element of the Model e Program. [C-3, pg. 8.] Dealers will need to pay Ford a one-time charge for this software, and thereafter a recurring annual fee of approximately \$33,000. [C-2, pg. 10.]

129. Guest XP is intended to facilitate customer online service reservations. [August 10, 2023 Tr., 172:2-173:1.] Ford dealers currently have a variety of options for other products that currently serve this function, most of which are significantly less expensive. [R-173, pg. 33.] While Ford contends that Guest XP will eventually include a variety of functions that these other programs do not have, that will not be the case at launch of the product. [August 10, 2023 Tr., 179:6-183:6.]

130. Guest XP is not specifically related to EV sales or service, and Ford also plans to implement Guest XP for ICE vehicles. This reflects that Guest XP has no direct connection to the sale and servicing of EVs.

I. MeCP and MAAP Pricing

131. There are two “pillars” of Model e Program: (1) foundational standards that are required to participate in Model e, and hence sell and service EVs; and (2) the Model e Commitment Program (“*MeCP*”), which allows dealers to earn financial incentives for complying with certain additional standards. The standards of MeCP include: (a) using a Minimum and Maximum Allowable Advertised Price (“*MAAP*”), (b) providing all customers with the option of remote pickup and delivery for sales and service; (c) and engaging in certain customer service follow ups and check-ins. [*Id.*]

132. While MeCP is not a requirement of Model e *per se*, it does relate to the returns on investment dealers should expect from EV sales. At the Vegas meeting, Ford personnel discussed

how Ford dealers would earn revenue from EVs under Model e. [May 19, 2023 Tr., 81:4-84:1; C-40, at 34.] Ford intends to sell EVs to dealers at an “invoice cost” (i.e., the dealer’s cost) which is equal to the Manufacturers Suggested Retail Price (“MSRP”). [Id.] This means that dealers will be buying the car for the same price the manufacturer advertises to consumers. [Id.] Although it is possible for dealers to sell the vehicle for over MSRP, and thereby still earn a “markup” on the vehicle, the primary way that Ford dealers will profit from EVs in the future will be through earning a percent of the invoice price from Ford (what Ford referred to as a “margin”). [Id.]

133. Thus, if a vehicle was sold to a dealer at \$50,000 invoice cost, and the dealer retails that vehicle to a customer, Ford would pay that dealer a percentage of the \$50,000 cost the dealer paid. [Id.] In this sense, margins are similar to a commission paid to a sales representative.

134. However, under the Model e Program, dealers will only earn approximately half of the available margin unless they met all of the elements of the MeCP program. [May 22, 2023 Tr., 61:21-62:8, 246:5-18.] In addition, approximately 1% of the invoice price will only be earned if a dealer advertises the vehicle within a certain price range set by Ford (aka MAAP), the bottom of which would be MSRP. [May 22, 2023 Tr., 243:21-245:18.] Thus, a dealer that does not meet the standards of MeCP may still be able to sell EVs, but at approximately 50% of the front-end gross profit of a dealer that does meet those standards.

During the Vegas Dealer meeting, Ford also told dealers that while the margins on EVs would initially increase, those margins would decrease steadily over the next three-years. [May 18, 2023 Tr., 145:7-148:22; C-40, at 37.] Ford told dealers that they would be able to earn back the difference through the sale of Ford “software” products to customers, but the details of those products have not yet been released to dealers and are still under consideration by Ford. [Id.]

J. Model e Enrollment Period

135. At the Vegas meeting, and in the Model e program materials, dealers were told that Ford's Next-Gen program would "sunset" on December 31, 2023. [C-3, pg. 1.] While Ford frequently used this term "sunset" throughout the hearing, it is clear that the Next-Gen program is terminating on December 31, 2023. [May 18, 2023 Tr., 75:14-24.]

136. Ford dealers were told that in order to continue selling EVs after the end of 2023, dealers would have to enroll in the Model e Program and meet the Model e "Foundational" elements, at a minimum. This was true even with respect to Ford's existing EVs, such as the Mach-e, the Lightning, and the e-Transit. Dealers were given a deadline of December 31, 2023, to meet Ford's Charging Standards. [May 18, 2023 Tr., 74:17-75:13; May 22, 2023 Tr., 53:17-55:13.]

137. Ford dealers were told that if they did not have to enroll in Model e at this time, they would be given another opportunity to enroll in 2025, albeit for sales starting in 2027. [May 22, 2023 Tr., 53:17-55:13.] In other words, a dealer that did not enroll in the Model e Program will be unable to sell EVs between January 1, 2024 and January 1, 2027, at the earliest.

138. Ford originally gave dealers only until October 31, 2022, to enroll in Model e Program. At the time dealers were required to enroll, many standards of the Model e Program were not fully defined or explained. An additional enrollment opportunity was then provided to dealers in February of 2023. Ex.R-179 at 3.

K. Model e Proforma

139. Shortly after announcing Model e Program, Ford provided dealers with a "proforma tool" that showed dealers what returns or losses they may see if they enrolled in Model e. [May 22, 2023 Tr., 120:20-121:24.] The proformas were detailed spreadsheets that contained pre-

populated data from Ford that varied by dealer. [May 19, 2023 Tr., 166:9–168:23.] The proformas reflected the dealers’ estimated costs of Model e, including the estimated costs of the charging standards, training, Guest XP and other Model e investments. [*Id.*; C-11, pg. 4-5.] The proformas also showed the dealers’ expected revenue from EV sales over the three-year life of Model e. [C-11, pg. 4-5.] Most importantly, the proformas contained pre-populated “throughput” numbers for each dealer in 2024, 2025, and 2026. [May 22, 2023 Tr., 195:5–196:12, 197:12–23.] “Throughput” is the number of EVs that Ford estimated that the dealer would sell in those years. [*Id.*] Although these proformas could be adjusted, Ford supplied the data in the proformas including throughput. [*Id.*]

140. The proformas that Ford created reflected that all twenty six Complainants would incur a loss from the investment in Model e. [See C-11.] Complainants provided the following summary of the Ford Certified Elite Proformas introduced at hearing:

Redacted-Under Seal

[C-11, pg. 1.]

141. As the above summary reflects, Ford estimated that Complainants would collectively lose over \$24 million during the three-year life of Model e Program. Complainants were also provided proformas for the Certified level of enrollment, but even at that lower level of investment, the proformas showed a collective loss of just under \$15 million for all Complainants.

[See C-10.]

142. Ford contends that the proformas *that Ford supplied to dealers* are not reliable because dealers were responsible for evaluating their own costs and profitability and adjusting the proforma. [May 22, 2023 Tr., 120:20-121:24.] It is unclear why Ford believed dealers would have enough time between September, 2022 and December 2, 2022 to fully assess those costs. For example, as part of Model e, Ford provided dealers with the opportunity to conduct a “site assessment” for the Model e Charging Standards with one of Ford’s approved “turnkey vendors.”

[C-2, pg. 16.] This site assessment, which many Complainants performed, cost \$1,500. [5/24 Tr., 45:2-16, 219:4-15; 6/6 Tr., 58:1-5; 6/7 Tr., 119:19-24; 6/12 Tr., 45:2-18; 6/14 Tr., 128:2-130:10 ; 7/18 Tr., 66:24-67:5.] Several Complainants testified that even after engaging a turnkey vendor, it took several months, in many cases the first or second quarter of 2023, to obtain a quote. [5/24 Tr., 45:2-16; 6/12 Tr., 45:2-12; 6/14 Tr., 128:2-130:1.]

143. The actual cost of the Charging Standards is typically much less than the \$1,120,000 that Ford initially estimated, and therefore the losses reflected in the proformas are overstated. [May 22, 2023 Tr., 53:17-54:24.] Even if this is so, the proformas reflect that Ford *believed* all twenty-six Complainants would lose substantial amounts of money and then evidence shows that the dealers will lose a substantial amount of money. Moreover, the costs of complying with Model e is still very high, even if less than Ford originally estimated. Ford witnesses testified that on average, nationally, the costs of installing the chargers has been approximately 70% of what Ford originally estimated. [May 19, 2023 Tr., 316:16-317:9; May 22, 2023 Tr., 53:17-54:24.]

144. Many Complainants also testified to costs ranging between \$600,000 and \$900,000 to meet the charging standards of the program, numbers that would still likely result in a loss on investment under the program. [5/24 Tr., 241:1-242:1; 6/5 Tr., 47:7-48:15, 252:14-253:3; 6/6 Tr., 45:3-46:8, 234:19-236:9; 6/15 Tr., 87:16-23; 7/18 Tr., 56:4-15.] In many instances, Complainants also testified that they were still waiting for information from utility companies to fully assess the costs of the program. [5/24 Tr., 244:11-245:7; 6/5 Tr., 187:5-190:6; 6/7 Tr., 119:19-123:13, 216:15-218:14.] As many of them noted, complying with the charging standards is likely to require substantial, and expensive power upgrades. [6/5 Tr., 187:5-190:6; 6/6 Tr., 45:3-46:8, 234: 19-236:9; 6/7 Tr., 119:19-123:13, 216:15-218:14; 7/18 Tr., 56:4-15.]

145. Ultimately, Ford could not and did not establish at Hearing that Complainants were likely to see a return on investment, let alone a significant or consistent return on investment.

146. The evidence also suggests that some of the proformas were “optimistic” because of the throughput numbers that Ford used. [May 22, 2023 Tr., 195:5-197:23.] The higher the throughput number on the proforma, the more return a dealer will see on the proforma. Ford contended during the hearing that the throughput numbers on the proformas were “low” because they were based on the assumption that every dealer in the country would sign up for Model e, which would constrain allocation. [*Id.*] However, just because more EVs may be available, that does not mean that Complainants are likely to sell that many EVs in 2024, 2025 and 2026. As reflected by the sales data presented at the hearing, some dealers are selling far fewer EVs than the throughput numbers Ford predicted they would sell, such that those numbers by Ford were unrealistic. [May 24, 2023 Tr., 54:1-14; June 5, 2023 Tr., 98:5-24; June 12, 2023 Tr., 113:5-114:13, 239:1-17; July 18, 2023 Tr., 47:10-48:9. *Compare* R-8, pg. 13; *with* C-11, pg. 1 (throughput). *See also* May 22, 2023 Tr., 207:18–211:10.] Moreover, Ford EVs are not selling as quickly as they had in the last year or two as supply catches up with demand. [6/5 Tr., 339:6-24; 8/10 Tr., 310:1-8.]

147. While it is be true that the EV market is expected to grow, Ford presented no evidence of how the market is expected to grow in Illinois, so that dealers are likely to meet or exceed the throughput numbers that were used to develop the proformas.

148. Complainants stipulated to that fact that they were financially sound and could afford the costs of Model e Program. The issue, however, is not whether they could afford Model e Program, but whether the program requirements are reasonable based on expectations in their markets.

149. On this record, the evidence reflected that Complainants are likely going to lose a substantial amount of money as a result of Model e during the life of the program.

L. Reduction of EV Dealers

150. Complainants contend that Model e Program is designed to force dealers, particularly those in smaller or rural markets, out of EV sales, thereby reducing the size of Ford's dealer network for EVs. Ford denies this and claims that Ford is "doubling down" on its dealers. Several internal Ford documents presented at the Hearing reflect that Ford expected a substantial number of dealers, particularly those in smaller markets outside of major urban areas, not to enroll in the Model e Program. For example, in an email communication about training costs, Dr. Gjaja admitted to several Ford personnel that the original budget for training costs was based on an expectation that only 1,000 dealers would sign up for Model e Program, or approximately 1/3 of all Ford dealers. [*Id.*]

151. In presentation materials from Dr. Gjaja's July 2022 presentation to Ford's Board of Directors, Ford included a map that reflects the hypothetical Model e enrollments for dealers in and outside of a major metropolitan area:

Redacted-Under Seal

[C-26, pg. 20.]

152. The box on the top right corner indicates that the information on the slide was based on Ford's "preliminary national modeling." Based on this modeling, Ford expected 8 out of 18 hypothetical dealerships, or approximately 44% of dealers in the geographic area, not to enroll in any level of Model e Program, thereby being forced out of EV sales and service entirely. Further, the slide reflects that Ford did not expect a majority of dealers to enroll as "sales and service" locations (which is how Ford initially referred to the Certified Elite dealers). According to the map, the majority of dealers that did not enroll at any level of the program were located on the outskirts or rural counties surrounding the hypothetical metro area.

153. On the right hand side of the map, Ford stated that it was preparing pro forma financial statements that would be distributed to each dealer in connection with Model e Program. Ford acknowledged: "We have assumed that dealers who are able to recover their capital investment within three years will enroll in either Sales & Service or Service Only."

154. Based on the Ford proformas given to Complainants, Ford did not expect *any* of them to recover their capital investment in the three-year term of the program.

155. 1,920 of Ford's nearly 3,000 dealers originally enrolled in the Model e Program at some level (this number has declined to 1,797 as of the end of the Hearing). [5/22 Tr., 101:6-15; 8/10 Tr., 94:13-21.] But by early August of 2022, more dealers opted out, leaving approximately 1,600 or 55% of dealers enrolled. See Aug. 10 Tr. 74:20-21 94:20-21 As a result, starting in 2024, 45% of its dealers in the United States will be prevented from EV sales and warranty service for at least the next three years.

156. There is other contemporaneous evidence that Ford is trying to reduce its dealer network. At the Hearing, Craig Kuhl of Jansen Ford of Breese testified that a Ford representative, Bradford Wilson, had informed Mr. Kuhl and his partner during a meeting at the dealership that Ford was seeking to reduce the number of dealers in his market area. [6/13 Tr., 227:16-229:8.] During this meeting, Wilson showed Kuhl a map reflecting that Ford sought to eliminate approximately eight dealership points from its network. [*Id.*]

157. In Ford's case in rebuttal, Mr. Wilson was called to refute the conversation. [8/2 Tr., 20:20.] Mr. Wilson claimed that it was Kuhl and his partner who raised the topic of reducing Ford dealers. [*Id.* at 45:13-48:18.] Mr. Wilson, however, acknowledged that he had discussed with Mr. Kuhl that Ford was seeking to reduce the number of points in the area to be more competitive with other manufacturers. [*Id.* at 57:2-62:19.] Mr. Wilson also acknowledged having a map that showed fewer Ford dealers, which was shown to Mr. Kuhl and his partner.

M. Involuntary Program

158. Ford contends that the Model e Program is "voluntary." However, it is undisputed that dealers are required to sign up for and comply with the Foundational Elements in order to

continue to sell and service vehicles they currently sell and service. Thus, in order to maintain their current status, participation in Model e Program is mandatory for all dealers.

159. At the end of 2023, Dealers that do not enroll in Model e Program will lose the ability to sell EVs to customers, or service EVs under warranty. [May 19, 2023 Tr., 163:4-20.] This means that non-Model e dealers will be unable to even service EVs under warranty that they previously sold. This will force non-Model e dealers to turn away existing customers and direct them to another Ford dealership, a direct competitor.

160. Complainants testified to the negative effects of being forced out of EV sales and service. *First*, all of the Complainants have sold at least a few EVs in the past three years. [See R-8, pg. 13.] Thus, each of the Complainants can reasonably expect to lose at least some sales and service revenue in the next three years if they are not enrolled in Model e Program.

161. *Second*, Complainants testified about the effect that being unable to sell Ford products would have on their reputation as a Ford dealer. [May 24, 2023 Tr., 54:22-57:10; June 5, 2023 Tr., 130:17-132:2; June 6, 2023 Tr., 46:9-48:13, 145:14-150:1, June 7, 2023 Tr., 211:23-214:15.] Much as Certified dealers would have to turn away non-“loyal” customers, dealers that have not enrolled in Model e Program would have to turn away *all* EV customers (loyal or otherwise). Complainants expressed concern that this would make customers perceive their dealership as something less than a full line Ford dealership.

162. *Third*, Complainants testified that if customers were redirected to other Ford dealers, that would be likely to affect Complainants’ ability to retain those customers in the future because they would now have a relationship with a competing Ford dealer. [May 24, 2023 Tr., 54:22-57:10; June 5, 2023 Tr., 130:17-132:2; June 6, 2023 Tr., 46:9-48:13, 145:14-150:1, June 7, 2023 Tr., 211:23-214:15.]

163. Complainant expressed concern that not being able to sell and service EVs would not only impact their EV sales, but also their ICE sales. Several Complainants testified that some potential EV customers come into the dealership asking about EV products, but ultimately end up buying an ICE product. [June 15, 2023 Tr., 139:10–140:21.] Thus, if Complainants are forced to turn away EV inquiries, those potential customers may ultimately go to another dealer, but end up purchasing an ICE vehicle that Complainants would have been able to sell to the customer. This would result in potential lost ICE sales, and not merely lost EV sales.

164. From this evidence, the Hearing Officer concludes that the Model e Program is not voluntary. Complainants were given no choice to remain on Next-Gen and continue selling EVs as they do today. Dealers that enrolled in the program were left with no other option to protect their ability to sell and service EVs as they do today.

165. Most Complainants enrolled at the Certified Elite level, with a few enrolled at the Certified Level. Several did not enroll at all. However, that does not make the program “voluntary.” Each of the Complainants testified that they felt they had no choice but to make their respective enrollment decisions to preserve their rights and avoid future harm when the program was implemented. [May 24, 2023Tr., 55:7-57:17, 246:14-247:6; June 5, 2023 Tr., 48:23-51:8, 130:11-132:10, 257:8-259:13; June 6, 2023 Tr., 46:9-47:7,145:17–150:1, 237:4-239:8; June 7, 2023 Tr., 30:10-35:7, 123:15-127:24, 212:2-214:15; June 12, 2023 Tr. 57:9-58:7, 170:10-171:9, 236:6-237:7; June 13, 2023 Tr., 30:21-33:2, 93:7-105:1, 230:8-233:23; June 14, 2023 Tr., 31:1-32:24, 126:5-127:10, 248:15-250:23; June 15, 2023 Tr., 29:4-31:5, 90:4-95:24, 240:21-243:16; July 18, 2023 Tr., 52:15-55:14.]

166. As several dealers testified, they were simply choosing the lesser of “three evils” for their dealership. [June 6, 2023 Tr., 46:9-47:7,145:17–150:1, 237:4-239:8; June 16, 2023 Tr.,

31:1-32:24.] Dealers who did not enroll testified that they could not justify taking the necessary losses to meet Ford's charging standards just to preserve their right to sell or service vehicles. [June 7, 2023 Tr., 30:10-35:7, 123:15-127:24; June 13, 2023 Tr., 230:8-233:23.]

167. Importantly, Ford required that each dealer enroll in Model e through Ford's "DPES" platform and agree to terms and conditions. On the online enrollment form, above a check box labeled "I Agree," Ford included the following phrase:

By checking the "I Agree" checkbox below, I represent that I am entering into this legally binding agreement on behalf of the dealership. I understand that this electronic agreement has the same legal effect as if I signed my name on a written legal contract.

[C-53.] This further supports that Ford considered the Model e Program to be a legally binding agreement, and not a "voluntary program" as its witnesses contended at Hearing.

CONCLUSIONS OF LAW

168. Complainants bring claims against Ford in relation to the termination of Next-Gen and the imposition of Model e under various sections of the Illinois Motor Vehicle Franchise Act: §§ 4(b), 4(c)(1), 4(c-5), 4(d)(1), 4(d)(4), and 4(d)(6).

169. When the IMVFA was passed in 1979, the General Assembly explained that "the [p]urpose of the bill is to attempt to strike a more fair balance between the interests of the manufacturers of automobiles and the dealers that operate in all of our districts." 81st Ill. Gen. Assem., Senate Proceedings, May 25, 1979, at 207 (statements of Senator Berman) (SA38.). Specifically, the Act was designed to release dealers who were held "captive" by automobile manufacturers. *Id.* Illinois courts have long recognized that the Act was "created for the benefit of the dealers and must therefore be liberally construed to carry out the legislative intent." *Kawasaki Shop of Aurora, Inc. v. Kawasaki Motors Corp., U.S.A.*, 188 Ill. App. 3d 664, 670 (2d Dist. 1989). The IMVFA was passed pursuant to the Illinois legislature's police power, and its

ultimate beneficiary is the Illinois consumer. *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 373 (2002).

V. Ford Violated Section 4(d)(6) of the IMVFA

170. Complainants assert that Ford violated Section 4(d)(6) of the IMVFA by terminating Complainants' right to sell Ford EVs unless they signed up for and met the standards of Model e. The Hearing Officer agrees for the reasons set forth below.

171. Section 4(d)(6) provides in relevant part:

(d) It shall be deemed a violation for a manufacturer, a distributor, a wholesaler, a distributor branch or division, or officer, agent or other representative thereof:

(6) to cancel or terminate the franchise or selling agreement of a motor vehicle dealer without good cause and without giving notice as hereinafter provided; to fail or refuse to extend the franchise or selling agreement of a motor vehicle dealer upon its expiration without good cause and without giving notice as hereinafter provided; or, to offer a renewal, replacement or succeeding franchise or selling agreement containing terms and provisions the effect of which is to substantially change or modify the sales and service obligations or capital requirements of the motor vehicle dealer arbitrarily and without good cause and without giving notice as hereinafter provided notwithstanding any term or provision of a franchise or selling agreement;

815 ILCS 710/4(d)(6) (emp. add.)

172. Ford contends that Section 4(d)(6) is not applicable because it is not terminating a franchise or selling agreement. Ford also argues that it is not offering Complainants a "replacement" franchise or selling agreement claiming that Next-Gen and Model e are "voluntary programs" that Ford can terminate or change at any time. The Hearing Officer considers those arguments below.

A. Next-Gen is a "Selling Agreement" under the IMVFA.

173. Ford's position is inconsistent with the plain language of the IMVFA and the evidence introduced at Hearing. First, the Next-Gen Agreement, to which each of the Complainants is currently a party, is a "selling agreement" within the contemplation of Section

4(d)(6). “A selling agreement is an agreement whereby an automobile dealer is permitted to sell the cars of a manufacturer, distributor, or wholesaler.” *Nw. Buick, Inc. v. Nissan Motor Corp.*, No. 89 C 9062, 1990 U.S. Dist. LEXIS 3462, at *11 (N.D. Ill. Mar. 28, 1990).

174. Ford’s attempt to avoid any interpretation of Next-Gen as a selling agreement fails based upon the plain language of the document, which Ford titles as the “Next-Gen EV Certification Agreement.” [Ex. C-1.] The text of the Next-Gen Agreement unequivocally provides that “ONLY FORD EV CERTIFIED DEALERS ARE AUTHORIZED TO ORDER AND SELL ANY NEW FORD BEV OR PHEV.” [*Id.* (emp. add.)] This language reflects that under the Next-Gen Agreement, Ford authorized (*i.e.*, permitted) Complainants to sell all new Ford BEV or PHEV that Ford manufactures.

175. Moreover, each of the Complainants agreed to the terms of the Next-Gen Agreement through Ford’s online enrollment platform, DPES. Moreover, Next-Gen had requirements that Complainants were obligated to meet, including installing chargers, performing training, and ultimately selling and servicing EVs, thereby giving Ford consideration in return for the “authorization” to sell EVs. Ford also performed under the Next-Gen Agreement by providing Complainants with EVs to sell and service. These are the hallmarks of a selling agreement, not a “program.” Under these facts, Next-Gen Agreement is a “selling agreement” under the IMVFA.

B. Complainants’ Arrangement with Ford to Sell and Service EVs is a “Franchise” under the Act.

176. Section 4(d)(6) also prohibits Ford from substantially modifying a dealer’s “franchise.” “Franchise” is defined even more broadly than a “selling agreement” as:

an oral or written arrangement for a definite or indefinite period in which a manufacturer, distributor or wholesaler grants to a motor vehicle dealer a license to use a trade name, service mark, or related characteristic, and in which there is a community of interest in the marketing of motor vehicles or services related thereto at wholesale, retail, leasing or otherwise.

815 ILCS 710/2(i).

177. Here, the evidence reflects that Complainants also have a “franchise” to sell Ford EVs. Notably, a franchise does not even have to be reduced to writing to be protected under Illinois law—oral “arrangements” can satisfy this standard. Further, by using both the terms “franchise” and “selling agreement” in Section 4(d)(6), the legislature intended to protect a broader class of relationships than just enforceable contractual agreements. *See, e.g. Zabinsky v. Gelber Grp., Inc.*, 347 Ill. App. 3d 243, 250 (1st Dist. 2004) (by protecting both “contracts and agreements” under Wage Payment and Collection Act, legislature intended for “agreement” to mean something broader than an enforceable contract).

178. Even if the Next-Gen Agreement is not a “selling agreement” as Ford contends, it still meets the definition of a “franchise” because it represents an arrangement between Ford and its dealers under which Ford dealers may sell and service Ford EV products. Next-Gen satisfies the “trade name, service mark, or “related characterizes” mark and “community of interest” elements of a franchise as well. Under Next-Gen, Ford authorized Complainants to sell “Ford” EVs, which not only bear the name “Ford” and are being sold by “Ford,” but the vehicles themselves bear the “Ford” logos. [C-26, at 14; c-39, at 17; C-40, at 2.] There is also a community of interest in the marketing of motor vehicles at wholesale, retail leasing or otherwise under Next-Gen. That is the very essence of the Next-Gen agreement; *i.e.*, to authorize Complainants to sell EVs at retail and market them to consumers. Accordingly, Next-Gen is both a “selling agreement” and a “franchise” as those terms are used under Section 4(d)(6), and therefore protected under Section 4(d)(6) of the IMVFA.

C. Ford's Actions Violate Complainants' Right to Sell All Ford Vehicles under the SSA

179. Even without the Next-Gen Agreement, the Board should still conclude that Complainants have a protected franchise right to sell and service EVs under their SSAs with Ford. The SSAs, themselves, entitle dealers to sell all Ford "Company Products," which include new cars and trucks manufactured and sold by Ford. Exs. R-27; R-68; R-69; R-70; R-71; R-72; R-73; R-75; R-76; R-77; R-78; R-79; R-80; R-81; R-82; R-83; R-84; R-94; R-85; R-86; R-87; R-88; R-89; R-90; R-91; R-92, at Standard Provisions, § 1.] As Ford witnesses acknowledged, this includes EV cars and trucks. [May 22, 2023 Tr., 168:19–169:10; 171:6–11.] While Ford may reserve the right under the SSA to offer only certain products to certain dealers, Ford *has* made EVs available to each of the Complainants for sale and service. Having done so, Ford cannot now take those products away without terminating or substantially modifying the Complainants' existing selling agreement or franchise with Ford.

D. Model e is Not "Voluntary."

180. Ford's argument is misplaced. The requirements of Next-Gen, and even other manufacturer's EV certification requirements, were indisputably easier for dealers to achieve, and substantially less expensive. The fact that dealers may have chosen to "live" with those requirements, instead of challenging them in litigation, does not reflect that dealers intended to indefinitely waive the right to challenge any EV certification requirements that Ford may come out with in the future. A waiver under the law is defined as a voluntary relinquishment of a known right (*Gallagher v. Lenart*, 226 Ill. 2d 208, 229 (2007)), and dealers could not have waived the right to challenge future EV certification requirements that were unknown to them when they agreed to earlier standards. Moreover, Section 27 of Complainants' SSAs prohibits implied

waivers under those agreements. Thus, Complainants could not have waived their right to challenge terminations of, or changes to, that agreement, by not doing so previously.

181. Ford also argues that because it reserved the right to change the terms of Next-Gen in the future, or even terminate Next-Gen at Ford's election, Ford can avoid the application of the IMVFA. However, the fact that the Next-Gen Agreement provides that Ford may terminate or modify that agreement at will has no relevance to the statutory inquiry. The IMVFA applies to *all* agreements between a manufacturer and a dealer. 815 ILCS 710/8.

182. Provisions in a franchise agreement that are contrary to protections under the IMVFA are not enforceable. *Crossroads Ford Truck Sales, Inc. v. Sterling Truck Corp.*, 341 Ill. App. 3d 438, 445 (4th Dist. 2003) (citing *People ex rel. Callahan v. Marshall Field & Co.*, 83 Ill. App. 3d 811, 818 (1st Dist. 1980)). Thus, the fact that a manufacturer reserves the right to terminate or change a franchise agreement at any time does not mean that a manufacturer is free to do so if the IMVFA prohibits it. Moreover, Section 4(e)(9) of the IMVFA prohibits manufacturers from requiring dealers to assent to prospective waivers of rights and liability under the IMVFA. 815 ILCS 710/4(e)(9). Similarly, Section 4(d)(6) applies "notwithstanding any term or provision in a selling agreement." 815 ILCS 710/4(d)(6). These statutory provisions prevent manufacturers from avoiding liability under the IMVFA by attempting to contract around the Act.

183. Ford also directs the Board to a recent South Dakota decision. The South Dakota Office of Hearing Examiners held that Ford not only was not arbitrary, in bad faith, or unconscionable in promulgating the Model e Program, but found that Ford had "good cause" for dealers selling and offering a full range of warranty service for electric vehicles meeting the Model e Program standards. *Frontier Motors Ford, Inc. v. Ford Motor Co.*, HF No. DOR 22-11 (S.D. Office of Hearing Examiners June 16, 2023). Office of Hearing Examiners concluded that

Ford had shown that “the Model e requirements are reasonable, and some are essential and required under South Dakota law.” *Id.* at 29.

184. However, Ford’s reliance on this non-binding recent South Dakota administrative decision is erroneous. First, the Board has no information about what evidence or information was before that administrative body as to conclude that the same evidence was considered or that the same result should be reached here. Second, the South Dakota law applied in that decision is distinguishable insofar as the term “franchise” under South Dakota law appears to require an “agreement,” as opposed to under Illinois law, which merely requires an “arrangement.” *Compare* SDCL § 32-6B-1(13) *with* 815 ILCS 710/2(i). *Third*, there is little explanation for many of the conclusions reached by the South Dakota ALJ in the written order. For example, there is no real explanation why that tribunal concluded that the “Next-Gen Agreement” was not an “agreement,” but instead a “program.” That rationale seemed to be based primarily on the fact that dealers enrolled in Next-Gen through the same online platform as other “Ford” programs, DPES. However, the ALJ did not examine the written terms and conditions of the Next-Gen Agreement, which clearly referred to it as an “agreement” and imposed terms and conditions on dealers. The ALJ also concluded that “dealer programs” do not change the sales or service agreement or franchise agreement of the dealers, but if Next-Gen authorized dealers to sell EVs, which are “Company Products” under the SSAs, then that decision seems unsupported. Finally, it is ultimately the Illinois Board that is tasked with applying Illinois law based on the facts before it. Accordingly, there is no persuasive value to the South Dakota administrative decision.

185. Ford raises several arguments to try to support its position that Next-Gen and Model e are “voluntary programs.” Ford argues that Model e is a voluntary program versus a selling agreement or franchise because none of the Complainants filed a protest over the Next-Gen

Agreement, even though they had to enroll in Next-Gen in order to receive allocation of EVs. Ford points out that several dealers enrolled in other manufacturer EV programs without filing any protest, which also demonstrates that these programs were “voluntary.”

186. Even if Next-Gen and Model e were “voluntary,” as Ford contends, that would not change the result here. Again, under the IMVFA, a franchise is *any arrangement* between a dealer and a manufacturer involving a trade name or mark and a community of interest related to selling vehicles at retail or wholesale. 815 ILCS 710/2(i). This broad definition of an “arrangement” covers voluntary programs. So, even assuming *arguendo* that dealers “voluntarily” entered into Next-Gen, that does not mean that Ford is now free to terminate that arrangement or substantially modify it without good cause.

E. Ford is Attempting to Terminate Complainants’ Existing Selling Agreement or Franchise to Sell and Service EVs.

187. It cannot be disputed that Ford is terminating Complainants’ Next-Gen Agreement and their existing franchise that authorizes them to sell and service EVs. While Ford contends that Next-Gen is “sunsetting,” that agreement has no expiration or term. Stripped of all pretense, Next-Gen is not “sunsetting” at all; Ford has decided to terminate Next-Gen. And when Ford does, dealers who are currently enrolled in Next-Gen will lose the right and ability to sell and service Ford EVs *unless* they enroll in Model e. Ford is therefore terminating Next-Gen, and hence a franchise and/or selling agreement, as discussed above. Accordingly, Ford must have good cause and issue statutory notice before doing so.

188. Ford contends that because Complainants will still be allowed to sell Ford ICE products, there is no termination or modification of a franchise or selling agreement. However, that is inconsistent with the evidence. Ford is only taking away EVs from certain dealers—*i.e.*, those who have not enrolled in Model e or met the standards of that program. It is not canceling

or removing a model from its line of vehicles across all dealers (*i.e.*, a market withdrawal”). This selective “discontinuation” of sales only at certain Ford dealerships amounts to a termination of a franchise within the contemplation of Section 4(d)(6).

189. For example, in *Mid-State Truck Serv., Inc. v. Gen. Motors Corp.*, the United States District Court for the Western District of Wisconsin considered a similar provision of Wisconsin’s franchise statute in a case where GM was canceling a GMC dealer’s ability to sell heavy duty trucks. No. 87-C-995-S, 1988 U.S. Dist. LEXIS 18288, at **9–19 (W.D. Wis. Mar. 28, 1988). The Court concluded that because GM was not withdrawing these products from the market entirely, it could not simply cancel a dealer’s ability to sell heavy duty trucks under Wisconsin’s franchise statute, even if the dealer would still be authorized to sell other GM products. *Id.* at **19–24. Citing the remedial nature of Wisconsin’s franchise statute, the court also rejected that it had to defer to GM’s “business judgment” about how best to market and distribute its products. *Id.* at **20–21. Because GM was not withdrawing its products entirely from the market, the court entered summary judgment on liability in favor of the dealer. *Id.* at **23–26.

190. Here too, Ford is terminating the Next-Gen Agreement and advising dealers that their right to sell EV products under that agreement is coming to an end. However, Ford is not withdrawing from the EV market entirely. To the contrary, it is stilling planning to sell EVs through other Ford dealers who have enrolled in Model e and met its terms and conditions. Accordingly, Ford’s termination of the Next-Gen program is prohibited by Section 4(d)(6) unless Ford has provided statutory notice and has good cause for terminating the program.

F. Ford is Offering Complainants a Replacement Franchise or Selling Agreement that Substantially Modifies or Changes their Obligations Arbitrarily and Without Good Cause.

191. Ford has also offered dealers a replacement for Next-Gen: Model e. Ford argues that Model e is also a voluntary program. However, if dealers are to retain their right to sell and service Ford EV products, they had no choice other than enrolling in Model e. Moreover, Model e contains specific requirements that a dealer must meet to continue to sell and service EVs. Tellingly even Ford's enrollment form that dealers had to electronically sign referred to the terms and conditions of Model e as a "legally binding agreement."

192. Ford's expert witness, David Smith, presented opinion testimony that the Model e Program was "voluntary" because some dealers enrolled and some did not. However, this opinion is not persuasive. There was no scientific or analytical basis offered for Smith's "opinion." It is also inconsistent with the evidence. Dealers testified that they enrolled in the program because they had no choice to preserve their investments and relationships with EV customers. Other dealers that did not enroll in the program testified that the cost of the program and eCommerce terms and conditions were too onerous to justify even enrolling to preserve the ability to sell and service EVs. This does not reflect "voluntary" behavior—it simply reflects parties mitigating their losses in different ways that best meet their circumstances. Ford also presented no contrary evidence from any dealer in support of the program who believed that he or she had a voluntary choice with respect to Model e.

193. Instead, Model e is a replacement franchise or selling agreement, just like Next-Gen. The Model e terms and conditions state unmistakably that "Dealers who enroll as Certified Elite Dealers [under Model e] are eligible to sell or service new EVs." Thus, like Next-Gen, Model e authorizes dealers to sell and service EVs. Although Ford has used terms like "standards," "elements," and "program pillars," under Model e, these are just different words for "requirements" or "terms and conditions" that are part of any agreement. Dealers must "agree" to

meet Ford's standards, elements and program pillars to sell and service EVs. For all of the reasons that Next-Gen was a selling agreement or a franchise, the same is true about Model e.

194. Moreover, Model e substantially changes the sales and service obligations and capital requirements of a dealer. Dealers will be required to install expensive chargers at their dealership without an expectation of a return on those investments in the foreseeable future. One of those chargers must be offered to the public. Dealers must also conduct expensive training and purchase software from Ford to continue selling EVs. Dealers are required to sell EVs only through Ford's website, Ford.com and purchase Guest XP from Ford. These are substantial modifications to the existing sales and service obligations, and capital requirements, that Complainants have under Next-Gen.

195. To be clear, Next-Gen is not expiring. That agreement is perpetual and is only ending because Ford is terminating that agreement, which Ford is only doing as to make way for Model e. If dealers do not accept Ford's "offer" of Model e, they will lose the ability to sell and service EVs. For this reason, Ford's actions are best viewed as a termination under Section 4(d)(6), and not as an offer of a replacement or renewal agreement. However, whether this case is viewed as solely a termination of Complainants' right to sell and service EVs, or as the offer of a replacement agreement to do so, Ford's actions violate Section 4(d)(6) for the same reasons: Ford failed to give statutory notice and lacks good cause for its actions.

G. Ford Failed to Provide Statutory Notice for The Termination of Next-Gen or the Imposition of Model e.

196. Section 4(d)(6) contains specific notice provisions that a manufacturer is required to follow if the manufacturer intends to cancel or terminate a franchise or selling agreement or renew or replace a franchise or selling agreement. Specifically, the manufacturer is required to

send a written notice to the dealer via certified mail at least sixty (60) days “before the proposed action.” § 4(d)(6)(A) & (B). The notice must include a “detailed statement setting forth the specific grounds for the proposed” cancelation or termination, or in the case of a renewal or replacement, the “proposed action.” In all cases, this notice must inform the Complainant that they have a right to file a protest before the Motor Vehicle Review Board.

197. With respect to notice, Ford’s witness Mike O’Brien acknowledged that Ford has not provided Complainants with any formal notice of the termination of Next-Gen or the imposition of the Model e Program, let alone one that complied with Section 4(d)(6). [5/22 Tr., 155:19–156:2, 175:20–176:9.] Ford has already told its dealer body that the program is “sunsetting” and required dealers enroll Model e, originally by December 2, 2022. Dealers that did not do so by that time were told they will lose their ability to sell EVs. Thus, Ford has already taken steps to terminate the Next-Gen Agreement, and replace it with Model e, without complying with the notice provisions of the statute. This alone violates Section 4(d)(6).

H. Ford Lacks Good Cause to Terminate Complainants’ Next-Gen Agreements or Replace it with Model e.

198. Even if Ford did send a notice that would comply with Section 4(d)(6), it still cannot terminate Complainants’ ability to sell or service EVs or require them to agree to Model e for a more fundamental reason—Ford has not established that it has good cause to do so, as required by Section 4(d)(6).

190. “Good cause” is defined under Section 2(v) of the IMVFA as “facts establishing commercial reasonableness in lawful or privileged competition and business practices as defined at common law.” 815 ILCS 710/2(v). In Illinois, “commercial reasonableness” is measured by an objective standard. *Houser v. State Farm Ins. Co.*, 193 Ill. App. 3d 125, 128 (3d Dist. 1989); *Millers Mut. Ins. Ass’n v. House*, 286 Ill. App. 3d 378, 384 (5th Dist. 1997). Because this standard

is objective, and not subjective, it does not turn on what Ford thinks is reasonable or what Complainants think is reasonable, but rather, what the Board thinks is objectively reasonable in light of the evidence presented by the parties. *Id.*

200. In addition, Section 12(c) outlines nine factors that the Board must consider in evaluating whether there is “good cause” to terminate a franchise or selling agreement. Again, Ford has the undisputed statutory burden for establishing good cause under Section 4(d)(6).

201. ***First***, the Board must consider “the amount of retail sales transacted by the franchisee during a 5-year period immediately before the date of the notice of proposed action as compared to the business available to the franchisee.” Typically, in a termination case under Section 4(d)(6), a dealer’s sales are evaluated to see whether they are significantly lower than the potential sales in the market (*i.e.*, poor performance). Here, however, Ford presented no evidence that any of the Complainants were not selling EVs that could be sold in their markets, much less doing so at a rate that would justify taking away their ability to sell EVs entirely now. No evidence regarding the Complainants’ “sales effectiveness” for EVs was presented as to reflect that Complainants are performing poorly with respect to EV sales. This is so, even though Ford acknowledged that it was measuring EV sale effectiveness. [5/22 Tr., 169:12–170:14.] Moreover, Ford presented no evidence that the required standards under Model e were likely to increase Complainants’ EV sales. While Ford may *think* that customers will like certain aspects of Model e, there was no empirical or quantitative evidence showing that sales of EVs were likely to increase *due to the Model e Program*, as opposed to other factors.

202. ***Second***, the Board must consider “the investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.” ***Third***, the Board must also consider

“the permanency of the franchisee’s investment.” Because these factors are related, they are considered together.

203. Importantly, the IMVFA is intended to protect the investments and properties of citizens of this state. 815 ILCS 710/1.1. Each of the Complainants has already made at least some investment in EV sales and service operations under Ford’s prior EV certification programs, including Next-Gen, primarily charging equipment, and special tools. Moreover, Complainants have made other investments in EV sales and service, such as training of dealership staff. While the amount of these prior investments may not be particularly significant in comparison to other investments dealers have made in their dealerships, Ford has not demonstrated that these investments are inadequate for EV sales and service at Complainants’ dealerships.

204. Moreover, there is no reason to look solely at Complainants’ investment in EV equipment, tools and training. Complainants do not operate separate EV dealerships; these products are part of Complainants overall dealership operations. The Complainants have significant investments in their franchises overall, as reflected in the report of Ford’s expert, Brian Gaspardo. [R-8, at 13.] Yet, Complainants risk losing sales and customers, including potential ICE customers, if they are forced to turn away customers inquiring about Ford EV products. Thus, Complainants risk losing value to their franchise investments, as a whole, if they are only allowed to sell a part of Ford’s product line. Ford must be able to show that its actions are justified in light of the potential harm to these substantial investments, something that Ford has not done.

205. ***Fourth***, the Board must consider “whether it is injurious to the public interest for the franchise to be cancelled or terminated or not extended or modified, or the business of the franchise disrupted.” This factor weighs heavily in favor of Complainants. The Model e Program is likely to drive Ford dealers in certain markets out of EV operations for at least the next three

years, and potentially longer. Again, internal emails from one of Ford's chief executives, Dr. Gjaja, reflect that Ford had estimated that as few as one-third of dealers would enroll in Model e, and a presentation that Dr. Gjaja gave to Ford's Board of Directors reflected that most enrollees were likely to be in major metropolitan areas. Further, only about 55% of Ford dealers have enrolled in Model e, and it is not clear that number will stay constant as Ford continues to push the Model e standards. Whether by design or by accident, Model e will have the effect of reducing the number of Ford dealers that are selling and servicing EVs in Illinois. This is likely to make EVs less accessible to Illinois consumers and result in more harm than good to consumers.

206. For one, consumers that have purchased EVs will be unable to get warranty service from their dealerships if those dealers are pushed out of EV service by Model e. It is not only foreseeable that such "orphaned" consumers will have to travel further to get warranty work performed, but it also deprives those consumers of the ability to work with a Ford dealership that they know and are familiar with. It also means that there will be *fewer* dealers and servicers of EV products in these markets, generally. Ford points to federal regulations that are incentivizing the adoption of EV products as evidence that the EV market will grow. While that may be so, it also reflects that there is a public interest in incentivizing the adoption of low emission vehicles. It is hard to see how a program that will substantially reduce the number of EV retailers and servicers in Illinois is consistent with these public goals. Moreover, the IMVFA is intended to promote healthy competition in motor vehicle sales. A program that forcefully reduces the number of competing EV retailers does not promote healthy competition. Given the potential for harm to the public, Ford needs a compelling justification for Model e, which it has not shown.

207. The fact that Ford is requiring Model e dealers to install a public Level 3 DC fast charger, which may plausibly benefit some consumers, does not offset these concerns. First,

dealers that do not enroll in Model e will not be installing public chargers anyway, so consumers close to these dealers will not benefit from this requirement. Moreover, as noted above, Ford presented no evidence that consumers actually want to charge their vehicles at a Ford dealership, or that Ford dealers are located in places where consumers are particularly likely to need a fast charger, such as highway exits.

208. Other aspects of Model e also raise concerns about potential injury to the public. For example, non-negotiable pricing could be interpreted to mean that dealers are not free to lower their prices for consumers. While consumers may not like negotiating, a policy that prevents dealers from lowering their prices is not good for the public. The same can be said for Ford's online trade-in tool. Although providing consumers with an easy online option to obtain trade-in values may sound desirable, the tool puts Ford squarely in the middle of the retail transaction with the consumer. It also means that consumers may earn a lower price on their trade in vehicle than a dealer may provide at the dealership. On this record, these restrictions do not appear to serve any compelling public interest, and instead, threaten to reduce competition among dealers, which is ultimately good for consumers.

209. Moreover, although the details of Ford's eCommerce platform and rapid replenishment system are still in development, it is unclear that those aspects of Model e will benefit the public either. For one, the Illinois Vehicle Code provides that "No person shall engage in this State in the business of selling or dealing in, on consignment or otherwise, new vehicles of any make, or act as an intermediary or agent or broker for any licensed dealer or vehicle purchaser other than as a salesperson" 625 ILCS 5/5-101(a). Under the Model e Program, Ford will not only be using its eCommerce platform to offer vehicles that are still owned by Ford for sale to consumers, it will be the exclusive forum in which sales transactions can be completed. While

dealers may ultimately deliver these vehicles to consumers, this certainly places Ford in the midst of the retail transaction, and not just the role of manufacturer and wholesales. Under Model e dealers will also have less inventory on their lots, reducing consumer access to inventory for immediate delivery. Finally, while Ford contends that these e-Commerce standards are intended to provide a “best-in-class” consumer experience, it is equally plausible from the evidence at hearing that these aspects of Model e Program are primarily to serve Ford’s planned online distribution system, and not consumer preference. While the exact details of Ford’s eCommerce and distribution system are not yet final, it is sufficient for the Board to conclude at this stage that Ford has not shown “good cause” to require dealers to agree to this system *as a condition* of being able to sell and service EVs.

210. *Fifth*, the Board must consider “whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and service personnel to reasonably provide for the need of the customers for the same line make of motor vehicles handled by the franchisee.”

211. This factor is also key to this dispute and again weighs heavily in favor of the Complainants. In drafting this statutory factor, the legislature used important words that guide this inquiry. The legislature instructed the Board to consider whether the franchise had “adequate” facilities and equipment to “reasonably provide” for the “need of customers.” This inquiry does not require a dealer to have *the best in class* or *ideal* facilities or equipment, but rather only adequate ones. Moreover, the inquiry does not require a dealer to meet every plausible desire of consumers, but rather reasonably provide for consumers’ needs. This means that dealers need facilities and equipment that are adequate to sell and service vehicles.

212. It is impossible to find on this record that Complainants do not currently have such facilities and equipment. Each Complainant testified that they were meeting the needs of their

dealership and customers with the existing charging and training requirements of Next-Gen. Even if this testimony was self-serving, Ford presented no contrary evidence about any of the Complainants as to call this testimony into doubt. Ford had the burden to establish that Complainants lack adequate facilities and equipment to reasonably meet the needs of EV customers before terminating their right to sell these products under Next-Gen. In short, Ford did not demonstrate “good cause” under this factor.

213. Sixth, the Board must consider “whether the franchisee fails to fulfill the warranty obligations of the manufacturer required to be performed by the franchisee.” There is no evidence that the Complainants could not fulfill EV warranty obligations under Next-Gen. Moreover, if dealers lose the ability to sell and service EVs, they will be unable to perform warranty service for EV customers. This factor illustrates the public importance of ensuring that consumers have access to warranty service, something Model e will make harder by forcing dealers out of EV service.

214. Seventh, the Board must consider “the extent and materiality of the franchisee’s failure to comply with the terms of the franchise and the reasonableness and fairness of those terms.” There is no evidence that any of the Complainants are not materially in compliance with the terms of their franchise, as to justify terminating their ability to sell EVs.

215. Eighth, the Board must consider “whether the owners of the franchise had actual knowledge of the facts and circumstances upon which cancellation or termination, failure to extend or renew, or changing or modification of the obligations of the franchisee as a condition to offering a renewal, replacement, or succeeding franchise or selling agreement.” On its face, this factor appears to relate to cases where a dealer is being terminated for reasons that were in the control of the dealer—such as performance issues. Those types of issues are not present in this case where Ford is terminating Next-Gen to make way for Model e Program. Nevertheless, it is worth noting

that Complainants had little say or notice in Ford's actions. Ford announced Model e, and the related termination of Next-Gen, at a meeting last September and gave dealers originally only two months to decide whether to enroll in the program or sit out on EV sales for three years. Many aspects of the Model e Program were, and still are, unclear or in development. To the extent this factor can be applied to this case, it does not support termination of Next-Gen or replacement with Model e.

216. Ninth, and finally, the Board must consider "the extent to which local market factors in the dealer's market area presented by the dealer impacted the dealer's performance." Again, Ford never considered local factors within the Complainants' markets. Instead, it looked to national data and made broad assumptions about its dealer body that assumed all dealer's EV markets are the same. Ford's contention that it could not evaluate each individual dealer's market is unavailing. Ford did not even attempt to consider how local markets may differ and tailor its program in a way that reflected those needs. Ford can do that, and it has in the past with respect to other facility programs. This is particularly important here, where Ford is asking dealers to install chargers beyond those required by any comparable program in the market.

217. On this record, the Hearing Officer does not find that Ford had good cause to terminate Complainants' rights to sell EVs under Next-Gen or their existing SSAs. Nor did Ford have good cause to offer to replace Next-Gen with Model e. For avoidance of doubt, Ford does not have good cause for requiring dealers to meet the Model e Charging Standards, sell EVs only online through Ford.com, pay \$40,000 annually for additional EV training, or purchase Guest XP from Ford. Therefore, Ford violated Section 4(d)(6) of the IMVFA.

VI. Ford Violated Section 4(d)(4) of the IMVFA.

218. Complainants assert that by requiring them to enroll in Model e to receive an allocation of EVs after January 1, 2024, Ford also violated Section 4(d)(4) of the IMVFA. That section provides that it is a violation for a manufacturer:

(4) to coerce, or attempt to coerce, any motor vehicle dealer to enter into any agreement with such manufacturer, distributor, wholesaler, distributor branch or division, factory branch or division, or wholesale branch or division, or officer, agent or other representative thereof, or to do any other act prejudicial to the dealer by threatening to reduce his allocation of motor vehicles or cancel any franchise or any selling agreement existing between such manufacturer, distributor, wholesaler, distributor branch or division, or factory branch or division, or wholesale branch or division, and the dealer.

219. Ford argues that its actions in this case are not coercive because Model e is “voluntary” and dealers had a choice to either enroll or not enroll in the program. It is difficult to think of many actions that a manufacturer could take that are more coercive than telling dealers they will lose products they are currently selling unless they agree to terms unilaterally imposed by the manufacturer. Regardless, the Board need not ultimately decide whether Ford’s approach to Model e was “coercive.” Section 4(d)(4) prohibits Ford from doing “any other act prejudicial to the dealer *by threatening to reduce his allocation of motor vehicles or cancel any franchise or any selling agreement existing between such manufacturer . . . and the dealer.*” This second clause of Section 4(d)(4), which is disjunctive to the first clause, does not require “coercion,” but rather, simply a threat to take away vehicle allocation or cancel a franchise in order to get the dealer to do something “prejudicial to the dealer.”

220. The Complainants argue that Model e is prejudicial to them for a variety of reasons, but especially because the expense of the program is not likely to be recovered from EV sales during the life of the program. Complainants expect to lose money operating under Model e. And it is not just Complainants that expect to lose money; Ford also expects them to lose money. This

is reflected on the proformas that Ford gave each of the Complainants, which reflected that Complainants were expected to lose a collective projected amount in excess of \$24 million for all of the Complainants.

221. The Model e Program is therefore prejudicial to the Complainants. Yet, Ford has threatened to take away their ability to sell or service EVs for the next three years—*i.e.* reduce their allocation of EVs or cancel their franchise to sell Ford EVs—if Complainants do not agree to the terms of the program. These facts fit the prohibitions of Section 4(d)(4).

VII. Ford violated Section 4(c)(1) of the IMVFA.

222. Similar to Section 4(d)(4), Complainants assert that by requiring them to enroll in the Model e Program to receive an allocation of EVs after January 1, 2024, Ford also violated Section 4(c)(1) of the IMVFA. That section provides:

It shall be deemed a violation for a manufacturer, . . . to coerce, or attempt to coerce, any motor vehicle dealer:

(1) to accept, buy or order any motor vehicle or vehicles, appliances, equipment, parts or accessories therefor, or any other commodity or commodities or service or services which such motor vehicle dealer has not voluntarily ordered or requested except items required by applicable local, state or federal law; *or to require a motor vehicle dealer to accept, buy, order or purchase such items in order to obtain any motor vehicle or vehicles or any other commodity or commodities which have been ordered or requested by such motor vehicle dealer;*

815 ILCS 710/4(c)(1) (emphasis added).

223. Again, Ford argues that it has not coerced dealers in any respect. But again, like Section 4(d)(4), Section 4(c)(1) does not require coercion where the manufacturer is refusing to deliver vehicles ordered or requested by the dealer. In drafting that subsection, the legislature included a disjunctive clause that also makes it a violation of the IMVFA to require a dealer to accept, buy, order or purchase certain appliances, equipment, etc. in order to obtain motor vehicles

ordered or requested by the dealer. Because it is disjunctive, the only plain reading of the second clause in subsection 4(c)(1) is to read it as an alternative to “coercion” (*i.e.*, “It shall be deemed a violation for a manufacturer, . . . to coerce, or attempt to coerce, any motor vehicle dealer . . . or to require a motor vehicle dealer to accept, buy, order or purchase . . .”).

224. This language prohibits Model e because Ford is requiring dealers to purchase and install chargers as a condition of receiving allocation of EVs after December 31, 2023. Chargers are equipment or appliances within the meaning of this statute. Ford is also requiring dealers to purchase and use a Ford proprietary software program, Guest XP, as a condition of obtaining EVs under Model e. Guest XP is a commodity or service within the meaning of this statute.

225. Ford is prohibited from doing this under the IMVFA. Further, the fact that Ford has yet to actually refuse to fulfill any deliveries because it is still 2023 does not mean that this Section has not been violated. Ford has announced in unmistakable terms that dealers that do not enroll in Model e and comply with its Charging Standards will not be able to order or sell perform warranty service EVs after December 31, 2023. In the face of such clear statements from Ford, Complainants do not have to wait until they are actually further harmed to seek relief from the Board. *See generally Alternate Fuels, Inc. v. Dir. of the Ill. EPA*, 215 Ill. 2d 219, 231 (2004) (an issue is justiciable where an assertion of uncertainty regarding a plaintiff’s legal rights is made); *First of Am. Bank, N.A. v. Netsch*, 166 Ill. 2d 165, 175–76 (1995) (bank’s declaratory challenge to state policy was proper where it alleged the policy would affect prices received on sheriff’s sales); *Bituminous Cas. Corp. v. Commercial Union Ins. Co.*, 273 Ill. App. 3d 923, 930–31, 210 Ill. Dec. 216, 221, 652 N.E.2d 1192, 1197 (1st Dist. 1995) (where a party receives positive and unequivocal notice of another party’s intent not to perform, the injured party may bring suit). Ford

has violated Section 4(c)(1) by conditioning the fulfillment of orders on the purchase and installation of electric chargers and the use of Guest XP.

VIII. Ford violated Section 4(c-5) of the IMVFA.

226. As part of Model e, Ford requires that dealers install and offer public charging at their dealerships. Complainants contend that this violates Section 4(c-5).

227. Section 4(c-5) of the IMVFA provides:

(c-5) A manufacturer, a distributor, a wholesaler, a distributor branch or division, a factory branch or division, or a wholesale branch or division, or officer, agent, or other representative thereof may not:

(1) require a motor vehicle dealer to offer a secondary product;

As used in this subsection, “secondary product” means all products that are not new motor vehicles or original equipment manufacturer parts.

228. Complainants contend that by forcing them to offer a public charger on their lots, Ford is requiring them to offer a secondary product, namely electricity for charging EV batteries. Complainants repeatedly noted that they do not offer gas pumps for customers or the public.

229. Ford argues that electricity is not a “product” and is best understood as an “amenity.” There are no cases interpreting this precise issue within the meaning of Section 4(c-5), leaving it to the Board to decide in the first instance whether the legislature intended to include electricity within the definition of secondary product under Section 4(c-5). The Hearing Officer recommends that the Board conclude that electricity is a secondary product when an OEM mandates that a dealer offer it to consumers for use in their vehicles.

230. There are several reasons to reach this conclusion. Foremost, the Illinois Supreme Court has held in other statutory contexts that electricity constitutes “tangible personal property” that is capable of being “retailed.” *Exelon Corp. v. Dep’t of Revenue*, 234 Ill. 2d 266, 284 (2009). This alone strongly suggests that when electricity is offered to consumers, either with or without

charge, it is a “product.” Moreover, several courts in other states have found electricity to be a “good” under the Uniform Commercial Code or a “product” for strict liability purposes. *Puget Sound Energy, Inc. v. Pac. Gas & Elec. Co. (In re Pac. Gas & Elec. Co.)*, 271 B.R. 626, 638 (N.D. Cal. 2002); *Helvey v. Wabash Cty. REMC*, 151 Ind. App. 176 (1972); *In re Grede Foundries, Inc.*, 435 B.R. 593, 596 (Bankr. W.D. Wis. 2010); *Detroit Edison Co. v. Dep't of Treasury*, 303 Mich. App. 612, 844 N.W.2d 198, 207 (Mich. App. 2013); *Bryant v. Tri-County Elec. Membership Corp.*, 844 F. Supp. 347, 349 (W.D. Ky. 1994); *Bellotti v. Duquesne Light Co.*, 44 Pa. D. & C.3d 425 (C.P. 1987). In many of these cases, the court’s rationale is based on the fact that electricity can be metered and “sold” like other goods or products.

231. Here, electricity fits the definition of a “secondary product” in Section 4(c-5), which are “all products that are not new motor vehicles or original equipment manufacturer parts.” Electricity is a product, but it is not a vehicle or a part, much less an original equipment manufacturer (*i.e.*, Ford) part. Hence, it is a secondary product, and Ford cannot require dealers to offer it to the public.

232. Notably, the legislature expressly provided that manufacturers may offer incentive programs to “encourage” dealers to offer secondary products. However, that cannot be a *requirement*, as it is under the Model e Program. 815 ILCS 710/4(c-5). Ford’s public charger requirement violates Section 4(c-5).

233. The Respondent contends that since § 4(c-5)(1) was added to the Dealer Act by 2021 Illinois Laws 102-0433 (House Bill 2435), effective January 1, 2022, and every Dealer’s Sales and Service Agreement—except for Anderson’s Rock River Ford’s—was signed and in effect before then. *See* Exs. R-27, 67-73, 75-94. Ford further argues that § 4(c-5)(1) is inapplicable to all of the Dealers except Anderson’s Rock River Ford because amendments to the

Act do not apply retroactively to franchise agreements entered into before their passage. In support of its argument, the Respondent relies on *McAleer Buick-Pontiac Co. v. General Motors Corp.*, 95 Ill. App. 3d 111, 610-611 (4th Dist. 1981); *Yakubinis v. Yamaha Motor Corp.*, 365 Ill. App. 3d 128, 140 (1st Dist. 2006); *McKay Nissan, Ltd. v. Nissan Motor Corp. in U.S.A.*, 764 F. Supp. 1318, 1319 (N.D. Ill. 1991). However, in *Nissan v. MVRB*, the court held that amendments to the Illinois Motor Vehicle Franchise Act are only impermissibly retroactive if the application of the amendment would impair the rights a party possessed when it acted, would increase a party's liability for past conduct or would impose new duties with respect to actions already taken. *Nissan North America, Inc. v. Motor Vehicle Review Board*, 2014 Ill. App (1st) 123795, 7 N.E.3D 25 (1st Dist. 2014). The amendment does not impact a party's vested rights. Therefore, the Hearing Officer recommends that the Board apply 4(c-5) to all of the dealers' Protests.

IX. Ford Violated Section 4(d)(1) of the IMVFA.

234. Complainants also assert that Ford violated Section 4(d)(1) of the IMVFA, which makes it unlawful for a manufacturer:

(1) to adopt, change, establish or implement a plan or system for the allocation and distribution of new motor vehicles to motor vehicle dealers which is arbitrary or capricious or to modify an existing plan so as to cause the same to be arbitrary or capricious;

235. The termination of the Next-Gen Agreement and the adoption of the Model e Program will result in a change or establishment of a new plan or system for allocating and distributing new motor vehicles. On the most basic level, it will change the dealers who will receive EVs, creating effectively two (or three if Certified dealers are included) classes of Ford dealers with respect to EVs. Only dealers that have enrolled in Model e will receive

an allocation of EVs. Even those dealers will only be allowed to carry a limited number in stock as inventory. This is a different system than exists today.

236. In *Belleville Toyota v. Toyota Motor Sales, U.S.A., Inc.*, 316 Ill. App. 3d 227, 242 (5th Dist. 2000) (*reversed on other grounds in Belleville Toyota v. Toyota Motor Sales, U.S.A.*, 199 Ill. 2d 325, 371(2002)), the Illinois appellate court interpreted the term “arbitrary” as used under the IMVFA to mean “without fair or substantial reason.” The court also interpreted the term “capricious” to mean “unpredictable.” *Id.*

237. Under these definitions, the Hearing Officer finds the Charging Standards of Model e Program to be both “arbitrary” and “capricious.” If there *is* a reason for requiring dealers to install not one, not two, *but three* Level 3 DC fast chargers at their dealerships, it was not presented by Ford at the Hearing. While it appears that these charging standards may have been set using national sales data and “math,” that data and “math” have no relationship to the need for chargers in markets in Illinois, particularly those of the Complainants. As Complainants persuasively argued, there appears to be no rationale for requiring charges at their specific dealership for example; a dealer in Clinton, Illinois, to have the same number of expensive fast chargers as a dealer in Los Angeles County, California clearly is both arbitrary and capricious.

238. The Charging Standards that Ford imposed under the Model e Program are also unpredictable. Less than three years ago, Ford required dealers to install only two Level 2 chargers as part of the Next-Gen Agreement. Although EVs may have grown in popularity in the last three years, Ford presented no data to suggest that they had grown so popular as to justify increasing the Next-Gen charging standards by several factors. Given that Ford appears to reserve the right to change Charging Standards whenever, and at whatever level, it desires without giving due consideration to the rate of EV adoption in local markets, dealers have no assurance that Ford will

not require them to install six fast chargers, or ten or twenty, in the next wave of Charging Standards.

239. This type of behavior is unpredictable and is therefore “capricious” as that term is used in Section 4(d)(1). In other words, Section 4(d)(1) prohibits a manufacturer from changing its allocation or distribution system just because the manufacturer wants to do so. Instead, Section 4(d)(1) requires that changes in the system for allocating or distributing vehicles must have a rational, predictable justification based on objective needs and trends in the market, and not just the unilateral business decisions of the manufacturer.

240. Because the Model e Program will result in different allocation or distribution system than the one that exists today, and because at least the Charging Standards of the program are arbitrary and capricious, it violates Section 4(d)(1).

X. Ford Violated Section 4(b).

241. Complainants assert that Ford violated Section 4(b) by terminating the Next-Gen Agreement and by trying to impose Model e on the Complainants. Section 4(b) provides “[i]t shall be deemed a violation for any manufacturer, factory branch, factory representative, distributor or wholesaler, distributor branch, distributor representative or motor vehicle dealer to engage in any action with respect to a franchise which is arbitrary, in bad faith or unconscionable and which causes damage to any of the parties or to the public.”

242. Section 4(b) only requires the Board to find that the manufacturer’s actions are one of the following: arbitrary, in bad faith, or unconscionable. With respect to bad faith, there are certainly aspects of Ford’s actions that appear to be in bad faith. Ford has provided no justification for the excessive Charging Standards of Model e, which is the primary driver of the expense nor

for the e-Commerce requirements which shift retail sales functions from dealers to Ford. Whether Ford intended to or not, Model e and standards will have the effect of forcing many Ford dealers out of EV retail for at least the next several years, without any apparent justification. Ford's own CEO, Jim Farley, has described the standards of Model e as being "brutal" for dealers. [C-71.] While other Ford witnesses disagreed with this statement, the fact that Ford's highest executive told the public that the Model e standards are "brutal" reflects a clear, unmistakable acknowledgement that the standards would be abnormally difficult for dealers to meet.

243. There is other evidence that Ford has not proceeded with Model e Program in good faith. Ford announced Model e Program with little notice last September and gave dealers initially less than two months to evaluate the program before deciding whether to enroll or forfeit EV sales and service for the next several years. Although Ford eventually extended this enrollment period, it only did so due to the strong objections that Ford received from dealer associations throughout the nation. Moreover, at the time, many aspects of Model e were not fully developed and dealers were forced to make decisions about expensive investments with little information about how the program would actually be administered. Ford dealers were provided with little to no information about how EVs would be distributed under the new Model e Program or how many vehicles they would be allocated or allowed to stock in inventory if they enrolled. Further, it is clear that dealers did not receive information from Ford about important aspects of Model e Program, such as the use of rapid replenishment centers, which may affect dealers' views of the program.

244. Ford also provided Complainants with proformas reflecting they were likely to lose money on Model e Program. While Ford's witnesses may now regret having provided these proformas, it is incredible to believe that a company like Ford did not think through how those

proformas might be viewed by dealers. This suggests that the proformas were provided to discourage enrollment in the program, and hence thin out the number of Ford retailers selling EVs.

245. Ultimately, the Board need not conclude that Ford acted in bad faith to find a violation of Section 4(b). For the same reasons expressed above in connection with Complainants claims under Section 4(d)(6) and 4(d)(1), the Hearing Officer finds that the decision to terminate Next-Gen and replace it with the “brutal” Model e Program was arbitrary, because it lacked “fair or substantial reason.” *Belleville Toyota*, 316 Ill. App. 3d at 242.

246. A finding of arbitrariness is not alone sufficient to find a violation of Section 4(b). As Ford contends, there must also be evidence that the manufacturer’s actions “causes damage to any of the parties or to the public.” 815 ILCS 710/4(b). Ford equates this reference to “damage” in Section 4(b) with a showing of legal, money “damages.” Ford therefore argues that the Complainants must demonstrate a quantifiable financial loss to prevail on this claim.

247. Money damages are not involved in this Protest, and indeed, the Board lacks authority to award “damages.” The plain language of Section 4(b) reflects that it does not require quantifiable financial “damages.” *First*, Illinois courts have distinguished the concept of “damage,” meaning harm or injury, from the concept of “legal damages,” meaning recoverable financial losses. *Mulligan v. QVC, Inc.*, 382 Ill. App. 3d 620, 627 (1st Dist. 2008). “Whereas damages are the recompense or compensation awarded for the damage suffered, damage is the loss, hurt, or harm which results from the injury.” *Id.* Given that the Illinois legislature used the term “damage” and not “damages,” there is no reason to believe Complainants were required to show an actual financial loss at this juncture to prevail on a Section 4(b) claim.

248. *Second*, had the legislature intended to require that dealers show actual, present financial losses to sustain a Section 4(b) claim, it could have said as much. The fact that the

legislature instead limited the inquiry to “damage” reflects that parties are not required to submit proof of financial loss to prevail on such a claim.

249. *Third*, the legislature provided that a violation of Section 4(b) might occur if there is “damage” to the public. There is no reason to suspect that the legislature intended for dealers to have to prove a financial loss to the public to prevail on such a claim. This supports the conclusion that damage means “harm” or “injury,” and not just a financial loss.

250. Even so, there was evidence presented that Complainants have suffered, or are likely to suffer, financial losses as a result of Ford’s actions. For one, Ford’s proformas reflect that Complainants were expected to incur significant losses as a result of Model e Program. Even if these estimates were overstated, there is no countervailing evidence to reflect that any of the Complainants were expected to profit from Model e or break-even.

251. Further, most of the Complainants enrolled in Model e have already paid at least \$1,500 to have site assessments performed by Ford turnkey vendors, and have already been charged at least several thousand dollars for training under the program, which was unnecessary. These expenses are sufficient to reflect a “damage” to these Complainants.

252. With respect to dealers that did not enroll in Model e, Ford contends that these dealers have suffered no losses and, in fact, will come out ahead because they were not “forced” to invest in Model e Program. However, based on the fact that the dealers had sold at least some EVs in the past, it is likely that dealers that are “kicked out” of EV sales for the next three years will incur at least some lost revenue.

253. These facts are sufficient for the Hearing Officer to conclude that the termination of Next-Gen and the imposition of Model e will result in “damage” to Complainants. There is nothing in Section 4(b) that requires the “damage” suffered by them to be significant or even

quantifiable to find a violation of Section 4(b). Whether and to what extent Complainants can prove recoverable legal “damages” from Ford’s action is a matter that would need to be addressed by another tribunal, and not the Board.

254. Additionally, as noted above, damage to Complainants is not the only inquiry in a Section 4(b) case. A Section 4(b) violation also occurs if the manufacturer’s actions cause damage to the public. As discussed above, Model e appears to do more harm to the public than good. It reduces the number of EV retailers in the State of Illinois. This threatens to hamper and not promote healthy competition between dealers. It also threatens to leave existing Ford EV consumers without local Ford dealerships to service their EVs, or at least, requires them to seek out new dealerships to do so. In fact, it is difficult to see from the evidence presented at Hearing how Model e benefits anyone other than Ford. Given that the harm to the public outweighs any benefit to the public, the Hearing Officer finds that Ford’s actions violate Section 4(b) for that reason too.

XI. Attorneys’ and Expert Fees.

255. Having found that Complainants have substantially prevailed on their claims under the IMVFA due to the misconduct of Ford, the Hearing Officer finds that Complainants are entitled to seek recovery of their attorneys’ fees and expert witness fees under Section 13 of the IMVFA, 815 ILCS 710/13.

256. In an administrative action before the Board, the issue of an award of attorneys’ fees need not be addressed in this proposed decision. These issues can be considered as part of subsequent proceedings, even after the Board issues a final order on Complainants’ protest. 92 Ill. Adm. Code 1001.770(e)(3). Accordingly, I, as the Hearing Officer, need not address in this order the extent to which Complainants have incurred recoverable fees and expenses. It is sufficient that

the Hearing Officer conclude, and I have specifically done so, that Complainants' have substantially prevailed on their claims, and therefore are entitled to their fees and costs under Section 13.

CONCLUSION AND AWARD

The Hearing Officer finds that Ford violated Sections 4(b), 4(c)(1), 4(c-5), 4(d)(1), 4(d)(4), and 4(d)(6) when it decided to terminate Complainants' Next-Gen Agreements and announced that Complainants would be unable to sell and service Ford EVs after December 31, 2023, unless they enrolled in the Model e Program. The Hearing Officer further finds that Ford violated those same provisions of the IMVFA when it required Complainants to move forward with the standards of Model e, without good cause.

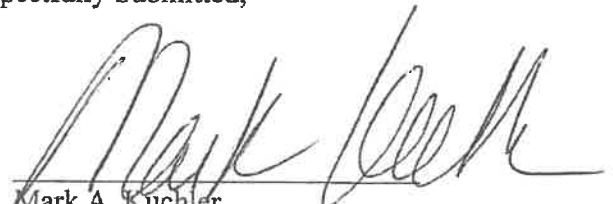
THEREFORE, it is recommended to the Motor Vehicle Review Board that the protests against the action of Ford Motor Company be UPHeld consistent with this decision.

THEREFORE, it is also recommended that Complainants be awarded their reasonable attorneys' fees, expert fees, and costs, pursuant to Section 13 of the IMVFA, the proceedings for which shall proceed as outlined in 92 Ill. Adm. Code 1001.770(e)(3). In addition, the Respondent shall be responsible for all of the Board's costs and expenses pursuant to 8/5ILLC 710/30.

Dated: October 23, 2023

Respectfully Submitted,

By:


Mark A. Kuchler
Hearing Officer