

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Filing by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company of a Grid Modernization Business Plan)	Case No. 16-481-EL-UNC
)	
In the Matter of the Filing by Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company Application for Approval of a Distribution Platform Modernization Plan)	Case No.17-2436-EL-UNC
)	
In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company to Implement Matters Relating to the Tax Cuts and Jobs Act of 2017)	Case No.18-1604-EL-UNC
)	
In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Tariff Change)	Case No.18-1656-EL-TA
)	
)	

**REPLY COMMENTS ON THE DAYMARK REPORT
BY
THE NORTHWEST OHIO AGGREGATION COALITION
AND ITS MEMBER COMMUNITIES**

The Northwest Aggregation Coalition and its member communities (together “NOAC”) respectfully submits these reply comments on the “Operational Benefits Assessment of FirstEnergy Ohio’s Grid Mod 1” prepared by Daymark Energy Advisors, Inc and dated November 14, 2022. This will be referred to as the Report or Daymark Report.

NOAC Reply Comments

Reply Comment 1: FirstEnergy Did Not Meet Its Obligations Under the Commission Order or Under Its Federal Corporate Compliance Program

FirstEnergy (FE) states that its reporting for Grid Mod 1 was consistent with the Commission Order and “disagree that the CBA or its sources are non-transparent.”¹ However, Daymark documents serious problems with FE’s record keeping, transparency, and internal controls.

Daymark should have found an open and transparent system that could be easily audited.

FirstEnergy promised this in its July 2021 Deferred Prosecution Agreement.² FE entered into this Agreement to settle its bribery of both the Ohio House Speaker and the Chairman of the PUCO, *inter alia*. The DPA exists only so long as FirstEnergy abides by its terms. FirstEnergy’s corrupt scheme used corporate concealments and falsifications to avoid detection. Thus, the DPA requires FirstEnergy to perform the “Corporate Compliance Program” at Appendix B. The program **requires** FirstEnergy to turn over a new leaf, establish transparent processes, and maintain good and complete corporate records. For example, Term 4 states:

FirstEnergy Corp, will ensure that it has a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of

¹ Introduction page 2 and 3: For the reasons more fully set forth below, the Companies respectfully request that the Commission find that: (1) the Companies’ deployment and reporting for Grid Mod I was consistent with the approved Stipulation, Supplemental Stipulation, and Commission Order; (2) the fixed operational savings included in Attachment D of the Stipulation⁶ be used for years 4-6; and (3) Daymark’s additional recommendations be considered in the context of future grid modernization proposals, consistent with the Supplemental Stipulation

² United States v. FirstEnergy Corp., Case No. 1:21-CR-00086-TSB (S.D. Ohio), Deferred Prosecution Agreement (filed Jul. 22, 2021).

fair and accurate books, records, and accounts. This system should be designed to provide reasonable assurances that transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and to maintain accountability for assets.

Daymark found the situation so bad that it could not perform a cost-benefit analysis.

In its Comments, FirstEnergy never mentions its duties under the DPA and instead makes a tortured construction of the Commission's Grid Mod 1 Order. Its position must be rejected.

Reply Comment 2: FirstEnergy's Seeks to Avoid Accountability and Its Duty to Provide Monetary Remediation to Ratepayers

FirstEnergy's Comments call the Daymark audit a success and it wants to "consider" Daymark's recommendations in future phases. This would avoid its accountability.

FirstEnergy in the Deferred Prosecution Agreement agrees to perform "four broad categories of remediation." The fourth is "**monetary remediation to rate payers.**"³ This remediation includes its corrupt activities at the PUCO.⁴ The obligation is clear: FirstEnergy itself is to investigate the monetary losses to ratepayers from its corruption at the PUCO and then to refund these amounts. However, FirstEnergy's Comments set out a course that will impede and avoid its obligation.

The facts leave little doubt that FirstEnergy would target the \$650,000,000 Grid Mod 1 to add unnecessary overcharges and then act to obscure this from discovery. Its effort to obscure

³ "FirstEnergy Corp. further represents that it has implemented four broad categories of remedial measures, including: (1) employment consequences for executives and employees who engaged in misconduct, (2) enhancements to Company's compliance program, (3) improvements to the Company's policies and procedures, and (4) monetary remediation to ratepayers." PDA at page 7

⁴ See pages 36-46 in the DPA Statement of Facts.

transparency is discussed in Comment 1 Its efforts to influence the requirements, pad financial opportunities, and pass Grid Mod 1 are discussed below.

The Statement of Fact at pages 36-37 reveal that FirstEnergy wrongfully paid Public Official B, now believed to be Attorney Samuel Randazzo⁵, to influence his powerful client to favor FirstEnergy interests in matters before the PUCO. From 2013 onward FirstEnergy paid a Randazzo-owned company more than \$1 million a year. Attorney Randazzo's client signed and supported the Stipulation in Grid Mod 1.⁶

While Grid Mod 1 was pending, the PUCO Chairman resigned. This opened an avenue to greatly increase Mr. Randazzo's influence. Mr. Randazzo became the new Chairman through their combined efforts.

The Statement of Facts discusses the new and bribed Chair and his duty to FirstEnergy:

In January 2019, Public Official B received a payment of \$4,333,333, which represented the remaining payment amounts designated in the amended consulting agreement from 2019 through 2024. FirstEnergy Corp. was under no legal obligation to make the payment at that time.

Public Official B as PUCO Chairman

FirstEnergy Corp. paid the entire \$4,333,333 to Company 1 for Public Official B's benefit **with the intent and for the purpose that, in return, Public Official B would perform official action in his capacity as PUCO Chairman to further FirstEnergy Corp.'s interests** relating to passage of nuclear legislation and other specific FirstEnergy Corp. legislative and regulatory priorities, as requested and as opportunities arose. (Pages 36 and 37).

⁵ Mr. Randazzo denies any wrongdoing.

⁶ See PDA Statement at pages 36-37.

Some months later, now Chairman Randazzo voted to approve Grid Mod 1. Thus, Mr. Randazzo both received money to influence his client to favor FirstEnergy's interest in Grid Mod 1 and he received money to influence the wording of the PUCO Order and its passage.

NOAC in its original comments called (1) for an independent forensic audit of FirstEnergy's Grid Mod 1 project and (2) to make customers whole based on those findings. Almost all commentors, particularly customer advocates like OMAEG and the OCC, call for accountability before proceeding to Grid Mod Phase 2. NOAC supports these positions. These are variations on a theme.⁷ Each of these Comments are in accord with the Corporate Compliance Program and with FirstEnergy's duty to provide the monetary remediation set forth in the Deferred Prosecution Agreement.

In contrast, FirstEnergy calls the audit a success and it wants to "consider" Daymark's recommendations in future phases. The Commission should reject such an approach because it leaves customers holding the bag and violates the DPA and PUCO's own rules and precedents. (See OMAEG and OCC original comments.)

Comment 3: FirstEnergy Improperly Asks the PUCO to Overlook Audit Standards

FirstEnergy Comments ask the PUCO to accept the audit as is and just move to Phase 2 proceedings. NOAC in its original comments states that the circumstances surrounding and found by the audit require greater scrutiny and require a third-party forensic audit. NOAC's position correctly states well known audit principles.

⁷ The NOAC approach includes looking into the root cause of why the PUCO's oversight of Grid Mod 1 failed. (As one example, why wasn't Daymark provided a copy of the DPA Statement of Facts and Appendix B's "Corporate Compliance Program?") Issues of "regulatory capture" or of large corporations having asymmetric power to overwhelm the regulators are well known.

The Public Company Accounting Oversight Board or PCOAB is the recognized source of Audit Standards (AS) for outside auditors of public companies. The Daymark Report failed to even mention AS 2405 “Illegal Acts by clients.”⁸ Nor did it implement its requirements for greater scrutiny when suspicious activity is found, (Also, remember that Term 4 of the PDA requires FirstEnergy to use “generally accepted accounting principles.”)

This section is set out below and Grid Mod 1 factors indented and in italics:

.09 In applying audit procedures and evaluating the results of those procedures, the auditor may encounter specific information that may raise a question concerning possible illegal acts, such as the following:

- Unauthorized transactions, improperly recorded transactions, or transactions not recorded in a complete or timely manner in order to maintain accountability for assets

Daymark’s finding a lack of transparency and of records so bad it could not perform a cost benefit analysis, etc. for Grid Mod 1.

- Investigation by a governmental agency, an enforcement proceeding, or payment of unusual fines or penalties

Investigation by Federal Prosecutors especially of Samuel Randazzo, and investigations by the Ohio Attorney General, SEC, and FERC. Federal indictment. Payment of \$230,000,000 penalty in DPA.

- Violations of laws or regulations cited in reports of examinations by regulatory agencies that have been made available to the auditor

Payment of bribes to PUCO Chairman during relevant times, DPA Statement of Facts.

- Large payments for unspecified services to consultants, affiliates, or employees

Payment of bribes to PUCO Chairman, Speaker of House and affiliated companies. Payments to Randazzo-owned businesses.

⁸ At <https://pcaobus.org/oversight/standards/auditing-standards/details/AS2405>. See also AU 316A "Consideration of Fraud in a Financial Audit Statement". At <https://pcaobus.org/oversight/standards/archived-standards/details/AU316a#:~:text=Two%20types%20of%20misstatements%20are,arising%20from%20misappropriation%20of%20assets>.

- Sales commissions or agents' fees that appear excessive in relation to those normally paid by the client or to the services actually received

Payments approximately \$1 million per year to business owned by Samuel Randazzo before he became Chairman of PUCO and while he represented a party in Grid Mod 1 proceedings.

- Unusually large payments in cash, purchases of bank cashiers' checks in large amounts payable to bearer, transfers to numbered bank accounts, or similar transactions

FE paid over \$60 million in HB 6/PUCO scandal through irregular processes bypassing standard corporate procedures. These included \$4.3 million bribe to Chairman of PUCO just prior to his appointment. Earlier payments to a business owned by Samuel Randazzo.

- Unexplained payments made to government officials or employees

See above.(Now explained as bribery etc.)

- Failure to file tax returns or pay government duties or similar fees that are common to the entity's industry or the nature of its business

Expensing the above expenditures

In sum, AS 2405's requirement for greater scrutiny are triggered for Grid Mod 1.

Respectfully submitted,

/s/ Thomas R. Hays

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Commission of Ohio Docketing Information System on
8/25/2023 4:13:08 PM**

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**Case No(s). 16-0481-EL-UNC, 17-2436-EL-UNC, 18-1604-EL-UNC, 18-1656-EL-
ATA**

Summary: Comments Reply Comments to Daymark Grid Mod 1 Report electronically filed by Mr. Thomas R. Hays on behalf of NOAC and Lake Township Board of Trustees and Lucas County Board of Commissioners and City of Toledo and City of Sylvania and Village of Ottawa Hills and City of Perrysburg and City of Northwood and City of Maumee and The Village of Holland and City of Oregon and Perrysburg Township and City of Rossford and Village of Walbridge and City of Waterville and Village of Delta.