

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Ohio Edison	)	
Company, the Cleveland Electric	)	
Illuminating Company, and the Toledo	)	Case No. 17-974-EL-UNC
Edison Company's Compliance with	)	
R.C. 4928.17 and the Ohio Adm. Code	)	
Chapter 4901:1-37.	)	

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**APPLICATION FOR REHEARING  
BY  
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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November 17, 2023

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On October 18, 2023, the PUCO denied OCC's application for rehearing concerning a third stay it ordered of its four FirstEnergy investigations (initiated largely in response to OCC's requests). With its Entry, the PUCO will have denied millions of Ohio utility consumers much-needed answers from FirstEnergy (and others) for a year and a half. OCC's ability to investigate is stayed. But FirstEnergy's ability to seek more rate increases is not stayed. The PUCO's use of stays is asymmetrical, in favor of FirstEnergy and to the disfavor of consumers.

OCC seeks rehearing of the PUCO's Entry that denied OCC's alternative request that, if the PUCO continues to stay the FirstEnergy investigation, it should stay FirstEnergy's efforts to increase rates to consumers through its two grid modernization cases and its fifth electric security plan. The PUCO's Entry is unjust, unreasonable and unlawful in the following respects:

**ASSIGNMENT OF ERROR NO. 1: The PUCO acted unreasonably in denying OCC's request to stay FirstEnergy's fifth electric security plan case and grid modernization cases based on its finding that the FirstEnergy ESP V and the Grid Mod I and II cases "are completely unrelated to H.B. 6 and OCC presents no**

rational basis for a delay.”<sup>1</sup> The PUCO failed to address OCC’s stay request under the six part balancing test applied earlier to the U.S. Attorney’s stay requests.

**ASSIGNMENT OF ERROR NO. 2: The PUCO acted unreasonably in concluding that delaying FirstEnergy’s ESP would be “highly improper and may ultimately harm the very customers of FirstEnergy represented by OCC.”**

OCC asks the PUCO to modify on rehearing its October 18, 2023 Entry. The PUCO should stay FirstEnergy’s ESP V and its Grid Mod I and II cases, which are inextricably linked with the findings and the outcome of the four stayed HB 6 investigations.

OCC’s Application for Rehearing is more fully explained by the accompanying Memorandum in Support.

Respectfully submitted,

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<sup>1</sup> Entry on Rehearing at ¶ 29 (Oct. 18, 2023).

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

The PUCO has four investigations,<sup>2</sup> initiated largely at OCC's request, relating to the FirstEnergy House Bill 6 scandals. United States District Judge Algenon Marbley described the scandals as FirstEnergy's "*unparalleled corruption* of Ohio's democratic process."<sup>3</sup> On August 23, 2023, the PUCO approved the U.S. Attorney's third six-month request to stay these investigations into the FirstEnergy House Bill 6 scandal. OCC respects the role of the U.S. Attorney.

But before paying billions of dollars more to FirstEnergy, consumers have a right to know how deep the corruption runs, including potentially into FirstEnergy's ESP V and Grid Mod I and II. That corruption potentially involves FirstEnergy and its relationship with former PUCO Chair Randazzo. Recall that FirstEnergy Corp. entered into a Deferred Prosecution Agreement with the Government under which it admitted that it "paid \$4.3 million dollars to [Randazzo] through his consulting company in return for [Randazzo] performing official action in his capacity as PUCO Chairman to further

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<sup>2</sup> Case Nos. 17-974-EL-UNC, 20-1502-EL-UNC, 17-2474-EL-RDR and 20-1629-EL-RDR.

<sup>3</sup> *Emp. Retirement Sys. of City of St. Louis v. Jones*, Case No. 2:20-cv-4813, Order of Final Settlement Approval at 17 (Aug. 23, 2022) (Emphasis added).

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.*”<sup>4</sup>

The PUCO has stayed its four investigations into the HB 6 scandal at the request of the U.S. Attorney. While OCC opposed that decision,<sup>5</sup> it offered a reasonable alternative to the PUCO. If a stay is ordered of the PUCO investigations of FirstEnergy, then it should stay pending FirstEnergy proceedings -- FirstEnergy’s ESP V and its Grid Mod (Phase I and II).<sup>6</sup> That would create a fairness of balance and symmetry in PUCO regulation – something that is especially needed when it comes to FirstEnergy’s 2 million consumers. Going forward with these other proceedings is also inefficient and prejudicial to consumers. As the PUCO acknowledged, the public has an interest in the efficient use of government resources.<sup>7</sup>

But the PUCO rejected OCC’s request to stay the pending FirstEnergy proceedings. So FirstEnergy consumers are being denied the fairness of balance and symmetry in regulation. The PUCO-initiated cases with potential outcomes adverse to

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<sup>4</sup> *United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement at 17 (July 20, 2021) (emphasis added).

<sup>5</sup> See also “U.S. Attorney investigating FirstEnergy/HB 6 scandal needs to let ratepayer probes proceed,” Cleveland Plain Dealer (Oct. 22, 2023), <https://www.cleveland.com/opinion/2023/10/us-attorney-investigating-firstenergyhb-6-scandal-needs-to-let-ratepayer-probes-proceed-ashley-brown.html>; “PUCO needs to do its duty by ratepayers and the U.S. attorney needs to get out of the way,” Cleveland Plain Dealer (Oct. 27, 2023), <https://www.cleveland.com/opinion/2023/10/puco-needs-to-do-its-duty-by-ratepayers-and-the-us-attorney-needs-to-get-out-of-the-way-editorial.html>.

<sup>6</sup> *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of Phase Two of Their Distribution Grid Modernization Plan*, Case No. 22-704-EL-UNC; *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.

<sup>7</sup> *In the Matter of the Review of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company’s Compliance with R.C. 4928.17 and Ohio Adm. Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC, Entry at ¶ 79 (Aug. 24, 2022).

FirstEnergy are stayed but cases that FirstEnergy initiated for charging consumers higher rates are ongoing.

Staying the pending FirstEnergy proceedings would be fair to FirstEnergy's two million consumers. Rehearing should be granted.

## **II. GROUNDS FOR REHEARING**

**ASSIGNMENT OF ERROR NO. 1: The PUCO acted unreasonably in denying OCC's request to stay FirstEnergy's fifth electric security plan case and grid modernization cases based on its finding that the FirstEnergy ESP V and the Grid Mod I and II cases "are completely unrelated to H.B. 6 and OCC presents no rational basis for a delay."<sup>8</sup> The PUCO failed to address OCC's stay request under the six part balancing test applied earlier to the U.S. Attorney's stay requests.**

### **A. The PUCO ruling denies OCC the opportunity to establish a rational basis for the very issues it faults OCC for not proving.**

The PUCO stayed the House Bill 6 investigations but has allowed FirstEnergy Utilities to go about business as usual – pushing their applications to collect more and more money from consumers. FirstEnergy's ESP V, and its Grid Mod I<sup>9</sup> and II are in the works as though the House Bill 6 scandal has been resolved and has no impact. But this is far from known.

FirstEnergy Corp. admitted that it "paid \$4.3 million dollars to [Randazzo] through his consulting company in return for [Randazzo] performing 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."<sup>10</sup> Certainly "regulatory priorities" for

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<sup>8</sup> Entry on Rehearing at ¶ 29 (Oct. 18, 2023).

<sup>9</sup> FirstEnergy's Grid Mod 1 was approved yesterday and will likely be the subject of rehearing requests.

<sup>10</sup> *United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement at 17 (July 20, 2021).



FirstEnergy would have included a \$516 million investment in grid modernization —an investment approved for collection from consumers while Mr. Randazzo chaired the PUCO.<sup>11</sup> And FirstEnergy’s interests and regulatory priorities would have extended to Rider DCR and Rider AMI, two of the riders FirstEnergy is seeking to extend in FirstEnergy’s ESP V. Both of these riders were included in FirstEnergy’s ESP IV, which is under investigation for among other things, side deals between the former PUCO Chair and FirstEnergy.

The PUCO asserts that there is no connection between these proceedings and the FirstEnergy investigations. According to the PUCO they are “completely unrelated.” It asserts that OCC has produced no “rational basis” for its request for a stay.<sup>12</sup>

But the PUCO actions would deny OCC the opportunity to establish a rational basis for the very issues it faults OCC for not proving. This regulatory Catch 22 is unfair to consumers who are caught in the middle of the regulatory morass that surrounds the FirstEnergy scandal. The PUCO acted unreasonably in concluding in its Entry on Rehearing that the FirstEnergy cases “are completely unrelated to H.B. 6 and OCC presents no rational basis for a delay.”<sup>13</sup>

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<sup>11</sup> *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, Opinion and Order (July 17, 2019); *see also: In the Matter of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order (July 18, 2012).

<sup>12</sup> Entry on Rehearing at ¶ 19 (Oct. 18, 2023).

<sup>13</sup> Entry on Rehearing at ¶ 29 (Oct. 18, 2023).

**B. FirstEnergy’s ESP V and Grid Mod I and II cases are related to the four FirstEnergy investigations that have been stayed.**

**1. FirstEnergy’s ESP V seeks increased charges from consumers for at least two riders which are related to the four FirstEnergy investigations that have been stayed.**

Under FirstEnergy’s fifth electric security plan, it seeks to increase charges to consumers by \$1.4 billion. Hearings are ongoing as of the writing of this motion. The commonality between the FirstEnergy investigation cases and FirstEnergy ESP V case is the distribution charges FirstEnergy seeks to collect from consumers under its fifth electric security plan (Rider DCR and Rider AMI). In its fifth electric security plan, FirstEnergy has asked to extend these riders for eight years. The PUCO’s conclusion that FirstEnergy’s ESP V is “completely unrelated to H.B.6” rings hollow.<sup>14</sup>

These are the very same riders that the Auditor in one of the PUCO investigation cases (Case No. 20-1629-EL-RDR) found cost misallocations related to FirstEnergy’s role in the House Bill 6 scandal. And the cost allocation issues are also a fundamental element of the other three FirstEnergy’s investigations.

And further, FirstEnergy distribution costs were also investigated by FERC with some of the costs linked to HB 6 matters. FERC conducted a wide-ranging audit of FirstEnergy that evaluated its compliance with a number of areas including affiliate transactions, service company accounting, record keeping, and reporting requirements. FERC issued seven findings of noncompliance and thirty-eight recommendations that required FirstEnergy and its subsidiaries to take corrective action.<sup>15</sup> Among the

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<sup>14</sup> See, e.g., *In the Matter of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company’s Compliance with R.C. 4928.17 and the Ohio Adm. Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC, Entry at ¶ 19 (Oct. 18, 2023).

<sup>15</sup> *In re: FirstEnergy Corp.*, Docket No. FA 19-1-000, Audit Report at 4-13 (Feb. 4, 2022).

noncompliance findings were improper accounting for maintenance expenses incurred to remove vegetation, improper accounting for lobbying expenses, donations and other costs, and improper accounting for service company allocated costs.<sup>16</sup>

The PUCO, by its finding, would lead one to believe that the evidence accumulated to date about misallocations, improper accounting, and HB 6 misdeeds are all behind us and that Rider DCR and Rider AMI are all on the up and up. But if that is so, why not allow that information to be exposed to the light of day? That can only be done when the stays on the four FirstEnergy investigations are lifted, and evidence is produced and considered in conjunction with FirstEnergy's requests to collect more money from consumers in its three cases. Rehearing should be granted.

**2. FirstEnergy's Grid Mod I and II address issues related to the four PUCO investigations of FirstEnergy.**

In FirstEnergy's Grid Mod I case,<sup>17</sup> FirstEnergy is charging consumers for \$516 million related to its Grid Mod I program which was set in motion through a settlement in FirstEnergy's ESP IV.<sup>18</sup> In FirstEnergy's ESP IV, FirstEnergy agreed to file a business plan for grid modernization.<sup>19</sup> As part of the settlement, FirstEnergy agreed

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<sup>16</sup> *Id.*

<sup>17</sup> *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of Phase Two of Their Distribution Grid Modernization Plan*, Case No. 22-704-EL-UNC; *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.

<sup>18</sup> *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of Phase Two of Their Distribution Grid Modernization Plan*, Case No. 22-704-EL-UNC; *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.

<sup>19</sup> *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company for Authority to Provide a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Third Supplemental Stipulation at 9-10 (Dec. 1, 2015).

that, if the PUCO approved its plan, it would collect charges from consumers through a single-issue ratemaking charge. FirstEnergy's ESP IV is presently under investigation, through Case No. 20-1629-EL-RDR, where the PUCO expanded the audit scope to include an investigation of whether FirstEnergy violated R.C. 4928.145.<sup>20</sup>

The PUCO, under the direction of former Chair Randazzo, later approved a specific grid modernization charge to consumers when it resolved a seemingly unrelated tax savings case.<sup>21</sup> Consumers who have been ordered to pay for Grid Mod I expenditures<sup>22</sup> deserve to know whether Mr. Randazzo undertook "official action in his capacity as PUCO Chairman to further FirstEnergy Corp.'s interests" "as requested and as opportunities arose" in securing approval for the Grid Mod I rider charge to consumers.

In FirstEnergy's Grid Mod II, FirstEnergy is seeking approval to charge consumers for an additional \$626 million grid modernization investment even though it hasn't demonstrated the benefits it promised from Grid Mod I. FirstEnergy's Grid Mod II case is premised on its Grid Mod business plan which relates back to FirstEnergy's ESP IV as well as former Chairman Randazzo's approval of grid modernization charges

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<sup>20</sup> *In the Matter of the 2020 Review of the Delivery Capital Recovery Rider of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 20-1629-EL-RDR, Entry (Dec. 15, 2021).

<sup>21</sup> *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, Opinion and Order (July 17, 2019).

<sup>22</sup> *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of Phase Two of Their Distribution Grid Modernization Plan*, Case No. 22-704-EL-UNC; *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, Entry (Nov. 16, 2023).

to consumers through the tax savings case. Grid Mod I and II cannot be separated from the HB 6 investigations. Rehearing should be granted.

**C. The rational basis for the delay OCC requests is established under the six-factor balancing test.**

When the PUCO issued its initial Stay Entry in the House Bill 6 cases, the PUCO relied on *F.T.C. v. E.M.A. Nationwide, Inc.*<sup>23</sup> and related cases, which use a balancing test to decide whether a civil case should be stayed due to a related criminal proceeding.<sup>24</sup> OCC argued against a stay,<sup>25</sup> but the PUCO rejected OCC's arguments.<sup>26</sup>

Nonetheless, the PUCO should, consistent with earlier orders approving the U.S. Attorney's stay requests, apply the six-part balancing request to OCC's request for a stay. Under such an analysis there is a rational basis for staying both FirstEnergy's ESP V and its two grid modernization cases. The PUCO was wrong when it concluded that OCC had established no rational basis for the stay and failed to consider OCC's arguments under the six-part balancing test.

**1. There are overlapping issues that exist making a stay reasonable.**

The first factor in the PUCO's balancing test is whether there is any overlap of the issues between the criminal case and the PUCO case.<sup>27</sup> The PUCO concluded that

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<sup>23</sup> 767 F.3d 611 (6th Cir. 2014).

<sup>24</sup> See, e.g., *In the Matter of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company's Compliance with R.C. 4928.17 and the Ohio Adm. Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC, Entry (Aug. 2, 2022).

<sup>25</sup> *Id.*, Application for Rehearing (Sept. 22, 2023); *Id.*, Application for Rehearing (April 7, 2023); *Id.*, Application for Rehearing (Sept. 23, 2022).

<sup>26</sup> See, e.g., *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 20-1502-EL-UNC, Entry (Oct. 18, 2023).

<sup>27</sup> *In the Matter of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company's Compliance with R.C. 4928.17 and the Ohio Adm. Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC, Entry at 19 (Aug. 2, 2022).

this factor weighed in favor of a stay due to “the similarities between the legal issues and subject matter such as the charges, fact issues, witnesses, and evidence.”<sup>28</sup>

This factor also weighs in favor of a stay of FirstEnergy cases due to the similarities of the legal issues and subject matter. In FirstEnergy’s Grid Mod I case,<sup>29</sup> FirstEnergy is charging consumers for \$516 million related to its Grid Mod I program which was set in motion through a settlement in FirstEnergy ESP IV.<sup>30</sup> In FirstEnergy’s ESP IV, FirstEnergy agreed to file a business plan for grid modernization.<sup>31</sup> As part of the settlement, FirstEnergy agreed that, if the PUCO approved its plan, it would collect charges from consumers through a single-issue ratemaking charge.

The PUCO, under the direction of former Chair Randazzo, later approved that single issue ratemaking charge in the tax savings case.<sup>32</sup> Stakeholders deserve to know whether Mr. Randazzo undertook “official action in his capacity as PUCO Chairman to further FirstEnergy Corp.’s interests” in securing approval for the Grid Mod I rider charge to consumers.

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<sup>28</sup> *Id.* at 19-20.

<sup>29</sup> *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of Phase Two of Their Distribution Grid Modernization Plan*, Case No. 22-704-EL-UNC; *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.

<sup>30</sup> *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of Phase Two of Their Distribution Grid Modernization Plan*, Case No. 22-704-EL-UNC; *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.

<sup>31</sup> *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company for Authority to Provide a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Third Supplemental Stipulation at 9-10 (Dec. 1, 2015).

<sup>32</sup> *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, Opinion and Order (July 17, 2019).

In FirstEnergy's Grid Mod II, FirstEnergy is seeking approval to charge consumers for an additional \$626 million grid modernization investment even though it hasn't demonstrated the benefits it promised from Grid Mod I. FirstEnergy's Grid Mod II case is premised on its Grid Mod business plan which relates back to FirstEnergy's ESP IV and Chairman Randazzo's approval of grid modernization charges to consumers through the tax savings case.

In Case No. 20-1629-EL-RDR, the Auditor found cost misallocations related to House Bill 6.<sup>33</sup> These cost allocation issues also permeate the corporate separation investigation<sup>34</sup> and the political and charitable spending<sup>35</sup> investigation. These cost misallocation issues are also intrinsic to Rider AMI and Rider DCR, both of which are being extended in FirstEnergy's ESP V.

Thus, the first factor in the PUCO's balancing test - whether there is any overlap of the issues between the criminal case and the PUCO case – weighs in favor of a stay.

## **2. The status of the criminal proceeding weighs in favor of a stay of FirstEnergy's ESP V.**

The second factor is the status of the criminal proceeding.<sup>36</sup> The PUCO concluded that the U.S. Attorney's ongoing investigation into the House Bill 6 scandal is sufficient

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<sup>33</sup> *In the Matter of the 2020 Review of the Delivery Capital Recovery Rider of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 20-1629-EL-RDR, Audit Report, Expanded Scope (Aug. 3, 2021).

<sup>34</sup> *In the Matter of the Review of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company's Compliance with R.C. 4928.17 and Ohio Adm. Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC.

<sup>35</sup> *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 20-1502-EL-UNC.

<sup>36</sup> *In the Matter of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company's Compliance with R.C. 4928.17 and the Ohio Adm. Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC, Entry at 22 (Aug. 2, 2022).

to satisfy this second factor.<sup>37</sup> This factor also weights in favor of a stay of the Grid Mod and ESP V cases because the U.S. Attorney’s criminal investigation is still ongoing.

**3. The interests of the PUCO weigh in favor of staying the FirstEnergy cases.**

The fifth factor is the interests of the PUCO.<sup>38</sup> The PUCO concluded that this factor weighed in favor of staying the House Bill 6 cases to avoid the risk of interfering with the federal criminal investigation.<sup>39</sup> If the FirstEnergy ESP V, and its Grid Mod I and II cases go forward, then this would also run the risk of interfering with the federal criminal investigation, given potential misallocation of costs that occurred as part of the House Bill 6 scandal. This means common witnesses/subjects of the investigation may be common to the three pending FirstEnergy proceedings. This factor therefore also weighs in favor of a stay of FirstEnergy’s ESP V and its Grid Mod I and II cases.

**4. The public interest weighs in favor of staying the PUCO’s consideration of FirstEnergy’s ESP V and its Grid Mod I and II.**

The sixth factor is the public interest.<sup>40</sup> In the House Bill 6 cases, the PUCO viewed the public interest as broader than merely the interests of Ohio consumers and concluded that this factor weighted in favor of a stay. The PUCO stated: “the public interest in effective criminal prosecution generally outweighs any existing civil interests.”<sup>41</sup> Applying this same broad view of the public interest, this factor weighs in favor of a stay of FirstEnergy’s ESP V and its Grid Mod I and II cases. In both the House

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<sup>37</sup> *Id.*, Entry at 3-4 (Aug. 23, 2023).

<sup>38</sup> *Id.*, Entry at 23 (Aug. 2, 2022).

<sup>39</sup> *Id.* at 23-24.

<sup>40</sup> *Id.* at 24.

<sup>41</sup> *Id.* at 25.



Bill 6 cases and in the pending FirstEnergy cases, the continued litigation of these cases while the criminal investigation is in progress could interfere with the criminal investigation.

**5. The private interests of those impacted by the stay weigh in favor of staying the PUCO's consideration of FirstEnergy's ESP V and its Grid Mod I and II.**

The third and fourth factors involve balancing the private interests of those impacted by a stay.<sup>42</sup> The PUCO concluded that these factors are “largely neutral” when evaluated separately in terms of the Department of Justice’s interest in the criminal investigation vs. consumers’ interests in fair rates.<sup>43</sup>

Unlike the House Bill 6 cases, this factor weighs in favor of a stay of the FirstEnergy ESP V and its Grid Mod I and II. The public’s interest in fair rates would be aided by a full investigation of H.B. 6 corruption. The public’s interest greatly outweighs FirstEnergy’s interest in charging consumers for \$1.4 billion under FirstEnergy’s ESP V and a billion more through its Grid Mod programs. All of these cases may be tainted by the HB 6 scandal as part of the “legislative and regulatory priorities” former PUCO Chairman Randazzo undertook for FirstEnergy “as requested and as opportunities arose.”

When all six factors of the PUCO’s balancing test are considered, the case for a stay is strong. It provides a rational basis for delaying any further consideration of FirstEnergy’s ESP V and its Grid Mod I and II. But the PUCO failed to even address the merits of OCC’s claim other than to arbitrarily dismiss it. The PUCO should grant this application for rehearing and stay FirstEnergy’s ESP V and its Grid Mod I and II cases.

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<sup>42</sup> *Id.* at 26.

<sup>43</sup> *Id.*

**ASSIGNMENT OF ERROR NO. 2: The PUCO acted unreasonably in concluding that delaying FirstEnergy’s ESP would be “highly improper and may ultimately harm the very customers of FirstEnergy represented by OCC.”**

The PUCO has noted that delaying this proceeding would be “highly improper and may ultimately harm the very customers of FirstEnergy represented by OCC”<sup>44</sup> The PUCO’s ruling was mistaken and unreasonable.

There is nothing improper about delaying FirstEnergy’s electric security plan. It is true that utilities are required by law to maintain a standard service offer. Yet that standard offer can be set by other means than an electric security plan. Indeed, the law allows a utility to meet its standard service offer obligation through a market rate offer, under R.C. 4928.142. There is nothing that stands in the way of implementing a market rate offer for FirstEnergy consumers by the time that the current ESP expires (May 2024).

The PUCO also has allowed standard service offer auctions to proceed when a utility’s electric security plan is expiring and there is no subsequent PUCO approved electric security plan in place. For instance, the PUCO approved a competitive bidding process for Dayton Power and Light when its standard offer auction bidding process was about to expire without another PUCO approved electric security plan in place.<sup>45</sup> The PUCO could do so here. Rehearing should be granted, and the PUCO should order FirstEnergy to establish a market rate offer for establishing a standard offer to consumers in lieu of considering FirstEnergy’s ESP V.

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<sup>44</sup> *In the Matter of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company’s Compliance with R.C. 4928.17 and the Ohio Adm. Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC, Entry at ¶ 19 (Oct. 8, 2023).

<sup>45</sup> *In the Matter of the Application of the Dayton Power and Light Company to establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 08-1094-EL-SSO, Entry (March 22, 2017).

### III. CONCLUSION

To protect consumers, the PUCO should grant rehearing on OCC's assignments of error and modify or abrogate its Order as described above.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Application for Rehearing was served on the persons stated below via electronic transmission, this 17<sup>th</sup> day of November 2023.

/s/ John Finnigan

John Finnigan

Assistant Consumers' Counsel

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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