**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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 |

**REPLY TO FIRSTENERGY’S MEMORANDUM IN OPPOSITION TO OCC’S MOTION FOR STAY**

**BY**

**OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

# I. INTRODUCTION

This week’s criminal indictment issued against the former PUCO Chair and former FirstEnergy executives is the latest in the saga of corruption involving Ohio utility influence over state officials. Attorney General Yost aptly described the reach of corruption as going beyond tainted H.B. 6 to “the hostile capture of a significant portion of Ohio’s state government by deception, betrayal and dishonesty.”[[1]](#footnote-2) And according to Attorney General Yost, more may be coming.

Yet, at the Public Utilities Commission of Ohio, it appears to be business as usual for FirstEnergy. FirstEnergy has before the PUCO requests for rate increases totaling $2.1 billion.[[2]](#footnote-3) OCC and others[[3]](#footnote-4) have asked the PUCO to put the hold on further FirstEnergy increases until after the ultimate extent of the corruption is known. While we still do not know for certain whether any improper rulings impacted the approval of FirstEnergy’s Grid Mod program (including collection from consumers of costs through Rider AMI), we do know that the program was approved by former Chair Randazzo mere months after he was installed at the PUCO for the purpose of “performing official action in his capacity as PUCO Chairman to further FirstEnergy Corp.’s interests relating to . . . regulatory priorities, as requested and as opportunities arose.”[[4]](#footnote-5) The PUCO could find based on the evidence developed in the investigation cases that H.B. 6 costs include costs that have been capitalized and charged to consumers through numerous riders, including Rider AMI.

To protect consumers, the PUCO should stay this case until after FirstEnergy’s next distribution rate case, after the House Bill 6 (“H.B. 6”) investigation cases are resolved, and after the former PUCO Chair Sam Randazzo’s federal and state criminal indictments have run their course. These pending criminal matters cannot help but to call into question the legitimacy of FirstEnergy’s charges to consumers that were approved under former PUCO Chair Randazzo’s watch. Those charges include FirstEnergy’s grid modernization program under which FirstEnergy has been authorized to charge consumers $600 million with $750 million more FirstEnergy would like to charge consumers.

FirstEnergy of course denies there is any linkage between its grid modernization program (Phase 2) and the federal charges (11) issued in the indictment against Former Chair Randazzo. We would expect even now with the state indictment of the former PUCO Chair and former FirstEnergy executives, FirstEnergy’s denials will continue.

The PUCO should look beyond the FirstEnergy denials and take action to protect consumers. The PUCO should reject the arguments raised in FirstEnergy’s Memorandum Contra and grant OCC’s Motion for Stay.

# II. ARGUMENT

## A. OCC’s Motion for Stay established a link between Grid Mod II and the indictment of former PUCO Chair Randazzo. The PUCO should reject FirstEnergy’s claim that the link is pure speculation.

FirstEnergy[[5]](#footnote-6) mistakenly argues that a Stay Order would be improper because this case is “completely unrelated”[[6]](#footnote-7) to the criminal indictment against Mr. Randazzo. To the contrary, OCC’s Motion for Stay established the clear linkage between the present case and Mr. Randazzo’s indictment. Further, FirstEnergy’s Memorandum Contra asserts that any connection between the present case and the criminal indictment is “based on speculation and conjecture.”[[7]](#footnote-8) But the legal standard for a stay only requires OCC to show

a *potential for overlap of the issues* in the present case and the criminal case. This case should be stayed.

FirstEnergy cites language in the PUCO’s Stay Order of the H.B. 6 investigation cases for the proposition that the present case is unrelated to the indictment.[[8]](#footnote-9) However, OCC’s Motion for Stay addressed this point by establishing how the two cases are connected.[[9]](#footnote-10)

As OCC established, the key connection between the two cases rests on:

1. FirstEnergy’s explicit admission that it bribed Mr. Randazzo with a $4.3 million payment and, with FirstEnergy’s support, Mr. Randazzo became the PUCO’s Chair where he was to “perform[] official action for the benefit of [FirstEnergy], as requested and as opportunities arose;”[[10]](#footnote-11)
2. One of Mr. Randazzo’s “official actions” for the benefit of FirstEnergy was approving FirstEnergy’s initial grid modernization business plan, along with subsequent approval of charges to consumers for up to $516 million in grid modernization charges in a July 17, 2019 Opinion and Order (“Grid Mod I”);[[11]](#footnote-12) and
3. FirstEnergy’s application in the present case seeks approval of a “Grid Mod II” plan which relies on and directly results from the Grid Mod I deployment approved under Mr. Randazzo.[[12]](#footnote-13)

FirstEnergy cites to the PUCO’s October 18, 2023 Entry on Rehearing in four H.B. 6 investigation cases for the proposition that the two cases are unrelated.[[13]](#footnote-14) FirstEnergy’s argument is misleading. OCC filed an Application for Rehearing in those cases on November 17, 2023 showing how the PUCO erred by reaching this conclusion.[[14]](#footnote-15) The PUCO’s October 18, 2023 Entry therefore is not a final ruling. FirstEnergy’s Memorandum Contra fails to mention this important fact.

FirstEnergy’s Memorandum Contra asserts that any connection between the present case and the criminal indictment is “based on speculation and conjecture.”[[15]](#footnote-16) Despite FirstEnergy’s argument to the contrary, the legal standard for a stay only requires OCC to show a *potential for overlap of the issues* in the present case and the criminal case.

The foregoing point becomes clear from a review of *F.T.C. v. E.M.A. Nationwide, Inc*.[[16]](#footnote-17) and related cases, on which the PUCO relied to stay the H.B. 6 cases. *F.T.C. v. E.M.A. Nationwide, Inc*. and its progeny use a balancing test to decide whether a civil case should be stayed due to a related criminal proceeding.[[17]](#footnote-18) This balancing test, when properly applied to the present case, makes it clear that the consideration and potential approval of FirstEnergy’s Grid Mod II application should be stayed until FirstEnergy’s next distribution rate case and after the H.B. 6 cases and the criminal case are resolved.

In its Motion for Stay, OCC discussed in detail the *F.T.C. v. E.M.A. Nationwide, Inc*. balancing test. OCC will not repeat those arguments here. However, a few points must be noted to counter FirstEnergy’s argument that a stay of this case would be “based on speculation and conjecture.”[[18]](#footnote-19) The overriding point is that a stay should be granted when there is a potential overlap of issues between the present case and the criminal case.

FirstEnergy asserts that the conduct alleged in Mr. Randazzo’s indictment occurred between 2010 and 2019, and thus “can have no relation to Gird Mod II, which was filed in 2022.”[[19]](#footnote-20) FirstEnergy’s assertion is wrong. One of Mr. Randazzo’s “official actions” for the benefit of FirstEnergy occurred in 2019 -- approving FirstEnergy’s initial grid modernization business plan along with subsequent approval of charges to consumers in Grid Mod I.[[20]](#footnote-21) FirstEnergy’s application in the present case seeks approval of a “Grid Mod II” plan that relies on and directly results from the Grid Mod I deployment approved under Mr. Randazzo.[[21]](#footnote-22)

## B. Staying consideration of Grid Mod II would not harm consumers. Prematurely moving forward with Grid Mod II would lead to asymmetrical regulation that unreasonably favors FirstEnergy to the detriment of its two million consumers.

FirstEnergy asserts that proceeding with Grid Mod II is needed because it “will expand the benefits of the Companies’ investments in their first phase of distribution grid modernization (“Grid Mod I”) to additional customers and will further the development of a reliable, resilient, and modern distribution grid, while providing protections for customers.”[[22]](#footnote-23) To the contrary, proceeding with Grid Mod II would harm consumers.

FirstEnergy’s mere assertion of supposed “consumer benefits” from Grid Mod II should ring hollow. FirstEnergy was not able to demonstrate actual consumer benefits of Grid Mod I. The auditor’s review of Grid Mod I showed that FirstEnergy failed to demonstrate the usefulness of its Grid Mod I investments. FirstEnergy thwarted the auditor’s review of actual operational savings, hindering any PUCO assessment of whether consumers should be receiving more savings from the Grid Mod I program.

For example, Daymark found that at the time of the audit report, portions of Grid Mod I technologies were in fact undergoing or awaiting full activation.[[23]](#footnote-24) As a result, Daymark did not have the data “to rely on for determining functionality and performance of these technologies in comparison to planned specifications.”[[24]](#footnote-25) Further, Daymark found FirstEnergy to be lax in presentation of clear documentation of the complete assumptions behind operational savings estimates, combined with the lack of direct reporting as to operations savings being achieved. This precluded a direct audit determination of current and future level of operational savings to be credited to consumers under Rider AMI.

FirstEnergy’s request for approval of Grid Mod II comes after it admitted to the U.S. Department of Justice to committing honest services wire fraud and bribing the former PUCO chair as part of the H.B. 6 scandal (otherwise known as “the largest bribery, money laundering scheme ever perpetrated against the people of the state of Ohio”).[[25]](#footnote-26) FirstEnergy admitted to bribing the former PUCO Chair Sam Randazzo, who has since been criminally indicted for bribery and embezzlement.[[26]](#footnote-27) As detailed in our Motion for Stay, Grid Mod II is inextricably intertwined with the H.B. 6 scandal and FirstEnergy’s corrupt bribery scheme. Parts of ESP V, like FirstEnergy’s proposal to charge consumers *$21 million annually* through the Delivery Capital Recovery Rider, are also inextricably intertwined with the H.B. 6 scandal and FirstEnergy’s corrupt bribery scheme.

Yet FirstEnergy expects the PUCO to consider and approve Grid Mod II (and its Delivery Capital Recovery Rider as part of ESP V) while the PUCO has blocked moving forward with other investigations regarding how FirstEnergy consumers have been harmed by the H.B. 6 scandal and whether they should receive refunds. That is unfair. Indeed, regulators in other states have ordered H.B. 6-related refunds to consumers.[[27]](#footnote-28) Meanwhile, the PUCO’s H.B. 6 investigations are operating under a third consecutive six-month stay.[[28]](#footnote-29)

Given the overlap between this case and the four FirstEnergy investigations *that have been stayed* (as described in our Motion to Stay), it is only fair that the related cases (*i.e*., Grid Mod II) also be stayed. The PUCO has broad powers to ensure fairness and has done so in past cases.[[29]](#footnote-30) Staying the consideration, approval, and implementation of Grid Mod II in this case would create a fairness of balance and symmetry in the PUCO’s regulation – something that is especially needed when it comes to FirstEnergy’s two million consumers.

# III. CONCLUSION

FirstEnergy’s two million consumers deserve a fair review of FirstEnergy’s proposed Grid Mod II investments and what they will have to pay under Rider AMI. OCC has demonstrated that staying Grid Mod II is appropriate until after FirstEnergy’s upcoming rate case, after the H.B. 6 investigation cases are resolved, and after the Randazzo criminal trial has run its course. PUCO should protect consumers and grant OCC’s Motion for Stay.

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| Respectfully submitted,   |  |  | | --- | --- | |  | Maureen R. Willis (0020847)  Ohio Consumers’ Counsel    */s/ William J. Michael*  William J. Michael (0070921)  Counsel of Record  Donald J. Kral (0042091)  Assistant Consumers’ Counsel    **Office of the Ohio Consumers’ Counsel**  65 East State Street, Suite 700  Columbus, Ohio 43215  Telephone [Michael]: (614) 466-1291  Telephone [Kral]: (614) 466-9571  [william.michael@occ.ohio.gov](mailto:william.michael@occ.ohio.gov)  [donald.kral@occ.ohio.gov](mailto:donald.kral@occ.ohio.gov)  (willing to accept service by e-mail) | |  |
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Reply to FirstEnergy’s Memorandum in Opposition to OCC’s Motion for Stay was served on the persons stated below via electronic transmission, this 13th day of February 2024.

*/s/ William J. Michael*

William J. Michael

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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1. Ohio Attorney General’s Office, “Former PUCO Chairman, Former FirstEnergy Executives Indicted on Public Corruption Charges,” News Release (Feb. 12, 2024). [↑](#footnote-ref-2)
2. Application (July 15, 2022) at 66, ¶ 21 (“The Companies request authorization to recover in Rider AMI their actual Grid Mod II capital costs, up to $626.4 million, and incremental O&M expenses associated with Grid Mod II up to an aggregate of $144.1 million over the deployment period.”); *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Establish a Standard Service Offer*, Case No. 23-301-EL-SSO,FirstEnergy Ex. 2, Direct Testimony of Santino L. Fanelli (“Fanelli Testimony”) at SLF-1 (April 5, 2023) ($1.4 billion). [↑](#footnote-ref-3)
3. Case No. 23-301-EL-SSO, Motion for Limited Stay of FirstEnergy’s Distribution Riders by Northwest Ohio Aggregation Coalition, Ohio Manufacturers’ Association Energy Group, and Office of the Ohio Consumers’ Counsel (Dec. 6, 2023). [↑](#footnote-ref-4)
4. United States of America v. FirstEnergy Corp., Case No. 1:21-cr-86, Deferred Prosecution Agreement at 18 (July 20, 2021) (emphasis added). [↑](#footnote-ref-5)
5. The Cleveland Electric Illuminating Company, Toledo Edison and Ohio Edison. [↑](#footnote-ref-6)
6. FirstEnergy Memorandum Contra at 1 (Feb. 6, 2024). [↑](#footnote-ref-7)
7. *Id.* at 2. [↑](#footnote-ref-8)
8. *Id.* at 1. [↑](#footnote-ref-9)
9. OCC Motion for Stay at 1-2 (Jan. 22, 2024). [↑](#footnote-ref-10)
10. *United States of America v. FirstEnergy Corp*., Case No. 1:21-cr-86, Deferred Prosecution Agreement at 17 (July 22, 2021). [↑](#footnote-ref-11)
11. *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, et al., Opinion and Order at 73 (July 17, 2019). [↑](#footnote-ref-12)
12. Application at 1 (July 15, 2022). [↑](#footnote-ref-13)
13. FirstEnergy Memorandum Contra at 1 (Feb. 6, 2024). [↑](#footnote-ref-14)
14. Case Nos. 17-974-EL-RDR, 17-2474-EL-RDR, 20-1502-EL-UNC and 20-1629-EL-RDR, OCC Application for Rehearing (Nov. 17, 2023). [↑](#footnote-ref-15)
15. FirstEnergy Memorandum Contra at 2 (Feb. 6, 2024). [↑](#footnote-ref-16)
16. 767 F.3d 611 (6th Cir. 2014). [↑](#footnote-ref-17)
17. *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. 24, 2022). [↑](#footnote-ref-18)
18. FirstEnergy Memorandum Contra at 2 (Feb. 6, 2024). [↑](#footnote-ref-19)
19. FirstEnergy Memorandum Contra at 4. [↑](#footnote-ref-20)
20. *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, et al., Opinion and Order at 73 (July 17, 2019). [↑](#footnote-ref-21)
21. Application at 1 (July 15, 2022). [↑](#footnote-ref-22)
22. FirstEnergy Memorandum Contra at 1. [↑](#footnote-ref-23)
23. *In the Matter of the Application of 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, et al., Audit Report (Nov. 14, 2022) at 4. [↑](#footnote-ref-24)
24. *Id.* [↑](#footnote-ref-25)
25. T. Armus, [*GOP Ohio House speaker arrested in connection to $60 million bribery scheme*](https://www.washingtonpost.com/nation/2020/07/22/ohio-house-speaker-arrested-republican/)*,* [The Washington Post](https://en.wikipedia.org/wiki/The_Washington_Post)(July 23, 2020). [↑](#footnote-ref-26)
26. *United States v. Randazzo,* Case No. 1:23-cr-114, Indictment (Nov. 29, 2023). [↑](#footnote-ref-27)
27. D. Anderson, *Potomac Edison faces Maryland audit after admitting it charged customers for FirstEnergy’s bribes and lobbying,* Utility Dive (Oct. 26, 2023); K. Kowalski, *How Randazzo spent millions from FirstEnergy,* Energy News Network (May 17, 2023). [↑](#footnote-ref-28)
28. *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. 24, 2023); *In the Matter of the Review of the Distribution Modernization Rider of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 17-2474-EL-RDR, Entry (Aug. 24, 2023); *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 (Aug. 24, 2023); *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 (Aug. 24, 2023). [↑](#footnote-ref-29)
29. *See, e.g., In the Matter of the Application 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 R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing (Oct. 12, 2016), at ¶¶ 38, 39 (permitting the PUCO Staff to propose an alternative proposal for a distribution modernization rider). [↑](#footnote-ref-30)