

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the	)	
Political and Charitable Spending by	)	
Ohio Edison Company, the Cleveland	)	Case No. 20-1502-EL-UNC
Electric Illuminating Company, and the	)	
Toledo Edison Company.	)	

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

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March 29, 2022

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Eighteen months ago (on September 8, 2020), OCC filed investigatory motions asking the PUCO to order an independent management audit and investigation of FirstEnergy.<sup>1</sup> In response, PUCO Attorney Examiner Gregory Price initiated this case, but without an independent, external Auditor to investigate FirstEnergy's political and charitable spending related to tainted House Bill 6 (H.B. 6).

On October 27, 2021, OCC filed an additional motion for an independent Auditor to be hired.<sup>2</sup> In the ensuing pleading cycle, OCC filed a reply in support of its motion on November 19, 2021, in which OCC detailed the needed elements of an audit. On March 9, 2022, the PUCO ordered an audit of the FirstEnergy Utilities' political and charitable spending, *without even referencing OCC's reply and only mentioning OCC's motion in passing*.<sup>3</sup>

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<sup>1</sup> *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, et al., OCC Motion (Sept. 8, 2020).

<sup>2</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-EI-UNC, Motion for Independent Auditor (Oct. 27, 2021).

<sup>3</sup> *Id.*, Entry (Mar. 9, 2022).

The PUCO defined the audit's scope as determining whether "the Companies' show-cause demonstration is sufficient" to ensure that the costs of any political or charitable spending in support of H.B. 6 were not charged to the FirstEnergy utility consumers.<sup>4</sup> But with a limited scope for its audit, this PUCO ruling could be a sidestep, not the needed step forward that OCC has advocated for providing answers and protection to FirstEnergy's two million consumers.

OCC files this Application for Rehearing to ask the PUCO to further define and broaden the scope of the audit so that it can be effective for finding answers and protection for Ohio consumers. These changes are critical in the midst of a "bribery scheme [that] was designed to *directly* take money out of the pockets of millions of Ohioans."

The scope of the PUCO audit should be broadened. The scope of the audit should include FirstEnergy spending in 2017-2019 in support of the nuclear subsidy legislation that preceded H.B. 6. The audit scope should include a review of costs booked as general advertising costs (Account 930.1) that were assigned, allocated or distributed to the FirstEnergy Utilities. The audit should focus on discovery provided not only by the utilities, but also discovery provided by FirstEnergy Corp. The audit should include an investigation of whether FirstEnergy Corp. allocated any costs to the FirstEnergy Utilities arising from the FirstEnergy Solutions bankruptcy settlement that might have indirectly included H.B. 6 costs. The audit should require FirstEnergy to provide access to documents produced by FirstEnergy related to the FERC audit, including documents pertaining to FirstEnergy Corp.'s agreement to a number of recommendations from the

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<sup>4</sup> *Id.*

FERC audit related to its accounting for lobbying expenses and donations. And the Auditor should have access to FirstEnergy Corp.'s internal investigation report by a committee of independent members of FirstEnergy's Board of Directors. The audit should also include an investigation of FirstEnergy's response to the PUCO's Show Cause Entry.

The PUCO should structure this audit to fully identify the complete scope of FirstEnergy's improper activities relating to its political and charitable spending in support of H.B. 6. Accordingly, under R.C. 4903.10, OCC applies for rehearing of the PUCO's March 9, 2022 Entry. As explained more fully in the following Memorandum in Support, the PUCO's Entry was unreasonable and unlawful in the following respects and should be modified:

**ASSIGNMENT OF ERROR NO. 1:** The PUCO erred by unreasonably and unjustly limiting the scope for auditing FirstEnergy's political and charitable spending to merely a review of "whether the show cause demonstration submitted by Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company is sufficient to ensure that the cost of any political or charitable spending in support of Am. H.B. 6, or the subsequent referendum effort, were not included, directly or indirectly, in any rates or charges paid by ratepayers in this state." That audit scope is too narrow and defers too much to FirstEnergy's self-investigation which even FirstEnergy later had to correct.

- A. The PUCO erred by not requiring the scope of the audit to include a review of FirstEnergy's spending on nuclear subsidy legislation in 2017-2019 that preceded H.B. 6.
- B. The PUCO erred by not requiring in the scope of the audit a review of costs booked as general advertising costs (Account 930.1) that were assigned, allocated or distributed to the FirstEnergy Utilities.
- C. The PUCO erred by not requiring in the scope of the audit a review of documents from FirstEnergy Corp. and other FirstEnergy entities, instead of merely documents from "the Companies" which might be interpreted as only the FirstEnergy Utilities.



- D. The PUCO erred by not requiring in the scope of the audit an investigation of whether FirstEnergy Corp. allocated any costs to the FirstEnergy Utilities arising from the FirstEnergy Solutions bankruptcy settlement that might have indirectly included H.B. 6 costs.
- E. The PUCO erred by not ordering FirstEnergy to provide the Auditor for review the documents produced by FirstEnergy to FERC related to FERC's audit, including documents pertaining to FERC's recommendations on lobbying and donation activities. FirstEnergy is still continuing its year-long objection to providing OCC with the documents it gave to FERC.
- F. The PUCO erred by not ordering the FirstEnergy Utilities and FirstEnergy Corp. to provide the Auditor for review the FirstEnergy Corp. internal investigation report (and related documents), which was the investigation conducted by a committee of independent members of FirstEnergy's Board of Directors. And the PUCO should have ruled on OCC's related September 20, 2021 interlocutory appeal and ordered FirstEnergy to produce the internal investigation report to OCC.
- G. The PUCO erred by not requiring in the scope of the audit an investigation of the veracity of FirstEnergy's sworn affidavit and other responses to the PUCO's Show Cause order.
- H. The PUCO erred by limiting the audit to "inside and outside government relations staff and lobbyists." There are potentially many other inside and outside staff who were involved in various tasks related to passing nuclear generation legislation between 2017 and 2019 and defeating the H.B. 6 referendum effort. The audit should be broadened to include all labor, overhead and other related charges paid to inside and outside staff and lobbyists and other vendors who worked on nuclear generation legislation.
- I. The PUCO erred by not requiring the scope of the audit to include a review of all FirstEnergy's political spending during 2017-2019 that may have been improperly charged to the FirstEnergy Ohio Utilities.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING  
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**I. BACKGROUND**

The H.B. 6 scandal became public in July 2020, when the U.S. Attorney of the Southern District of Ohio filed criminal charges against Former House Speaker Larry Householder and others.<sup>5</sup> The criminal charges stem from what “is likely the largest bribery, money laundering scheme ever perpetrated against the people of the state of Ohio \*\*\*bribery, pure and simple.”<sup>6</sup>

Shortly after the U.S. Attorney filed the criminal complaint, OCC filed several motions (on September 8, 2020) asking the PUCO to investigate FirstEnergy’s role in H.B. 6. On September 15, 2020, the PUCO ordered that “this proceeding should be opened to review the political and charitable spending by the FirstEnergy Utilities in support of Am. Sub. H.B.6, and the subsequent referendum effort.”<sup>7</sup> Notably, the PUCO

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<sup>5</sup> *United States v. Larry Householder, et al.*, Case No. 1:20-cr-00077-TSB, Complaint (S.D. Ohio) (Jul. 21, 2020).

<sup>6</sup> *Jennifer L. Miller v. Michal J. Anderson*, Case No. 5:20CV1743, Order at 2 (Mar. 22, 2022).

<sup>7</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 Entry at ¶5 (Sept. 15, 2020).

investigation did not include an independent audit but relied on the FirstEnergy Utilities to self-report.

The FirstEnergy Utilities were “directed to show cause, by September 30, 2020, demonstrating that the costs of any political or charitable spending in support of Am. Sub. H.B. 6, or the subsequent referendum effort, were not included, directly or indirectly, in any rates or charges paid by ratepayers in this state.”<sup>8</sup> The FirstEnergy Utilities responded by filing an affidavit from Mr. Santino Fanelli, Director of Rates and Regulatory Affairs, FirstEnergy Service Company, stating that “the Companies have not included, directly or indirectly, any H.B. 6 costs in any rates or charges paid by ratepayers in Ohio.”<sup>9</sup> This statement was later shown to be incorrect.<sup>10</sup>

On July 20, 2021, FirstEnergy formally signed a Deferred Prosecution Agreement. In the Deferred Prosecution Agreement, FirstEnergy “stipulated[d] and agree[d] that if this case proceeded to trial, the United States would prove the facts set forth below beyond a reasonable doubt.”<sup>11</sup>

FirstEnergy then admitted that it “conspired with public officials and other individuals and entities to pay millions of dollars to and for the benefit of public officials in exchange for specific official action for FirstEnergy Corp.’s benefit.”<sup>12</sup> Among other facts, FirstEnergy admitted to paying more than \$59 million to Generation Now and more

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<sup>8</sup> *Id.*

<sup>9</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, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company Response to Show Cause Entry, Affidavit of Santino L. Fanelli at ¶4 (Sept. 30, 2020).

<sup>10</sup> *Id.*, Motion to file Supplemental Response (Aug. 6, 2021).

<sup>11</sup> *United States of America v. FirstEnergy Corp.*, Case No. 21:21-cr-86, Deferred Prosecution Agreement at 14.

<sup>12</sup> *Id.* at 17.

than \$22 million to companies owned by “Public Official B,” former PUCO Chairman Randazzo.<sup>13</sup> FirstEnergy admitted that paying these millions of dollars was intended to influence official action, namely the passage of H.B.6.

FirstEnergy Corp. also admitted that its priorities included passage of nuclear legislation and that it sought “official action from Public Official A and Public Official B in the form of helping draft nuclear legislation that would further the interests of FirstEnergy Corp. and FES and by pressuring and advising public officials to support nuclear legislation for FirstEnergy Corp.’s and FES’s benefit.”<sup>14</sup>

FirstEnergy Corp. also admitted that “it was pursuing state legislation in Ohio to save the power plants through help from Public Official A, including the ZEN (Zero-Emissions Nuclear Resource Program) energy proposals outlined in House Bill 178 Senate Bill 128 and House Bill 381 in 2017, which failed to gain support necessary for passage before Public Official A became Speaker in 2019.”<sup>15</sup> FirstEnergy Corp. admitted that “[c]entral to FirstEnergy Corp.’s state solution strategy was payments for Public Official A’s benefit to Generation Now, which was Public Official A’s 501(C)(4), as Public Official A pursued the Ohio House Speakership. The FirstEnergy Corp. payments began in 2017, as Public Official A began executing his strategy to regain the Speakership.”<sup>16</sup>

The Deferred Prosecution Agreement also revealed additional political spending in support of nuclear subsidies. FirstEnergy Corp admitted that

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<sup>13</sup> *Id.* at 16, 17.

<sup>14</sup> Deferred Prosecution Agreement at 17 (Jul. 22, 2021).

<sup>15</sup> *Id.* at 21.

<sup>16</sup> *Id.* at 21.

[i]n 2017 and 2018, FirstEnergy Corp. attempted to seek relief for its nuclear power generation facilities through a federal solution of its energy generation business. To further a federal solution, certain FirstEnergy Corp. executives met with federal officials and hired consultants with close connections to federal officials to lobby and assist in securing official action to subsidize the nuclear and coal plants through DOE action and the FERC rulemaking process. FirstEnergy Service also approved a \$5,000,000 wire to a 501(c)(4) entity connected to federal official(s), on or about May 1, 2017, shortly after hiring a consultant with close connections to those federal officials.<sup>17</sup>

After the Deferred Prosecution Agreement was filed, the FirstEnergy Utilities revised their response to the PUCO's September 15, 2020 Show-Cause Order.<sup>18</sup> The FirstEnergy Utilities stated that "[p]rior to the filing of the DPA [Deferred Prosecution Agreement], the Companies were unaware that the \$4.3 million payment in part constituted political spending in support of HB 6."<sup>19</sup>

FERC, in its recent audit of FirstEnergy, concluded that there were "significant shortcomings in FirstEnergy and its subsidiaries' internal controls over financial reporting, including controls over accounting for expenses relating to civic, political, and related activities, such as lobbying activities performed by and on behalf of FirstEnergy and its subsidiaries."<sup>20</sup> FERC found that FirstEnergy Service Company had improperly accounted for and improperly reported lobbying expenses and donations, and other costs

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<sup>17</sup> Deferred Prosecution Agreement at 20.

<sup>18</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, Motion for Leave to File a Supplemental Response to the September 15, 2020 Show Cause Entry (Aug. 6, 2021).

<sup>19</sup> *Id.*, Supplemental Response at 1.

<sup>20</sup> Docket No. FA19-1-000, FERC Audit Report at 48, (Feb. 4, 2022).



lacked proper documentation or were misclassified.<sup>21</sup> Additionally FERC found that FirstEnergy Service Company allocated and charged the improperly accounted for lobbying, donation and unsupported costs to FirstEnergy and its subsidiaries.<sup>22</sup> This led to FirstEnergy subsidiaries improperly accounting for and reporting these expenses on their books and records, with overbilling to utility consumers.<sup>23</sup>

Specifically, FERC found:

- \$10.9 million of lobbying expenses improperly recorded in utility accounts;<sup>24</sup>
- \$70.9 million in payments to various entities for lobbying and other nonoperating purposes that were not sufficiently supported, a portion of which was charged to FirstEnergy Utilities;<sup>25</sup>
- \$22.8 million in payments to entities associated with the former Chair of the PUCO, a portion of which was allocated to the FirstEnergy Ohio Utilities;<sup>26</sup>
- \$28.8 million of payments made to sixteen entities associated with one person, with payments allocated to FirstEnergy Utilities;<sup>27</sup> and
- Improper charging of internal lobbyist expenses to the FirstEnergy Utilities.<sup>28</sup>

And even more concerning, FERC noted that:

several factual assertions agreed to by FirstEnergy in DPA [Deferred prosecution Agreement] and the remedies FirstEnergy agreed to undertake, *point towards internal controls having been possibly obfuscated or circumvented to conceal or mislead as to the actual amounts, nature, and purpose of the lobbying expenditures made, and as a result, the improper inclusion of lobbying and other nonutility*

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<sup>21</sup> *Id.* at 5.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 49.

<sup>25</sup> *Id.* at 50.

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

<sup>27</sup> *Id.* at 51.

<sup>28</sup> *Id.* at 51-52.

*costs in wholesale transmission billing rates. (Emphasis added.)*<sup>29</sup>

FERC made six recommendations to address the problems it found with respect to FirstEnergy's accounting for lobbying expenses and donations.<sup>30</sup> FirstEnergy Corp., in its response to the FERC audit report,<sup>31</sup> largely accepted FERC's recommendations, including FERC's six recommendations on lobbying expenses and donations.

The PUCO has repeatedly stated regarding tainted H.B. 6 that it is "determined to act in a deliberate manner, based upon facts rather than speculation."<sup>32</sup> In its Entry, it reiterates its "commitment, with respect to the Companies' activities surrounding the passage of H.B. 6, to follow the facts wherever they may lead...."<sup>33</sup>

The audit the PUCO ordered is an important step toward developing the facts related to FirstEnergy's H.B. 6 activities. The PUCO defined the audit's scope as determining whether "the Companies' show cause demonstration is sufficient" to ensure that the cost of any political or charitable spending in support of H.B. 6 were not charged to the FirstEnergy utility consumers.<sup>34</sup> But without further direction, this PUCO ruling could be a sidestep, and not the needed step forward that OCC has advocated for providing answers to FirstEnergy's two million consumers.

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 10-11.

<sup>31</sup> FirstEnergy Response at 10-11 (Jan. 24, 2022) (Attachment).

<sup>32</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 ¶17 (Nov. 4, 2020).

<sup>33</sup> *Id.*, Entry at ¶13.

<sup>34</sup> *Id.*, Entry (Mar. 9, 2022).

## II. MATTERS FOR RECONSIDERATION

**ASSIGNMENT OF ERROR NO. 1: The PUCO erred by unreasonably and unjustly limiting the scope for auditing FirstEnergy’s political and charitable spending to merely a review of “whether the show cause demonstration submitted by Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company is sufficient to ensure that the cost of any political or charitable spending in support of Am. H.B. 6, or the subsequent referendum effort, were not included, directly or indirectly, in any rates or charges paid by ratepayers in this state.” That audit scope is too narrow and defers too much to FirstEnergy’s self-investigation which even FirstEnergy later had to correct.**

**A. The PUCO erred by not requiring the scope of the audit to include a review of FirstEnergy’s spending on nuclear subsidy legislation in 2017-2019 that preceded H.B. 6.**

The PUCO set the audit period from January 1, 2017 through December 31, 2019<sup>35</sup> but limited the review to “political or charitable spending in support of Am. Sub. H.B. 6 or the subsequent referendum effort.”<sup>36</sup> Because of the interrelatedness of nuclear legislation being pursued at the same time, the PUCO should rule that the audit will include a review of FirstEnergy spending in 2017-2019 in support of the nuclear subsidy legislation that preceded H.B. 6.

H.B. 6 was introduced in the Ohio House of Representatives on April 12, 2019.<sup>37</sup> But FirstEnergy Corp. began its effort to obtain subsidies for its nuclear plants much earlier, such as with the Zero Emissions Nuclear Resource Program. In fact, H.B. 6 was the culmination of a three-year campaign by FirstEnergy Corp. to enact legislation to subsidize its nuclear power plants.

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<sup>35</sup> *Id.*, Entry, Request for Proposal at 3 (Mar. 9, 2022).

<sup>36</sup> *Id.*

<sup>37</sup> Ohio Legislature, 133<sup>rd</sup> General Assembly, House Bill 6, available at: <https://www.legislature.ohio.gov/legislation/legislation-status?id=GA133-HB-6>.

In this regard, FirstEnergy Corp. admitted in the Deferred Prosecution Agreement that:

it was pursuing state legislation in Ohio to save the power plants through help from Public Official A, including the ZEN (Zero-Emissions Nuclear Resource Program) energy proposals outlined in House Bill 178 Senate Bill 128 and House Bill 381 in 2017, which failed to gain support necessary for passage before Public Official A became Speaker in 2019.<sup>38</sup>

And FirstEnergy Corp. admitted that:

[c]entral to FirstEnergy Corp.'s state solution strategy was payments for Public Official A's benefit to Generation Now, which was Public Official A's 501(C)4, as Public Official A pursued the Ohio House Speakership. The FirstEnergy Corp. payments began in 2017, as Public Official A began executing his strategy to regain the Speakership.<sup>39</sup>

Accordingly, the PUCO should have included within its investigation a review of FirstEnergy spending in 2017-2019 in support of nuclear subsidy legislation, and not just "political or charitable spending in support of Am. Sub. H.B. 6 or the subsequent referendum effort." The PUCO should grant rehearing and modify its Entry under R.C. 4903.10 to accommodate a wider scope of auditing that is structured to obtain needed answers for consumers.

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<sup>38</sup> Deferred Prosecution Agreement at 21.

<sup>39</sup> *Id.*

**B. The PUCO erred by not requiring in the scope of the audit a review of costs booked as general advertising costs (Account 930.1) that were assigned, allocated or distributed to the FirstEnergy Utilities.**

The PUCO listed several accounts within the scope of the audit but did not include Account 930.1-General Advertising. The PUCO should revise the scope of the audit to include this account.

On January 11, 2022, OCC filed a Motion regarding the proper scope of the audit.<sup>40</sup> The Motion was based on an Opinion by the District of Columbia Court of Appeals dated December 28, 2021.<sup>41</sup> The Opinion reversed and remanded a FERC ruling concerning the types of political spending that can be included in rates. The Court held that spending on public relations, advertising, opinion polling and advocacy services to support a transmission line project cannot be included in rates. The PUCO's Request for Proposals includes in the audit all of the accounts listed in the ruling of the District of Columbia Court of Appeals, except for Account 9301. – General Advertising.

The criminal complaint, for example, explains that “from July 24 to October 22, 2019, Company A-controlled accounts wired over \$38 million into Generation Now to defeat the ballot initiative so HB 6 would go into effect. The Enterprise funneled the money to various accounts and entities controlled by the Enterprise to purchase media ads and mailers against the ballot initiative.”<sup>42</sup> Additionally, FirstEnergy Corp. admitted

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<sup>40</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, Motion to Accept Statement of Additional Authority (Jan. 11, 2022).

<sup>41</sup> *Newman v. FERC*, No. 20-1324, 2021 U.S.App.LEXIS 38373 (D.C. Cir. Dec. 28, 2021). This opinion is attached to OCC's Statement of Additional Authority.

<sup>42</sup> *United States v. Matthew Borges*, Case No. 1:20-MJ-00526, Criminal Complaint at ¶17 (Jul. 17, 2020).

that payments made to Generation Now supported “ads to provide legislators with the necessary cover to support House Bill 6.”<sup>43</sup>

The audit should examine spending charged to Account 930.1-General Advertising to determine whether any such costs were charged to the FirstEnergy Utilities and collected from consumers in rates. The PUCO should grant rehearing and modify its Entry under R.C. 4903.10 to expand the scope of the audit to include an examination of general advertising.

**C. The PUCO erred by not requiring in the scope of the audit a review of documents from FirstEnergy Corp. and other FirstEnergy entities, instead of merely documents from “the Companies” which might be interpreted as only the FirstEnergy Utilities.**

The RFP attached to the PUCO Entry states that the scope of the audit should include all documents produced by “the Companies” in response to discovery requests.<sup>44</sup> The Companies could be interpreted by an Auditor as merely the FirstEnergy Utilities, but they did not produce that many documents in this case. Instead, they claimed that most of the relevant documents were beyond their possession, custody or control. For example, OCC subpoenaed and obtained many documents from FirstEnergy Corp.

The PUCO should require that the audit will also include a review of the documents produced by FirstEnergy Corp. and any of its affiliates. Otherwise, the Auditor could have few documents to review, which will unreasonably limit its audit. The PUCO should grant rehearing, and the PUCO’s Entry should be modified under R.C. 4903.10.

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<sup>43</sup> Deferred Prosecution Agreement at 27.

<sup>44</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, Entry, RFP at 3 (Mar. 9, 2022).

**D. The PUCO erred by not requiring in the scope of the audit an investigation of whether FirstEnergy Corp. allocated any costs to the FirstEnergy Utilities arising from the FirstEnergy Solutions bankruptcy settlement that might have indirectly included H.B. 6 costs.**

The PUCO defined the scope of the audit too narrowly. The audit should have included an investigation as to whether FirstEnergy Corp. allocated any costs to the FirstEnergy Utilities arising from the FirstEnergy Solutions bankruptcy settlement that might have indirectly included H.B. 6 costs.

This is a complex issue but the risk for consumers is real. Oxford Advisors, one of the PUCO-hired Auditors in the investigation cases,<sup>45</sup> explained it this way:

FirstEnergy has significant potential risk and financial exposure related to creditor demands and related claims in the bankruptcy litigation of First Energy Solutions (“FES”). **FirstEnergy has separated and fully removed FES from its business through the bankruptcy, but at a steep price.**<sup>46</sup>

When FirstEnergy Solutions filed for bankruptcy, FirstEnergy Service Company continued to provide shared services throughout the bankruptcy case.<sup>47</sup> FirstEnergy Solutions emerged from bankruptcy (as Energy Harbor) on February 27, 2020.<sup>48</sup> Most of the \$60 million bribe to Larry Householder was paid to defeat the referendum, and the majority of this spending occurred during the third quarter of 2019 (about \$18 million).<sup>49</sup>

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<sup>45</sup> *In the Matter of the Review of the Distribution Modernization Rider of Ohio Edison, the Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 17-2474-EL-RDR.

<sup>46</sup> *Id.*, Motion for Subpoena Duces Tecum to PUCO Auditor Oxford Advisors, Attachment (Third Interim Quarterly Report) at 3 (Dec. 10, 2021).

<sup>47</sup> J. Funk, *Bankruptcy court oks FirstEnergy Solutions settlement, setting stage for reorganization*, Cleveland.com (Jan. 29, 2019).

<sup>48</sup> P. Fitzgerald, *FirstEnergy Solutions Exits Bankruptcy as Energy Harbor*, Wall Street Journal (Feb. 27, 2020).

<sup>49</sup> *U.S. v. Householder*, Case No. 1:20-cr-00077-TSB. Complaint at 15-16 (S.D. Ohio) (July 21, 2020).

FirstEnergy Service Company transmitted nearly all of these payments to Generation Now.<sup>50</sup> FirstEnergy Solutions directed a significant amount of these payments.

In an amended answer in a civil case, FirstEnergy stated:

FirstEnergy admits that between August 1, 2019 and October 2019, FirstEnergy Service Company, *as directed by FirstEnergy Solutions Corp. n/k/a Energy Harbor*, wire transferred \$25,738,591 from FirstEnergy Solutions Corp. to Generation Now.<sup>51</sup>

Given that FirstEnergy Solutions directed these payments, FirstEnergy Service Company might have billed the cost of these payments to FirstEnergy Solutions.

FirstEnergy Corp. reached a settlement with FirstEnergy Solutions, its creditors and other parties that allowed FirstEnergy Solutions to emerge from bankruptcy (as Energy Harbor). Among other terms, the settlement called for FirstEnergy Corp. to credit FirstEnergy Solutions \$112.5 million toward charges by FirstEnergy Service Company.<sup>52</sup> If FirstEnergy Corp. charged any of \$112.5 million to the Ohio utilities, then consumers indirectly paid H.B. 6 costs.

The audit should include whether FirstEnergy Corp. distributed, allocated or assigned to FirstEnergy's Ohio utilities any costs from the bankruptcy settlement, either directly or indirectly, in the form of general and administrative expenses. If so, the audit should examine how the \$112.5 million settlement was determined and whether FirstEnergy Solutions owed FirstEnergy Service Company any unpaid amounts for Generation Now payments at the time of the bankruptcy settlement. The audit should

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<sup>50</sup> *Id.*

<sup>51</sup> *Smith v. FirstEnergy Corp.*, Case No. 2:20-cv-03755. First Amended Answer of FirstEnergy Corp. at 6 (Mar. 31, 2021) (Emphasis added).

<sup>52</sup> J. Funk, *Bankruptcy court oks FirstEnergy Solutions settlement, setting stage for reorganization*, Cleveland.com (Jan. 29, 2019).



resolve these issues to protect consumers from indirectly paying for H.B. 6 costs or the costs of the referendum. The PUCO should grant rehearing, and the PUCO's Entry should be modified under R.C. 4903.10.

- E. The PUCO erred by not ordering FirstEnergy to provide the Auditor for review the documents produced by FirstEnergy to FERC related to FERC's audit, including documents pertaining to FERC's recommendations on lobbying and donation activities. FirstEnergy is still continuing its year-long objection to providing OCC with the documents it gave to FERC.**

The PUCO should have ordered FirstEnergy Corp. and its affiliates to give the Auditor access to documents and communications provided by FirstEnergy Corp. and its affiliates to FERC in connection with FERC's recent audit. That audit spanned the period of January 1, 2015 to September 30, 2021, a period that covered the scandalous and criminal activity associated with H.B. 6.

FERC's audit was publicly released on February 4, 2022. The audit report contains seven findings of noncompliance and 38 recommendations that require FirstEnergy and its subsidiaries to take corrective actions (including apparently refunds to consumers).<sup>53</sup> FERC's audit findings included its acknowledgement of "significant shortcomings" in FirstEnergy and its subsidiaries' internal controls over financial reporting for expenses relating to civic, political and lobbying activities.<sup>54</sup> FERC additional noted that:

several factual assertions agreed to by FirstEnergy Corp. in DPA [Deferred Prosecution Agreement] *point towards internal controls having been possibly obfuscated or circumvented to conceal or mislead as to the actual amounts nature, and purpose of the lobbying expenditures made* and as a result, the improper inclusion of lobbying

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<sup>53</sup> FERC Audit Report (Feb. 4, 2022), Docket No. FA19-1-000.

<sup>54</sup> *Id.* at 48.

and other nonutility costs in wholesale transmission billing rates. (Emphasis added.)<sup>55</sup>

Attorney Examiner Addison recently ruled that documents and communications provided by FirstEnergy and its affiliates to FERC during the course of the audit should be produced to OCC and others within thirty days.<sup>56</sup> Attorney Examiner Addison's ruling was in response to OCC's request to revisit OCC's motion to compel, filed last June (2021). Attorney Examiner Price originally denied OCC's motion to compel in his August 31, 2021 ruling.<sup>57</sup> But on March 16, 2022, FirstEnergy filed an Interlocutory Appeal, asking the PUCO Commissioners to overturn Examiner Addison's ruling.

The Auditor should be allowed to access this information as it will further the PUCO's objective of a full and fair investigation into FirstEnergy's political and charitable spending in support of H.B. 6 and the referendum. The PUCO erred in not explicitly ruling that this information is within the scope of the audit.

Additionally, the PUCO should order the Auditor to specifically review the analysis and follow up reporting that FirstEnergy Corp. has agreed to provide to FERC related to the costs incurred for internal and external lobbying activities. FirstEnergy Corp., in its response to the FERC audit report,<sup>58</sup> accepted FERC's six recommendations dealing with accounting for lobbying expenses donations and costs that lacked proper supporting documentation. These FERC recommendations are:

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<sup>55</sup> *Id.*

<sup>56</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, Tr. 55 (Mar. 11, 2022). FirstEnergy Utilities have sought an interlocutory appeal of this ruling. *See Id.*, Interlocutory Appeal (Mar. 16, 2022).

<sup>57</sup> Tr. 18; 36-37 (Aug. 31, 2021).

<sup>58</sup> FirstEnergy Response at 10-11. (Jan. 24, 2022) (Attachment).

**Recommendation 21:** Critically review and strengthen internal controls in FirstEnergy and its subsidiaries. Establish and implement procedures governing methods to be used to appropriately identify, account for, track report, and review all lobbying costs, donations and any unsupported expenses, including but not limited to, expenses of external lobbyist, moneys paid to corporate entities to be used for lobbying, and other external lobbying costs and internal lobbying costs, including employee lobbying time and other internal lobbying costs.

**Recommendation 22:** Train relevant staff on the internal control enhancements and procedures established, including internal controls over vendor creation in the accounts payable system, payments, accounting and reporting violations; and provide periodic training in this areas as needed.

**Recommendation 23:** Perform an analysis of costs that FirstEnergy and its subsidiaries incurred associated with internal and external lobbying activities, including payments of FirstEnergy funds to outside entities for purposes of those entities using those funds for lobbying, and provide support to identify lobbying-related expenses improperly charged to utility operating accounts, for the audit period and, with respect to the specific issues discussed in this finding, for the entire period affected by or relevant to each such specific issue. Within 60 days of the issuance of this audit report and on a rolling basis within 60 days of conclusion of each internal or external investigation discussed in the finding or any new internal or external investigation arising directly from Ohio House Bill 6 (HB 6) or lobbying activities occurring prior to 2021, provide the results of the investigation, proposed correcting journal entries, and FirstEnergy's analysis of the findings from each investigation and the related impact on prior and future accounting and rate development to audit staff.

**Recommendation 24:** Submit a refund analysis within 60 days of the issuance of this audit report and on a rolling basis within 60 days of conclusion of each investigation discussed in the finding or any new investigation arising directly from HB 6 or lobbying activities occurring prior to 2021, for DAA's review, that explains and details the following: (1) lobbying costs donations, and unsupported costs in utility operating and plant accounts; and internal

lobbying costs as identified pursuant to the analysis performed in response to Recommendation No. 23, plus interest; (2) determinative components of the refund; (3) refund method; (4) wholesale transmission customers to receive refunds; and (5) period(s) refunds will be made.

**Recommendation 25:** File a refund report with the Commission after receiving DAA's assessment of the refund analysis.

**Recommendation 26:** Refund the amounts disclosed in the refund report to customers, with interest calculated in accordance with section 35.19 of the Commission's regulations.<sup>59</sup>

These recommendations which FirstEnergy Corp. agreed to, are important for consumer protection. The PUCO should have included these as part of the audit ordered in this case. The PUCO should grant rehearing, and the PUCO's Entry should be modified under R.C. 4903.10.

**F. The PUCO erred by not ordering the FirstEnergy Utilities and FirstEnergy Corp. to provide the Auditor for review the FirstEnergy Corp. internal investigation report (and related documents), which was the investigation conducted by a committee of independent members of FirstEnergy's Board of Directors. And the PUCO should have ruled on OCC's related September 20, 2021 interlocutory appeal and ordered FirstEnergy to produce the internal investigation report to OCC.**

The PUCO should have ordered that the Auditor include in its review all documents related to the internal investigation by a committee of the FirstEnergy Corp. Board of Directors. That should include the investigation report. It is a key document that must be part of the investigation for solving the maze of FirstEnergy corruption and for protecting two million utility consumers in this case. But PUCO Attorney Examiner

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<sup>59</sup> FERC Audit Report at 10-11; FirstEnergy Response at 10-11.

Gregory Price ruled that OCC was not entitled to these documents in discovery.<sup>60</sup> We asked the PUCO Commissioners in September 2021 to overturn that ruling,<sup>61</sup> but to date have not received a decision.

The PUCO should order these documents to be provided to the Auditor, and the Auditor should be required to review the documents including the investigation report for its audit in this case. Also, the PUCO should rule on OCC's September 20, 2021 Interlocutory Appeal and reverse Attorney Examiner Price's ruling that denied OCC's discovery of the internal investigation report and related documents. The PUCO should grant rehearing, and the PUCO's Entry should be modified under R.C. 4903.10.

**G. The PUCO erred by not requiring in the scope of the audit an investigation of the veracity of FirstEnergy's sworn affidavit and other responses to the PUCO's Show Cause order.**

The PUCO announced the scope of its audit as "a review to determine whether the show cause demonstration submitted by Ohio Edison company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company is sufficient to ensure that the cost of any political or charitable spending in support of Am. Sub. H.B.6, or the subsequent referendum efforts, were not included directly or indirectly, in any rates or charges paid by ratepayers in this state."<sup>62</sup> When the PUCO issued its request for

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<sup>60</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, Prehearing Conference, Tr. at 28-29 (Sept. 14, 2021).

<sup>61</sup> *Id.*, Interlocutory Appeal (Sept. 20, 2021).

<sup>62</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, Entry at 1 (Mar. 9, 2022).

proposal for the audit, it asked the Auditor to “obtain and review all appropriate documentation relating to the Companies show cause filings.”<sup>63</sup>

But the PUCO should expressly require the Auditor to investigate the veracity of the affidavits and the filings made by the FirstEnergy Utilities in response to its Show Cause Order. FirstEnergy’s response (in its show cause filings) is troubling in at least two respects.

First, the Director of Rates and Regulatory Affairs (Mr. Fanelli), who produced the affidavit under oath, knew that Generation Now costs were charged to the FirstEnergy Utilities when he was preparing the response.<sup>64</sup> But he did not disclose this information to the PUCO and parties. Instead, he changed the accounting records to remove the inappropriate charges from the Utilities’ books, without disclosing that inappropriate charges had been included.<sup>65</sup> And yet, in the affidavit filed with the PUCO, Mr. Fanelli claimed that the “[t]he Companies have not included, directly or indirectly, any H.B.6 costs in any rates or charges paid by ratepayers in Ohio.”<sup>66</sup>

Second, the FirstEnergy Utilities claimed in their Supplemental Response that they didn’t know the \$4.3 million payment to Mr. Randazzo was for political purposes until they read about it in the Deferred Prosecution Agreement. This is an interesting claim, given that FirstEnergy Corp. shares with the FirstEnergy Utilities many of the same board members, executive leadership, inside lawyers, outside lawyers and shared services employees.

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<sup>63</sup> *Id.*, Request for Proposal at 3.

<sup>64</sup> Deposition of Mr. Santino L. Fanelli at 129, 130, 204 (Mar. 10, 2021).

<sup>65</sup> *Id.* at 129-137.

<sup>66</sup> Ohio Edison Company the Cleveland Electric Illuminating Company, and the Toledo Edison Company’s Response to Show Cause Entry, Affidavit at ¶4 (Sept. 30, 2020).

The PUCO should have ordered the audit to include a review of the veracity of the FirstEnergy Utilities' affidavit and responses to the PUCO's Show Cause order.

The PUCO should modify its order accordingly. The PUCO should grant rehearing, and the PUCO's Entry should be modified under R.C. 4903.10.

**H. The PUCO erred by limiting the audit to “inside and outside government relations staff and lobbyists.” There are potentially many other inside and outside staff who were involved in various tasks related to passing nuclear generation legislation between 2017 and 2019 and defeating the H.B. 6 referendum effort. The audit should be broadened to include all labor, overhead and other related charges paid to inside and outside staff and lobbyists who worked on nuclear generation legislation.**

The RFP states that the Auditor should review “political or charitable spending in support of Am. Sub. H.B. 6, or the subsequent referendum effort, including both inside and outside government relations staff and lobbyists.” By adding the phrase “including both inside and outside government relations staff and lobbyists,” the PUCO creates an ambiguity. The FirstEnergy Utilities, or perhaps the Auditor, could interpret this in the restrictive sense -- to mean that the audit must be limited to costs charged by “inside and outside government relations staff and lobbyists.” It should include, but not be limited to, labor costs, overhead charges, and other costs such as outside services, materials, travel, entertainment, media, etc.

A better approach would be to define the audit's scope as “all forms of political or charitable spending in support of nuclear subsidy legislation or federal support for FirstEnergy's nuclear plants from 2017 to 2019, regardless of whether the spending is for internal or external resources.” The audit scope could then provide a list of examples, as long as it is clear that the list of examples is not meant to be exhaustive.

Limiting the review to spending by “government relations staff” will exclude expenses incurred by others who may have worked on H.B. 6-related matters, including but not limited to corporate executives, attorneys, rate department staff, plant operators, area managers, local managers, account representatives, economic development staff, policy staff and communications staff. The audit should identify, to the extent possible, the universe of costs expended on H.B. 6 related matters. And then the Auditor should review the ratemaking treatment for these costs to determine if consumers paid any of the identified costs in rates (*e.g.*, internal FirstEnergy payroll and payroll overhead costs), or if revenues collected from consumers were used by FirstEnergy to pay certain of the identified costs.

Limiting the review to spending by “lobbyists” is also too narrow. “Lobbyist” can be viewed as only encompassing someone who is registered with the Joint Legislative Ethics Committee. In fact, there are many other types of outside services that may have been employed, and paid for by consumers, to aid the nuclear legislative effort. These expenses that may have been allocated, distributed, or charged to the FirstEnergy Utilities could include political consultants, dark money groups, law firms, communications firms, advocacy firms, grassroots lobbying firms, polling firms and paying subject matter experts to develop testimony as witnesses.

There are many news reports of firms being involved in the H.B. 6 effort: Generation Atomic,<sup>67</sup> Nuclear Matters (which apparently hired The Brattle Group to

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<sup>67</sup> J. Stinchcomb, *Grassroots activists aim to save Davis-Bessie from closure*, Port Clinton News Herald (May 26, 2017).



develop a pro-nuclear report),<sup>68</sup> The Success Group,<sup>69</sup> Partners for Progress,<sup>70</sup> Empowering Ohio's Economy,<sup>71</sup> Growth and Opportunity Coalition<sup>72</sup> and others.

The audit should encompass the types of costs identified in *Newman, v. FERC*.<sup>73</sup> In that case, the court reversed and remanded a FERC ruling concerning the types of political spending that can be included in rates. The court held that spending on public relations, advertising, opinion polling and advocacy services to support a transmission line project cannot be included in rates.

The scope of the audit should be broad enough to allow the audit to take the Auditor where the accounting records leads. The Auditor's focus should not be unreasonably narrowed or restricted by the RFP.

Based on the foregoing, the PUCO should explicitly define the scope of the audit to include all forms of internal staff costs and external services costs relating to efforts to pass nuclear legislation during 2017-2019 and to defeat the H.B. 6 referendum

The PUCO should grant rehearing, and the PUCO's Entry should be modified under R.C. 4903.10.

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<sup>68</sup> Nuclear Matters web page, [https://www.nuclearmatters.com/impacts\\_of\\_premature\\_nuclear\\_retirements\\_in\\_ohio\\_and\\_pennsylvania](https://www.nuclearmatters.com/impacts_of_premature_nuclear_retirements_in_ohio_and_pennsylvania).

<sup>69</sup> K. Kowalski, *In Ohio, utility and fossil fuel influence reaches beyond bailout bill*, Energy News Network (Apr. 19, 2021).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Newman v. FERC*, No. 20-1324, 2021 U.S.App.LEXIS 38373 (D.C. Cir. Dec. 28, 2021). This opinion is attached to OCC's Statement of Additional Authority.

**I. The PUCO erred by not requiring the scope of the audit to include a review of all FirstEnergy’s political spending during 2017-2019 that may have been improperly charged to the FirstEnergy Ohio Utilities**

In addition to H.B. 6-related political spending costs, we now know that FirstEnergy improperly charged other political costs to some of their utilities in 2017-2019. In the Deferred Prosecution Agreement FirstEnergy Corp admitted that:

[i]n 2017 and 2018, FirstEnergy Corp. attempted to seek relief for its nuclear power generation facilities through a federal solution of its energy generation business. To further a federal solution, certain FirstEnergy Corp. executives met with federal officials and hired consultants with close connections to federal officials to lobby and assist in securing official action to subsidize the nuclear and coal plants through DOE action and the FERC rulemaking process. FirstEnergy Service also approved a \$5,000,000 wire to a 501(c)(4) entity connected to federal official(s), on or about May 1, 2017, shortly after hiring a consultant with close connections to those federal officials.<sup>74</sup>

Newly discovered evidence shows that the costs for a “\$5 million wire transfer to a 501(c)(4) entity connected to federal officials” was likely a payment to “America First” and was partially allocated to FirstEnergy’s Maryland utility.<sup>75</sup> Given this revelation, it would be reasonable for the PUCO to require the Auditor to investigate whether any of these costs were also allocated to FirstEnergy’s Ohio Utilities. This would be consistent with the PUCO’s pledge “to act in a deliberate manner, based upon facts rather than speculation.”<sup>76</sup>

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<sup>74</sup> Deferred Prosecution Agreement at 20.

<sup>75</sup> J. Tomich, *FirstEnergy utility gave to pro-Trump dark money group*, E&E News (Mar. 28, 2022).

<sup>76</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 ¶17 (Nov. 4, 2020).

Given this evidence of additional improper political spending, the PUCO should expand the audit to include a review of all of FirstEnergy's political spending during 2017-2019 that may have been improperly charged to the FirstEnergy Ohio Utilities.

The PUCO should grant rehearing, and the PUCO's Entry should be modified under R.C. 4903.10.

### III. CONCLUSION

On rehearing the PUCO should further define and broaden the scope of its audit so that it can be effective for finding answers and protection for Ohio consumers. These changes are needed for the challenge of auditing FirstEnergy. It is worth repeating what FERC shockingly found after its audit of FirstEnergy:

several factual assertions agreed to by FirstEnergy in DPA [Deferred prosecution Agreement] and the remedies FirstEnergy agreed to undertake, *point towards internal controls having been possibly obfuscated or circumvented to conceal or mislead as to the actual amounts, nature, and purpose of the lobbying expenditures made, and as a result, the improper inclusion of lobbying and other nonutility costs in wholesale transmission billing rates.* (Emphasis added.)<sup>77</sup>

In the words of Louis Brandeis<sup>78</sup> and as recently quoted by U.S. District Judge John Adams,<sup>79</sup> “sunlight is said to be the best of disinfectants.” Millions of Ohioans need sunlight shined on FirstEnergy and its scandals.<sup>80</sup> Rehearing for a broadened and more defined audit should be granted as requested by OCC.

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<sup>77</sup> Docket No. FA19-1-000, FERC Audit Report at 48, (Feb. 4, 2022).

<sup>78</sup> Louis D. Brandeis, *What Publicity Can Do*, Harpers Weekly, Vol. 58, No. 2974 (Dec. 20, 1913).

<sup>79</sup> *Jennifer L. Miller v. Michal J. Anderson*, Case No. 5:20CV1743, Order at 9 (Mar. 22, 2022).

<sup>80</sup> *Id.*

Respectfully submitted,

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Ohio Consumers' Counsel

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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 29<sup>th</sup> day of March 2022.

/s/ Maureen R. Willis  
Maureen R. Willis  
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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## V. FirstEnergy's Response



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January 24, 2022

Mr. Gerald Williams  
Director and Chief Accountant  
Division of Audits and Accounting  
Office of Enforcement  
Federal Energy Regulatory Commission  
888 First Street, NE, Room 5K-13  
Washington, DC 20426

**Re: FirstEnergy Corp. Docket No. FA19-1-000**

Dear Mr. Williams:

FirstEnergy Corp. and its subsidiaries ("FirstEnergy" or "the Company"), pursuant to Section 41.1(b) of the Commission's regulations in 18 C.F.R. Part 41, provides the following response to the Draft Audit Report of the Division of Audits and Accounting ("DAA") within the Federal Energy Regulatory Commission ("Commission" or "FERC")'s Office of Enforcement. Our response addresses the January 7, 2022 Draft Audit Report.

As discussed in Attachment A, FirstEnergy largely accepts the Findings and Recommendations in the Draft Audit Report. In many instances, DAA Staff's Recommendations have been implemented or are already underway. For the Recommendations that have not yet been implemented, we look forward to working cooperatively with DAA Staff during the compliance phase of the audit.

FirstEnergy is committed to fostering a strong culture of compliance, including ensuring compliance with the Commission's accounting regulations. We appreciate that the changes that have been implemented and will be implemented as part of this audit will help us achieve that goal. Our whole team would like to thank DAA Staff for their professionalism and courtesy throughout the audit.

Respectfully submitted,

/s/ Jason Lisowski

Jason Lisowski  
FirstEnergy Corp., Vice President,  
Controller & Chief Accounting Officer

Mr. Gerald Williams  
Director and Chief Accountant  
Division of Audits and Accounting

Attachment A

Docket No. FA19-1-000

January 24, 2022

**Responses to Specific Findings and Recommendations**

**Finding 1: Allocation of Overhead Costs to CWIP**

*FirstEnergy respectfully submits that its approach to capitalizing and allocating overhead costs to CWIP is consistent with the Commission's regulations. Specifically, as the costs in question generally were for services and expenses of employees of FirstEnergy Service Company, FirstEnergy used an "appropriate allocation method" as provided in Section 367.11 of Part 367 (Uniform System of Accounts for Centralized Service Companies). An "appropriate allocation method" under this Section does not require the use of the timecard reports or time study described in Part 101, which DAA Staff incorrectly relies on exclusively and without regard to Part 367.*

*FirstEnergy respectfully submits that DAA Staff's position would read Section 367.11 out of the regulations, which would be contrary to the regulation, established canons of statutory/regulatory interpretation, and principles of prior notice and due process with regard to the proper application and interpretation of the regulation. Prior notice and due process are of particular importance here because, in 2010, DAA Staff audited FirstEnergy, FirstEnergy Service Company, and associated companies and, in the course of that audit, DAA Staff audited the cost allocations and billing by FirstEnergy Service Company, including capitalization of A&G overheads costs to construction, as well as evaluated the accounting of those costs on the utilities' books under the Uniform System of Accounts requirements under 18 C.F.R. Part 101. See December 6, 2010, Final Audit Report, Docket No. FA10-2-000. Unlike the current audit, where DAA Staff does not address Part 367, the 2010 audit expressly considered both Part 367 and Part 101, and did not result in any findings that FirstEnergy's allocation method was inconsistent with Commission regulations or any recommendations that FirstEnergy alter its approach. As such, FirstEnergy relied reasonably on the outcome of this audit to continue its practice of applying an "appropriate methodology" as permitted in Section 367.11 of the Commission's regulations for allocating and capitalizing FirstEnergy Service Company overheads.*

*Also important here is that the State Commissions that regulate FirstEnergy's franchised public utility affiliates during state jurisdictional rate proceedings have had opportunity to review FirstEnergy's existing allocation and capitalization of FirstEnergy Service Company overhead costs to its franchised public utility affiliates and have issued rate orders without modifying those rates. As such, these costs have been included in retail rates pursuant to lawfully-issued State Commission orders.*

*Nonetheless, as noted below in the Company's response to Recommendation 1, FirstEnergy has retained, and DAA Staff have approved, a consultant – Black & Veatch Management Consulting, LLC ("B&V") – to conduct a representative time study for allocation of overhead costs incurred in 2021 to CWIP, and to assist with the development of procedures*



Mr. Gerald Williams  
Director and Chief Accountant  
Division of Audits and Accounting

Attachment A

Docket No. FA19-1-000

January 24, 2022

*FirstEnergy subsidiaries shall use to periodically determine the allocation of overhead labor and labor-related costs.*

*Although B&V will develop capitalization rates for the audit period, FirstEnergy respectfully submits that the proper course here is to apply the 2021 capitalization rate to 2022 and future years, subject to reasonable plans to update the 2021 capitalization rate periodically. Reasons for prospective application of the B&V study results are that a large amount of expense could be run through forward-looking formula rates, as well as the fact that, as noted above that, during state jurisdictional rate proceedings, State Commissions previously have had opportunity to examine the capitalization rates that were applied to distribution accounts and have issued rate orders without modifying those rates.*

**Recommendation 1:** Retain an independent third-party entity, subject to approval by DAA, to conduct a representative labor time study for allocation of overhead costs incurred in 2021 to CWIP, and to assist with the development of procedures FirstEnergy subsidiaries shall use to periodically determine the allocation of overhead labor and labor related costs capitalized by each FirstEnergy subsidiary into the cost of construction after 2021. The independent consultant should have expertise and experience independently performing time studies used in the determination of overhead capitalization rates of U.S. based utilities subject to the accounting requirements prescribed for public utilities and licensees or for natural gas companies under 18 C.F.R. Part 101 or Part 201, respectively. The time study should involve a representative sample of study participants (employees) that provides for extrapolation of the study results to the full population of FirstEnergy employees, and should include processes for application of the study results from the audit period to the issue date of this audit report, and processes for applying the capitalization rate(s) the study finds for 2021 back to the period January 1, 2015 through December 31, 2020, either with no change to the capitalization rates found in the study or with such modifications to the capitalization rate(s) the independent consultant finds reasonable and supported by evidence. The independent consultant should use its expertise and all relevant information available to it to make recommendations as to what the capitalization rate(s) should be for prior years for each FirstEnergy subsidiary, should set forth the basis for its recommendations, and provide both the recommendations and the basis therefore to FirstEnergy and DAA. If there is no recommendation by the independent consultant for any year or other period between January 1, 2015 and December 31, 2020 for any specific capitalizable cost center, then FirstEnergy should base its capitalization rate and the amount to be capitalized for such year or period on the rates and costs of such specific cost centers for which FirstEnergy can provide to DAA reasonable evidence as to the time employees in such cost centers spent having a definite relation to construction, and exclude from consideration those cost centers for which FirstEnergy cannot provide such evidence, per, for example, 18 C.F.R. Part 101, General Instruction No. 2 and § 41.8.



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The progress of the study should be reported within 120 days and the time study results provided to DAA for review and consideration within 180 days of the date of issuance of this audit report, and the developed allocation procedures should be submitted when complete, but no later than 60 days after completion of DAA's review of the labor time study. At a minimum, the developed allocation procedures should provide a method for overhead cost allocation and capitalization to construction based on actual timecard distributions or where this procedure is impractical, based on periodic time studies.

**FirstEnergy Response:** *FirstEnergy respectfully requests that changes to capitalization rates and revised procedures should be applied prospectively only. As noted above in the response to Finding 1, FirstEnergy has proposed, and DAA Staff have approved, FirstEnergy's retention of B&V to conduct a representative time study for allocation of overhead costs incurred in 2021 to CWIP, and to assist with the development of procedures FirstEnergy subsidiaries shall use to periodically determine the allocation of overhead labor and labor-related costs capitalized by each FirstEnergy subsidiary into the cost of construction after 2021. The determined 2021 capitalization rate will be applied to 2022 and future years, subject to reasonable plans to update the rate periodically.*

*Although changes to capitalization rates and revised procedures should be prospective only, B&V has prepared a Statement of Work that includes processes for application of the study results from January 1, 2015 to date, and processes for applying capitalization rates that B&V finds reasonable and supported by the evidence for this period. FirstEnergy will submit the updated Statement of Work for DAA Staff review.*

**Recommendation 2:** Revise written policies, practices, procedures, and controls governing the methods used to account for, track, report, and review overhead labor and related costs, and all other costs allocated to construction projects to be consistent with Commission accounting requirements. In addition, adopt procedures to retain formal documentation supporting the amount of overhead costs allocated to electric plant accounts.

**FirstEnergy Response:** *Accept. The Company will revise its policies, procedures, and controls accordingly.*

**Recommendation 3:** Revise accounting processes and procedures to account for and report capitalized A&G amounts recorded in Accounts 920, Administrative and General Salaries, and 921, Office Supplies and Expenses, using Account 922, Administrative Expenses Transferred – Credit, consistent with Commission regulations.

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**FirstEnergy Response:** *Accept. The Company will make the recommended revisions.*

**Recommendation 4:** Train relevant staff on the revised overhead allocation, control, and A&G accounting procedures and documentation, and provide periodic training in this area, as needed.

**FirstEnergy Response:** *Accept. The Company will provide the training accordingly.*

**Recommendation 5:** Train staff on the time reporting guidelines and establish a periodic training program in this area.

**FirstEnergy Response:** *Accept. The Company will provide the training accordingly.*

**Recommendation 6:** Within 30 days of the completion of Recommendation No. 1, submit an estimate to DAA, including the calculations and determinative components, of overhead costs that would have been allocated to CWIP from 2015 through the present consistent with the requirements of Electric Plant Instruction No. 4 and General Instruction No. 9. The estimate should be based on a recalculation of 2015's and subsequent years' overhead costs allocated to construction with labor and related costs removed from the cost of plant that were not associated with construction activities based on the methodology developed in response to Recommendation No. 1.

**FirstEnergy Response:** *Accept. The Company will submit the results of the B&V study to DAA Staff.*

**Recommendation 7:** With the response to Recommendation No. 6, submit proposed accounting entries to DAA that remove the overhead costs that were allocated to CWIP and electric plant in service from 2015 through the present that exceed the amount of costs that would have been allocated to the accounts based on the methodology developed in response to Recommendation No. 1. Also, provide proposed accounting entries to remove associated amounts from other accounts and balances affected by the inappropriately allocated cost such as the accumulated depreciation and ADIT accounts, and AFUDC balances capitalized into CWIP and electric plant in service. If the adjusting entries result in a significant impact to income for the current year, FirstEnergy subsidiaries may account for the transaction as a correction of a prior period error in Account 439, Adjustments to Retained Earnings. Such adjustments to retained earnings with the proposed accounting entries should be submitted to DAA.

**FirstEnergy Response:** *Based on the relevant facts and circumstances, FirstEnergy respectfully requests that changes to capitalization rates and revised procedures should be applied prospectively only. As noted above in FirstEnergy's comments in response to Finding No. 1, only prospective application is warranted, as retroactive application could result in a large amount of expense being run through forward-looking formula rates. Prospective application is further warranted as, during state jurisdictional rate*

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*proceedings, State Commissions previously have had opportunity to examine the capitalization rates that were applied to distribution accounts and have issued rate orders without modifying those rates. As such, FirstEnergy respectfully requests that the language of Recommendation No. 7 be updated to reflect that FirstEnergy will ensure that its accounting entries, on a going forward basis, reflect the B&V study results.*

**Recommendation 8:** Revise account balances for FirstEnergy subsidiaries' utility plant, accumulated depreciation, ADIT, and other account balances impacted by the inappropriate allocation of unsupported overhead costs after receiving DAA's approval of proposed accounting entries submitted per Recommendation No. 7, and restate and footnote the balances reported in the next-filed FERC Form No. 1 reports of the FirstEnergy subsidiaries for both the current and comparative years presented in each subsidiary's next-filed report, as necessary to reflect and disclose the revisions.

**FirstEnergy Response:** *Based on the relevant facts and circumstances, FirstEnergy respectfully requests that changes to capitalization rates and revised procedures should be applied prospectively only. Adoption of this course would leave all account balances intact, and thus require no further action with regard to FERC Form 1 reporting. As noted above in FirstEnergy's comments in response to Finding No. 1, only prospective application is warranted, as retroactive application could result in a large amount of expense being run through forward-looking formula rates. Prospective application is further warranted as, during state jurisdictional rate proceedings, State Commissions previously have had opportunity to examine the capitalization rates that were applied to distribution accounts and have issued rate orders without modifying those rates. As such, FirstEnergy respectfully requests that the language of Recommendation No. 8 be updated to reflect that no account balances will be revised.*

**Recommendation 9:** Submit a refund analysis to DAA that explains and details the following: (1) calculation of refunds that result from correcting the overstatement of transmission plant due to the improperly capitalized labor costs, as determined by the labor time study, plus interest; (2) determinative components of the refund; (3) refund method; (4) wholesale transmission customers to receive refunds; and (5) period(s) refunds will be made.

**FirstEnergy Response:** *Based on the relevant facts and circumstances, FirstEnergy respectfully requests that changes to capitalization rates and revised procedures should be applied prospectively only. Adoption of this course would leave all account balances intact, and thus would not require a refund analysis. As noted above in FirstEnergy's comments in response to Finding No. 1, only prospective application is warranted, as retroactive application could result in a large amount of expense being run through forward-looking formula rates. Prospective application is further warranted as, during state jurisdictional rate proceedings, State Commissions previously have had opportunity to examine the capitalization rates that were applied to distribution accounts and have*



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*issued rate orders without modifying those rates. As such, FirstEnergy respectfully requests that the language of Recommendation No. 9 be updated consistent with this response.*

**Recommendation 10:** File a refund report with the Commission after receiving DAA's assessment of the refund analysis.

**FirstEnergy Response:** *Based on the relevant facts and circumstances, FirstEnergy respectfully requests that changes to capitalization rates and revised procedures should be applied prospectively only. Adoption of this course would leave all account balances intact, and thus would not require refunds or a refund report. As noted above in FirstEnergy's comments in response to Finding No. 1, only prospective application is warranted, as retroactive application could result in a large amount of expense being run through forward-looking formula rates. Prospective application is further warranted as, during state jurisdictional rate proceedings, State Commissions previously have had opportunity to examine the capitalization rates that were applied to distribution accounts and have issued rate orders without modifying those rates. As such, FirstEnergy respectfully requests that the language of Recommendation No. 10 be updated consistent with this response.*

**Recommendation 11:** Refund the amounts disclosed in the refund report to customers, with interest calculated in accordance with section 35.19a of the Commission's regulations.

**FirstEnergy Response:** *Based on the relevant facts and circumstances, FirstEnergy respectfully requests that changes to capitalization rates and revised procedures should be applied prospectively only. Adoption of this course would leave all account balances intact, and thus would not require refunds or a refund report. As noted above in FirstEnergy's comments in response to Finding No. 1, only prospective application is warranted, as retroactive application could result in a large amount of expense being run through forward-looking formula rates. Prospective application is further warranted as, during state jurisdictional rate proceedings, State Commissions previously have had opportunity to examine the capitalization rates that were applied to distribution accounts and have issued rate orders without modifying those rates. As such, FirstEnergy respectfully requests that the language of Recommendation No. 11 be updated consistent with this response.*

**Finding 2: Accounting of Vegetation Management Costs**

*FirstEnergy provides the following response to the four recommendations in the Draft Audit Report dealing with Accounting for Vegetation Management Costs:*

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**Recommendation 12:** Revise accounting policies and procedures for vegetation management activities in distribution corridors to be consistent with Commission accounting requirements.

**FirstEnergy Response:** *Accept. The Company has already remediated this Finding by revising its policies effective October 1, 2021.*

*Although the policies have now been updated, it is the Company's position that the FPU's appropriately capitalized the cost to electric plant in service prior to this date, and therefore, there is no overstatement of electric plant in service, accumulated depreciation, ADIT, depreciation expenses, and other account balances, nor is there an understatement of operating expenses incurred.*

**Recommendation 13:** Train relevant staff on the revised vegetation management accounting policy and procedures and provide periodic training.

**FirstEnergy Response:** *Accept. The Company will train our employees on the revised vegetation management accounting policy and procedures.*

**Recommendation 14:** Submit proposed accounting entries and supporting documentation to DAA that reflect the correction of the FirstEnergy FPU's CWIP, electric plant in service, accumulated depreciation, ADIT, and other accounts impacted by the capitalization of vegetation management expenses for the period from October 1, 2021 through the present within 60 days of issuance of this audit report.

**FirstEnergy Response:** *Accept. The Company will submit the requested accounting entries and supporting documentation reflecting the revised policy effective October 1, 2021. No corrections are necessary because the policy change was implemented by the Company as of October 1, 2021, and the Company did not have any further capitalization of vegetation management after this date. The requested accounting entries demonstrate that the capitalization of vegetation management expenses ceased on October 1, 2021, as proposed in Recommendation No. 12.*

**Recommendation 15:** Revise the FirstEnergy FPU's CWIP, electric plant in service, accumulated depreciation, ADIT, and other accounts impacted by over-accrual of AFUDC after receiving DAA's approval of the proposed accounting entries per Recommendation No. 14 and restate and footnote the FERC Form No. 1 reports for current and comparative years as necessary.

**FirstEnergy Response:** *Accept. The Company has already completed the recommended policy and accounting changes as of October 1, 2021. Therefore, there is no additional information to provide. Since the changes are made prospectively from October 1, 2021, the Company disagrees with the Commission's recommendation to correct prior period balances and to restate prior Form 1s.*

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**Finding 3: Accounting for Amortization of Regulatory Assets**

*FirstEnergy provides the following response to the five recommendations in the Draft Audit Report dealing with Accounting for Amortization of Regulatory Assets:*

**Recommendation 16:** Revise policies, practices, and procedures to amortize or write off the regulatory assets consistent with Commission accounting requirements.

**FirstEnergy Response:** *Accept. The Company will revise our policies, practices, and procedures consistent with Commission requirements.*

**Recommendation 17:** Train relevant staff on the revised methods, and provide periodic training in this area, as needed.

**FirstEnergy Response:** *Accept. The Company will train our employees on the revised method.*

**Recommendation 18:** Submit a refund analysis, within 60 days of issuance of this audit report, to DAA for review that explains and details the following: (1) calculation of refunds that result from the correction of ATSI's and TrAILCo's improper and unauthorized, respective, depreciation and amortization of plant and regulatory assets to the depreciation expense account and inclusion of the expenses in service rate determinations, plus interest; (2) determinative components of the refund; (3) refund method; (4) wholesale transmission customers to receive refunds; and (5) period(s) refunds will be made.

**FirstEnergy Response:** *Accept. The Company will submit a refund analysis within 60 days from the issuance of the audit report, in accordance with the Commission's recommendation.*

**Recommendation 19:** File a refund report with the Commission after receiving DAA's assessment of the refund analysis.

**FirstEnergy Response:** *Accept. The Company will file a refund report after receiving DAA's assessment of the refund analysis.*

**Recommendation 20:** Refund the amounts disclosed in the refund report to customers, with interest calculated in accordance with section 35.19a of the Commission's regulations.

**FirstEnergy Response:** *Accept. Accounting recorded correcting entries in Q3 2021. For transmission rate purposes, these corrections will be handled through the standard formula rate true-up process. For each impacted transmission entity, the 2021 actual transmission revenue requirement, which will be developed in the May/June 2022, will include these adjustments and therefore will be a component of the overall true-up for calendar year 2021 rates. This true-up plus interest in accordance with 35.19a will be*



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*included in the next projected transmission revenue requirement. For TrAILCo, this refund will occur from June 1, 2022 through May 31, 2023. For the remaining impacted entities, the refund will occur over calendar year 2023.*

**Finding 4: Accounting for Lobbying Expenses, Donations, and Costs that Lacked Proper Supporting Documentation**

*FirstEnergy provides the following response to the six recommendations in the Draft Audit Report dealing with Accounting for Lobbying Expenses, Donations, and Costs that Lacked Proper Supporting Documentation:*

**Recommendation 21:** Critically review and strengthen internal controls in FirstEnergy and its subsidiaries. Establish and implement procedures governing methods to be used to appropriately identify, account for, track, report, and review all lobbying costs, donations, and any unsupported expenses, including, but not limited to, expenses of external lobbyists, monies paid to external corporate entities to be used for lobbying, and other external lobbying costs and internal lobbying costs, including employee lobbying time and other internal lobbying costs.

**FirstEnergy Response:** *Accept. The Company will review and strengthen its internal controls in the Company and its subsidiaries accordingly.*

**Recommendation 22:** Train relevant staff on the internal control enhancements and procedures established, including internal controls over vendor creation in the accounts payable system, payments, accounting, and reporting violations; and provide periodic training in this area, as needed.

**FirstEnergy Response:** *Accept. The Company will provide the training accordingly.*

**Recommendation 23:** Perform an analysis of costs that FirstEnergy and its subsidiaries incurred associated with internal and external lobbying activities, including payments of FirstEnergy funds to outside entities for purposes of those entities using those funds for lobbying, and provide support to identify lobbying-related expenses improperly charged to utility operating accounts, for the audit period and, with respect to the specific issues discussed in this finding, for the entire period affected by or relevant to each such specific issue. Within 60 days of the issuance of this audit report and on a rolling basis within 60 days of conclusion of each internal or external investigation discussed in the finding or any new internal or external investigation arising directly from Ohio House Bill 6 (HB 6) or lobbying activities occurring prior to 2021, provide the results of the investigation, proposed correcting journal entries, and FirstEnergy's analysis of the findings from each investigation and the related impact on prior and future accounting and rate development to audit staff.

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**FirstEnergy Response:** *The Company accepts this recommendation, subject to the points below.*

*With respect to providing the results of future investigations, if any, into the requested lobbying-related expenses, FirstEnergy will provide responsive factual information but not information protected from disclosure by the attorney-client privilege and attorney work product doctrines or other relevant law.*

**Recommendation 24:** Submit a refund analysis, within 60 days of issuance of this audit report and on a rolling basis within 60 days of conclusion of each investigation discussed in the finding or any new investigation arising directly from HB 6 or lobbying activities occurring prior to 2021, for DAA's review, that explains and details the following: (1) calculation of refunds resulting from correcting the improper accounting for external lobbying costs, donations, and unsupported costs in utility operating and plant accounts; and internal lobbying costs as identified pursuant to the analysis performed in response to Recommendation No. 23, plus interest; (2) determinative components of the refund; (3) refund method; (4) wholesale transmission customers to receive refunds; and (5) period(s) refunds will be made.

**FirstEnergy Response:** *Accept. The Company will implement to the extent the results of Recommendation No. 23, if any, warrant a refund to customers.*

**Recommendation 25:** File a refund report with the Commission after receiving DAA's assessment of the refund analysis.

**FirstEnergy Response:** *Accept. The Company has already started to implement the refunds, and, to the extent the results of the analysis, if any, warrant an additional refund to customers, the Company will implement that additional refund as well.*

**Recommendation 26:** Refund the amounts disclosed in the refund report to customers, with interest calculated in accordance with section 35.19a of the Commission's regulations.

**FirstEnergy Response:** *Accept. The Transmission Companies have already started to implement the refunds, and, to the extent the results of the analysis, if any, warrant an additional refund to customers, the Transmission Companies will implement that additional refund as well.*

#### **Finding 5: Accounting for Funds Used During Construction**

*FirstEnergy makes the following response to the two recommendations in the Draft Audit Report dealing with Accounting for Funds Used During Construction:*

**Recommendation 27:** Revise and implement the FPU's processes and procedures to calculate their respective AFUDC rates consistent with EPI No. 3(A)(17) and other



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applicable Commission requirements. Revisions should include processes to prevent the inclusion of balances in Accounts 216.1 and 219 in the AFUDC rate calculations.

**FirstEnergy Response:** *Accept. The Company has already revised and implemented an AFUDC policy consistent with Commission requirements, including but not limited to, the exclusion of balances in Account 216.1 and 219 in the AFUDC rate calculations.*

**Recommendation 28:** Train relevant staff on the revised AFUDC calculation method, and provide periodic training, as needed.

**FirstEnergy Response:** *Accept. The Company will provide the training accordingly.*

#### **Finding 6: Service Company Billing Procedures**

*FirstEnergy provides the following response to the two recommendations in the Draft Audit Report dealing with Service Company Billing Procedures:*

**Recommendation 29:** Revise FESC policies, procedures, and accounting systems so as to provide sufficient billing information to FirstEnergy's subsidiaries in accordance with the Commission's regulations.

**FirstEnergy Response:** *Accept. The Company will revise its policies, procedures, and systems accordingly.*

**Recommendation 30:** Train relevant staff on the revised policies, procedures, and accounting systems and provide periodic training in this area, as needed.

**FirstEnergy Response:** *Accept. The Company will provide the training accordingly.*

#### **Finding 7: Accounting for Fuel – Coal Supply and Other Consulting Services**

*FirstEnergy provides the following response to the eight recommendations in the Draft Audit Report dealing with Accounting for Fuel – Coal Supply and Other Consulting Services:*

**Recommendation 31:** Revise accounting policies and procedures for cost of fuel by the FPU's to ensure compliance with the Commission's accounting regulations.

**FirstEnergy Response:** *Accept. The Company will revise the accounting policies and procedures accordingly.*

**Recommendation 32:** Train relevant staff on the revised policies and procedures and provide periodic training.

**FirstEnergy Response:** *Accept. The Company will train relevant staff on the revised policies and procedures and provide periodic training.*

**Recommendation 33:** Perform an analysis of all monthly payments made to consultants, including BCG Resources, LLC, that were included in the cost of fuel used in operations

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during the audit period and submit the analysis to DAA with supporting documents within 60 days of issuance of this audit report. Based on the analysis, submit proposed adjusting accounting entries to record the consultation costs in the appropriate accounts for DAA's review and approval.

**FirstEnergy Response:** *Accept. The Company will perform an analysis of all monthly payments made to consultants by Monongahela Power Company as described in Recommendation No. 33. Based upon the fuel cycle, the Company's understanding is that any fuel at issue would have already been burned in close proximity to the timing of payments under the contract and therefore any accounting impact arising from this review is anticipated to be de minimis.*

**Recommendation 34:** Revise the FirstEnergy FPU's fuel inventory and other account balances impacted by the improper accounting after receiving DAA's approval of the proposed accounting entries per Recommendation No. 33 and restate and footnote the FERC Form No. 1 reports for current and comparative years as necessary.

**FirstEnergy Response:** *Accept. The Company will revise the FirstEnergy FPU's fuel inventory and other impacted account balances. Based on a preliminary review, changes to the accounting entries are anticipated to be de minimis; however, if appropriate, FirstEnergy will footnote the FERC Form No. 1 for the current year. There is no need to restate prior balances and revise previously issued Form 1s.*

**Recommendation 35:** Review collections received, including but not limited to uplift payments, during the audit period based, in part, on the cost of fuel and submit an analysis to DAA for review of retail and wholesale overcollections due to improper recording of costs in Account 501.

**FirstEnergy Response:** *Accept. The Company will review collections received and will provide the necessary support regarding such collections as part of the compliance phase. Based on the Company's preliminary investigation, if any refund is due, such refund is anticipated to be de minimis.*

**Recommendation 36:** Submit a refund analysis if there were overcollections from wholesale customers, within 60 days of issuance of this audit report, for DAA's review, that explains and details the following: (1) calculation of refunds resulting from the improper accounting for fuel costs, plus interest; (2) determinative components of the refund; (3) refund method; (4) wholesale customers to receive refunds; and (5) period(s) refunds will be made.

**FirstEnergy Response:** *Accept. The Company will do a refund analysis to determine if there was any effect on wholesale rates. Based on the fuel cycle, the Company's understanding is that any of the fuel at issue would have already been burned and therefore, if any refund is due, it would be de minimis.*

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**Recommendation 37:** File a refund report with the Commission after receiving DAA's assessment of the refund analysis.

**FirstEnergy Response:** *Accept. If, after the analysis performed pursuant to Recommendation No. 36, a refund is indicated, the Company shall file a refund report with the Commission.*

**Recommendation 38:** Refund the amounts disclosed in the refund report to customers, with interest calculated in accordance with section 35.19a of the Commission's regulations.

**FirstEnergy Response:** *Accept. In the event a refund is indicated, the Company shall refund the amount in the refund report, with interest calculated in accordance with section 35.19a of the Commission's regulations.*

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Consumers' Counsel electronically filed by Ms. Alana M. Noward on behalf of  
Willis, Maureen R.