

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)
Edison Company, The Cleveland Electric)
Illuminating Company, and The Toledo) Case No. 16-481-EL-UNC
Edison Company of a Grid Modernization)
Business Plan.)

In the Matter of the Filing by Ohio Edison)
Company, The Cleveland Electric)
Illuminating Company, and The Toledo)
Edison Company Application for) Case No. 17-2436-EL-UNC
Approval of a Distribution Platform)
Modernization Plan.)

In the Matter of the Application of Ohio)
Edison Company, The Cleveland Electric)
Illuminating Company, and The Toledo)
Edison Company to Implement Matters) Case No. 18-1604-EL-UNC
Relating to the Tax Cuts and Jobs Act of)
2017.)

In the Matter of the Application of Ohio)
Edison Company, The Cleveland Electric)
Illuminating Company, and The Toledo) Case No. 18-1656-EL-UNC
Edison Company for Approval of a Tariff)
Change.)

**REPLY COMMENTS FOR CONSUMER PROTECTION
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Bruce Weston (0016973)
Ohio Consumer's Counsel

Angela D. O'Brien (0097579)
Counsel of Record
Deputy Consumers' Counsel

Office of the Ohio Consumers' Counsel
65 East State Street, Suite 700
Columbus, Ohio 43215
Telephone: [O'Brien] (614) 466-9531

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angela.obrien@occ.ohio.gov
(willing to accept service by e-mail)

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**REPLY COMMENTS FOR CONSUMER PROTECTION
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I. INTRODUCTION

FirstEnergy has charged its consumers a total of \$634 million over the last four years for its Grid Mod I program. Those charges to FirstEnergy consumers include up to \$72 million for so-called stranded investment associated with legacy meters. That means FirstEnergy is charging consumers for both the old (replaced) meters and the new meters. That's a lot of money for two million FirstEnergy consumers to be charged. And that

money doesn't include the nearly half-billion dollars that FirstEnergy charged consumers for its infamous distribution modernization rider.

FirstEnergy sold the PUCO on its program with a cost-benefit analysis showing that the program would produce over \$1 billion of net benefits for consumers.¹ But to date – after consumers have paid more than \$600 million over the past four years – there has been no review of whether FirstEnergy's Grid Mod 1 is providing the promised benefits for consumers.² In other words, there has been no PUCO determination that Grid Mod I is “useful” to consumers. Nor has FirstEnergy shown that its investment is “used.” Instead, the investment may just be “gold-plating.” And, at the same time, FirstEnergy is seeking PUCO approval to charge consumers for the next phase of its Grid Mod Program—Grid Mod II where it is asking consumers to fund a *\$900 million* investment.

Some years ago, FirstEnergy announced to investors that it would be focusing on making money from operations under government regulation instead of in markets under competition. Some facts seem to be coming in that FirstEnergy's focus on money-making from regulated operations may not be all that consumers would hope or deserve from utility regulation.

The PUCO should put the brakes on any approval of charges to consumers for Grid Mod II. Any PUCO approval of Grid Mod II should await a determination, if that is even possible, that all aspects of Grid Mod I (that consumers have paid for) is “used and

¹ *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, Stipulation and Recommendation at Attachment B (Nov. 9, 2018).

² There have been very limited disallowances recommended by the PUCO Staff for FirstEnergy's Grid Mod expenses and investment. From 2019 to 2021, approximately \$5 million in total has been recommended for disallowance in FirstEnergy's Grid Mod 1 annual audit cases, which are all awaiting a PUCO decision. *See* Case Nos. 18-1647-EL-UNC, 21-1903-EL-UNC, 20-1672-EI-UNC.

useful.” Determining the used and usefulness of Grid Mod 1 will require much more than the filing of comments and reply comments.

The Northwest Ohio Aggregation Coalition (“NOAC”) requested a forensic audit (on various FirstEnergy scandal issues) in connection with FirstEnergy’s Grid Mod I.³ In any such audit, there should be a deeper dive into the Auditor’s “concerning conclusions” (as Ohio Energy Leadership Council characterized them).⁴ That deeper dive should include whether FirstEnergy’s Grid Mod investment (that has been charged to consumers) is *used and useful* for consumers.

Recall that in the Deferred Prosecution Agreement, FirstEnergy Corp. admitted that it:

paid \$4.3 million dollars to Public Official B [former Chair Randazzo] through his consulting company in return for Public Official B performing official action in his capacity as PUCO Chairman to further FirstEnergy Corp.’s interests relating to passage of nuclear legislation *and other specific FirstEnergy Corp. legislative and regulatory priorities, as requested and as opportunities arose.*⁵

Consumers deserve answers – and protection. Especially after consumers were charged over \$600 million for a program that has avoided scrutiny under Ohio’s traditional rate making standard of used and useful (R.C. 4909.15).

³ NOAC Comments (Aug. 11, 2023). Note that the PUCO has approved a third stay request by the U.S. Attorney in the four H.B. 6 investigations. *See, e.g., 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. 23, 2023).

⁴ Ohio Energy Leadership Council Comments at 2 (Aug. 11, 2023).

⁵ *United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement at 17 (July 20, 2021) (emphasis added).

II. RECOMMENDATIONS

- A. The PUCO should not continue charging consumers for Grid Mod I investments until the PUCO has determined the investments are used and useful. The PUCO should refund prior charges to consumers if FirstEnergy's investment in Grid Mod I is not demonstrated to be both "used and useful" to consumers.**

FirstEnergy is supposed to show that the Grid Mod 1 investment is used and useful and prudently incurred before collecting costs from consumers under Rider AMI, as authorized in FirstEnergy's ESP IV case.⁶ FirstEnergy bears the burden of proof for its application which is under PUCO consideration.⁷ Under the PUCO-approved Supplemental Stipulation FirstEnergy specifically agreed to "[v]erification that the Grid Mod I investments are used and useful and were prudently incurred."⁸

The Ohio Supreme Court recently addressed the used and useful test, noting that it "has been a feature of ratemaking in Ohio since 1911" and "it continues to be the standard that the Ohio legislature has chosen to determine whether a public utility may properly charge ratepayers for its capital investment."⁹ The Court noted that a public utility is only entitled to recover through rates, the value of that portion of property that is "actually used and useful for the convenience of the public."¹⁰ The Court specifically ruled that "useful" means that the "property must be beneficial in rendering service for

⁶ *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, Order at 31 (July 17, 2019); *see also* Chairman Haque's concurring opinion in Case No. 14-1297-EL-SSO, at ¶ 3, where he described Rider AMI as functioning "as the corresponding traditional regulatory mechanism, providing a return for monies expended to construct/maintain service."

⁷ *Id.* at ¶ 107.

⁸ *Id.*, Supplemental Stipulation at ¶ 4 (Jan. 25, 2019).

⁹ *In re Application of Suburban Natural Gas Co.*, 166 Ohio St.3d 176, 2021-Ohio-3224, ¶¶ 18, 20.

¹⁰ *Id.* at ¶ 17 (citations omitted).

the convenience of the public.”¹¹ Under the used and useful standard there is no charging consumers for gold-plating.

But the PUCO has not analyzed whether FirstEnergy’s investment is used and useful, despite three years of reviewing charges to consumers. Instead, the scope of the PUCO Staff’s review in the annual Rider AMI proceedings has been “a review of the application and its supporting work papers to confirm the prudence of expenses incurred during the review period and the mathematical accuracy of the schedules included in the application.”¹² Neither the words “used and useful,” nor the principle is discussed or applied in any of the Staff’s past annual reviews of FirstEnergy’s Rider AMI.¹³

In this proceeding, where operational benefits of FirstEnergy’s Grid Mod I program were to be examined, FirstEnergy thwarted the investigation by apparently making itself unauditable (based on results of a PUCO audit).¹⁴ The Ohio Energy Leadership Council in its comments agreed noting that there is a “lack of transparency, documentation and tracking of benefits and cost savings” which “requires an explanation from FirstEnergy and a remedy.”¹⁵

This situation is untenable and should not be tolerated. It especially should be strictly dealt with by the PUCO given the PUCO’s admonishment to FirstEnergy (when it approved Grid Mod 1 charges to consumers) that “the estimated net benefit projections

¹¹ *Id.* at ¶ 25.

¹² *See, e.g.*, Case No. 18-1647-EL-RDR, Staff’s Review and Recommendations at 1 (Dec. 24, 2020).

¹³ *See* Case No. 18-1647-EL-RDR, Staff Review and Recommendations (Dec. 24, 2020); Case No. 19-1903-EL-RDR, Staff Review and Recommendations (March 24, 2022); Case No. 20-1672-EL-RDR, Staff Review and Recommendations (Feb. 1, 2023).

¹⁴ *See* Operational Benefits Assessment of FirstEnergy Ohio’s Grid Mod I at 1-5 (Nov. 14, 2022).

¹⁵ Ohio Energy Leadership Council Comments at 3.

are just that and *Grid Mod I should have the requisite controls in place to routinely monitor the projected and resulting costs and benefits associated with its program.*”¹⁶

OCC and OMAEG/Kroger in comments pointed out that there has been no finding of used and useful when it comes to FirstEnergy’s Grid Mod I program.¹⁷ In this regard, OMAEG/Kroger recommended that FirstEnergy should not be allowed to continue collecting Grid Mod I investments from consumers until it demonstrates the amounts previously collected are actually prudent, used, and useful.¹⁸

OCC agrees and would further recommend that if investment is not found to be used and useful, the past collections from consumers should be refunded, as recommended by NOAC in its Comments.¹⁹ Refunds to consumers could be ordered under Rider AMI, given the approved tariff language that “[t]his Rider is subject to reconciliation, including, but not limited to increases or refunds.”²⁰ The PUCO found this tariff language “clearly anticipates the possibility that, as a result of an audit ordered by the Commission, a disallowance may occur and such disallowance may result in a refund to ratepayers.”²¹ Refunds should be ordered if FirstEnergy fails to show how the Grid Mod I investments are both used and useful to its consumers. Refunds to consumers are

¹⁶ *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, Opinion and Order at ¶ 122 (July 17, 2019) (emphasis added).

¹⁷ OCC Comments at 8-9, OMAEG/Kroger Comments at 8.

¹⁸ OMAEG Comments at 8.

¹⁹ NOAC Comment 5.

²⁰ See FirstEnergy Utilities Rider AMI Tariff. The Rider AMI tariff also defines reconciliation “based solely upon the results of audits ordered by the Commission in accordance with the July 18, 2012 Opinion and Order in Case No. 12-1230-EL-SSO, and the March 21, 2016 Opinion and Order in Case No. 14-1297-EL-SSO and upon the Commission’s orders in Case No. 18-47-AU-COI.”

²¹ *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, Opinion and Order at ¶ 120 (July 17, 2019).

also required under the Supplemental Stipulation²² that was approved by the PUCO as part of resolving the case. Specifically, the Supplemental Stipulation requires that “[i]f a Commission order finds that costs were either not prudently incurred or were not used and useful, such costs will not be collected from customers and, if already collected, shall be refunded to the customers.”

B. The PUCO should stay any further consideration of FirstEnergy’s Grid Mod II application until after FirstEnergy has proven the benefits to consumers of Grid Mod I and after the Auditor’s recommendations have been implemented.

OCC, OMAEG/Kroger and NOAC filed comments recommending that Grid Mod II not go forward given the Auditor’s recommendations on FirstEnergy’s Grid Mod I program.²³ The Ohio Energy Leadership Council also concluded that the Auditor’s recommendations should be adopted.²⁴ NOAC commented that Grid Mod II should be set aside and folded into FirstEnergy’s ESP 5 application but not until after an independent forensic audit occurs.²⁵ NOAC also recommended cancelling Grid Mod II.²⁶

As highlighted in the comments of OCC, NOAC, OMAEG and the Ohio Energy Leadership Council, the Auditor made twelve key findings that could be described as showing that FirstEnergy is unauditable.²⁷ The Auditor found that FirstEnergy failed to provide the data necessary so that Daymark could complete an assessment of the operational benefits of Grid Mod I.

²² *Id.*, Supplemental Stipulation and Recommendation at ¶ 4 (Jan. 25, 2019).

²³ OCC Comments at 7-8, OMAEG/Kroger Comments at 8, NOAC Comment 6.

²⁴ Ohio Energy Leadership Council Comments at 3.

²⁵ NOAC Comment 6.

²⁶ NOAC Comment 4.

²⁷ Operational Benefits Assessment of FirstEnergy Ohio’s Grid Mod I at 1-5.

As noted by OMAEG/Kroger, FirstEnergy should not be accommodated or rewarded for failing to provide adequate supporting documentation of its operational savings and benefits of Grid Mod I.²⁸ It is neither just nor reasonable (but it would be absurd) to allow FirstEnergy to move forward with plans to implement Grid Smart II and charge its consumers hundreds of millions of dollars more, before the PUCO has resolved the serious deficiencies noted by its auditor. Doing so would be contrary to the PUCO's conclusion, in approving Grid Mod I, that "grid modernization should only be implemented if the benefits of grid modernization outweigh the costs."²⁹

FirstEnergy's response to the Auditor-noted deficiencies is to consider the Auditor's recommendations on metrics and performance tracking in *future* grid modernization efforts.³⁰ But effective regulation would not be granting FirstEnergy its requested pass on past noncompliances – especially not with \$600 million charged to consumers. And, it should be remembered, that these charges were preceded by nearly a half-billion dollars charged to consumers under the infamous distribution modernization rider.

Implementing recommendations down the road for the next phase of FirstEnergy's Grid Mod, as FirstEnergy would have it, avoids helping consumers with the current problems under FirstEnergy's Grid Mod I. And the tracking and monitoring

²⁸ OMAEG/Kroger Comments at 4.

²⁹ *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, Opinion and Order at ¶ 111.

³⁰ FirstEnergy Comments at 8.

are key to the operational benefits assessment and review that was agreed to *before charging consumers for the next phase of grid modernization*.³¹

The PUCO should consider the Auditor's recommendation *now*, especially the deficiencies that led the Auditor to conclude that he could not "directly audit or determine the current and future level of operational savings to be credited" to consumers.

Commenters Ohio Energy Leadership Council,³² OMAEG/Kroger³³ and OCC³⁴ all advocated for the Auditor's recommendations to be adopted.

But, as explained *supra*, further examination is required to determine whether FirstEnergy's Grid Mod investment to date, which FirstEnergy consumers are paying a return (profit) on and of, is used and useful to consumers. And if it is not demonstrated to be used and useful, the program should end and refunds to consumers should be ordered.

C. The fixed operational savings under the Settlement should be compared to the actual savings achieved and a modified level of savings should be considered.

OCC's primary recommendation is that if FirstEnergy's Grid Mod I investment is not proven and found to be used and useful, then the PUCO should order FirstEnergy to cease charging its customers for the program. And refunds should be ordered for past Grid Mod I collections from consumers.

If the PUCO determines that FirstEnergy's investment in Grid Mod I is used and useful for consumers, then it will have to decide what level of operational savings should

³¹ *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, Case No. 16-481-EL-RDR, Order at ¶ 44.

³² Ohio Energy Leadership Council Comments at 3.

³³ OMAEG/Kroger Comments at 8.

³⁴ OCC Comments at 7.

be credited to consumers in years 4, 5, and 6 for the program. NOAC advocated against using the fixed operational savings established under the settlement.³⁵ The Ohio Energy Leadership Council and FirstEnergy both urged use of the fixed operational savings.³⁶ Those fixed operational savings would create the following credits to consumers: Year 4: \$8.58 million; Year 5 \$9.68 million; and Year 6 \$9.82 million.

Daymark was supposed to estimate the actual operational savings under FirstEnergy's Grid Mod I and compare those savings to the credits being made to consumers and recommend an ongoing level of credits to consumers.³⁷ But Daymark concluded that "the lack of clear documentation of the complete assumptions behind operational savings estimates, combined with the lack of direct reporting as to operational savings being achieved, precluded a direct audit determination of a current and future level of operational savings to be credited to Rider AMI [consumers]."³⁸ Strikingly, Daymark reported that it "is unable to make a recommendation for an ongoing level of operational savings to be recognized in rates."³⁹

Remarkably, the Grid Mod I Settlement foresaw that the Auditor would be unable to make a recommendation for an ongoing level of operational savings. The Settlement provided that, in the event that "there is no adopted recommendation from the third-party consultant review [on the level of operational savings], then the deemed annual

³⁵ NOAC Comments at 6.

³⁶ Ohio Energy Leadership Council Comments at 10; FirstEnergy Comments at 2.

³⁷ *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, Request for Proposal No. RA21-GM-1 at 3 (March 9, 2022); *see also* Opinion and Order at ¶ 44.

³⁸ Daymark Audit at 2 (Nov. 14, 2022).

³⁹ *Id.* at 50.

Operational Savings from Grid Mod I shall continue[.]” with the fixed operational savings agreed to under the Settlement for years 4,5, and 6.⁴⁰

This should give the PUCO pause. Coincidentally, FirstEnergy’s behavior –its lack of clear documentation and its lack of direct reporting -- led to the Auditor having “no adopted recommendation” for a consumer credit in years 4, 5, and 6. To now accept that those fixed savings should be adopted by default, seems a contrivance enabled by FirstEnergy. And it seems to undermine the settlement agreed to by FirstEnergy and others, including OCC, which was intended to allow a modified level of savings to be considered by the Auditor.

OCC recommends that the PUCO direct FirstEnergy to cooperate with the Auditor and identify the actual operational savings achieved to date under FirstEnergy’s Grid Mod I program.⁴¹ Given FirstEnergy’s lack of documentation and direct reporting that led the Auditor to being unable to make a recommendation on savings, the PUCO should consider whether alternative operational savings (such as actual savings) should be used.

⁴⁰ *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, Stipulation at 22, 23 (Nov. 9, 2018).

⁴¹ FirstEnergy was ordered in another case to show cause why they should not assess a forfeiture for their delayed responses to a PUCO-approved Auditor’s data requests. *In the Matter of the Review of the Non-Market-Based Service Rider Pilot Program Established by Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 22-391-EL-RDR, Entry at ¶ 15 (April 7, 2023). The PUCO should consider a similar show cause order here.

D. In a forensic audit, the PUCO could explore consumer issues related to FirstEnergy's Grid Mod I.

The FirstEnergy Grid Mod I program is inextricably linked to FirstEnergy's ESP IV, Case No. 14-1297-EL-SSO. In FirstEnergy's ESP IV, the PUCO approved⁴² the Third Supplemental Stipulation. There, the FirstEnergy Utilities committed to filing a grid modernization business plan and created Rider AMI giving them the right to collect grid modernization costs from consumers.⁴³ Under the Stipulation, the formula for collecting the costs from consumers was laid out as being "based on a forward looking formula rate concept that would be subsequently reconciled for actual costs compared to forecasted costs and for actual revenue received compared to revenue forecasted to be recovered."⁴⁴

FirstEnergy's ESP IV is the very case that the PUCO ruled should be investigated for a potential FirstEnergy violation of R.C. 4928.145 (allowing discovery of side deals).⁴⁵ (The case was most recently stayed for a third time in response to the U.S. Attorney's request for a stay. Before that the PUCO sua sponte stayed the side deal issue, that affects OCC's and consumers' rights.)⁴⁶ The PUCO found "that there is information in this docket and in the public domain which may demonstrate a potential violation of

⁴² *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).

⁴³ *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, Third Supplemental Stipulation at 9-10 (Dec. 1, 2015).

⁴⁴ *Id.*

⁴⁵ *In the Matter of the 2020 Review of the Delivery Capital Recovery Rider of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 20-1629-EL-RDR, Entry (Dec. 15, 2021).

⁴⁶ *Id.*, Entry (Aug. 23, 2023)

the Companies’ obligation to disclose a ‘side agreement’ during the *ESP IV Case*.’⁴⁷

OCC had conducted the discovery on FirstEnergy, that the PUCO references. The information the PUCO referred to related to former PUCO Chair Randazzo and a consulting agreement with FirstEnergy that was amended in 2015. The PUCO described its pursuit of the matter as “consistent with our commitment, with respect to the Companies’ activities surrounding the passage of H.B.6, to follow the facts wherever they may lead***.”⁴⁸

And the facts do potentially lead to more of FirstEnergy’s H.B. 6 activities, including its involvement with the former PUCO Chair as it relates to approving the Settlement *in this case*. FirstEnergy’s settlement in this case was approved on July 19, 2019, a time when Mr. Randazzo was acting as the PUCO Chair. Former Chair Randazzo signed the PUCO Order approving the Settlement. The Settlement, though opposed, was approved in total, with no modifications.

The Northwest Ohio Aggregation Coalition (“NOAC”) requested a forensic audit (on various FirstEnergy scandal issues) in connection with FirstEnergy’s Grid Mod I.⁴⁹ In any such audit, there should be a deeper dive into the Auditor’s “concerning conclusions” (as Ohio Energy Leadership Council characterized them).⁵⁰ That deeper dive should include whether FirstEnergy’s Grid Mod investment (that has been charged to consumers) is *used and useful* for consumers.

⁴⁷ *Id.*, Entry at ¶ 8 (Dec. 15, 2021).

⁴⁸ *Id.*, Entry at ¶ 13.

⁴⁹ NOAC Comments (Aug. 11, 2023). Note that the PUCO has approved a third stay request by the U.S. Attorney in the four H.B. 6 investigations. *See, e.g., 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. 23, 2023).

⁵⁰ Ohio Energy Leadership Council Comments at 2 (Aug. 11, 2023).

III. CONCLUSION

Consumers should not be charged by FirstEnergy for Grid Mod I investments that don't deliver the benefits FirstEnergy promised. The PUCO should disallow future costs for investments in Grid Mod I that FirstEnergy cannot demonstrate are used and useful and prudently incurred. And the PUCO should order refunds of costs already collected from consumers if FirstEnergy fails to prove the investment in Grid Mod I is used and useful. The PUCO should consider whether alternative operational savings from the program should be credited to consumers as a result of FirstEnergy unauditability that prevented the Auditor from making an alternative savings recommendation.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumer's Counsel

/s/ Angela D. O'Brien
Angela D. O'Brien (0097579)
Counsel of Record
Deputy Consumers' Counsel

Office of the Ohio Consumers' Counsel
65 East State Street, Suite 700
Columbus, Ohio 43215
Telephone: [O'Brien] (614) 466-9531
angela.obrien@occ.ohio.gov
(willing to accept service by e-mail)

CERTIFICATE OF SERVICE

I hereby certify that a copy of these Reply Comments for Consumer Protection was served on the persons stated below via electronic transmission, this 25th day of August 2023.

/s/ Angela D. O'Brien
Angela D. O'Brien
Deputy Consumers' Counsel

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

SERVICE LIST

Thomas.lindgren@ohioago.gov
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylerecohn@BKLlawfirm.com
gkrassen@bricker.com
dstinson@bricker.com
paul@carpenterlipps.com
ctavenor@theOEC.org
rkelter@elpc.org
jweber@elpc.org
Bojko@carpenterlipps.com
ghiloni@carpenterlipps.com
glpetrucci@vorys.com
mwarnock@bricker.com
dborchers@bricker.com

cwatchorn@firstenergycorp.com
bknipe@firstenergycorp.com
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mpritchard@mwncmh.com
rdove@keglerbrown.com
mdortch@kravitzllc.com
dparram@bricker.com
joliker@igsenergy.com
mnugent@igsenergy.com
Bethany.Allen@igs.com
whitt@whitt-sturtevant.com
kennedy@whitt-sturtevant.com
dproano@bakerlaw.com
ahaque@bakerlaw.com
eprouthy@bakerlaw.com

Attorney Examiners:
Megan.addison@puc.state.oh.us
Gregory.price@puc.state.oh.us

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ATA**

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Consumers' Counsel electronically filed by Ms. Alana M. Noward on behalf of
O'Brien, Angela D..