**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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 |

**THE ENVIRONMENTAL ADVOCATES’ REPLY**

**TO FIRSTENERGY’S MEMORANDUM CONTRA**

**THE MOTION TO EXPAND THE SCOPE OF THE COMMISSION’S REVIEW OF FIRSTENERGY’S POLITICAL AND CHARITABLE SPENDING**

# Introduction

Despite Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company’s (collectively, the “FirstEnergy Utilities”) rhetoric to the contrary, Environmental Advocates’ motion simply asks the Commission to fulfill one of its key obligations: examining how utility and parent company actions impact regulated customers. In arguing against the Environmental Advocates’ motion to expand this investigation, the FirstEnergy Utilities essentially assert that the Commission should, in the midst of an unprecedented $61 million public corruption scandal tied closely to their parent company, allow them to police themselves. The FirstEnergy Utilities’ Memorandum Contra completely ignores the importance of House Bill 6 (“H.B. 6”) to the service their customers receive, as that law changes important policies related to the FirstEnergy Utilities’ service to their customers. The U.S. Attorney for the Southern District of Ohio’s criminal complaint alleges a connection between “Company A” (widely regarded as FirstEnergy Corporation), Generation Now, and “Householder’s Enterprise” that led to the passage of H.B. 6. Criminal Complaint at 4, No. 1:20-MJ-00526 (S.D. Ohio July 17, 2020). Not only did H.B. 6 bailout nuclear plants that benefitted the unregulated FirstEnergy Solutions Corporation that is the subject of the criminal complaint, but also it eliminated energy efficiency and created a decoupling mechanism.[[1]](#footnote-1) These actions directly affected FirstEnergy Utilities’ customers.

The issue here is whether any of the FirstEnergy companies’ activities, corporate or utility, adversely affected their regulated customers. The FirstEnergy Utilities are regulated monopolies with obligations that go beyond complying with criminal laws. They have obligations to comply with the public-interest standards outlined under Ohio public utilities law. Moreover, FirstEnergy Corporation should not act in ways that harm the FirstEnergy Utilities’ customers, especially if the parent company acted in coordination with its regulated utilities. Hence, whether H.B. 6 was good policy is not the issue. Instead, the issue is whether this Commission will take the steps necessary to examine how the FirstEnergy Utilities’ actions, and those of its parent company on H.B. 6, impacted ratepayers.

# argument

## Revised Code 4905.05 and 4905.06 Give the Commission the Jurisdiction and Responsibility to Investigate Both the FirstEnergy Utilities and FirstEnergy Corporation on Conduct that Could Impact Ratepayer Services or Rates.

This Commission’s jurisdiction to expand its investigation beyond campaign and charitable contributions should not be in question. However, the FirstEnergy utilities attempt to narrowly define this Commission’s jurisdiction, asserting that Commission factfinding about utility and parent company actions tied to a significant change in utility customer service and rates would be outside of the Commission’s authority. *See* Memorandum Contra at 6–7. The FirstEnergy Utilities misread the Ohio Revised Code. Section 4905.05 provides an expansive list of entities, persons, and objects within this Commission’s jurisdiction, stating that “the jurisdiction, supervision, powers, and duties of the public utilities commission extend to *every public utility*, and railroad.” R.C. 4905.05 (emphasis added). That list also expressly includes under Commission jurisdiction and supervision “persons or *companies owning*, leasing, or operating such public utilities” and “the records and accounts of the business thereof done within this state.” *Id.* (emphasis added). The FirstEnergy Utilities are certainly “public utilities” under R.C. 4905.05, and FirstEnergy Corporation is a company that *owns* the FirstEnergy Utilities. Thus, the law clearly gives the Commission jurisdiction over both the FirstEnergy Utilities and FirstEnergy Corporation.

The larger flaw with the Memorandum Contra is the FirstEnergy Utilities’ misreading of the Commission’s general supervision over utilities and utility parent companies under R.C. 4905.06. The FirstEnergy Utilities seemingly argue that because none of the Commission investigations the Environmental Advocates cited dealt with the precise issue in this case—an expanded investigation into the FirstEnergy Companies, both parent and utilities, due to unprecedented allegations of bribery—the requested investigation is impermissible. Memorandum Contra at 6. However, the statutory language leaves no room for uncertainty about this Commission’s jurisdiction over FirstEnergy Corporation and the Utilities: “[t]he public utilities commission has *general supervision over all public utilities* within its jurisdiction” and has “general supervision over *all other companies referred to in section 4905.05* of the Revised Code.” R.C. 4905.06 (emphasis added). As discussed above, both the FirstEnergy Utilities and FirstEnergy Corporation are covered under § 4905.05. Therefore, this Commission has jurisdiction to investigate not only the FirstEnergy Utilities, but also FirstEnergy Corporation.

## Evidence of a Violation of an Ohio Utility Law or Commission Order Is Unnecessary to Open or Expand an Investigation.

Instead of looking to the statutory text and the long history of Commission investigations prompted by consumer concerns and public controversies, the FirstEnergy Utilities attempt to constrain this Commission’s oversight by arguing that “the Commission’s jurisdiction is limited to cases or controversies.” Memorandum Contra at 7. The only support for that proposition, however, is dicta from a 2006 complaint proceeding in which the Commission noted that it need not address an ancillary question raised in the proceedings because there was not a “case or controversy on th[at] issue at th[e] time.” *In the Matter of the Complaint of Ohio Power Company v. Consolidated Elec. Cooperative, Inc.*, No. 06-890-EL-CSS, Opinion and Order at 16 (July 25, 2007). That dicta establish only that the Commission has discretion in determining when it will consider particular issues not raised in a complaint proceeding. It does not establish a jurisdictional standard, especially one that is found nowhere in the Ohio Revised Code.

The FirstEnergy Utilities similarly appear to confuse the complaint process, which does require specific allegations, with the investigation that the Environmental Advocates request. *See* Memorandum Contra at 8. The FirstEnergy Utilities offer no support for the assertion that “their compliance [with R.C. 4905.06] necessarily requires the presence of an alleged wrongdoing or violation of a particular utility law, rule, or order by the utility.” Memorandum Contra at 9. To require specific allegations to open or expand investigations would call into question numerous investigations that the Commission has conducted without first receiving specific allegations of “wrongdoing or violation[s] of a particular utility law, rule, or order.” Moreover, this narrow interpretation of Commission jurisdiction would so significantly limit parent company and utility oversight given the great difficulty for the average ratepayer or interested organization to find evidence of a particular legal violation prior to an investigation, that it would leave those entities to largely police themselves.

Indeed, the FirstEnergy Utilities ignore entirely that the Environmental Advocates’ motion clearly and repeatedly calls for an *investigation*, not a complaint. Black’s Law Dictionary defines an “investigation” as “[t]he activity of trying to find out the truth about something” and “an authoritative inquiry into certain facts.” *Investigation*,Black’s Law Dictionary (11th ed. 2019). The FirstEnergy Utilities’ argument —that the Environmental Advocates’ lack of evidence that the utilities or their parent company violated the law—is unavailing. Memorandum Contra at 8. By definition, an investigation is meant to uncover the necessary evidence. That fact-finding mission is all that Environmental Advocates request, and the basis for the investigation is the U.S. Attorney’s criminal complaint that makes allegations related to FirstEnergy Utilities and its parent corporation.

## The FirstEnergy Utilities’ Argument that a More Thorough Investigation Would “Usurp the Management Role of Public Utilities” Is a Non-Sequitur Because Environmental Advocates Request Only an Expanded Investigation, Not Specific Remedies.

The FirstEnergy Utilities attempt to warn the Commission away from this necessary investigation with the argument that an expanded investigation would be akin to “usurp[ing] the management role of public utilities.” Memorandum Contra at 7. The FirstEnergy Utilities have apparently misunderstood the simple request that the Environmental Advocates make in their motion. The motion is for an investigation, not any specific remedy. Granting the Environmental Advocates’ motion might require the FirstEnergy Utilities to continue responding to discovery requests, provide the Commission with more documents and data, and participate in hearings given the magnitude of the H.B. 6 scandal. That is not an onerous task, and it is within the ordinary course of any case. It is something that the FirstEnergy Utilities know they could be subject to in order to operate as a public utility in the state of Ohio. The FirstEnergy Utilities’ arguments, if brought to a logical conclusion, seem to suggest that *any* investigation would violate their “management role.” That is clearly nonsensical.

The FirstEnergy Utilities also attempt to wield the First Amendment as a shield against common regulatory oversight and assert that the investigation requested is into “the First Amendment exercise of political speech.” Memorandum Contra at 4. But this once again misreads the Environmental Advocates’ motion in order to distract from the conduct that should be under investigation: FirstEnergy Corporation and its subsidiaries’ involvement with the unprecedented $61 million corruption scandal related to H.B. 6. The Environmental Advocates have not asked for a specific *enforcement action* that could raise First Amendment issues.[[2]](#footnote-2) Instead, the Environmental Advocates merely request that the Commission use its normal investigatory powers to scrutinize FirstEnergy Corporation and the FirstEnergy Utilities, which are subject to Commission jurisdiction.

## There Are Sufficient Allegations and Questions to Support Expanding the Investigation.

Although the Environmental Advocates’ motion is not required to meet a particular burden of proof, it still presents sufficient support for the need to open a full investigation. The criminal complaint against former Speaker Larry Householder and his associates, of course, does not name FirstEnergy or the FirstEnergy Utilities. That is not, as the FirstEnergy Utilities would like it to be, a smoking gun. Criminal proceedings operate under different standards, and the criminal complaint dealt with federal laws and issues that, though related to this proceeding, are not within the scope of the Commission. However, the allegations contained within that complaint and the Attorney General’s more recently filed civil complaint—and the recent news that the SEC is also investigating FirstEnergy Corporation[[3]](#footnote-3)—certainly raise questions sufficient for this Commission to exercise its broad regulatory authority.

The importance and magnitude of this issue also demonstrate the need for an expanded investigation. The FirstEnergy Utilities insist that the Environmental Advocates “have not shown there is a case or controversy concerning the Companies’ provision of public utility service,” Memorandum Contra at 8, but that ignores the direct ways H.B. 6 has and will continue to impact ratepayers. Regardless of the merits of H.B. 6—which, contrary to the FirstEnergy Utilities’ response, the Environmental Advocates do not seek to litigate in this investigation—the law indisputably alters Ohio utility customers’ rates and service. Ratepayers soon will no longer pay for or be able to participate in energy efficiency portfolio programs but will face charges for decoupling. *See* R.C. 4928.66, 4928.47. Additionally, they will pay new charges to support Energy Harbor’s nuclear power plants. R.C. 3706.46. Regardless of one’s feelings about the legislation, the potential involvement of FirstEnergy Corporation or its subsidiaries in the corruption scandal related to H.B. 6 and the legislation itself has enormous implications for customer rates and services.

## An Expanded Investigation Is Necessary to Help the Commission Determine Whether Corporate Separation Requirements and Other Rules Need to Be Amended to Protect Ratepayers.

The FirstEnergy utilities take special issue with the Environmental Advocates’ request for an investigation into any corporate separation violations or issues connected to FirstEnergy Corporation or its subsidiaries’ conduct related to H.B. 6. It is obvious from their motion that the Environmental Advocates believe that there may be violations of corporate separation requirements based on FirstEnergy Corporation’s actions. But the FirstEnergy Utilities argue that the request is “baseless” because the Environmental Advocates have “fail[ed] to rationally link the information in the federal criminal complaint and other press reports to any actual corporate separation requirements that the Companies have not adhered to.” Memorandum Contra at 12. In fact, the Memorandum Contra makes it seem like the Corporation is exempt from those requirements and only the actions of the utilities matter. But that is not the case. *See* Compliance Audit of the FirstEnergy Operation Companies with the Corporate Separation Audit, *In re Ohio Edison Co., the Cleveland Elec. Illuminating Co., and the Toledo Edison Co.’s Compliance with R.C. 4928.17*, No. 17-974-EL-UNC (investigating in the compliance audit how the FirstEnergy Utilities interacted with FirstEnergy Solutions Corporation, FirstEnergy Corporation, and FirstEnergy Service Company). The Commission has done such comprehensive audits before, and this unprecedented situation certainly calls for another. Furthermore, as discussed above, the Environmental Advocates need not present evidence of wrongdoing before any factfinding can take place; the Commission need only determine that such factfinding would be beneficial. For example, we know that the legislation included decoupling while eliminating efficiency, which is an issue specific to FirstEnergy Utilities. How that decoupling provision came to be in H.B. 6, and whether it was the Utilities or FirstEnergy Corporation that pushed for it raises questions that this Commission should seek answers for.

The FirstEnergy Utilities, however, are not wrong that the current corporate separation requirements may not translate perfectly to wrongdoing in this case. This is the very reason that an expanded investigation is necessary. The Commission’s responsibility is to ensure that public utilities are not abusing their market power to the detriment of ratepayers and the state of Ohio, and the public deserves to know whether that abuse has occurred. A full investigation is required for the Commission and Ohioans to understand better what regulation is necessary to ensure that the FirstEnergy Companies are complying with their obligations to their customers and the state of Ohio.

# conclusion

The Environmental Advocates’ request for an expanded investigation does not require the Commission to go beyond its authority. Instead, it is a call for the Commission to make use of its oversight responsibility for fact-finding purposes. This is a reasonable request given the extraordinary and unprecedented public corruption scandal—in which FirstEnergy Corporation, the parent company of the FirstEnergy Utilities, is implicated. A central responsibility of this Commission is to protect ratepayers and the integrity of public utility service in Ohio. The Environmental Advocates’ motion provides an avenue for the Commission to fulfill that role, and the Commission should grant the motion.

Dated: October 21, 2020 Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing *The Environmental Advocates’ Reply to FirstEnergy’s Memorandum Contra the Motion to Expand the Scope of the Commission’s Review of FirstEnergy’s Political and Charitable Spending* was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on October 21, 2020. The PUCO’s e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Robert Kelter

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1. Decoupling is supposed to compensate utilities from the loss of revenue stemming directly from energy efficiency programs. Thus, it’s highly ironic that the legislation would eliminate energy efficiency and allow decoupling in the same bill. [↑](#footnote-ref-1)
2. Even if this were an enforcement action, the First Amendment’s protections are also not nearly as broad as the FirstEnergy utilities would have this Commission believe. For example, direct regulation of communication—which is not even at issue here—is permitted to protect against false, deceptive, and misleading statements or other violations of law. *See, e.g.*, *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978); *Sec. & Exchange Comm’n v. Wall Street Publishing Inst.*, 851 F.2d 361, 376 (D.C. Cir. 1988). [↑](#footnote-ref-2)
3. *See* Jim Mackinnon, *Federal Lawsuit Shows SEC Investigating FirstEnergy*, Columbus Dispatch (Sept. 16, 2020), <https://www.dispatch.com/story/business/energy-resource/2020/09/16/federal-lawsuit-shows-sec-investigating-firstenergy/42632893/>. [↑](#footnote-ref-3)