

**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.)	

**THE ENVIRONMENTAL ADVOCATES’ MOTION TO EXPAND THE SCOPE
OF THE COMMISSION’S REVIEW OF FIRSTENERGY’S POLITICAL AND
CHARITABLE SPENDING AND MEMORANDUM IN SUPPORT**

The Public Utilities Commission of Ohio’s review into political and charitable spending by the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively the “FirstEnergy utilities”) related to Amended Substitute House Bill 6 and the subsequent referendum campaign is an important first step toward the Commission fulfilling its oversight obligations regarding alleged public corruption scandal. However, the Commission’s proposed review is too narrow. A robust investigation is necessary for the Commission to meet its statutory responsibilities and restore public confidence in utility oversight. Therefore, pursuant to Ohio Revised Code §§ 4905.05, 4906.06, and 4909.154 and Ohio Administrative Code § 4901-1-12, the Environmental Law & Policy Center (“ELPC”) and Ohio Environmental Council (“OEC”) (collectively, the “Environmental Advocates”) move to expand the scope of the Commission’s review to a full investigation. Specifically, the Commission should direct the FirstEnergy utilities and parties to address additional issues related to corporate separation and corporate management. The Environmental Advocates set forth support for this motion in more detail in the attached Memorandum in Support.

Dated: September 29, 2020

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Public Utilities Commission of Ohio not only has the power to oversee public utilities in the state, but also the primary responsibility for ensuring that those public utilities comply with state law and do not harm the public interest. The Commission recognizes this broad authority in paragraphs 2 and 3 of its Entry through its references to Ohio Revised Code 4905.06 and 4905.05, respectively. Entry Order at 1 (Sept 15, 2020). While the Environmental Advocates appreciate that the Commission has opened this docket, it is critical that this effort not simply be a review of items submitted by FirstEnergy. In order to protect the public and FirstEnergy ratepayers specifically, as well as restoring public confidence in public utility regulation in light of the alleged Amended Substitute House Bill 6 (“HB6”) scandal, this docket must be an independent and thorough investigation by the Commission and/or a third party entity. The term “review” implies that the Commission will examine the documents FirstEnergy submits, whereas “investigation” indicates a more proactive search for information.¹ To address

¹ It is unclear why the Commission uses the term “review” in this docket rather than “investigation.” Regardless of terminology, it is essential that the Commission is appropriately probative given the gravity of the allegations in federal complaint against former House Speaker Larry Householder and others that have been tied to FirstEnergy.

this concern, we request that the Commission expand its more limited review to a broader investigation, consistent with the recommendations set forth below.

The Environmental Advocates request that the Commission expand its investigation to look beyond direct financial aspects of FirstEnergy utilities' involvement in this scandal. A proper investigation must include: (1) how the FirstEnergy utilities and their affiliates were involved in the legislation; (2) how FirstEnergy's actions may have run afoul of either the letter or spirit of Ohio's corporate separation requirements; and (3) whether and why the utilities or their parent corporation took positions to support a former unregulated affiliate, FirstEnergy Solutions, now known as Energy Harbor.

The July 2020 Criminal Complaint's allegations² suggest coordination among various current and former FirstEnergy affiliates in the HB6 scandal. The Commission has broad supervisory and investigative authority related to utilities, and the Commission should utilize that authority to examine exactly how FirstEnergy's activities affected its customers. The Commission's proposed focus on only the use of ratepayer funds in this scandal is an examination of only the symptom, not the disease. As the American legal system has long recognized, "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman."³ Restoring public trust in Ohio's competitive energy markets and utilities begins with shedding a light on what FirstEnergy actually did and what can be done to prevent future public utility abuses.

II. ARGUMENT

A. The Commission Has an Obligation to Conduct a Broader Review of FirstEnergy's Role in the House Bill 6 Debate and Referendum Beyond FirstEnergy's Financial Involvement.

² See *United States v. Householder et al.*, No. 1:20-MJ-00526, Criminal Complaint (S.D. Ohio July 17, 2020).

³ LOUIS BRANDEIS, *OTHER PEOPLE'S MONEY* 62 (Nat'l Home Library Found. ed. 1933).

Ohio law gives the Commission both the power and responsibility to oversee public utilities. The Commission has “general supervision over all public utilities,” including the ability to investigate utilities for “their compliance with all laws, orders of the commission, franchises, and charter requirements.” Ohio R.C. § 4905.06. Furthermore, “[Ohio Revised Code] 4909.154 specifically empowers the commission to investigate management policies, practices and organization to determine whether a public utility is properly managed.” *Office of Consumers’ Counsel v. Pub. Utils. Comm’n*, 67 Ohio St. 2d 153, 168 (1981). These statutory powers give teeth to one of the Commission’s central policy objectives: “[e]nsuring effective competition in the provision of retail electric service by avoiding anticompetitive subsidies.” Ohio R.C. § 4928.02. Therefore, the Commission has both the power and responsibility to investigate the extent to which FirstEnergy utilities used their money and influence to push for outcomes that could have harmed their customers or the competitive market. Nothing in the Ohio Revised Code limits the Commission to investigating public utilities on the basis of only their financial dealings.

Indeed, there is a long history of Commission investigations into public utilities that are much more thorough on issues of much less significance than the current FirstEnergy corruption scandal. This history shows that the Commission’s review unnecessarily limits its investigatory powers and that there is precedent for expanding this review into a full and thorough investigation. In 2004, for example, the Commission opened an investigation into Dayton Power & Light (“DP&L”) based on recent reports that DP&L’s parent company had delayed filing required SEC forms and suffered some challenges to its creditworthiness. *In re Commission Investigation of the Financial Condition of the Dayton Power & Light Co.*, No. 04-0486-EL-COI, Entry ¶ 5 (Apr. 7, 2004). Unlike this case, the Commission did not merely ask DP&L to

respond to a narrow question about the troubling situation, but instead asked PUCO Staff to **actively investigate** DP&L's financial condition and DP&L to file a financial plan. *Id.* ¶ 4. The Commission's inquiry into the FirstEnergy utilities in 2017 was similarly broad. *See In re Ohio Edison Co., Cleveland Elec. Illuminating Co. & Toledo Edison Co.'s Compliance with R.C. 4928.17*, No. 17-0974-EL-UNC. There, the Commission launched an investigation into "the compliance with the Corporate Separation Rules," approved the hiring of an independent auditor, and instructed FirstEnergy to provide all documents and information relevant to the audit. No. 17-0974-EL-UNC, Attorney Examiner's Entry (May 17, 2017).

The recent history of investigations also shows the importance of broad participation and discovery. For example, in 2018 the Commission launched an investigation into the financial impact of the Tax Cuts and Jobs Act of 2017 ("TCJA") on Ohio utilities. *In re Commission's Investigation of the Financial Impact of the Tax Cuts and Jobs Act of 2017 on Regulated Ohio Utility Companies*, No. 18-0047-AU-COI. Although that investigation focused only on how the Commission will need to reconcile utility rates with the TCJA, the case included discovery, hearings, and numerous opportunities for comments. *See* No. 18-0047-AU-COI, Attorney Examiner Entry (May 24, 2018). Even the regular determinations of whether public utilities' approved electric security plans ("ESPs") have resulted in significantly excessive earnings include opportunities for testimony and participation in the docket. *See, e.g., In re Application of Duke Energy Ohio, Inc. for Administration of the Significantly Excessive Earnings Test*, 19-0460-EL-UNC.

In light of the U.S. Attorney's Criminal Complaint and the depth of the HB6 scandal that the Complaint reveals, the Commission should conduct a thorough investigation that goes beyond requiring FirstEnergy to self-report on financial aspects of its connections to the scandal

and a mere call for comments. The Criminal Complaint and press reports⁴ suggest that FirstEnergy has exploited its power that stems from its monopoly status as a distribution utility in Ohio to the detriment of its customers and has undermined public trust in both the Ohio energy market and the Ohio government. For example, the Shared Services Agreement between FirstEnergy Corp. and FirstEnergy Solutions, through which FirstEnergy Services Company provided government affairs support to FirstEnergy Solutions, created close ties between the FirstEnergy utilities and an unregulated affiliate throughout the lobbying process.

Beyond the Shared Services Agreement, the very nature of how FirstEnergy operates raises issues. FirstEnergy Corp. CEO Chuck Jones has ultimate authority over FirstEnergy the regulated utility. The Criminal Complaint alleges that the CEO of “Company A” (FirstEnergy Corp.) spoke with former House Speaker Householder 84 times between early 2017 and July 2019, including 30 times during the first half of 2019 when the General Assembly was considering HB6.⁵ Moreover, in a call to analysts Mr. Jones stated, “We gave our support because FirstEnergy has the obligation to serve 2 million customers in the state of Ohio, including looking out for their long-term energy supply, even though we are no longer in the competitive generation business and would not get a single dollar of the House Bill 6 funding for those plants.”⁶

The Commission needs to explore what Mr. Jones meant by this statement. Who is “we” in terms of “we gave our support?” Did that support actually benefit FirstEnergy’s two million customers

⁴ See, e.g., Mark Gillispie, *FBI: Multiple Groups Involved in Ohio’s \$60M Corruption Scheme*, WASH. POST (Aug. 5, 2020), https://www.washingtonpost.com/business/fbi-multiple-groups-involved-in-ohio-60m-corruption-scheme/2020/08/05/efe1dc16-d75e-11ea-a788-2ce86ce81129_story.html; Tom Henry, *FirstEnergy’s ‘Brazen Arrogance’ Seen in Householder Scandal Too, Critics Claim*, TOLEDO BLADE (July 30, 2020), <https://www.toledoblade.com/local/politics/2020/07/30/FirstEnergy-s-brazen-arrogance-seen-in-Householder-scandal-too-critics-claim/stories/20200729122>.

⁵ *United States v. Larry Householder et al.*, No. 1:20-MJ-00526, Criminal Complaint ¶ 182 (S.D. Ohio July 17, 2020).

⁶ Darren Sweeney, *FirstEnergy Bet Millions, Reputation on Ohio Nuclear Plants*, S&P GLOBAL MARKET INTELLIGENCE (Aug. 3, 2020), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/firstenergy-bet-millions-reputation-on-ohio-nuclear-plants-59605087>.

as Mr. Jones alleged, or its shareholders? What actually motivated the Company to support HB6?

Neither example includes pure financial conduct, but they do suggest a pattern of utility behavior that undermines the competitive wholesale market to the detriment of utility customers.

Given the severity of the allegations against FirstEnergy, the Commission must look beyond how FirstEnergy spent ratepayer dollars. Money is fungible, and looking only for close ties between ratepayer funds and bad acts will likely miss other abuses of market power that the Commission has the authority to police. Once the Commission completes that analysis it not only needs to determine whether FirstEnergy violated its obligation to its customers, but also whether we need more separation between FirstEnergy Corporation and the regulated utilities than we currently have.

B. The Commission Should Investigate FirstEnergy's Corporate Separation Policies and Practices Throughout the House Bill 6 Debate to the Present.

The allegations in the Criminal Complaint and press reports suggest that during the HB6 debate and subsequent referendum campaign individuals working for FirstEnergy Corporation and FirstEnergy Service Company worked to influence legislation beneficial to FirstEnergy Solutions, now Energy Harbor. Throughout that time, FirstEnergy Corporation was either the parent company or creditor of FirstEnergy Solutions, which formally emerged from Chapter 11 bankruptcy proceedings as the reorganized and unaffiliated entity Energy Harbor on February 27, 2020.⁷ These close ties between FirstEnergy Corp. and its former affiliate undermine public confidence that ratepayers are not directly or indirectly subsidizing nonregulated businesses.

The separation of regulated and unregulated utility businesses is central to Ohio's competitive energy market. Utilities with noncompetitive businesses in the state must

⁷ See *In re Filing by FirstEnergy Sols. Corp. of a Petition for Reorganization Under Chapter 11 of the U.S. Bankruptcy Code*, No. 18-0569-EL-UNC, Final Update (Mar. 2, 2020).

“implement[] and operate[] under a corporate separation plan” approved by the Commission. Ohio R.C. § 4928.17. Among other requirements, the plan must satisfy “the public interest in preventing unfair competitive advantage and preventing the abuse of market power.” *Id.* § 4928.17(A). These corporate separation requirements apply both to the organization of the utility and its affiliates and the actions that individual utility employees take. The utility cannot cross-subsidize its unregulated affiliate, and “[e]mployees of the electric utility or persons representing the electric utility shall not indicate a preference for an affiliated electric services company.” Ohio Admin. Code § 4901-1-37-04(A)(3), (D)(9).

Prior investigations into the FirstEnergy utilities’ corporate separation practices have failed to answer fundamental questions and do not address the current situation facing the Commission. *See In re Review of the Ohio Edison Co. et al. Compliance with R.C. 4928.17 and the Ohio Adm. Code Chapter 4901:1-37*, No. 17-974-EL-UNC (May 17, 2017). The 2017 audit, for example, did reveal that FirstEnergy Service Company had mixed competitive service employees with EDU employees. *Id.* But that review did not consider how the FirstEnergy utilities and the competitive FirstEnergy businesses worked together on political issues or how FirstEnergy utilities took positions to the benefit of their unregulated affiliates. Those types of connections get to the heart of the HB6 scandal and the declining public trust in public utilities.

Additionally, in 2012, it was revealed that FirstEnergy made “seriously flawed” decisions regarding the unreasonable costs it incurred for its non-solar renewable energy credits (“RECS”).⁸ Specifically, the audit found that, at times, FirstEnergy had paid more than \$675 for its RECS, while the market rate determined from U.S. Department of Energy reports put the

⁸ *In re Review of the Alternative Energy Resource Rider Contained in the Tariffs of Ohio Edison Co., the Cleveland Elec. Illuminating Co., and the Toledo Edison Co.*, No. 11-5201-EL-RDR, Redacted Final Management/Performance Audit Report at 28 (Aug. 15, 2012).

expected price at the relevant times at no more than \$45.⁹ Most importantly, in regards to FirstEnergy’s affiliate—FirstEnergy Solutions—the auditor concluded that FirstEnergy should have known that “the prices bid by FirstEnergy Solutions reflected significant economic rents and were excessive by any reasonable measure.”¹⁰ This previous abuse demonstrates First Energy’s willingness to use its regulated monopoly utility to benefit its unregulated companies and demonstrates the need for a more comprehensive investigation.

C. The Investigation Should Include a Review of Whether and Why the FirstEnergy Utilities Took Positions Contrary to their Customers’ Best Interests.

Related to the corporate separation issue is the question of why FirstEnergy utilities would financially support the HB6 corruption scandal given that the primary beneficiary of that legislation was a soon-to-be unaffiliated entity. Although the parties may debate about the policy underlying HB6, it is clear that the key winner under HB6 is the former FirstEnergy affiliate FirstEnergy Solutions, now known as Energy Harbor. Understanding the decision-making process behind FirstEnergy utilities’ involvement, if any, and the extent to which FirstEnergy utilities used their employees to support HB6, is crucial. Such an investigation will help the Commission make informed judgments about how the regulated companies’ actions impacted captive customers and how to avoid such impacts in the future.

Even if FirstEnergy’s electric distribution utilities were not directly involved, the fact that FirstEnergy Corporation and FirstEnergy share the same name creates the impression they operate as one company and allows FirstEnergy to blur lines with legislators, regulators, and the public. This is similar to the conclusion of the auditor in the corporate separation investigation

⁹ *Id.* (stating that the Companies at times paid more than 15 times the price of the applicable \$45 Alternative Compliance Payment for RECs); *id.* at 26.

¹⁰ *Id.* at iv.

that “using ‘FirstEnergy’ in the Ohio Companies’ CRES affiliate’s name, ‘FirstEnergy Solutions’ implies an endorsement by the FirstEnergy Ohio Companies.” *In re Review of the Ohio Edison Co. et al.*, No. 17-974-EL-UNC, SAGE Management Consultants, LLC Final Report for Compliance Audit of the FirstEnergy Operating Companies with the Corporate Separation Rules of the Public Utilities Commission of Ohio at 98 (May 14, 2018). Hence, the Commission should examine whether FirstEnergy’s failure to distinguish its actions harms its customers and needs to be addressed.

III. CONCLUSION

A thorough investigation is an important first step for the Commission toward fulfilling its statutory obligations to oversee FirstEnergy and protect the public interest. However, the current scope of the review/investigation, which is limited to consideration only of the FirstEnergy utilities’ direct financial involvement in the HB6 and referendum schemes through political and charitable contributions, does not go far enough. The Commission has the authority and obligation to conduct a broader investigation into FirstEnergy and FirstEnergy utilities that targets not only these financial issues, but also answers questions about corporate separation, management, and the effect of FirstEnergy Corporation’s actions on its regulated utility customers. Thus, Environmental Advocates request the Commission expand the scope of its review and clarify that it intends to investigate how FirstEnergy’s actions effected its regulated monopoly customers.

Dated: September 29, 2020

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *The Environmental Advocates' Motion to Expand the Scope of the Commission's Review into the FirstEnergy's Political and Charitable Spending and Memorandum in Support* was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on September 29, 2020. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

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Case No(s). 20-1502-EL-UNC

Summary: Motion of the Environmental Advocates to Expand the Scope of the Commission's Review into the FirstEnergy's Political and Charitable Spending and Memorandum in Support electronically filed by Mr. Robert Kelter on behalf of Environmental Law & Policy Center and Ohio Environmental Council