

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**OHIO PARTNERS FOR AFFORDABLE ENERGY’S MEMORANDUM CONTRA TO
OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON COMPANY’S MOTION FOR A
PROTECTIVE ORDER**

I. INTRODUCTION

This proceeding was opened by the Public Utilities Commission of Ohio (“Commission”) on September 15, 2020, to investigate certain dealings of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, “FirstEnergy” or the “Companies”). The Commission “determined that this proceeding should be opened to review the political and charitable spending by the FirstEnergy Utilities in support of Am. Sub. H.B.6¹ and the subsequent referendum effort.”² Ohio Partners for Affordable Energy (“OPAE”) filed a Motion to Intervene in this proceeding on September 29, 2020. On October 9, 2020 the Office of the Ohio Consumers’ Counsel (“OCC”) filed a Notice to take Deposition of Santino Fanelli and Request for Production of Documents (“Notice”). On October 16, 2020, the Companies filed a Motion for a Protection Order (“Motion”) seeking to block non-written discovery. On October 20, 2020, the Attorney Examiner directed that any memorandum contra to the Companies’ Motion for a Protective Order be filed by November 2, 2020.³ Pursuant to this

¹ Hereinafter referred to as H.B. 6.

² Entry, at ¶5 (Sept. 15, 2020).

³ Entry, at ¶13 (Sept. 20, 2020).

Entry and Ohio Admin. Code 4901-1-12, OPAE files this Memorandum Contra to the Companies' Motion for a Protective Order.

II. LAW AND ARGUMENT

In support of its Motion, FirstEnergy asserts several arguments and lines of reasoning to support the avoidance of non-written discovery. These arguments range from parties are not entitled to full discovery, to full discovery is not necessary because the Companies already answered the question posed by the Commission. None of the Companies' arguments have merit and the Commission should deny the Motion for a Protective Order.

A. The existence of a scheduled evidentiary hearing is not a condition precedent to parties' entitlement to discovery.

FirstEnergy argues that all forms of discovery are not guaranteed in all cases; specifically, the Company argues that full discovery is only contemplated or appropriate when there is an evidentiary hearing scheduled.⁴ Additionally, FirstEnergy argues that engaging in discovery prior to the establishment of any factual issues is unduly burdensome until the Commission determines what, if any, issues are present.⁵

These claims are contrary to Ohio law as previously stated by the Commission. Revised Code 4903.082 guarantees ample rights of discovery to all parties and intervenors. Ohio Admin. Code 4901-1-17 (A) states "discovery may begin immediately after a proceeding is commenced and should be completed as expeditiously as possible." Ohio Admin. Code 4901-1-16 (H) states "the term 'party' includes any person who has filed a motion to intervene which is pending at the time a discovery request or motion is served or filed."

⁴ FirstEnergy's Memorandum in Support of its Motion at pp. 3-4.

⁵ Id. at p. 7.

The Commission has previously interpreted the above statute and rules together in a similar case involving Columbia Gas of Ohio (“Columbia”).⁶ In that case, Columbia sought to stay discovery on the basis that no procedural schedule was established.⁷ Columbia argued that since the Commission had yet to determine the nature and scope of any future proceedings discovery was improper and in the event the Commission finds an evidentiary hearing was unnecessary discovery should be stayed permanently.⁸ The Commission correctly rejected these arguments.⁹ The Commission stated,

[A]lthough the Commission will determine what further process may be necessary following the receipt of the comments and reply comments, the parties should be permitted to continue the discovery process. Section 4903.082, Revised Code, requires the Commission to ensure ample rights of discovery, while Rule 4901-1-17(A), O.A.C, generally provides that discovery may begin immediately after a proceeding is commenced and should be completed as expeditiously as possible. The discovery process will aid the parties in the preparation of their comments and reply comments in these cases and, ultimately, better inform the Commission's review of the application.¹⁰

Similarly, in Case No. 11-5886-EL-CRS, the Commission set a procedural schedule which included periods for comments and reply comments but stated that if, after review of the comments, a hearing is necessary it would be held.¹¹ Further, the Commission stated,

As a final matter, the attorney examiner notes that, under Ohio Adm.Code 4901-1-16(H), the term "party" includes any person who has filed a motion to intervene, which is pending at the time a discovery request or motion is to be served or filed. Therefore, unless and until the attorney examiner rules on any pending motion to intervene, all parties, including the Company, are subject to discovery for the purposes of these proceedings, and should timely respond to all discovery requests.¹²

⁶ Pub. Util. Comm. Case No. 11-5351-GA-UNC et al., Entry, at ¶8 (Jan. 27, 2012).

⁷ Id. at ¶6.

⁸ Id.

⁹ Id. at ¶8.

¹⁰ Id. (Emphasis added.)

¹¹ Pub. Util. Comm. Case No. 11-5886-EL-CRS et al. Entry at ¶¶11-12. (March 3, 2020.)

¹² Id. at ¶13.

Taken together, these two cases make it clear that the proper interpretation of the statutes and rules governing discovery is to allow ample discovery upon the commencement of the proceeding. Ample discovery enables parties to adequately present issues to the Commission who may then determine if a hearing is necessary.

This interpretation is supported by Chairman Randazzo's testimony before the General Assembly. In response to questions¹³ from Rep. Leland regarding the scope and process of this proceeding the Chairman testified,

[The Commission] required FirstEnergy to provide information demonstrating that money associated with the referendum and political charitable activities surrounding House Bill 6 is not included in rates. Once they provide that, other parties have the opportunity to provide comments. [The Commission] will have other parties intervening in this case. **Some may choose to do discovery some may not choose to do discovery; it's a case.** It's an investigation. **So what happens after that as I hope you would expect of [the Commission] will be a function of what the evidence shows and what [the Commission's] legal authority is** and that's as much as I can say about.¹⁴

The Chairman specifically noted that this case includes the right to discovery, with no caveats as to its scope. Further, the Chairman stated that the Commission will use the evidence provided through comments to make a determination as to the necessity of what happens after the comment period, presumably including the possibility of a hearing. Parties cannot submit evidence to the Commission absent full rights of discovery.

The Commission should reject FirstEnergy's claims that full rights of discovery are contingent up a scheduled evidentiary hearing in this proceeding and deny the Companies' Motion for a Protective Order.

¹³ <https://ohiochannel.org/video/ohio-house-select-committee-on-energy-policy-and-oversight-9-16-2020> at 1:11:00.

¹⁴ Id. at 1:11:55. (Emphasis added.)

B. Parties are entitled to full discovery and are not required to rely on the Companies' promises.

In addition to alleging discovery is not necessary because there is not yet an evidentiary hearing set, FirstEnergy alleges that discovery is unnecessary because the Companies have already answered the Commission's question.¹⁵ Specifically, the Companies stated,

The Companies' Response clearly affirmed that the Companies have not included, directly or indirectly, any H.B. 6 costs in any rates or charges paid by ratepayers in Ohio. No further discovery is needed for interested parties to comment on the Companies' Response.¹⁶

Per FirstEnergy's interpretation of this proceeding, the Companies have answered the Commission's questions and anyone who is interested, be they parties or the Commission, must simply take FirstEnergy's word for it. FirstEnergy continues to interpret this proceeding as a simple comment proceeding where no intervention is required¹⁷ and discovery is limited and ultimately unnecessary since the Companies answered the Commission's question.¹⁸

FirstEnergy's interpretation of this proceeding makes a mockery of the Commission process. The Commission established this proceeding based off a request by the Ohio Consumers' Counsel in two separate dockets.¹⁹ That request was based on an eighty-two page Criminal Complaint filed by the United States Attorney for the Southern District of Ohio, David Devillers, who characterized the actions identified in the Criminal Complaint as "what is likely the largest bribery, money laundering scheme ever perpetrated against the people of Ohio."²⁰ The Commission established this proceeding to "review the political and charitable spending by

¹⁵ Memorandum in Support of its Motion at p. 5.

¹⁶ FirstEnergy's Memorandum in Support of its Motion at p. 5.

¹⁷ See FirstEnergy's Memo Contrasting the Interventions of OPAE, ELPC, OEC, OMA, IGS, OHA, NOAC, and NRDC. Only OCC and OEG have not had their intervention contested by FirstEnergy. Any Memo Contra due to IEU's Motion to Intervene is due the same day as this Memo Contra.

¹⁸ FirstEnergy's Memorandum in Support of its Motion at p. 1.

¹⁹ Entry at ¶4. (Sept. 15, 2020).

²⁰ https://www.youtube.com/watch?v=dYmkBvTNW20&feature=emb_title starting at 12:05.

the FirstEnergy Utilities in support of Am. Sub. H.B.6 and the subsequent referendum effort.”²¹

If the Commission would have been satisfied merely asking FirstEnergy about how it was involved in the passage and maintenance of H.B. 6 it could have done so. Instead, it established a proceeding, with a comment period, which may lead to a hearing as stated by the Chairman. None of that can happen if parties are blocked from the full rights of discovery to which they are entitled.

OPAE respectfully requests that the Commission deny FirstEnergy’s Motion for a Protective Order and provide the full and robust discovery process envisioned by the original Entry and confirmed by the Chairman’s testimony before the General Assembly.

C. FirstEnergy should not be allowed to limit the scope of this investigation.

FirstEnergy is attempting to limit the scope of this proceeding to those expenses that are rightfully and directly recoverable through rates. FirstEnergy’s repeated refrain is that none of the political or charitable donations FirstEnergy expended in support of H.B. 6 or the subsequent referendum effort were included in any rates or charges paid by ratepayers.²² FirstEnergy stated in its Response to the Show Cause Order that the expenses at issue could not have been within customers’ rates because they did not occur in a test year and further they are not recoverable expenses.²³ FirstEnergy relies on this line of reasoning in objecting to the parties’ full rights of discovery by claiming the Companies can only provide the same answer so many ways before it becomes burdensome.²⁴

It is FirstEnergy’s oversimplification which is making this process unduly burdensome. The Commission specifically directed the Companies to demonstrate that the costs of any

²¹ Entry, at ¶5 (Sept. 15, 2020).

²² FirstEnergy’s Memorandum in Support of its Motion at p. 1.

²³ FirstEnergy’s Response to the Show Cause Order at pp. 1-2.

²⁴ FirstEnergy’s Memorandum in Support of its Motion at p. 1.

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.²⁵ FirstEnergy has only addressed whether those expenses were charged to customers directly. However, FirstEnergy has made no effort to deny those costs were not paid by ratepayers indirectly.

It is an elementary principle of public utility rate design that utilities are entitled to a reasonable rate of return on their investments. This rate of return is built into their base rates and constitutes the profits for a utility (assuming it is managed well). The rate of return is built into every customer's rate. Every customer provides FirstEnergy with a little bit of profit. FirstEnergy's profitability has been confirmed by their most recently completed Significantly Excessive Earnings Test cases.²⁶ Therefore, there have been profits, provided by customers, from which political and charitable contributions could have been sourced.

This was confirmed by the Chairman's testimony before the General Assembly. Rep. Leland asked the Chairman,

What money does a utility get, if they are not PAC contributions which could be voluntary contributions from employees, what money do utilities get that does not come from a rate payer? So what monies could they have possibly used to be part of this [alleged] huge bribery scandal that did not come from ratepayers.²⁷

The Chairman responded,

Mr. Chairman, Representative, members of the committee, the bulk of the revenue that is available to the utility comes from ratepayers. Some of those ratepayers are subject to our jurisdiction some are not.²⁸

²⁵ Entry at ¶15 (Sept. 15, 2020.)

²⁶ Pub. Util. Comm. Case No. 18-0857-EL-UNC, Opinion and Order (March 20, 2019).

²⁷ <https://ohiochannel.org/video/ohio-house-select-committee-on-energy-policy-and-oversight-9-16-2020> at 1:10:04.

²⁸ Id. at 1:10:26.

It is clear from both the basic elements of rate design and the Chairman's comments that it is very likely ratepayer money was used, albeit indirectly, in FirstEnergy's political and charitable contributions related to H.B. 6 and the subsequent referendum. This inquiry is not merely limited to expenses and other capital expenditures that are explicitly included in rates. The only way for the parties to be able to sufficiently comment on FirstEnergy's Response to the Show Cause Order is through the discovery process. Parties are entitled to full discovery through which they can verify the responses FirstEnergy provided the Commission in its filed Response to the Show Cause Order.

OPAE respectfully requests that the Commission deny FirstEnergy's Motion for a Protective Order and reaffirm the parties' rights to a robust discovery process.

D. To the extent FirstEnergy's charitable and political contributions impacted the cost of utility service or harmed the public interest they are within the scope of the Commission's jurisdiction.

FirstEnergy has repeatedly claimed that a utility's political contributions or donations are outside the scope of the Commission's jurisdiction.²⁹ Generally, that is true because, as FirstEnergy noted in its Response to the Show Cause Order, the Commission has long disallowed political and charitable contributions as an operating expense and therefore they are not recoverable through rates.³⁰ Further, the Supreme Court of Ohio has held that generally, the management of a utility (and by extension management's use of funds) is not subject to Commission oversight as FirstEnergy cited in its Memorandum Contra to OCC's Interlocutory

²⁹ FirstEnergy's Memorandum in Support of its Motion at p. 6; FirstEnergy's Memorandum Contra to OCC's Interlocutory Appeal at p. 5. (OCC hungers for would stray far beyond the Commission's and the OCC's jurisdiction into questions of unregulated holding company activities and use of the Companies' revenues.); FirstEnergy's Memorandum Contra to OPAE's Motion to Intervene at p. 3. (Moreover, OPAE's claimed interest – to determine whether the Companies' political and charitable spending may have impacted H.B. 6 – is not within the Commission's jurisdiction.)

³⁰ FirstEnergy's Responses to Show Cause Order at pp. 2-3.

Appeal in this proceeding.³¹ These are the doctrines behind which FirstEnergy attempts to hide and claim “nothing to see here, move along.”

However, it is not that simple and to argue it is that simple is to insult the Commission, which initiated this proceeding. The Commission is well aware of the rules governing what is and is not allowed to be charged to customers by FirstEnergy. But as was previously noted, FirstEnergy is allegedly a part of the largest corruption scheme ever perpetrated against Ohioans. This is an extraordinary circumstance and one in which the Commission is well within its rights to investigate. The very Ohio Supreme Court case that FirstEnergy cited to in its Memorandum Contra to OCC’s Motion for a Protective Order makes that clear. The Ohio Supreme Court in *Elyria Tel. Co.*, stated,

It is undoubtedly true that a utility conducts a business so closely related to the public interest that it is subject to extensive control and regulation. Nevertheless, it is still an independent corporation and possesses the right to regulate its own affairs and manage its own business, **unless in doing so a situation develops which is inimical to the public interest.**³²

The Ohio Supreme Court specifically stated that the Commission has broader authority with regards to its oversight of utilities when the public interest is at risk of being harmed. The U.S. Attorney for the Southern District of Ohio has alleged a public corruption scheme that, if true, is clearly inimical to the public interest of all Ohioans. The Commission is well within its jurisdiction to determine if FirstEnergy’s political and charitable spending was part of an alleged criminal enterprise.

In addition to authority under Ohio Supreme Court precedent, the Commission has the statutory authority to investigate both the individual FirstEnergy electric distribution utilities as

³¹ FirstEnergy’s Memorandum Contra to OCC’s Interlocutory Appeal at p. 8 (Citing *Elyria Tel. Co. v. Pub. Util. Comm.*, 158 Ohio St. 441, 447- 448, 110 N.E.2d 59 (1953).)

³² *Elyria Tel. Co. v. Pub. Util. Comm.*, 158 Ohio St. 441, 447- 448, 110 N.E.2d 59 (1953). (Citing *City of Cleveland v. Public Utilities Commission*, 102 Ohio St. 341, 131 N.E. 714.) (Emphasis Added.)

well as their holding company in so far as their spending has affected the cost of the provision of utility service. The Commission opened this proceeding citing to its jurisdiction under R.C. 4905.05 and R.C. 4905.06.³³ Revised Code 4905.05 gives the Commission jurisdiction over FirstEnergy, including FirstEnergy's holding company, "insofar as such records and accounts may in any way affect or relate to the costs associated with the provision of electric utility service by any public utility operating in this state and part of such holding company system."³⁴ Revised Code 4905.06 similarly provides that the Commission has general supervision over all public utilities in its jurisdiction and states the Commission may:

[E]xamine such companies and keep informed as to their * * * compliance with all laws and orders of the commission, insofar as any of such matters may relate to the costs associated with the provision of electric utility service by public utilities in this state which are affiliated or associated with such companies.³⁵

The Commission, by law, has the authority to review any spending by FirstEnergy that may relate to the costs of the provision of electric service in Ohio. Amended Substitute House Bill 6 impacts the costs of several provisions of electric service in Ohio including by codifying several charges and eliminating others. If FirstEnergy spent money in support of passing Am. Sub. H.B. 6 or preventing the subsequent repeal effort, those funds would be subject to Commission oversight pursuant to R.C. 4905.05 and R.C. 4905.06.

OPAE respectfully requests that the Commission deny FirstEnergy's Motion for a protective Order and reaffirm the parties' entitlement to a robust discovery process.

III. CONCLUSION

OPAE continues to be alarmed by the by the obstructionist tact taken by FirstEnergy in this proceeding. FirstEnergy's actions, thus far in this proceeding, include seeking to block the

³³ Entry at ¶¶2-3.

³⁴ R.C. 4905.05 (emphasis added.)

³⁵ R.C. 4905.06 (emphasis added.)

intervention of almost every party, seeking to limit the scope of the investigation, and limit the scope of discovery. These are not actions indicative of a company with nothing to hide but rather of a company who does not feel accountable to its customers or its regulator. OPAE hopes the Commission weighs the Companies' actions in this proceeding as it considers the appropriateness of expanding the scope of this proceeding. OPAE respectfully requests that the Commission deny FirstEnergy's Motion for a Protective Order and reaffirm the parties' rights to a full and robust discovery process.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served on all parties of record via the DIS system on November 2, 2020.

/s/ Robert Dove
Robert Dove

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Summary: Memorandum Contra to Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Motion for a Protective Order electronically filed by Mr. Robert Dove on behalf of Ohio Partners for Affordable Energy