

**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.)	

**ENVIRONMENTAL ADVOCATES’ 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.¹ and the subsequent referendum effort.”² Environmental Law & Policy Center (“ELPC”) filed a Motion to Intervene in this proceeding on September 18, 2020. Natural Resources Defense Council (“NRDC”) and Ohio Environmental Council (“OEC”) filed Motions 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”). In response, 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’

¹ Hereinafter referred to as H.B. 6.

² Entry, at ¶5 (Sept. 15, 2020).

Motion for a Protective Order be filed by November 2, 2020.³ Pursuant to this Entry and Ohio Admin. Code 490-1-12, the Environmental Advocates file this Memorandum Contra to the Companies' Motion for a Protective Order.

II. LAW AND ARGUMENT

FirstEnergy asserts several arguments to support its attempt to avoid all non-written discovery requests, ranging from its assertion that parties are not entitled to full discovery to asserting that full discovery is not necessary because the Companies already answered the question posed by the Commission. The Companies' arguments have no merit and the Commission should deny the Motion for a Protective Order.

A. A scheduled evidentiary hearing is not a condition precedent to parties' entitlement to a robust discovery process.

FirstEnergy's argument that all forms of discovery are not guaranteed in all cases flies in the face of Ohio law and Commission precedent. 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

³ Entry, at ¶13 (Sept. 20, 2020).

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

⁵ Id. at p. 7.

“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.”

The Commission has already dispensed with this argument. The Commission interpreted the above statute and rules in a similar Columbia Gas of Ohio (“Columbia”) case.⁶ In the Columbia case, Columbia sought to stay discovery, arguing that no procedural schedule had yet been established.⁷ Columbia argued that since the Commission had yet to determine the nature and scope of any future proceedings, discovery was improper and that if the Commission found that 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

In another matter, 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

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.)

discovery for the purposes of these proceedings, and should timely respond to all discovery requests.¹²

Taken together, these two cases make it clear that the Commission's own interpretation of the statutes and rules governing discovery in its proceedings allow for ample discovery upon the commencement of the proceeding to enable 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 the parties may conduct discovery, with no caveats as to its scope. Further, the Chairman stated that the Commission will use the evidence provided through comments to determine what should happen 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.

¹² Id. at ¶13.

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 not required to simply rely on the Companies' voluntarily provided information.

FirstEnergy further alleges that discovery is unnecessary because the Companies have already responded to 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

The Companies' response to the Commission's question and their reaction to discovery requests now is that anyone who is interested--parties or the Commission--must simply assume the veracity of that Response—a concept that defies and misinterprets the very purpose of discovery. FirstEnergy continues to wrongly assume this proceeding is a simple comment proceeding where intervention is not required¹⁷ and discovery is limited and unnecessary since the Companies answered the Commission's question.¹⁸

FirstEnergy's interpretation of this proceeding makes a mockery of the Commission's existence as regulator of electric utilities. This proceeding was opened after requests by the Ohio Consumers' Counsel in two separate dockets¹⁹ based on “what is likely the largest bribery, money laundering scheme ever perpetrated against the people of Ohio.”²⁰ The allegations contained in the eighty-two page Criminal Complaint filed by the United States Attorney for the Southern District of Ohio, David Devillers, go to the very heart of what this Commission exists for—to serve all residential and business consumers in Ohio and, among other things, ensure

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 Contrasts the Interventions of OP&E, 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.

financial integrity in the Ohio utility industry.²¹ Since the Complaint was made public, two of individuals have plead guilty for their role in the corruption scandal.²² Further, FirstEnergy terminated its Chief Executive Officer, Chuck Jones, and two Senior Vice Presidents for violation of certain FirstEnergy policies and FirstEnergy’s Code of Conduct.²³

The Commission established this proceeding to “review the political and charitable spending by the FirstEnergy Utilities in support of Am. Sub. H.B.6 and the subsequent referendum effort.”²⁴ The Commission could have asked FirstEnergy how it was involved in the passage and maintenance of H.B. 6, but instead, it established a proceeding, with a comment period, which may lead to a hearing as can be reasonably inferred by the Commission Chairman’s testimony before the General Assembly. Parties have the right, and the Commission has a duty to permit, full discovery to which the Parties are entitled. Further, ELPC and OEC have a pending motion to expand the scope of the Commission’s review that has yet to be ruled on as well.²⁵

Environmental Advocates respectfully request that the Commission deny FirstEnergy’s Motion for a Protective Order and provide the full and robust process envisioned by the original Entry and confirmed by the Chairman’s testimony before the General Assembly. FirstEnergy continues to attempt to block accountability and transparency related to their actions and spend around House Bill 6 and the referendum, and their ratepayers and all Ohioans have a right to the full picture, and permitting a robust discovery process is critical to ensuring that happens.

C. The Commission dictates the scope of discovery, and FirstEnergy should not be permitted to limit the scope as it sees fit.

²¹ <https://puco.ohio.gov/wps/portal/gov/puco/about-us/resources/mission-and-commitments>

²² <https://ohiocapitaljournal.com/2020/10/29/two-men-tied-to-householder-corruption-probe-plead-guilty/>

²³ <https://investors.firstenergycorp.com/file/Index?KeyFile=405788662>

²⁴ Entry, at ¶5 (Sept. 15, 2020).

²⁵ See Environmental Advocates’ Motion to Expand the Scope of the Commissions Review (Sept. 29, 2020).

FirstEnergy’s attempts to limit the scope of this proceeding to only what it wants to disclose must be rejected. FirstEnergy claims 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,²⁶ stating 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.²⁷ FirstEnergy oversimplifies the issue, claiming that they shouldn’t be subject to the full discovery process because having to answer the question posed by the Commission too many ways would be “burdensome”.²⁸

The Commission specifically directed the Companies to show whether the costs of any political or charitable spending in support of Am. Sub. H.B. 6, or the subsequent referendum effort, were included, directly or indirectly, in any rates or charges paid by ratepayers in this state.²⁹ FirstEnergy has only addressed whether those expenses were charged to customers directly and has made no effort to deny those charges were not paid by ratepayers indirectly—a prime source for discovery, both written and through deposition.

Public utilities are entitled to a reasonable rate of return on their investments, and that amount is built into their base rates and their profits. That rate of return is built into every customer’s rates, and therefore every customer’s energy bill provides FirstEnergy with a little bit of profit—and their profitability has been confirmed by their most recent Significantly Excessive Earnings Test cases.³⁰ FirstEnergy’s refusal to address any indirect costs paid by customers is exactly why robust discovery is necessary—these profits, provided by customers, contain money from which political and charitable contributions could have been sourced.

²⁶ FirstEnergy’s Memorandum in Support of its Motion at p. 1.

²⁷ FirstEnergy’s Response to the Show Cause Order at pp. 1-2.

²⁸ FirstEnergy’s Memorandum in Support of its Motion at p. 1.

²⁹ Entry at ¶5 (Sept. 15, 2020.)

³⁰ Pub. Util. Comm. Case No. 18-0857-EL-UNC, Opinion and Order (March 20, 2019).

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.³¹

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.³²

Based upon the basic principles of rate design and the Chairman's own comments, it is very possible that ratepayer money was used indirectly in FirstEnergy's political and charitable contributions related to H.B. 6 and the subsequent referendum—and that possibility must be tested and investigated through a robust discovery process. Parties must be able to engage in discovery in order to sufficiently comment on FirstEnergy's Response to the Show Cause Order. Under Ohio law and Commission precedent, parties are entitled to full discovery through which they can verify the responses FirstEnergy provided to the Commission in its filed Response to the Show Cause Order.

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

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

FirstEnergy has repeatedly claimed that a utility's political or charitable contributions are outside the scope of the Commission's jurisdiction.³³ It is true that the Commission has long

³¹ <https://ohiochannel.org/video/ohio-house-select-committee-on-energy-policy-and-oversight-9-16-2020> at 1:10:04.

³² Id. at 1:10:26.

disallowed political and charitable contributions as an operating expense which means they are not recoverable through rates, as FirstEnergy points out.³⁴ The Supreme Court of Ohio has also 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 Appeal in this proceeding.³⁵ These are the doctrines behind which FirstEnergy attempts to hide.

However, this is a different type of situation. The Commission is quite familiar with the rules governing what FirstEnergy is allowed to charge to its customers, but we are dealing with a situation of a completely different magnitude than a standard rate proceeding. FirstEnergy is alleged to be involved in the largest corruption scheme ever perpetrated against Ohioans—an extraordinary circumstance in which the Commission is not only permitted to investigate, but must, in order to protect Ohio ratepayers. The very Ohio Supreme Court case that FirstEnergy cites in its Memorandum Contra to OCC's Motion for a Protective Order makes this 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.**³⁶

³³ 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 NRDC's Motion to Intervene at p. 3. (Moreover, NRDC'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.)

³⁴ FirstEnergy's Responses to Show Cause Order at pp. 2-3.

³⁵ 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).)

³⁶ *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.)

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.

Further, the Commission has statutory authority to investigate both the individual FirstEnergy electric distribution utilities as well as their holding company to determine how their spending has affected the cost of the provision of utility service. The Commission opened this proceeding citing to its jurisdiction under R.C. 4905.05,³⁷ which 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,"³⁸ and to Revised Code 4905.06 which 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.³⁹

The Commission, by law, has the authority to review any spending of FirstEnergy's 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.

³⁷ Entry at ¶¶2-3.

³⁸ R.C. 4905.05 (emphasis added.)

³⁹ R.C. 4905.06 (emphasis added.)

Sub. H.B. 6 or the subsequent repeal effort, those funds would be subject to Commission oversight pursuant to R.C. 4905.05 and R.C. 4905.06.

The Environmental Advocates respectfully request that the Commission deny FirstEnergy's Motion for a Protective Order and reaffirm the parties' entitlement to a robust discovery process.

III. CONCLUSION

The Environmental Advocates urge the Commission to reinforce Ohio law and Commission precedent to permit a robust discovery process and thoroughly review the political and charitable spending of FirstEnergy, both directly and indirectly affecting customer rates. Further, the Environmental Advocates' urge the Commission to weigh the Companies' actions in this proceeding as it considers the appropriateness of expanding the scope of this proceeding as explained in the Motion to Expand the Scope filed by ELPC and OEC. The Environmental Advocates respectfully request that the Commission deny FirstEnergy's Motion for a Protective Order and reaffirm the parties' rights to a full and robust discovery process.

/s/Robert Dove
Robert Dove (0092019)
Kegler Brown Hill + Ritter Co., L.P.A.
65 E State St., Ste. 1800
Columbus, OH 43215-4295
Office: (614) 462-5443
Fax: (614) 464-2634
rdove@keglerbrown.com

(Willing to accept service by email)
Attorney for NRDC

/s/Miranda Leppla
Miranda Leppla (0086351)
Counsel of Record

Trent Dougherty (0079817)
Chris Tavenor (0096642)
1145 Chesapeake Avenue, Suite I
Columbus, Ohio 43212-3449
(614) 487-7506 - Telephone
mleppla@theOEC.org
tdougherty@theOEC.org
ctavenor@theOEC.org
*Counsel for the Ohio Environmental
Council*

/s/Caroline Cox
Caroline Cox (0098175)
Environmental Law & Policy Center
21 W. Broad Street, 8th Floor
Columbus, OH 43215
(312) 795-3742
*Counsel for the Ohio Environmental
Law and Policy Center*

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/ Miranda Leppla
Miranda Leppla

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

11/2/2020 5:15:13 PM

in

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

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 Ms. Miranda R Leppla on behalf of Environmental Law & Policy Center and Natural Resources Defense Council and Ohio Environmental Council