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 Edison Company's Compliance with R.C. 4928.17 and the Ohio Adm. Code Chapter 4901:1-37.	**)**	**Case No. 17-974-EL-UNC**

Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Memorandum Contra the Application for Rehearing Related to FirstEnergy's House Bill 6 Activities and Other Matters by the Office of the Ohio Consumers' Counsel

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I. INTRODUCTION

Twice accusing the Commission of merely "going through the motions" in this case, the Office of the Ohio Consumers' Counsel ("OCC") raises six assignments of error on the November 4, 2020 Entry (the "November 4 Entry") ordering an additional corporate separation audit of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the "Companies").[1] OCC's rehearing application has little to do, however, with anything the Commission ordered in the November 4 Entry.

Instead, OCC focuses on the extra-record allegations in the federal criminal matter involving House Bill 6 and FirstEnergy Corp.'s public disclosures concerning the termination of certain of its executives. (App. at 2-3). OCC then proceeds to reassert the legally baseless request from its September 8 motions that the Commission open a new proceeding to investigate and audit

[1] Application for Rehearing Related To FirstEnergy's House Bill 6 Activity And Other Matters by Office of the Ohio Consumers' Counsel ("App."), at 3; Memorandum in Support of Application for Rehearing Related To FirstEnergy's House Bill 6 Activity And Other Matters ("Mem."), at 14.

FirstEnergy Corp.'s and the Companies' alleged political activities in relation to House Bill 6.[2] But neither the Companies' nor FirstEnergy Corp.'s political and charitable spending is subject to Commission jurisdiction. And, contrary to OCC's strained arguments otherwise, the corporate separation statutes do not change that.

As explained further below, OCC has failed to show, as it must, that the November 4 Entry is in any way unreasonable or unlawful. R.C. 4903.10. Some of OCC's assignments of error improperly seek new relief for the first time on rehearing. Most ask the Commission to exercise authority its enabling statutes do not confer. And all lack merit. The Commission should reject the application in its entirety.

II. ARGUMENT

A. The November 4 Entry is not unreasonable or unlawful for not ordering an independent investigation of FirstEnergy Corp.'s or the Companies' political expenditures.

OCC's fourth, fifth, and sixth assignments of error all raise the same issue: OCC's misguided request that the Commission investigate FirstEnergy Corp.'s or the Companies' political and charitable spending. These assignments of error simply repackage OCC's prior demand that the Commission open an "independent management audit and investigation" of "FirstEnergy's corporate governance, its corporate relationships including its utility relationships with other FirstEnergy affiliated entities, and whether any money collected from consumers . . . was improperly used for any activities in connection with House Bill 6 instead of for electric utility service." (OCC Sept. 8 Mot. at 3-4). Indeed, OCC's fourth assignment of error argues that the Commission should have opened a new proceeding to investigate "whether the [Companies] used

[2] While OCC sometimes uses the names "FirstEnergy Corp." and "FirstEnergy Utilities" correctly to identify the entity about which it speaks, OCC also at times throughout its rehearing application confusingly uses the term "FirstEnergy" in contexts where it is unclear whether OCC means FirstEnergy Corp. or the Companies.

captive customer charges for regulated electric utility service to fund directly or indirectly FirstEnergy Corp.'s unregulated political and charitable activities." (Mem. at 7). And the fifth and sixth assignments merely repeat and expand that charge, claiming that the Commission erred by not ordering a "full" investigation and audit of "FirstEnergy's House Bill 6 activities." (Mem. at 12). Just like OCC's initial motion, these assignments of error lack factual and legal support.

To be sure, OCC engages in some mental gymnastics attempting to turn political and charitable spending into a corporate separation law issue—it argues that the Companies' or their parent's support for policy initiatives that may benefit affiliates somehow runs afoul of R.C. 4928.17. Those arguments fail as well. The corporate separation statutes do not provide a backdoor mechanism for the Commission to investigate or audit matters outside the scope of its jurisdiction, a point the Commission already recognized when it ordered the new audit "with due consideration to the limits on [its] statutory authority over FirstEnergy Corp. and over the political and charitable activity of all public utilities in this state." November 4 Entry at ¶ 17.

For these and the other reasons explained below, OCC's fourth, fifth, and sixth assignments of error must be denied.

i. The Commission lacks jurisdiction to examine FirstEnergy Corp.'s or the Companies' political and charitable spending.

The Ohio Supreme Court has repeatedly held that the Commission is a creature of statute and can only exercise the powers and jurisdiction expressly conferred by the General Assembly. *See, e.g.*, *In re Application of Ohio Edison Co.*, 158 Ohio St.3d 27, 2019-Ohio-4196, 139 N.E.3d 875, ¶ 13; *Canton Storage & Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St.3d 1, 5, 1995-Ohio-282, 647 N.E.2d 136 (1995); *Ohio Public Interest Action Group v. Pub. Util. Comm.*, 43 Ohio St.2d 175, 331 N.E. 2d 730 (1975); *Akron & Barberton Belt Rd. Co. v. Pub. Util. Comm.*, 165 Ohio St. 316, 135 N.E. 2d 400 (1956). There is simply no statute that empowers the Commission

to commence an investigation and audit of FirstEnergy Corp. or the Companies related to alleged House Bill 6 spending.

OCC claims the Commission has jurisdiction under R.C. 4905.05, 4905.06, and 4909.154 to conduct an audit and examine whether customer funds were used "directly or indirectly" to pay for "FirstEnergy Corp.'s unregulated political and charitable activities." (Mem at 7 n.25). But none of those statutes confer such broad authority over FirstEnergy Corp.

R.C. 4905.05 defines the Commission's jurisdiction as extending primarily to public utilities operating in Ohio as defined in R.C. 4905.03. The Companies are public utilities; FirstEnergy Corp. is not—it does not charge for or provide utility service. Further, while the Commission may have jurisdiction and general supervisory powers over public utility holding companies and their subsidiaries in narrowly defined circumstances under R.C. 4905.05 and R.C. 4905.06, those circumstances do not apply here.[3] Moreover, OCC's proposed investigation under R.C. 4905.05 is unrelated to "the costs associated with the provision of electric utility service by any public utility" in this state. Neither the allegations in the federal complaint nor anything in FirstEnergy Corp.'s public disclosures that OCC cites relates to the Companies' costs of providing retail electric service in Ohio. The Companies have no charge or rider designed to recover the costs of any of FirstEnergy Corp.'s political or charitable expenses. Thus, R.C. 4905.05 is doubly inapplicable.

R.C. 4905.06 applies to regulated public utilities and "all other companies referred to in section 4905.05 of the Revised Code to the extent of its jurisdiction as defined in that section." Because FirstEnergy Corp. is not one of the companies referenced in R.C. 4905.05, the

[3] *See* Case No. 17-0974, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Memorandum Contra Motions by the Office of the Ohio Consumers' Counsel Regarding House Bill 6 (September 23, 2020), at 4-6.

Commission lacks authority to examine it under R.C. 4905.06 for compliance with all laws and orders of the Commission.

Lastly, R.C. 4909.154 is similarly inapplicable. That statute governs regulated public utilities when fixing rates for utility service. Again, FirstEnergy Corp. is not a regulated public utility and does not provide utility service.

As to the Companies specifically, the Commission's authority is not unlimited. Typically, the Commission will examine a public utility's provision of utility service and the reasonableness of rates charged for that service. But the Commission cannot usurp the management role. *See Elyria Tel. Co. v. Pub. Util. Comm.*, 158 Ohio St. 441, 447-448, 110 N.E.2d 59 (1953) (utility "is subject to extensive control and regulation" but "is still an independent corporation and possesses the right to regulate its own affairs and manage its own business"); *West Ohio Gas Co. v. Pub. Util. Comm.*, 128 Ohio St. 301, 381 (1934); *City of Cleveland v. Pub. Util. Comm.*, 102 Ohio St. 341, 131 N.E. 714 (1921), syllabus para. 2. Here, OCC has not established a basis for the Commission to exercise jurisdiction over any political expenditures by the Companies.

Even if there were evidence of the Companies making House Bill 6-related contributions or donations, the Commission has found that the basis for political contributions and donations made by public utilities falls outside its jurisdiction. *See In re Chapter 4901:1-20, Ohio Adm. Code*, 2004 WL 1950732, Case No. 04-48-EL-ORD, Finding and Order at p. 14 (July 28, 2004). Similar to the arguments it makes here, in that proceeding OCC sought an amendment to the corporate separation rules that would have prohibited electric distribution utilities from making political contributions or donations that might give them a competitive advantage. *Id*. at p. 13. The Commission rejected OCC's request. As the Commission explained, "As for prohibiting and/or restricting political contributions and donations . . . , that issue is a matter outside of our

jurisdiction." *Id.* at p. 14 (emphasis added). One basis for this jurisdictional finding is that contributions and donations cannot be included in utility rates. *See Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 258, 431 N.E.2d 683 (1982), syllabus. Beyond that, the Ohio Supreme Court, citing R.C. 4905.05 and R.C. 4905.06, recently emphasized that the General Assembly has confined the Commission's jurisdiction to the supervision of public utilities when acting as public utilities. *In re Complaint of Direct Energy Business, LLC v. Duke Energy Ohio, Inc.*, 2020-Ohio-4429, ¶ 25 (Sept. 17, 2020). In sum, there is no legal prohibition on public utilities' spending for non-utility purposes, and the Commission has no jurisdiction to open an investigation into such spending.

ii. R.C. 4928.17 and 4928.18 do not provide such jurisdiction either.

Despite the clear limits on the Commission's jurisdiction set by statute and long recognized by the Ohio Supreme Court, OCC now attempts to characterize its proposed investigation and audit of FirstEnergy Corp.'s and the Companies' political and charitable spending as authorized under corporate separation law. OCC argues that if FirstEnergy Corp. used any customer revenues collected by the Companies for "political and charitable spending regarding House Bill 6," then R.C. 4928.17 would be violated because House Bill 6 benefitted FirstEnergy Corp. and former affiliate FirstEnergy Solutions. (Mem. at 8, 12). OCC then contends that the Commission therefore has the power under R.C. 4928.18 to initiate a complaint to investigate and audit this supposed potential violation of R.C. 4928.17. (*Id.*). OCC fundamentally misunderstands these statutes, however, and its argument should be rejected for at least three reasons.

First, as an initial matter, OCC's request in its fourth, fifth, and sixth assignments of error—that the Commission open a complaint proceeding under R.C. 4928.18 and R.C. 4905.26—is not properly before the Commission, because OCC raises it for the first time on rehearing. *See,*

e.g., *In the Matter of the Complaint of Suburban Natural Gas Company v. Columbia Gas of Ohio, Inc.*, Case No. 17-2168-GA-CSS, Second Entry on Rehearing at ¶ 23 (Oct. 23, 2019) ("[Complainant] attempts to alter its initial grounds for complaint by asserting this new argument at the rehearing stage of the proceeding. For this reason alone, rehearing should be denied."); *In the Matter of the Application of Killen Generating Station for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 09-891-EL-REN, Entry on Rehearing at ¶ 15 (May 26, 2010) ("[T]he Commission finds no merit to OCC and OEC's argument . . . , which was improperly raised for the first time on rehearing."); *In the Matter of the Commissions Review of Chapter 4901:1-35 of the Ohio Admin. Code.*, No. 18-1188-EL-ORD, 2020 WL 4819379, at *6 (F.E.D.A.P.J.P. July 29, 2020) (same). Nowhere in OCC's September 8 motion did it even mention these statutes, let alone request that the Commission open a complaint proceeding under them.

Second, as explained above, the Commission lacks jurisdiction over the Companies' or FirstEnergy Corp.'s political and charitable spending. OCC's strained arguments under R.C. 4928.17 and R.C. 4928.18 do not change that. Indeed, OCC does not cite to a single case in which the Commission determined it could audit or investigate the political spending of a utility or its affiliates under the corporate separation statutes and rules. That is hardly surprising given the Commission's earlier determination in the corporate separation context that political spending "is a matter outside of our jurisdiction." *In re Chapter 4901:1-20, Ohio Adm. Code*, 2004 WL 1950732, Case No. 04-48-EL-ORD, at p. 14. With no applicable authority to stand on, OCC resorts to citing a handful of decisions that merely reiterate the Commission's authority to enforce compliance with R.C. 4928.17. (Mem. at 8-10).

The problem with that approach is that neither R.C. 4928.17 nor R.C. 4928.18 grant unfettered authority to investigate all aspects of the Companies' and their affiliates' business operations. Rather, R.C. 4928.18 is limited by its own terms to an examination of "such books, accounts, or other records kept by an electric utility or its affiliate ***as may relate to the businesses for which corporate separation is required under section 4928.17*** of the Revised Code." R.C. 4928.18(B) (emphasis added). And R.C. 4928.17 is directed at ensuring that no affiliate "***in the business of providing competitive retail electric service***" is unfairly advantaged by its corporate relationship to a regulated utility. (emphasis added). OCC, however, has not alleged any such anti-competitive conduct or undue preference by the Companies in favor of an affiliate providing competitive retail electric service. Indeed, the Companies are free to support any legislation for reasons that have nothing to do with retail electric competition. Further, OCC's arguments are based on the flawed premise that the General Assembly would pass legislation that is anti-competitive for the retail electric market. Simply put, R.C. 4928.17 and R.C. 4928.18 do not reach either the Companies' or their affiliates' political spending, as OCC contends.

Third, even if R.C. 4928.18 had the reach OCC wrongly claims it has, OCC's request for a complaint proceeding against the Companies cannot stand, because OCC has not shown "reasonable grounds" under 4905.26. The Commission's jurisdiction under R.C. 4928.18 is premised on R.C. 4905.26, which requires "reasonable grounds for complaint." In other words, OCC must show that the Companies have done something that, if proven to be true, violates the corporate separation statutes, rules, or orders. Since R.C. 4928.17 does not reach political spending as alleged by OCC, OCC cannot make that showing. Further, OCC's mere request for an investigation fails to trigger the Commission's jurisdiction. *In the Matter of the Complaint of Ohio Consumer Alliance for Responsible Electrical Systems, v. FirstEnergy Corporation*, Case

No. 98-1616-EL-CSS, Entry at pp. 3-4 (May 19, 1999). OCC offers only speculation about the allegations in the federal criminal complaint and FirstEnergy Corp.'s public disclosures concerning the termination of certain executives, neither of which even suggest that the Companies engaged in any wrongdoing.

For all these reasons, the Commission should deny rehearing on OCC's fourth, fifth, and sixth assignments of error.

B. The Commission also lacks authority to order FirstEnergy Corp. to produce records of investigations related to House Bill 6.

Related to its unsupported and unsupportable demand for a Commission investigation of FirstEnergy Corp.'s political activity, OCC's first assignment of error requests rehearing because the November 4 Entry supposedly "fail[ed] to order FirstEnergy to produce . . . all documents pertaining to investigations that are underway concerning FirstEnergy's House Bill 6 activities." Once again, this is relief OCC did not ask for in its September 8 motion, which renders this argument improper for rehearing. *In the Matter of the Application of Killen Generating Station for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 09-891-EL-REN, Entry on Rehearing at ¶ 15. Regardless, OCC cites no authority granting the Commission the broad power OCC asks it to exercise. And because the Commission lacks jurisdiction to investigate FirstEnergy Corp.'s political spending, it did not err by not ordering FirstEnergy to produce documents relating to any investigations concerning House Bill 6.

C. OCC's request for an "independent audit committee" to oversee the auditor is neither properly before the Commission nor grounds for rehearing.

OCC's second assignment of error claims the Commission erred by failing to appoint an "independent audit committee or special council" to help select an auditor and to oversee the newly-ordered corporate separation audit. (Mem. at 3-4). This assignment of error should be rejected. Procedurally, it is not properly before the Commission, since OCC never requested that

an "independent audit committee or special council" be appointed to oversee the new corporate separation audit it requested in its September 8 motion. Substantively, OCC's position makes little sense. Nowhere does OCC explain why Marcum LLP ("Marcum"), the independent auditor appointed on December 2 pursuant to Staff's request for proposal, would require oversight by yet another independent entity. Nor does OCC even attempt to give any reason why Marcum is not sufficiently independent to carry out its audit duties without oversight from a separate third party. Referencing former Chairman Randazzo's recent resignation, the only argument OCC offers is that an independent audit committee "is especially important given that the House Bill 6 scandal has now touched the PUCO Chair's office." (Mem at 4). That argument rings hollow. Whatever concerns OCC may have harbored about Chairman Randazzo's influence over audit proceedings have been mooted by his departure.

Further, there is no authority requiring the Commission to appoint an independent committee to oversee the work of an independent auditor. The only case OCC points to is *In the Matter of the Investigation into the Gas Purchasing Practices and Policies of Columbia Gas of Ohio*, Case No. 83-135-GA-COI. But that case is irrelevant. There, the Commission ordered an audit of Columbia Gas pursuant to R.C. 4905.302 and O.A.C. 4901:1-14-07, neither of which are applicable to the Companies. Beyond that, the creation of the audit advisory committee in that case was purely a matter of the Commission's discretion. OCC cannot show that the Commission's decision not to order such a committee here was unreasonable or unlawful.

D. OCC's request for vacation of rulings in other proceedings is improper under R.C. 4903.10, and it has offered no grounds sufficient to support vacating the November 4 Entry.

In its third assignment of error, OCC claims that the Commission erred by "issuing its ruling and then not vacating and revisiting its rulings on the OCC's motions and related issues." Though it's hardly clear, OCC is apparently asking the Commission to "revisit" its actions taken

(or not taken) in this case, Case No. 20-1502-EL-UNC, and Case No. 17-2474-EL-RDR. Indeed, the only decision OCC specifically complains about is the September 15 Entry in Case No. 20-1502, which OCC characterizes as the Attorney Examiner "respond[ing] to OCC's [September 8] motions – by mostly not granting them." (Mem. at 5). But regardless of whether OCC's assignment of error concerns other proceedings or the November 4 Entry in this case, it must be rejected.

First, to the extent OCC's arguments are directed at decisions in other dockets (e.g., Case No. 20-1502-EL-UNC), they are not properly before the Commission in this case. R.C. 4903.10 permits parties to apply for rehearing "in respect to any matters determined **in the proceeding**." (emphasis added). Plainly, any decisions in *other proceedings* are not proper subjects for rehearing here.[4]

Second, if OCC's position is that the November 4 Entry should be vacated because of the circumstances surrounding former Chairman Randazzo's resignation, that argument fails, too. OCC says the Commission has authority to revisit decisions "under R.C. 4905.26 and Ohio Civil Rule 60(B)," citing *In re: Complaint of the City of Cincinnati v. Cincinnati Gas & Electric Co. et al.* ("*Complaint of Cincinnati*"), 91-377, 1991 WL 11811022 (June 27, 1991). That case has no application here. In *Complaint of Cincinnati*, the Commission determined only that, in some circumstances, it has authority to vacate a final Commission order in a complaint proceeding brought under R.C. 4905.26. But even taking its argument at face value, OCC still has not shown any reason to vacate the November 4 Entry (or any other Commission decision).

[4] *See also In the Matter of the Joint Application of the Ohio Bell Tel. Co. & Ameritech Mobile Servs., Inc. for Approval of the Transfer of Certain Assets*., Case No. 89-365-RC-ATR, 1990 WL 10648916, at *1 (Dec. 13, 1990) ("Because [the] application for rehearing would involve an extra-record review and determination of the remaining material, we must agree . . . that the application for rehearing falls outside of the scope of [R.C. 4903.10].").

In the appeal of the Commission's decision in *Complaint of Cincinnati*, the Ohio Supreme Court set forth the standard governing whether vacation of prior Commission orders is necessary in light of a complaint alleging "improper conduct" on the part of a Commissioner. *Cincinnati v. Pub. Util. Comm.*, 64 Ohio St. 3d 279, 281, 595 N.E.2d 858, 860 (1992). There, the Court began "under the assumption" that the former chairman engaged in the improper conduct—namely, *ex parte* communications with the utilities' CEOs. *Id.* at 281. Even under this assumption, the Court found that "vacation and reconsideration is an inappropriate remedy where . . . the party complaining has not been prejudiced by the improper conduct." *Id.* at 282. Even though the "commission's chairman should have been disqualified from participating in the case" there was no prejudice when the votes of the other commissioners and the record supported the Commission's decision. *Id.* (citing *Ohio Transp. v. Pub. Utilities Comm'n*, 164 Ohio St. 98, 108, 128 N.E.2d 22, 29 (1955)).

Here, OCC concedes Chairman Randazzo did not participate in the November 4 Entry. (Mem. at 6). And OCC neither alleges any "improper conduct" on behalf of the four commissioners who signed that Entry nor points to anything in the record that would not support the Commission's issuance of the Entry. Moreover, the November 4 Entry does not make any final determinations or resolve any disputed issues as to OCC. So even if OCC's request to vacate were procedurally proper, OCC has not provided any reason for vacation under the *Cincinnati* framework.

III. CONCLUSION

For all these reasons, the Commission should reject OCC's rehearing application in its entirety.

Dated: December 14, 2020

Respectfully submitted,

/s/ Ryan A. Doringo

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On behalf of the Companies

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on December 14, 2020. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Ryan A. Doringo
Attorney for the Companies

Summary: Memorandum Contra Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Ryan A Doringo on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company