

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 : Case No. 20-1502-EL-UNC
Cleveland Electric :
Illuminating Company, and :
The Toledo Edison Company.:

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PREHEARING CONFERENCE

before Mr. Gregory Price, Ms. Megan Addison, and
Ms. Jacky St. John, Attorney Examiners, at the Public
Utilities Commission of Ohio, via Webex, called at
10:09 a.m. on Thursday, January 7, 2021.

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1 APPEARANCES:

2 FirstEnergy Service Company
 3 By Mr. Brian Knipe
 4 76 South Main Street
 5 Akron, Ohio 44308

6 Jones Day
 7 By Ms. Michael R. Gladman
 8 325 John H. McConnell Boulevard, Suite 600
 9 Columbus, Ohio 43215

10 Jones Day
 11 By Mr. Ryan A. Doringo
 12 901 Lakeside Avenue East
 13 Cleveland, Ohio 44114

14 On behalf of the Ohio Edison Company, The
 15 Cleveland Electric Illuminating Company,
 16 and The Toledo Edison Company.

17 Bruce J. Weston, Ohio Consumers' Counsel
 18 By Ms. Maureen R. Willis,
 19 Senior Counsel
 20 and Mr. John Finnigan,
 21 Assistant Consumers' Counsel
 22 65 East State Street, Suite 200
 23 Columbus, Ohio 43215

24 On behalf of the Residential Customers of
 25 the Ohio Edison Company, The Cleveland
 Electric Illuminating Company, and The
 Toledo Edison Company.

Interstate Gas Supply, Inc.
 By Ms. Bethany Allen,
 Mr. Joseph Olikier,
 and Mr. Michael Nugent
 6100 Emerald Parkway
 Dublin, Ohio 43016

On behalf of the Interstate Gas Supply,
 Inc.

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APPEARANCES: (Continued)

Kegler, Brown, Hill & Ritter Co., LPA
By Mr. Robert Dove
65 East State Street, Suite 1800
Columbus, Ohio 43215

On behalf of the Natural Resources
Defense Council and Ohio Partners for
Affordable Energy.

The Ohio Environmental Council
By Ms. Miranda R. Leppla
and Mr. Chris Tavenor
1145 Chesapeake Avenue, Suite I
Columbus, Ohio 43212

On behalf of The Ohio Environmental
Council.

Carpenter Lipps & Leland LLP
By Ms. Kimberly W. Bojko
280 North High Street
280 Plaza Suite 1300
Columbus, Ohio 43215

On behalf of the Ohio Manufacturers'
Association Energy Group.

McNees, Wallace & Nurick LLC
By Ms. Rebekah Glover
and Mr. Matthew R. Pritchard
21 East State Street, 17th Floor
Columbus, Ohio 43215

On behalf of the Industrial Energy Users
of Ohio.

Environmental Law & Policy Center
By Mr. Robert Kelter
and Ms. Caroline Cox
21 West Broad Street, Suite 800
Columbus, Ohio 43215

On behalf of the Environmental Law &
Policy Center.

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APPEARANCES: (Continued)

Boehm, Kurtz & Lowry
By Mr. Kurt Boehm,
Mr. Michael Kurtz,
and Ms. Jody Kyler Cohn
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202

On behalf of the Ohio Energy Group.

Bricker & Eckler, LLP
By Mr. Dylan Borchers,
Mr. Devin Parram,
and Ms. Jhay Spottswood
100 South Third Street
Columbus, Ohio 43215-4291

On behalf of the Ohio Hospital
Association.

Dave Yost, Ohio Attorney General
Mr. John Jones, Section Chief
By Mr. Werner L. Margard, III,
Assistant Attorney General
Public Utilities
30 East Broad Street, 16th Floor
Columbus, Ohio 43215

On behalf of the Staff of the PUCO.

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Thursday Morning Session,
January 7, 2021.

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EXAMINER ST. JOHN: Now, let's go on the record.

The Public Utilities Commission of Ohio has called for a prehearing conference at this time and place Case No. 20-1502-EL-UNC being 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.

My name is Jacky St. John, and with me are Gregory Price and Megan Addison. And we are the Attorney Examiners signed to preside over this prehearing conference.

Now let's begin by taking appearances starting with the Companies.

MR. KNIPE: Good morning, your Honors. Appearing on behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, I am Brian Knipe, FirstEnergy Service Company, 76 South Main Street, Akron, Ohio 44308.

Also appearing with me on behalf of the

1 Companies from the law firm of Jones Day, Michael
2 Gladman, 325 John H. McConnell Boulevard, Suite 600,
3 Columbus, Ohio 43215; as well as Ryan Doringo, North
4 Point, 901 Lakeside Avenue, Cleveland, Ohio 44114.

5 EXAMINER ST. JOHN: Thank you.

6 Now the Ohio Manufacturers' Association
7 Energy Group.

8 MS. BOJKO: Thank you, your Honors. On
9 behalf of the Ohio Manufacturers' Association Energy
10 Group, Kimberly W. Bojko, Carpenter Lipps & Leland,
11 280 North High Street, Columbus, Ohio 43215.

12 EXAMINER ST. JOHN: Thank you.

13 Ohio Consumers' Counsel.

14 MS. WILLIS: On behalf of the
15 2 million -- 2 million customers of the FirstEnergy
16 utilities, the Office of the Consumers' Counsel,
17 Maureen R. Willis, Senior Counsel; John Finnigan,
18 Assistant Consumers' Counsel, 65 East State Street,
19 Columbus, Ohio 43215. Thank you.

20 EXAMINER ST. JOHN: Thank you.

21 Natural Resources Defense Council.

22 MR. DOVE: Hello, your Honors. My name
23 is Robert Dove on behalf of Natural Resources Defense
24 Council as well as Ohio Partners for Affordable
25 Energy of the law firm Kegler, Brown, Hill & Ritter,

1 65 East State Street, Suite 1800, Columbus, Ohio
2 43215.

3 EXAMINER ST. JOHN: Thank you.

4 Do we have anyone else for the Ohio
5 Partners for Affordable Energy? All right. Perfect.
6 Ohio Environmental Council.

7 MS. LEPPLA: Good morning, your Honors.
8 My name is Miranda Leppla for the Ohio Environmental
9 Council, and Chris Tavenor is also on the line as
10 well. We are located at 1145 Chesapeake Avenue,
11 Suite I, Columbus, Ohio 43206.

12 EXAMINER ST. JOHN: Thank you.

13 Environmental Law & Policy Center.

14 MR. KELTER: Robert Kelter and Caroline
15 Cox on behalf of the Environmental Law & Policy
16 Center, 21 West Broad Street, Suite 800, Columbus,
17 Ohio 43215.

18 EXAMINER ST. JOHN: Thank you.

19 The Ohio Hospital Association.

20 MR. BORCHERS: Good morning. On behalf
21 of the Ohio Hospital Association, Dylan Borchers,
22 Devin Parram, and Jhay Spottswood with the law firm
23 of Bricker & Eckler, 100 South Third Street,
24 Columbus, Ohio 43215.

25 EXAMINER ST. JOHN: Thank you.

1 Interstate Gas Supply, Incorporated.

2 MR. ALEXANDER: Good morning, your Honor.
3 On behalf of Interstate Gas Supply, Inc., Bethany
4 Allen, Joe Oliker, and Michael Nugent, 6100 Emerald
5 Parkway, Dublin, Ohio 43016.

6 EXAMINER ST. JOHN: Thank you.

7 Industrial Energy Users - Ohio.

8 MS. GLOVER: Thank you, your Honor. On
9 behalf of the Industrial Energy Users of Ohio,
10 Rebekah Glover and Matthew Pritchard of the law firm
11 McNeese, Wallace & Nurick, 21 East State Street, 17th
12 Floor, Columbus Ohio 43215.

13 EXAMINER ST. JOHN: Thank you.

14 Lucas County. Do we have anyone here for
15 Lucas County?

16 All right. Moving on to the City of
17 Toledo. Anyone for Northwest Aggregation Coalition?

18 All right. Moving on to Ohio Energy
19 Group.

20 MR. BOEHM: Good morning, your Honors.
21 Appearing on behalf of the Ohio Energy Group, Kurt
22 Boehm, Mike Kurtz, and Jody Kyler Cohn with the law
23 firm of Boehm, Kurtz & Lowry, 36 East Seventh Street,
24 Cincinnati, Ohio, Suite 1510.

25 EXAMINER ST. JOHN: Thank you.

1 And the Attorney General.

2 MR. MARGARD: Thank you, your Honor. On
3 behalf of the Staff of the Commission, Dave Yost,
4 Ohio Attorney General, John Jones, Section Chief,
5 Public Utilities Section, by Assistant Attorney
6 General Werner L. Margard, 30 East Broad Street, 16th
7 Floor, Columbus, Ohio.

8 EXAMINER ST. JOHN: Thank you.

9 EXAMINER PRICE: Okay. Thank you.

10 At this time we will move on to discuss
11 the motion to compel -- or, I'm sorry, off to the
12 wrong foot already. We are here to discuss the
13 motion for a protective order filed by the Companies.
14 Just to make sure that the transcript, as this is
15 being transcribed, is clear as possible, I would like
16 everybody to adhere to the following naming
17 conventions: If you are referring to Ohio Edison,
18 CEI, or Toledo Edison, I would like you to refer to
19 them as the Companies; if you are referring to
20 FirstEnergy Corp., please refer to it as FirstEnergy
21 Corp.; if you are referring to FirstEnergy Solutions,
22 please call it FES or FirstEnergy Solutions; if you
23 are referring to the FirstEnergy Service Company,
24 please call it FirstEnergy Service Company; post
25 bankruptcy, if you are referring to FES after

1 bankruptcy, please refer to it as Energy Harbor.

2 Although we typically use FirstEnergy as
3 a synonym for the Companies, for purposes of today, I
4 would like to avoid using the term FirstEnergy
5 without any other qualifier so that the transcript is
6 perfectly clear as to who we all are referring to.
7 Thank you.

8 We have carefully reviewed all of the
9 pleadings that were filed regarding the motion for
10 protective order including the memoranda contra and
11 the replies, so I just think as a preliminary matter
12 would like to address one point and deny, in part,
13 the motion for protective order. The deposition of
14 Mr. Fanelli will be held at a mutually agreeable date
15 between OCC and the Companies. I -- we agree with
16 FirstEnergy as a general principle it is pretty early
17 in this proceeding for a deposition, but the
18 Companies were required to file a response from the
19 Commission entry initiating this from -- the AE entry
20 initiating this proceeding. The Companies did
21 include an affidavit.

22 Therefore, we think it's only fair the
23 statements in the affidavit be subject to
24 cross-examination -- cross-examination under oath
25 prior to the parties filing their comments regarding

1 the response.

2 Having said that, we can adjourn now, or
3 if people would like to discuss the scope of the
4 deposition, have any issues regarding the scope of
5 the deposition, we are available to talk about that
6 now.

7 So why don't we start with FirstEnergy.

8 MR. GLADMAN: Good morning, your Honor.
9 It's Mike Gladman from Jones Day on behalf of the
10 Companies. We appreciate your statement. That does
11 cut to the chase on some of these issues but I think
12 it probably makes sense to at least address at a high
13 level the scope of that deposition.

14 What I heard you just say in my notes was
15 that he is going to be -- Mr. Fanelli will be deposed
16 regarding his statements in the affidavit. If that
17 is the limitation and the scope of the deposition,
18 then from our perspective, yes, we could adjourn at
19 this point in time.

20 However, I think we need to note that the
21 deposition that OCC is seeking here goes well beyond
22 the scope of that statement and the show cause entry
23 from September. And the deposition notice itself on
24 its face makes clear that OCC does not intend to be
25 tethered by the statements in the affidavit qualifier

1 you just indicated or indeed the show cause entry.

2 For example, the deposition notice says
3 that OCC seeks to conduct a deposition upon oral
4 examination of this FirstEnergy Service Company
5 employee related to, among other things, this sworn
6 affidavit. Now, what are those other things that OCC
7 seeks the deposition on? Well, the notice itself
8 tells us by providing that OCC wants to depose
9 Mr. Fanelli about "matters including the use of funds
10 collected from FirstEnergy utility customers for
11 political and charitable spending in support of
12 tainted House Bill 6."

13 It goes on to say the deposition will
14 cover "his knowledge and expertise with respect to
15 the subject matter of this proceeding." And perhaps
16 most troubling it states that "The deposition will be
17 taken of the aforementioned deponent on relevant
18 topics related to this proceeding, including but not
19 limited to the deponent's filed affidavit, discovery
20 requests by OCC and other parties, and responses to
21 such discovery provided by FirstEnergy Utilities."

22 As I indicated at the outset, we have no
23 problem in light of your Honor's initial ruling about
24 Mr. Fanelli being deposed about his affidavit and the
25 statements therein. The concern comes particularly

1 acute with respect to the discovery request. As your
2 Honor is aware, we have a separate set of disputes
3 ongoing with respect to that written discovery.

4 There is -- you referenced at the outset there is a
5 motion to compel and a lengthy meeting process that
6 we've been going down that road. And I wouldn't
7 otherwise get into that, but because the deposition
8 notice tries to link those discovery requests to the
9 topics of the deposition, I would just point out that
10 there are many, many things in that written discovery
11 that goes well beyond the scope of the show cause
12 entry or the statements in the affidavit that you
13 just referenced.

14 For instance, there are topics about the
15 criminal complaint and government investigations that
16 are ongoing that do not remotely involve the
17 FirstEnergy utilities and this is just by way of
18 example. I could go for quite a while with those
19 topics, but interrogatories 8 through 10 from the
20 initial set of discovery requests from OCC cover
21 those, so do requests for admissions 1 through 3, and
22 document requests 8 through 13. That's just one
23 example of many.

24 There are also discovery requests
25 relating to DMR issues and also corporate separation

1 issues which, of course, now the Commission has come
2 up with a -- we view it as sort of a tripod approach
3 to examining these issues. We have the show cause
4 entry here which is fairly limited, and we have
5 separate proceedings for DMR and corporate
6 separation. We think those are also outside the box.

7 And I guess I would -- I would conclude
8 these brief remarks by saying that OCC doubles down
9 on its rejection of the claiming of the show cause
10 entry and their opposition for a motion of protective
11 order when they indicated that the -- whether House
12 Bill 6 costs were included in customer rates is
13 beside the point. That's the only point as I
14 understand the show cause entry and your statement
15 this morning. That's page 7 of the opposition that
16 OCC filed.

17 So we don't believe that OCC has an
18 intention of respecting the scope of the show cause
19 entry unless we make it very clear by your statements
20 and/or entry about how far this should go.

21 And in that regard, I will pause at that
22 moment and thank you for the time.

23 EXAMINER PRICE: Before we turn to OCC
24 and allow them to respond, I just had one
25 clarification. Do you object to questions in the

1 deposition regarding discovery responses actually
2 signed by Mr. Fanelli?

3 MR. GLADMAN: I don't think so, your
4 Honor, because my understanding of the approach,
5 again, that was predecessor counsel, but I believe
6 the responses that we gave were limited to what we
7 believe was the appropriate scope of the show cause
8 entry, so I think those -- those would be fair game
9 because those would be linked directly to the
10 affidavit.

11 EXAMINER PRICE: Thank you.

12 Ms. Willis.

13 MS. WILLIS: Thank you, your Honor. I
14 guess really quickly with respect to the last
15 question that your Honor had, I am not aware, and I
16 will certainly double-check, but I am not aware that
17 the discovery responses were signed by Mr. Fanelli.
18 That I may need correction on that.

19 I would -- I would believe, your Honors,
20 that in addition to -- interrelated to this question
21 about the motion for protection is a fundamental
22 issue about what is the appropriate scope of this
23 proceeding. I think that's what OCC discovery
24 requests go to.

25 Obviously we have a disagreement as to

1 what the scope -- the appropriate scope of this
2 proceeding is. We look to the Commission's order on
3 setting up this proceeding where the Commission
4 stated in paragraph 5 that it was a review of the
5 spending of FirstEnergy utilities, FirstEnergy
6 Companies on political and charitable contributions.
7 We believe that the spending includes whether or
8 not -- the issue of whether or not customer funds
9 were used for the alleged HB6 activities.

10 So that is very different than the scope
11 of the proceeding that the Company -- Companies have
12 set forth and believe. Their belief is that this
13 proceeding is only about what's charged in rates. So
14 there --

15 EXAMINER PRICE: Ms. Willis, can you
16 explain the difference to me between what's charged
17 in rates and customer funds? Customers have a right
18 to these funds after they've been paid in rates?

19 MS. WILLIS: No, your Honor, I am not
20 saying that they do. Our point is, your Honor, that
21 the Commission has authority to look at how the funds
22 are being used. For instance, the Commission can
23 look at whether or not the funds were used to benefit
24 the affiliates in violation of 4928.17. The
25 Commission can also look at the use of funds

1 collected from customers to determine whether they
2 were collected in violation of Commission rule,
3 Commission order; for instance, the Commission can
4 look at and we urge the Commission to look at whether
5 or not funds were -- that were collected from
6 customers were used in violation of the Distribution
7 Modernization Rider requirements and the statements
8 contained in the Commission's order where they were
9 not to use the funds in support of or in favor of
10 affiliates.

11 So I think there are ways to look at
12 statutory -- there is statutory jurisdiction for the
13 Commission to look at the use of funds and that is
14 different from whether or not rates are charged to
15 customers. So that is the point, that we believe
16 that you have to look at the use of those funds and
17 whether or not it is appropriate and just and
18 reasonable to allow customers' funds to be used to
19 support alleged illegal activities.

20 I would note, your Honor, that we are
21 prepared at this prehearing -- although it was not
22 part of the scope of the prehearing entry, we are
23 prepared to discuss and respond to OCC's motion to
24 compel. We would, in fact, believe it would be
25 appropriate for a ruling on that motion to compel.

1 That would be helpful in setting the scope of this
2 hearing -- setting the scope of the deposition and
3 perhaps would enable parties to have a clear picture
4 of what can and cannot be inquired into during the
5 deposition. Mr. Finnigan is prepared to respond to
6 questions on our motions to compel.

7 EXAMINER PRICE: We will not be ruling on
8 the motion to compel. That was -- that would be
9 fundamentally unfair to all the other parties. We
10 did not indicate that would be part of today's
11 prehearing conference. And to be honest, I am still
12 hopeful that the parties can work out amicable
13 resolution without Commission intervention which
14 would be the best resolution rather than having the
15 Bench do it. So hope --

16 MS. WILLIS: Your Honor --

17 EXAMINER PRICE: We will not allow this
18 to go on in perpetuity, but we still would like the
19 parties to see if they can work something out.

20 MS. WILLIS: Your Honor -- your Honor, if
21 I may briefly respond.

22 EXAMINER PRICE: Please.

23 MS. WILLIS: We have been engaged in
24 efforts over the last three weeks to try to bridge
25 the gap and to try to work this out. We've been

1 unable to do that, and I think the Companies' counsel
2 can -- will be able to explain that. We've had
3 three, four, five different conversations, lengthy
4 conversations, a half an hour, 20 minutes to a half
5 an hour. We've had written proposals going back and
6 forth. We've been unable to agree because I think
7 fundamentally, and it was recognized by FirstEnergy's
8 first counsel before he was replaced by Mr. Gladman,
9 that there is a fundamental disagreement as to the
10 scope of the authority -- of this proceeding and
11 there's a fundamental disagreement with respect to
12 what the Commission's jurisdiction is and there is a
13 fundamental disagreement as to the jurisdiction of
14 OCC.

15 I think it's very difficult to get beyond
16 that, and we have worked diligently to try to get
17 beyond that, but we have not been able to get beyond
18 that in the last three weeks counting.

19 EXAMINER PRICE: Mr. Gladman, care to
20 respond to that?

21 MR. GLADMAN: Certainly, your Honor. It
22 is accurate that we had three actual meet and confer
23 sessions with counsel for OCC and I working hard on
24 it. I thought we were actually making significant
25 progress with respect to those. Ms. Willis is

1 correct we also did exchange numerous proposals, and
2 the problem was we got an unexpected complete
3 reversal of course yesterday morning where the
4 fundamental tenets of the negotiations which had been
5 in effect since the very first meet and confer were
6 suddenly deemed unacceptable in any way, shape, or
7 form.

8 So I'm having a bit of a problem
9 suggesting that we've actually had good faith meet
10 and confer negotiations when they were, it turned
11 out, not based on the actual discussions that we were
12 having. It was, to be frank, a significant waste of
13 time and resources to engage in those negotiations
14 only to have OCC at the last minute say you know
15 what? Everything that we were discussing, some of
16 the things that they had proposed were no longer on
17 the table.

18 EXAMINER PRICE: Ms. Willis, final word
19 on this topic?

20 MS. WILLIS: Your Honor, as your Honor
21 might know, negotiations come and go, and we -- we do
22 appreciate the efforts that FirstEnergy utilities
23 made to resolve the motion to compel. I believe we
24 were earnestly negotiating over the last several
25 weeks and exploring different options.

1 Unfortunately we have not been able to
2 reach agreement which became apparent most recently,
3 I believe, we -- last week we conveyed to the company
4 that it did not look like the negot -- that the offer
5 that was put on the table would be acceptable, and
6 the options that were being discussed for compromise
7 were ultimately determined to be fundamentally
8 unacceptable to the Consumers' Counsel, so we took a
9 step back, and now we've reached a point of no
10 resolution.

11 EXAMINER PRICE: Take a step back, moving
12 the goalposts I think are synonyms, but we will
13 assume that negotiations have been conducted in good
14 faith and have failed, and we will take the motion
15 under advisement, but we will not be addressing it
16 today. It would not be fair to FirstEnergy or any of
17 the other parties to add a topic to this -- people
18 would not have a chance to prepare for, and frankly I
19 can assure you, I don't know about my colleagues, but
20 I am not prepared to talk about this so the --

21 MS. WILLIS: Thank you, your Honor.

22 EXAMINER PRICE: Are you finished
23 regarding the -- your discussion regarding the
24 deposition? We kind of veered off topic there for a
25 second.

1 MS. WILLIS: Your Honor, let me -- let me
2 quickly -- I guess I can quickly, if you allow me,
3 quickly to speak to the scope of the deposition. As
4 your Honor ruled, we -- it is very -- it is proper
5 and appropriate for us to have -- to be able to
6 conduct a deposition with regard to the affidavit and
7 the statements made in the affidavit.

8 And I would just want -- note one -- one
9 particular issue that we are concerned with is where
10 FE -- where the utilities, the Companies, I'm sorry,
11 the Companies are claiming that they have not
12 included directly or indirectly any HB6 costs in any
13 rates or charges, and that conclusion is based on
14 their assertion the current base rates were set in
15 2009 based on the test -- based on the test year
16 associated with the -- with the base case proceeding
17 in 07-551.

18 This is a fundamental misinterpretation
19 of the fundamental principles of ratemaking. The use
20 of the 2007 test year expense is just a set, a
21 reasonable level of revenue that's needed when the
22 rates are collected from customers. It's a snapshot
23 in time, and the base rates that -- that were paid by
24 customers now obviously are not paying for the actual
25 2007 test year expenses and a return on and return of

1 the investment.

2 So those expenses in 2007 have been
3 collected and paid for by customers. And the fact
4 that there were no -- the fact that the rates are
5 based on a 2007 test year is not dispositive of
6 whether customers are currently paying base rates
7 that include HB6 costs.

8 EXAMINER PRICE: You would concede in
9 2007 all political and charitable contributions were
10 excluded from test year expenses.

11 MS. WILLIS: Your Honor --

12 EXAMINER PRICE: I'm sorry. You're
13 muted.

14 MS. WILLIS: Your Honor, I'm sorry. Not
15 having that rate case information in front of me, I
16 can't -- can't directly respond to that, your Honor.
17 Yeah, that was the 07-551, but I can certainly look
18 into that and look into that rate case information
19 and ascertain whether or not that is correct.

20 EXAMINER PRICE: As a matter of law,
21 aren't political and charitable contributions always
22 excluded from test year expenses?

23 MS. WILLIS: That's my understanding
24 that's the policy of the Commission to do so. The
25 question though is whether or not those expenses were

1 included in the schedules and the charges, and I am
2 not able to, as we sit here today, say that all
3 political and charitable contributions were excluded
4 from rates.

5 EXAMINER PRICE: Okay. Ms. Willis,
6 regarding the deposition, you -- you would agree that
7 although generally the scope of this proceeding is
8 review the political and charitable spending, the
9 actual response that FirstEnergy was required to file
10 is limited to whether or not this -- the charitable
11 contributions were included in rates charged by
12 customers, right? So all -- the broader question
13 might be an appropriate topic for the entire
14 proceeding, my question is isn't it an appropriate
15 topic just for this deposition?

16 I'm sorry. You're muted.

17 MS. WILLIS: I apologize.

18 EXAMINER PRICE: That's okay.

19 MS. WILLIS: Your Honor, it would appear
20 that -- that the scope -- the scope of the comments
21 that was set forth by the Commission was a -- a more
22 confined scope than the review of the spending, but
23 we believe that, as can be seen in the numerous
24 pleadings that we've filed and in the interlocutory
25 appeals taken and the applications for rehearing,

1 that that was -- that was not an appropriate -- you
2 know, is not appropriate to limit the scope of this
3 proceeding and to only allow fact finding with
4 respect to whether or not charges were included in
5 rates.

6 We believe that customers, the 2 million
7 customers of FirstEnergy deserve answers, deserve
8 transparency, and ought to be able -- ought to be
9 able to -- we ought to be able to look into whether
10 or not they were unwittingly funding over \$60 million
11 worth of -- of alleged illegal payments, to be sure
12 that that \$60 million was allegedly paid came from
13 somewhere.

14 And as the utility and the utility
15 franchise holders serving Ohioans, FirstEnergy
16 companies and FirstEnergy Corp. should be cooperating
17 here in -- in the investigation, as the Commission
18 has termed it an investigation, one of three, that
19 where potentially millions of customers have been
20 harmed. In -- the Companies' position in this case
21 really seems at odd -- at odds with its recently
22 hired chief legal officer's announced commitment to
23 foster trust and transparency.

24 EXAMINER PRICE: Ms. Willis, let's keep
25 our arguments narrowly tailored to today's proceeding

1 and today's prehearing conference and this particular
2 case. You know, if you view the Commission's
3 jurisdiction as a pie, this is one slice of the pie.
4 We have two more slices of the pie in terms of the
5 DMR review which OCC asked for and the Commission has
6 granted to reopen that and also the corporate
7 separation proceeding where the Commission will
8 review whether a competitive advantage or undue
9 preference was given to any affiliates of the
10 companies. So let's try to keep this to our topics
11 on hand and not go into some broader arguments on
12 company philosophy at this point.

13 MS. WILLIS: Yes, your Honor.

14 EXAMINER PRICE: There will be time later
15 for that but it's not now.

16 Ms. Bojko, you had filed a memo contra to
17 the motion for protective order. Would you care to
18 speak to this?

19 MS. BOJKO: I would, your Honor. Thank
20 you so much. In mentioning your entries that
21 establish this proceeding and you quoted what the
22 show cause order was for and I think you left out a
23 couple words, respectfully. I believe that the order
24 said that the cost of any political or charitable
25 spending in support of HB6 or referendum efforts were

1 not included directly or indirectly in any rates or
2 charges paid by ratepayers in the state.

3 So the directly or indirectly piece I
4 think is important. If you look at First -- excuse
5 me, the Companies' responses, the Company responses
6 say that they only have to determine whether costs
7 were included in the Companies' rates and charges.
8 And so the entries, it was all three, the entries,
9 the September 15, the October 20, and the
10 December 10, said that the proceeding was open to
11 review the spending but then also the direct and
12 indirect piece of the costs.

13 And in the reply in support of the motion
14 for protective order, the Companies explicitly
15 challenged the Commission's jurisdiction with regard
16 to the spending aspect. And the Companies cite to
17 1920 and 1930 cases that states that the Commission
18 has no jurisdiction over spending and that they can
19 only look at rates and not the management practices
20 of the Companies.

21 That's just inconsistent with Commission
22 precedent and current Ohio law. For example, the
23 Commission has prudency reviews, they have management
24 performance audits, and they have affiliate abuse
25 cases which you've pointed out is a separate

1 proceeding.

2 But I would also argue that under HB6,
3 which you can argue whether it was the Companies or
4 their parent company that advocated for the HB6
5 passage, the FirstEnergy Companies did, in fact,
6 benefit from HB6 through a decoupling mechanism.

7 EXAMINER PRICE: Ms. Bojko. Ms. Bojko,
8 one second. You are confusing me because you are
9 saying FirstEnergy Companies, and we are trying to
10 stick to what -- if you are just referring to the
11 three utilities, we are just trying to stick to the
12 Companies.

13 MS. BOJKO: My apologies, your Honor. I
14 drafted some talking points prior to the nomenclature
15 that you set forth this morning.

16 Okay. So let's start with you can argue
17 whether it was FirstEnergy Corp., FirstEnergy
18 Solutions, or the Companies that had or advocated for
19 HB6 and wanted to implement HB6. But what we do know
20 is the Companies did, in fact, benefit from HB6 and
21 that one benefit that we know of is through the
22 decoupling mechanism.

23 Now, the decoupling mechanism allows the
24 Companies to collect 2018 revenues. So those would
25 have arguably covered 2018 expenses, clearly beyond

1 the 2007 test year expenses that have been discussed
2 this morning, and those expenses would have included
3 any expenses associated with House Bill 6.

4 So by the nature of the decoupling
5 mechanism, we have already gone beyond the rate case
6 of 2007 to look at what customers are charged for and
7 what revenues the Companies are now using on various
8 expenditures by the Companies. So I think that that
9 has not been discussed and that is an additional
10 consideration.

11 Similar to the Consumers' Counsel, we
12 believe that the Commission does, in fact, have
13 jurisdiction as jurisdiction under 4905.05, 4905.06,
14 and 4905.22 which mandates that customers are only
15 charged just and reasonable rates. And in addition
16 to that, although you just mentioned it's not part of
17 this proceeding, obviously I think before all of our
18 pleadings were filed, that case was not open, but
19 4928.17 prohibits the Companies from extending any
20 undue preference or advantage to any affiliate and
21 using the Companies' resources and funds to do that.

22 And we believe that those also fall under
23 the spending category and the review of direct or
24 indirect costs that were a part of the entry in the
25 beginning, so we believe that all of these statutes

1 authorize the Commission to examine whether the rates
2 or charges collected by the Companies from customers
3 are just and reasonable and whether they were used
4 for any unlawful or unjust purpose and that the
5 Commission does have jurisdiction. And the Supreme
6 Court has affirmed that once a situation develops
7 that is harmful to the public interest, the Companies
8 cannot shield their internal affairs from the
9 Commission's review. And that is 158 Ohio State 441.

10 So we do think the Commission has
11 jurisdiction. We think that in discovery matters
12 such as a deposition that whether something is
13 relevant or not at hearing and is admissible at
14 hearing is not part of the discussion. It's whether
15 the information sought appears reasonably calculated
16 to lead to the discovery of admissible evidence, and
17 a deposition is no different than written discovery.
18 It should be exploratory in nature and whether
19 information is reasonably calculated to lead to the
20 admissible evidence through comments or whatever
21 procedure posture you want to do.

22 This is a reasonable deposition. OMAEG
23 intends to participate in the deposition. And we do
24 believe that the Commission should signal to the
25 Companies what scope the proceeding is and the scope

1 of the deposition because although we are here to
2 talk about the most recent protective order, if you
3 read the Companies' motion for protective order, it
4 goes beyond just the deposition and tends to thwart
5 all discovery and limit the scope of the proceeding.

6 And if you look at the reply to OMAEG's
7 motion to intervene, the memo contra as well as the
8 discovery responses from -- or to OMAEG, there too we
9 have this underlining scope issue and
10 misunderstanding or misinterpretation in our view of
11 your entries regarding the scope and purpose of the
12 proceeding. Thank you.

13 EXAMINER PRICE: Mr. Dove, I believe OPAE
14 had filed a memoranda contra also; is that correct?

15 MR. DOVE: Yes, your Honor, and NRC both
16 filed memoranda contra.

17 EXAMINER PRICE: Would you care to speak
18 to this?

19 MR. DOVE: Briefly, your Honor. Thank
20 you for the opportunity. I would just echo
21 Ms. Bojko's comments regarding the need for the scope
22 to be defined in this proceeding because I -- the
23 show cause order did note that the -- the Companies
24 needed to demonstrate whether or not these costs were
25 collected directly or indirectly. And as of right

1 now, the Company appears to be limiting the scope to
2 costs that were directly collected through rates
3 which, as you noted, isn't -- per the law shouldn't
4 be happening.

5 And then in Mr. Fanelli's affidavit on
6 paragraph 6, he brings in riders and says that none
7 of the costs in relation to Amended House Bill 6
8 would have been recorded in accounts collected via
9 riders but that does not mean that money collected
10 via riders may not have been used for that. It just
11 may not have been directly collected, and we also
12 have a pending discovery dispute with the Company.

13 However, in fairness to the Companies, we
14 are still in negotiations with the Companies, but
15 when I left those off with their prior counsel, the
16 disagreement was similar to what it sounds like OCC
17 is having as to the fundamental scope, that if --
18 that the Company's position is they only need to
19 discuss whether or not charges related to House Bill
20 6 were directly collected. And as you re -- or noted
21 earlier, I think this scope is broader as to the
22 overall charitable spending, and I think it would be
23 helpful to have some direction as to what scope
24 should apply both in the deposition and for discovery
25 purposes.

1 Thank you, your Honor.

2 EXAMINER PRICE: Thank you.

3 Does any other party care to speak to
4 this before we go back to Mr. Gladman?

5 Mr. Gladman, you can have the final word.

6 MR. GLADMAN: Thank you, your Honor.
7 I'll be very brief about this. What I am hearing a
8 lot of is -- is arguments and issues that go well
9 beyond the scope of today's noticed hearing which was
10 to decide the motion for protective order and what
11 the deposition would be and what the scope would be.

12 I believe that your Honor has already
13 ruled on that, indicated where we are going there.
14 So I think questions about the jurisdiction of the
15 Commission are premature. While we stand by the
16 arguments in our motion, we don't think there's any
17 need to consider that jurisdiction at this point in
18 time in light of our understanding of the show cause
19 entry and the fact that the deposition is going to be
20 limited to Mr. Fanelli's affidavit.

21 A lot of what I am hearing from both
22 Ms. Bojko and Mr. Dove are arguments about, you know,
23 paragraph 6 of Mr. Fanelli's deposition. That sure
24 sounds like -- affidavit. That sure sounds like a
25 deposition question that you have deemed will be

1 proper when he gets to sit down in the chair, so I
2 think a lot of these questions will be resolved when
3 that deposition occurs.

4 EXAMINER PRICE: Thank you.

5 At this time I think we'll take a brief
6 break so that my colleagues and I can confer. Do not
7 log off of Webex. Feel free to disable your cameras
8 and mute your microphones.

9 Let's return at 11:05. We will put a
10 hard return on there, and then we will go from there.

11 Thank you all.

12 (Recess taken.)

13 EXAMINER PRICE: You know, it's an
14 interesting point that I am not really sure we are
15 giving you a ruling as we are giving guidance, but to
16 the extent that it's a ruling, we will assume it's a
17 ruling.

18 Just a couple quick questions about the
19 scope. The scope of the proceeding is what's set
20 forth in the entry, nothing more and nothing less.
21 It does not mean that this is what it always will be.
22 I think the Commission has been very clear in
23 indicating that it was going to approach this issue
24 in a thoughtful and deliberate manner and that the
25 Commission would go with where the facts take them,

1 but it will have to be based upon actual facts.

2 I think there are a lot of interesting
3 jurisdictional questions being raised that we don't
4 need to get to today for purposes of the deposition.
5 But I would note that the Supreme Court -- you know,
6 there are many areas where the Commission has not
7 overlapping but where it's not clear something is a
8 Common Pleas Court jurisdiction or the Commission's
9 jurisdiction, torts and contracts. And, of course,
10 the court has issued a test, you know, in the
11 Allstate case, and it's whether the Commission's
12 administrative expertise is necessary and whether
13 these are actions typically done by a utility. And I
14 believe -- I am certain the Commission will be guided
15 by these sort of established statutory tests in
16 examining the parameters of the jurisdiction as it
17 applies to this.

18 I just want to make a quick word about
19 directly and indirectly. I'm not ruling anything out
20 about directly or indirectly. I do want to explain
21 what we were thinking at the time when we wrote
22 directly and indirectly. We were trying to make sure
23 that contributions that may have been made by
24 FirstEnergy Service Company and then subsequently
25 charged back to the utilities were not excluded

1 somehow because they were not directly made by the
2 utilities.

3 We were not contemplating the idea that
4 FirstEnergy invested some money and then got interest
5 on that money and then used that money to make
6 charitable contributions from -- from wherever. I am
7 not ruling this out; I am not ruling it in. I will
8 just have to see where it takes us, but I do want to
9 explain what our original intent was by the phrase
10 directly and indirectly.

11 The other issue I wanted to address is
12 the corporate separation proceeding. We are
13 hiring -- as you all know, we are hiring another
14 auditor, and so I believe any questions regarding
15 undue preference, paying for things on behalf of the
16 utility, by the utility on behalf of the affiliate,
17 if that happened at all, or any other undue
18 preference from an affiliate are best left to that
19 corporate separation proceeding. It's going to be a
20 very large proceeding and very -- many of the parties
21 in this case are already in that case and there's a
22 lot of questions that are going to be addressed in
23 that proceeding.

24 The DMR is slightly different. We have,
25 of course, indicated that we are going to review the

1 DMR to ensure that they were used for purposes
2 related to grid modernization, but I don't think it's
3 unfair for there to be questions regarding whether
4 the DMR was a source of funds or any political
5 distributions made by the utilities or made by
6 FirstEnergy Service Corp. and then charged back to
7 the utilities as they do any other expense, whether
8 it's personnel or property or whatever.

9 So just generally then, and we'll open
10 the floor for clarifications, but generally, as we've
11 already covered, statements in the affidavit and
12 discovery responses signed by Mr. Fanelli are
13 certainly fair game in the deposition or questions in
14 the deposition.

15 Questions related to demonstration that
16 costs, political and charitable contributions were
17 not included in rates and charges paid by ratepayers
18 are fair game.

19 Questions regarding political and
20 charitable spending by the companies, and I am
21 stressing the Companies here, in support of House
22 Bill 6 and the referendum effort you can ask, and he
23 should -- Mr. Fanelli should answer to the best of
24 his knowledge. And I would simply just caution
25 Mr. Gladman, as I've previously ruled in other cases,

1 his knowledge is his knowledge. He doesn't have
2 separate compartments for what he knows as -- I know
3 he is -- I believe he is a shared service employee.
4 He doesn't get to compartmentalize his knowledge for
5 what he knows from the utilities versus what he might
6 know from New Jersey Power & Light, for example. His
7 knowledge is his knowledge, and he should answer
8 questions to the best of his ability regarding that
9 topic.

10 And, finally, just as a broader political
11 and charitable spending prior to House Bill 6
12 referendum efforts, I don't have a hard date, but
13 prior to those contributions are out of bounds. This
14 is related to political and charitable spending in
15 support of House Bill 6. If he can't tie it directly
16 to House Bill 6, it's out of bounds.

17 With that, are there any clarifications
18 or the like? Ms. Willis.

19 MS. WILLIS: No, your Honor.

20 EXAMINER PRICE: Okay. Good.

21 MS. WILLIS: Thank you for your ruling.

22 MR. GLADMAN: Your Honor, I do have a
23 question.

24 EXAMINER PRICE: Yes.

25 MR. GLADMAN: I heard kind of five parts

1 to your statement about the deposition. The first
2 one was statements in the affidavit. Second one was
3 discovery signed by Mr. Fanelli. The third one I
4 didn't quite get, if you have got them arranged that
5 way. Could I hear them again? I did hear the part
6 about the fourth and fifth one. I will stop there.

7 EXAMINER PRICE: No. It was probably
8 illiterate because I just have notes, not a full
9 sentence I am reading so. Questions regarding
10 whether there's a demonstration that the costs of
11 charitable and political donations were not included
12 in rates and charges paid by the ratepayers. It's
13 really a restatement of what's in the first entry in
14 this proceeding.

15 MR. GLADMAN: Got it. Thank you. May I
16 ask if you intend to issue a written ruling on this
17 or if we're just going to go with the oral ruling
18 today?

19 EXAMINER PRICE: This is it. This is all
20 you get.

21 MR. GLADMAN: Thank you.

22 EXAMINER PRICE: Okay. Last chance for
23 questions, clarifications.

24 Seeing none, where do we go from here in
25 this proceeding? We are, as I indicated earlier,

1 deferring ruling on the motions to intervene.
2 Actually I didn't state that earlier. We are
3 deferring ruling on motions to intervene. We will
4 get to that probably in a written order in due
5 course.

6 We are deferring ruling on the motions to
7 compel. We will take a look at what's been filed and
8 determine whether we believe another prehearing
9 conference is necessary or whether we think we can
10 just rule on the paper. A lot will depend on just
11 how tedious it will be for us to make this ruling,
12 whether it might be just more efficient for everybody
13 if we convene another prehearing conference.

14 We owe OCC rulings on two interlocutory
15 appeals and those will be made by subsequent entry.
16 That should come out fairly soon. And we indicated
17 earlier that we would set new dates for the comments
18 and replies, but we will not do that until we have
19 issued our ruling on the motions to compel. We don't
20 want the clock to run out on Intervenors while we are
21 dealing with the motion to compel.

22 MR. GLADMAN: Your Honor, can I -- one
23 final thing that maybe makes your job and life a
24 little bit easier. On the motions to intervene, I
25 know that prior to my involvement the Companies had

1 opposed I don't know if it was all, most if not all
2 of them. I have been authorized by the Company to
3 withdraw the objections and the oppositions to those
4 intervention motions in light of the things that have
5 happened since that time, so we would not oppose
6 those interventions.

7 EXAMINER PRICE: That is very helpful.
8 That will -- that will certainly expedite our ruling.
9 And at that point I would say everybody can assume
10 the motions will be granted. We will still put it in
11 writing at our next opportunity.

12 Okay. Anything else?

13 Yes.

14 MS. BOJKO: Your Honor.

15 EXAMINER PRICE: Ms. Bojko. I was so
16 close.

17 MS. BOJKO: I'm sorry? Oh, so close.

18 EXAMINER PRICE: I was so close.

19 MS. BOJKO: I guess I would just, this is
20 normally the case, since we are all here and it's on
21 the record assume one of you -- one of your Honors
22 will be available during the deposition if there's a
23 scope type of question, issue; or maybe the better
24 thing would be that all questions are answered, and
25 we deal with the admissibility and the scope issues

1 later. I don't know if you have a preference for
2 that. I think the latter is easier and more
3 expedient but.

4 EXAMINER PRICE: The answer is neither.
5 I mean, we are, of course, always available in the
6 depositions; and, no, I can't give a blanket answer
7 to everything. What if somebody has a privileged
8 claim?

9 MS. BOJKO: Privileged is different.

10 EXAMINER PRICE: It's all in the eyes of
11 the beholder. It's all in the eyes of the beholder.
12 We will be available, although I will tell everybody
13 in my experience I hate doing it because I don't know
14 the 10 questions that were asked before the one that
15 was in dispute, and so context is always a problem.
16 So we are -- we will be available, but we will be
17 reluctant to get involved. Everybody knows the
18 ground rules for depositions, and everybody knows how
19 they should proceed.

20 MS. BOJKO: Thank you.

21 EXAMINER PRICE: If there is an
22 intractable dispute, please feel free to give us a
23 call.

24 I know -- I don't know when -- we don't
25 know when the deposition is, but I am in the office

1 most days, so as long as it's not a Friday, you can
2 call me on my office line. If it's a Friday, you can
3 call my cell number.

4 MS. WILLIS: Your Honor, after having
5 spoken with some of the Intervenor parties who would
6 be interested, I think we're going to shoot for at or
7 around the 21st, provided certainly that Mr. Fanelli
8 is available, but I think that's what we are thinking
9 given the fact that counsel is otherwise -- most
10 counsel is otherwise engaged in other proceedings
11 until that point in time.

12 EXAMINER PRICE: Okay. I'll let you guys
13 work that out, but again, I am in the office most
14 days so. I'll be around.

15 MR. GLADMAN: Yeah, and obviously we are
16 not prepared to address that today, but we will
17 certainly discuss in good faith with Ms. Willis and
18 others.

19 EXAMINER PRICE: Thank you.

20 Okay. With that we are adjourned. We
21 are off the record.

22 (Thereupon, at 11:22 a.m., the prehearing
23 conference was adjourned.)

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CERTIFICATE

I do hereby certify that the foregoing is a true and correct transcript of the proceedings taken by me in this matter on Thursday, January 7, 2021, and carefully compared with my original stenographic notes.

Karen Sue Gibson, Registered
Merit Reporter.

(KSG-7020)

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1/19/2021 3:40:14 PM

in

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

Summary: Transcript in the matter of the Ohio Edison Company hearing held on 01/07/21 electronically filed by Mr. Ken Spencer on behalf of Armstrong & Okey, Inc. and Gibson, Karen Sue Mrs.