

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

**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA
THE MOTION OF ELPC AND OEC TO EXPAND THE SCOPE OF THE
COMMISSION'S REVIEW OF FIRSTENERGY'S POLITICAL AND CHARITABLE
SPENDING**

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I. INTRODUCTION

The Commission should deny the Motion to Expand the Scope of the Commission's Review ("Motion") filed by the Environmental Law and Policy Center ("ELPC") and Ohio Environmental Council ("OEC"). Although ELPC/OEC misleadingly insist an investigation of spending in support of Am. Sub. H.B. 6 ("H.B. 6") is necessary because of "the severity of the allegations against FirstEnergy,"¹ the federal criminal complaint that forms the basis for ELPC/OEC's Motion² contains no allegations of wrongdoing by Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, the "Companies"). To the contrary, the allegations involve past political activity by a social welfare organization, a state office holder and lobbyists regarding H.B. 6, not the provision of retail electric service by the Companies. Not only do ELPC/OEC lack any factual or legal support for an investigation of the H.B. 6-related issues that are the focus of their Motion, but the investigation they request falls outside the Commission's jurisdiction to regulate the Companies' provision of retail electric service.

This review proceeding was initiated to confirm that the costs of any political or charitable spending in support of H.B. 6 or the referendum effort are not in the rates and charges paid by the Companies' retail customers. ELPC/OEC seek to transform the scope of this review of the rate impact of the Companies' political and charitable spending into a full-blown Commission investigation into multiple other issues that ELPC/OEC deem worthy of investigation, including issues related to corporate funding of political activity. Specifically, ELPC/OEC request that the

¹ ELPC/OEC's Memorandum in Support ("Mem. in Supp.") at p. 6.

² See Mem. in Supp. at pp. 2, 5 (citing *United States v. Larry Householder, et al.*, No. 1:20-MJ-0526, Criminal Complaint (S.D. Ohio July 17, 2020)).

Commission investigate the following: “(1) how the FirstEnergy utilities and their affiliates were involved in the legislation; (2) how FirstEnergy’s³ actions may have run afoul of either the letter or spirit of Ohio’s corporate separation requirements; and (3) whether and why the utilities or their parent corporation took positions to support a former unregulated affiliate, FirstEnergy Solutions, now known as Energy Harbor.”⁴ ELPC/OEC claim in their Motion that the Commission has “oversight obligations regarding alleged public corruption scandal,”⁵ but they offer no statutory basis for the Commission’s investigation of public corruption. As framed by ELPC/OEC, these issues simply fall outside the Commission’s jurisdiction.

What ELPC/OEC want is an investigation of the First Amendment exercise of political speech by FirstEnergy Corp. and its subsidiaries – i.e., how and why any FirstEnergy-affiliated company was “involved” in the enactment of legislation.⁶ ELPC/OEC oppose as anti-competitive the state’s support for the carbon-free electricity produced by Ohio’s nuclear plants, and they view FirstEnergy Corp.’s support of Ohio’s nuclear plants, and the jobs and long-term economic benefits those plants provide, as an “abuse” that the Commission must investigate.⁷ Although ELPC/OEC try unsuccessfully to fit their requested investigation within the scope of various utility statutes, what they simply want is to know what “motivated [FirstEnergy Corp.] to support HB6?”⁸

³ ELPC/OEC define the three Ohio utilities in the Motion as the “FirstEnergy utilities” and then quickly dispense with any effort at clarity by making “FirstEnergy” the target of its Motion. As used by ELPC/OEC, “FirstEnergy” is a shape shifting term that sometimes appears to mean the Companies and at other times appears to mean FirstEnergy Corp. and all of its subsidiaries. To the extent ELPC/OEC’s request to investigate is directed at the Companies, this is addressed in section II.B.2., *infra*.

⁴ Mem. in Supp. at p. 2.

⁵ Motion at 1.

⁶ See *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 785, 98 S.Ct. 1407, 1420, 55 L.Ed.2d 707 (1978) (Striking down state law that prohibited corporate involvement in referenda because “[s]uch power in government to channel the expression of views is unacceptable under the First Amendment.”). See also *Citizens United v. Fed. Election Com’n*, 558 U.S. 310, 340, 130 S.Ct. 876, 898, 175 L.Ed.2d 753 (2010) (“political speech must prevail against laws that would suppress it, whether by design or inadvertence.”).

⁷ Mem. in Supp. at pp. 5-6.

⁸ *Id.* at p. 6.

The dangerous fallacy of this inquiry is made obvious by asking, “what motivated ELPC/OEC to oppose HB 6?” The Commission should not accept ELPC/OEC’s invitation to chill constitutionally protected activity. Instead, the Commission should remain focused on its traditional regulatory role.

There is no valid legal basis for the Commission to investigate the Companies and their holding company in the manner requested by ELPC/OEC. The Commission is a creature of statute, and it lacks a legal and factual basis for expanding the scope of this review to include undertaking the various investigations ELPC/OEC desire.

II. ARGUMENT

A. The Commission Should Deny ELPC/OEC’s Motion for Lack of Jurisdiction.

ELPC/OEC’s concern with the allegations in a federal criminal complaint involving H.B. 6—but not the Companies—is not a valid legal basis for invoking the investigatory powers of the Commission’s jurisdiction. The Ohio Supreme Court has repeatedly held that the Commission is a creature of the General Assembly and can exercise only the powers and jurisdiction expressly conferred by statute. *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, 647 N.E.2d 136 (1995); *Akron & Barberton Belt Rd. Co. v. Pub. Util. Comm.*, 165 Ohio St. 316, 135 N.E.2d 400 (1956). ELPC/OEC have not identified any statute that empowers the Commission to expand the scope of its review in this case of the Companies’ rates and charges to commence an investigation into the reasons why FirstEnergy Corp. management supports carbon-free nuclear power in Ohio.

1. The Commission lacks jurisdiction to investigate the Companies' political spending

While the Commission generally has jurisdiction to examine the Companies' compliance with Ohio utility law and orders of the Commission, that jurisdiction does not extend to the political activity that is of interest to ELPC/OEC. Indeed, ELPC/OEC have cited to no Commission proceeding in which the Commission investigated a public utility's support (or a public utility holding company's support) for legislation. Instead, the cases cited by ELPC involved investigations of a public utility's provision of utility service or the reasonableness of rates charged for that service. In the Dayton Power and Light ("DP&L") investigation cited by ELPC/OEC, the concern was the impact of the creditworthiness of DP&L's unregulated parent company on DP&L's continuing ability to provide adequate service to its retail customers.⁹ Similarly, the Commission's investigation of the Companies in Case No. 17-974-EL-UNC involved the Companies' compliance with R.C. 4928.17 and O.A.C. 4901:1-37.¹⁰ And the Commission's Tax Cuts and Jobs Act of 2017 investigation examined the options for including the benefits of this federal legislation in utility rates (not whether certain public utilities supported or opposed the legislation at the U.S. Congress).¹¹ In contrast, ELPC/OEC have not made any showing that the political activity they want investigated impacted utility rates or threatens the Companies' ability to provide adequate utility service.

⁹ *In the Matter of the Commission Investigation of the Financial Condition of The Dayton Power and Light Company*, Case No. 04-486-EL-COI, Entry at 1 (April 7, 2004) (noting Commission's goal of ensuring unregulated activities of a parent "do not negatively affect the financial condition or service quality of the regulated utilities serving Ohio.").

¹⁰ *In the Matter of the Review of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Compliance with R.C. 4928.17 and Ohio Adm. Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC, Entry at 2 (May 17, 2017).

¹¹ *In the Matter of the Commission's Investigation of the Financial Impact of the Tax Cuts and Jobs Act of 2017 on Regulated Ohio Utility Companies*, Case No. 19-47-AU-COI, Entry at 1 (Jan. 10, 2018).

ELPC/OEC's desire for a broad investigation into the political activity surrounding H.B. 6 ignores that the Commission cannot usurp the management role of public utilities. *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) (“It is a matter of common sense, as well as law, that the members of the Public Utilities Commission of Ohio cannot substitute themselves as managers of the gas company or dictate its policies”). Of course, management's pursuit of political and charitable activities is one aspect of the management role that is not “the provision of electric utility service” and, thus, falls outside the Commission's jurisdiction. *See Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 258, 431 N.E.2d 683 (1982), syllabus; *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) (finding that political contributions or donations are “a matter outside of our jurisdiction.”). Why the management of FirstEnergy Corp. or the Companies may have supported H.B. 6 strays far outside the scope of public utility oversight authorized by R.C. 4905.05 and 4905.06.

2. NRDC/OEC have not shown there is a case or controversy to be investigated

Additionally, as with other judicial tribunals, the Commission's jurisdiction is limited to cases or controversies. *See In the Matter of the Complaint of Ohio Power Company v. Consolidated Electric Cooperative, Inc.*, Case No. 06-890-EL-CSS, Opinion and Order at p. 16 (July 25, 2007). *See generally Lake Ski I-80, Inc. v. Habowski*, 11th Dist. Trumbull No. 2015-T-0002, 2015-Ohio-5535, 57 N.E.3d 215, ¶ 10 (“The legal term ‘jurisdiction’ denotes the authority conferred by law on a court to exercise its judicial power in a case or controversy before it.”).

NRDC/OEC's Motion essentially is a complaint against the Companies, and a complainant filing a complaint under R.C. 4905.26 must show "reasonable grounds for complaint"—in other words, show that a public utility has done something that, if proven to be true, violates a statute or Commission rule or order that causes legal injury to the complainant and entitles the complainant to relief. "Broad, unspecific allegations are not sufficient to trigger" a lengthy process of discovery and hearing. *In the Matter of the Complaint of the Office of Consumers' Counsel v. The Dayton Power & Light Company*, Case No. 88-1085-EL-CSS, Finding and Order at p. 7 (Sept. 27, 1988). A complaint that does not allege inadequate service but, instead, merely requests an investigation fails to trigger the Commission's jurisdiction. *See 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 p. 3–4 (May 19, 1999). Here, ELPC/OEC have not shown there is a case or controversy concerning the Companies' provision of public utility service that would invoke the Commission's jurisdiction, much less allow for the expansion of this review to include the various investigations ELPC/OEC seek.

Importantly, ELPC/OEC's Motion lacks any evidence that the Companies may have violated a provision of Ohio utility law or a Commission order. ELPC/OEC's Motion is devoid of any citation to a statute or Commission order that the Companies may have violated. ELPC/OEC ask the Commission to investigate whether the Companies "used their money and influence to push for outcomes that could have harmed their customers or the competitive market" based on the purported allegations contained in the federal criminal complaint, but fail to provide any facts suggesting the Companies were involved in any activities surrounding H.B. 6.¹² Indeed, the federal criminal complaint that is the basis for ELPC/OEC's motion makes no such allegation,

¹² Mem. in Supp. at p. 3.

nor do ELPC/OEC. Put simply, without any evidence, the Commission lacks jurisdiction to expand this review into a full-blown investigation of political activity surrounding H.B. 6.

B. ELPC/OEC’s Motion to Expand the Show Cause Entry Should Be Denied Because Each Issue ELPC/OEC Seek to Investigate Lacks Factual and Legal Support.

1. FirstEnergy’s Role in the H.B. 6 Debate and Referendum

ELPC/OEC seek to expand the scope of the Commission’s review to include how the Companies and their affiliates were involved in the legislative efforts regarding H.B. 6 and, specifically, want the Commission to investigate the extent to which the Companies “used their money and influence to push for outcomes that could have harmed their customers or the competitive market.”¹³ They claim R.C. 4905.06 and R.C. 4909.154 give the Commission the power and responsibility to investigate these issues, but they are mistaken.

While true that R.C. 4905.06 authorizes the Commission to oversee public utilities and examine the Companies’ compliance with Ohio utility law and orders of the Commission, the ability to investigate utilities for their compliance necessarily requires the presence of an alleged wrongdoing or violation of a particular utility law, rule, or order by the utility. Here, ELPC/OEC do not allege any wrongdoing by the Companies, much less any purported violation of any utility law or Commission order. Rather, the basis for their motion is the federal criminal complaint, which is devoid of any allegations of any wrongdoing by the Companies. Because ELPC/OEC have not shown that there is a “case or controversy” concerning the Companies’ provision of public utility service and instead merely request an investigation, this request fails to trigger the Commission’s jurisdiction. *See 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

¹³ Mem. in Supp. at p. 3.

3–4 (May 19, 1999). Further, while the Commission does have jurisdiction over the Companies’ rates and their provision of adequate service, how the Companies use the funds from their revenues is not the subject of Commission review. *See Elyria Tel. Co. v. Pub. Util. Comm.*, 158 Ohio St. 441, 447–448, 110 N.E.2d 59 (1953).

ELPC/OEC also rely on R.C. 4909.154 as a statutory basis for claiming the Commission has the power and responsibility to undertake an investigation into the Companies’ management policies, practices, and organization.¹⁴ This contention is without merit because R.C. 4909.154 is specific to base rate cases. *See In the Matter of the Commission-Ordered Investigation of Ameritech Ohio Relative to Its Compliance with Certain Provisions of the Minimum Telephone Service Standards Set Forth in Chapter 4901:1-5, Ohio Administrative Code*, Case No. 99-938-TP-COI, Entry on Rehearing at 16 (June 20, 2002) (“Section 4909.154, Revised Code, clearly applies to a rate case”); *In the Matter of the Application of the City of Cleveland for the Initiation of an Investigation and/or Rulemaking Proceeding to Implement Amended Section 4909.154, Revised Code*, Case No. 83-790-AU-UNC, 1987 WL 1466574 at *1, Entry (Feb. 10, 1987) (finding that R.C. 4909.154 “refers to the Commission’s consideration during a rate case proceeding of the management policies, practices, and organization of a public utility”); *In the Matter of the Complaint of Randustrial Corporation v. The Ohio Bell Telephone Co.*, Case No. 82-921-TP-CSS, *et al.*, 1984 WL 992121 at *13, Attorney Examiner’s Report (June 25, 1984) (“it is clear that the grant of authority [in R.C. 4909.154] given to allow the Commission to review management policies and practices of a utility is therein restricted to rate proceedings”). Because this review proceeding is not a base rate case, R.C. 4909.154 is inapplicable.

¹⁴ Mem. in Supp. at p. 3.

As noted above, ELPC/OEC's claim that "there is a long history of Commission investigations" that serves as precedent for the Commission to expand this review into a full and thorough investigation is also unavailing.¹⁵ ELPC/OEC wants the Commission to determine whether FirstEnergy Corp.'s support for "long-term energy supply" in Ohio benefits the Companies' ratepayers or FirstEnergy Corp.¹⁶ Indeed, they want the Commission to "look beyond how FirstEnergy spent ratepayer dollars" in search of any other potential "abuses of market power."¹⁷ Plainly stated, ELPC/OEC want the Commission, not the General Assembly, to determine whether it is good public policy for the state of Ohio to support nuclear power plants. None of the cases cited by ELPC/OEC address anything even remotely analogous.

Finally, ELPC/OEC defy all logic in attempting to argue that the Shared Services Agreement between FirstEnergy Corp. and FirstEnergy Solutions—to which the Companies are not a party—and the purported "nature of how FirstEnergy operates"¹⁸ serves as a valid basis to expand this review to include an investigation into the Companies. ELPC/OEC fail to tie these claims to any action by the Companies related to the provision of public utility service. Plus, the relationship between FirstEnergy Corp. and the Companies has been thoroughly explored in Case No. 17-974-EL-UNC. There is nothing new here to address.

2. Corporate Separation Policies and Practices

ELPC/OEC also seek to expand this review proceeding to include an investigation into the Companies' corporate separation practices because, according to ELPC/OEC, the federal criminal complaint and other press reports "suggest that during the HB6 debate and subsequent referendum

¹⁵ Mem. in Supp. at p. 3.

¹⁶ Mem. in Supp. at pp. 5-6.

¹⁷ Mem. in Supp. at p. 6.

¹⁸ Mem. in Supp. at p. 5.

campaign individuals working for FirstEnergy Corporation and FirstEnergy Service Company worked to influence legislation beneficial to FirstEnergy Solutions,” and that these “close ties between FirstEnergy Corp. and its former affiliate undermine public confidence that ratepayers are not directly or indirectly subsidizing nonregulated businesses.”¹⁹ Not only do ELPC/OEC fail to identify any actions on the part of the Companies, but they also fail to allege any specific provision of the Commission’s corporate separation rules the Companies may have violated as a result of these alleged actions surrounding H.B. 6.²⁰ By failing to rationally link the information in the federal criminal complaint and other press reports to any actual corporate separation requirements that the Companies have not adhered to, ELPC/OEC effectively concede that this request is baseless.

Moreover, ELPC/OEC’s acknowledgment that the prior investigations into the Companies’ corporate separation practices did not consider how the Companies and the competitive FirstEnergy businesses “worked together on political issues” or how the Companies “took positions to the benefit of their unregulated affiliates” only bolsters support for the Commission lacking jurisdiction over such issues.²¹ If issues related to political or other legislative activities truly concerned the provision of public utility service or competitive retail electric service, they would have been addressed in some prior investigation by the Commission. Yet, ELPC/OEC do not cite any previous investigation encompassing such issues, nor are the Companies aware of any

¹⁹ Mem. in Supp. at p. 6.

²⁰ Instead, ELPC/OEC simply reference Ohio Adm. Code 4901-1-37-04(A)(3) and (D)(9), concerning cross-subsidization of an unregulated affiliate and the prohibition on employees of an electric utility indicating a preference for an affiliated competitive electric services company, respectively. *See* Mem. in Supp. at p. 7. Neither is at issue here.

²¹ Mem. in Supp. at p. 7–8.

previous instance where the Commission has considered such issues when addressing corporate separation policies and practices.

3. Whether and why the Companies supported H.B. 6

ELPC/OEC's final request to expand this review proceeding focuses initially on management decision making before diverging into stranger territory. ELPC/OEC want the Commission to investigate the alleged decision-making process behind the Companies' involvement regarding H.B. 6 and the extent to which the Companies used their employees to support H.B. 6.²² However, as the Ohio Supreme Court recently emphasized, 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). As discussed above, it is not the Commission's responsibility to review management decision making regarding legislative activity. *Elyria Tel. Co.*, 158 Ohio St. at 448. Any involvement of the Companies in supporting H.B. 6 would not have qualified as the Companies "acting as public utilities."

ELPC/OEC also want to know why the Companies "would financially support the HB6 corruption scandal,"²³ despite having no basis to believe that the Companies did financially support the "scandal." Further, ELPC/OEC claim that "the fact that FirstEnergy Corporation and FirstEnergy share the same name creates the impression they operate as one company,"²⁴ which is not only unintelligible but also ignores that "FirstEnergy" is not included in any of the Companies' names. ELPC/OEC's apparent dislike for the public utility holding company structure is not a valid basis for expanding this review proceeding.

²² Mem. in Supp. at p. 8.

²³ Mem. in Supp. at p. 8.

²⁴ Mem. in Supp. at p. 8.

Notably, ELPC/OEC acknowledge that they are unaware of whether the Companies had any involvement in supporting H.B. 6.²⁵ But, they claim, any involvement by the Companies' employees should be investigated so it can be stopped in the future. Yet when did muzzling employee speech that conflicts with ELPC/OEC's own policy positions become a regulatory mandate? It should be obvious that advancing ELPC/OEC policies is not the Commission's role, and certainly not a valid basis to expand the scope of this review proceeding.

The Commission simply has no power to require the Companies to provide insight into, much less investigate, the Companies' alleged underlying reasons for any decision-making concerning H.B. 6.

III. CONCLUSION

For the foregoing reasons, the Companies respectfully request that the Commission deny ELPC/OEC's Motion.

Respectfully Submitted,

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²⁵ Mem. in Supp. at p. 8.

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CERTIFICATE OF SERVICE

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

/s/ James F. Lang

One of the Attorneys for Ohio Edison
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Summary: Memorandum Contra Motion of ELPC/OEC to Expand the Scope of the Commission's Review electronically filed by Mr. James F Lang on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company