BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Filing by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company of a Grid Modernization Business Plan	)	Case No. 16-0481-EL-UNC
In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and The Toledo Edison Company Application for Approval of a Distribution Platform Modernization Plan	)	Case No. 17-2436-EL-UNC
In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and The Toledo Edison Company to Implement Matters Relating to the Tax Cuts and Jobs Creation Act of 2017	)	Case No. 18-1604-EL-UNC
In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Tariff Change	)	Case No. 18-1656-EL-ATA

MOTION TO VACATE AND CONDUCT NEW PROCEEDINGS

Pursuant to Ohio Administrative Code 4901-1-12 and Ohio Rule of Civil Procedure 60(B), the Environmental Law & Policy Center (ELPC) respectfully moves to vacate the orders and conduct new proceedings in the above-captioned dockets. As explained more thoroughly in the attached Memorandum in Support, the recent circumstances of former Chair Sam Randazzo's departure from the Public Utilities Commission (PUCO) creates, at the very least, the appearance of impropriety. The public has a right to fair decisions regarding monopoly rates and services,

and that entitlement to fairness requires a Commission decision-making process without any undue influence from regulated utilities. The $4 million payment from FirstEnergy Corporation to the "entity associated with an individual who subsequently was appointed to a full-time role as an Ohio government official directly involved in regulating the Ohio Companies" raises questions regarding that official's impartiality. Revisiting these decisions will help ensure the rights of all parties to due process and restore public confidence in the Commission.

ELPC respectfully requests this Commission grant its motion to vacate the orders. The additional action required besides vacating the orders Chair Randazzo was involved in will depend on what the Commission finds regarding Chair Randazzo's actions in the docket. The Commission should ascertain exactly what his involvement in the proceedings entailed, including whether he influenced Staff positions that may have impacted the outcome of the case. The Commission should then determine the proper course of action, which may require actions ranging from new deliberations to much deeper corrective proceedings to ensure justice.

November 24, 2020

Respectfully submitted,

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MEMORANDUM IN SUPPORT

Recent revelations regarding the likely relationship between former Chair Sam Randazzo and FirstEnergy Corporation suggest a serious risk of bias that should have precluded Chair Randazzo from hearing any cases involving the FirstEnergy Utilities during his tenure at the Public Utilities Commission (PUCO). Based on the facts that have come to light, the Environmental Law and Policy Center (ELPC) files this motion requesting that the PUCO vacate the Orders in the above-captioned proceedings and allow for reconsideration of those proceedings.

The chain of events triggering this motion stretches from Governor DeWine's consideration and appointment of Chair Randazzo as PUCO Chair to Chair Randazzo's resignation on November 20, 2020. In his resignation letter, Chair Randazzo cited a raid on his home by the Federal Bureau of Investigation (FBI) and FirstEnergy Corporation's November 19, 2020 10-Q filing with the U.S. Securities and Exchange Commission (SEC) as reasons for his resignation.[1] That SEC filing states:

> Among the matters considered with respect to the determination by the committee of independent members of the Board of Directors that certain former members of senior management violated certain FirstEnergy policies and its code of conduct related to a payment of approximately $4 million made in early 2019 in connection with the termination of a purported consulting agreement, as amended, which had been in place since 2013. The counterparty to such agreement was an entity associated with an individual who subsequently was appointed to a full-time role as an Ohio government official directly involved in regulating the Ohio Companies, including with respect to distribution rates. It has not been determined if the payments were for the purposes represented within the consulting agreement. The matter is a subject of the ongoing internal investigation related to the government investigations.[2]

While we do not know with one-hundred percent certainty that FirstEnergy Corporation's 10-Q refers to Chair Randazzo, the timeline of events suggests that he is the "Ohio government official directly involved in regulating the Ohio Companies." As the above-quoted section of the 10-Q statement explains, FirstEnergy Corporation made a payment of approximately $4 million in early 2019 to "an entity associated with an individual" who came to fill a full-time regulatory role. According to the 10-Q report, that individual's associated entity had a "consulting agreement, as amended, which had been in place since 2013." Chair Randazzo resigned from his

[1] Letter from Sam C. Randazzo to Michael D. DeWine, Ohio Governor (Nov. 20, 2020), https://content.govdelivery.com/attachments/OHOOD/2020/11/20/file_attachments/1607093/Resignation.pdf; *see also* Mark Williams, *Powerful Ohio Utilities Regulator Steps Down Following FBI Search of His Home*, COLUMBUS DISPATCH (Nov. 20, 2020), https://www.dispatch.com/story/business/2020/11/20/ohio-utilities-regulator-resigns-following-fbi-search-his-home/6355499002/.

[2] FirstEnergy Corp., Quarterly Report (Form 10-Q) at 41 (Nov. 19, 2020).

law firm McNeese Wallace on December 31, 2018 and applied for a Commissioner appointment on January 17, 2019. [3] The Governor then appointed him Chairman on February 4, 2009.[4] In other words, Chair Randazzo "was appointed to a full-time role as an Ohio government official directly involved in regulating the [FirstEnergy] Ohio Companies," just as the individual mentioned in the FirstEnergy Corporation 10-Q report. The subsequent FBI search of Chair Randazzo's home adds further support to the belief that there is a connection between the individual discussed in the 10-Q report and Chair Randazzo.[5]

The circumstantial evidence connecting Chair Randazzo to the FirstEnergy Corporation's $4 million payment creates, at the very least, the appearance of impropriety. Chair Randazzo applied to the Commission in January 2019 and became Chairman February 4, 2019. By any reasonable definition of "early 2019," FirstEnergy Corporation would have made the payment very close in time to when Chair Randazzo received his appointment to the Commission.

I. Vacatur Is Necessary and Proper Under Commission Precedent in These Circumstances.

The connection between this $4 million payment from FirstEnergy Corporation to an entity associated with Chair Randazzo and his appointment to the Commission creates the appearance of corruption and a serious risk of bias that violates due process rights and requires vacating the orders and reconsidering the record in the cases that Chair Randazzo heard involving the FirstEnergy Utilities. The Commission rules do not specifically address situations

[3] *See* Letter from Sam Randazzo to Public Utilities Commission Nominating Council (Jan. 17, 2019), https://www.documentcloud.org/documents/5700521-Samuel-Randazzo-PUCO-application-2019.html.
[4] John Funk, *Governor DeWine Appoints Utility Lawyer Sam Randazzo to Chair PUCO*, CLEVELAND.COM (Feb. 4, 2019).
[5] *See* Mark Williams, *PUCO Chairman Skips Meeting Following FBI Search of His Home*, COLUMBUS DISPATCH (Nov. 18, 2020), https://www.dispatch.com/story/business/2020/11/18/puco-chairman-skips-meeting-after-the-fbi-search-his-home/6340595002/.

where new facts or evidence come to light after the Commission issues a final order.[6] The need to consider bias issues that get revealed only after the closing of the record and issuance of a final order is also extremely rare. However, when viewed in their totality, the Commission's broad authority and the different procedural laws and rules support vacating and reconsidering the orders in this proceeding. The Commission process in *Complaint of the City of Cincinnati v. Cincinnati Gas & Electric Co. et al.* lays out the analysis the Commission should apply to the current situation. *In re Complaint of the City of Cincinnati v. Cincinnati Gas & Elec. Co.*, No. 91-377, 1991 WL 11811022 (June 27, 1991).

The Commission in *Complaint of Cincinnati* noted that the Commission has broad authority to regulate public utilities and that it has an "obligation, as a quasi-judicial body, to conduct hearings in a manner that comports with the elements of fundamental fairness and due process." *Id.* at *1. In considering a complaint asking for vacatur of an order from the City of Cincinnati based on alleged commissioner bias, the Commission noted that it was "proper to consider the criteria for granting a motion to vacate under the rules of civil procedure." *Id.* Specifically, Ohio Rule of Civil Procedure 60(B) provides that an adjudicative body may relieve a party from a final order for any "reason justifying relief for the judgment." *Id.* (citing Ohio Civ. R. 60(B)). First, in terms of broad authority the Commission stated:

> Although Chapter 49 of the Revised Code, from which the Commission acquires its authority, does not specifically address the Commission's authority to vacate a final order outside the time for rehearing set forth in Section 4903.10, Revised Code, the Commission has used, and in some cases been directed by the Ohio Supreme Court to use, its general supervisory powers over utilities and Section 4905.26 Revised Code to review matters considered in prior orders. In *Western Reserve Transit v. Public Util. Comm.* (1974), 39 Ohio St. 2d 16, the Supreme Court found that Section 4905.26, Revised Code, is extremely broad and gives the Commission authority to review matters already considered in a prior proceeding.

[6] The Commission rules do, however, provided that the Commission or an attorney examiner may, on "their own motion or upon motion of any person for good cause shown, reopen a proceeding at any time prior to the issuance of a final order" for a purpose described in the motion. Ohio Admin. Code 4901-01-34.

Id. The Commission further explained that Rule 60(B) applies to its decision to reconsider a final order after new facts come to light:

> The Commission recognizes that the City's complain has many of the same aspects of a motion for relief from judgment filed pursuant to Rule 60(B) of the Ohio Rules of Civil Procedure in that the same aspects as a motion for relief from judgment filed pursuant to Rule 60(B) of the Ohio Rules of Civil Procedure in that the City is requesting the Commission vacate a prior order based upon the alleged bias of the former Chairman of the Commission.

Id. The Commission's approach in *Complaint of Cincinnati* makes logical sense in this case given both the State of Ohio's ultimate goal to protect utility consumers and the Commission's broad authority to do so. Moreover, deciding it has no authority to vacate and reconsider orders would perversely encourage parties conceal pertinent facts in the hopes they would not become public until after the Commission issues an order. While the Commission in *Complaint of Cincinnati* decided not to overturn the Commission's order, it went through the proper process of considering the new evidence before reaching its conclusion.

II. The Facts in this Proceeding Support Re-opening the Record to Consider Whether Mr. Randazzo's Bias Affected the Commission's Order.

The laws that apply generally to judges and judicial proceedings demonstrate the importance of using available procedural tools to address the appearance of impartiality in the proceedings involving both Chair Randazzo and the FirstEnergy Utilities. The Supreme Court has found not only that a failure of a judge to recuse his or herself from a proceeding "when he has 'a direct, personal, substantial, pecuniary interest' in a case" violates the Due Process Clause, but also that the appearance of bias is sufficient to require recusal. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)). In *Caperton*, the Supreme Court considered whether there was a violation of the Due Process Clause when a state judge failed to recuse himself from a proceeding involving a company that had a "pivotal

role in getting [him] elected" through a $3 million campaign contribution. *Id.* at 882. Although the Court found that "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal," it held that recusal was necessary in this case because there was "a serious risk of actual bias . . . when a person with a personal stake in a particular case had a significant and disproportionate influence" in the campaign and spending in the judicial election. *Id.* at 884. The current situation is similar in that a reasonable interpretation of recent events is that FirstEnergy Corporation paid $4 million to an entity closely associated with Chair Randazzo in close proximity to his appointment to the Commission. At the very least this situation creates the appearance of bias.

In Ohio, this requirement for impartial adjudicators is found throughout statutory and regulatory law. Ohio's Judicial Conduct Rules, for example, state that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." Ohio Code of Judicial Conduct Rule 2.11. Impartiality is so important to the adjudicatory process that even the Ohio Constitution contains provisions related to disqualification. *See* Ohio Const., Art. IV, § 5(C). The Ohio Revised Code also provides a mechanism for litigants to request judicial disqualification when there is apparent bias. *See* Ohio Rev. Code § 2701.03. Ohio courts have concluded that these provisions along with the common law create a broad obligation to guard against even the appearance of impartiality. As the Ohio Supreme Court recently explained, the test for whether an adjudicator's role "presents an appearance of impropriety" is objective, meaning that "[a] judge should step aside or be removed if a reasonable and objective observer would harbor serious doubts about the judge's impartiality." *In re Disqualification of Lewis*, 117 Ohio St. 3d 1227, 1228, 884 N.E.2d 1082 (2004).

Although PUCO Commissioners are not technically part of the judiciary, their roles are similar. They weigh evidence, assign rights to particular parties, and interpret and apply Ohio law on public utilities. The United States Supreme Court has made clear that the requirements of due process apply equally to judges and to agency decisionmakers like former PUCO Chair Randazzo. *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S. Ct. 1456, 1464, 43 L. Ed. 2d 712 (1975) (holding that "a fair trial in a fair tribunal is a basic requirement of due process [that] applies to administrative agencies which adjudicate as well as to courts"). As public officials, PUCO Commissioners must act in the public interest. Indeed, the Ohio criminal code makes it illegal for public officials to "solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon the public official." Ohio Rev. Code 102.03(E). Because PUCO Commissioners directly regulate public utilities in ways that can have financial impacts on all Ohioans, the duty to avoid bias or financial ties to regulated entities is particularly strong. Therefore, if Chair Randazzo is the individual mentioned in the 10-Q report, he had, at the very least, an ethical obligation to recuse himself.

The failure of Chair Randazzo to recuse himself and the current speculation about his involvement with FirstEnergy Corporation creates a cloud of suspicion that undermines the Commission's regulatory work and the type of "appearance of impartiality" abhorred in adjudicatory processes. While the Commission should identify the exact date of the payment, a payment of $4 million in close proximity to an individual's appointment "to a full-time role as an Ohio government official directly involved in regulating the [FirstEnergy Corporation's] Ohio Companies" creates an appearance of impropriety and undue influence. The situation disclosed in FirstEnergy Corporation's SEC 10-Q statement is a serious indication that the "individual who subsequently was appointed to a full-time role as an Ohio government official directly involved

in regulating the Ohio Companies" was not impartial when he participated in cases. At the very least, it raises questions related to whether that individual properly disclosed their financial interests. *See* Ohio Rev. Code 102.02. The $4 million payment to "an entity associated with an individual" who became a public official in a regulatory role is obviously more than the $3 million at issue in *Caperton*, and this financial tie between the individual and the FirstEnergy Utilities raises a reasonable question about impartiality in proceedings involving those utilities. The mere appearance of bias is enough to require a review of his involvement in cases related to the FirstEnergy Utilities.

The Commission should, therefore, follow the sensible approach of other states that recognize the need to vacate and rehear decisions tainted by Commissioner bias. In Illinois, for example, the Commissioners on the Illinois Commerce Commission must abide by the recusal principles applicable to judges. *Business & Professional People for the Pub. Interest v. Barnich*, 614 N.E.2d 341 (1st Dist. Ill. 1993). The Illinois Court of Appeals has held that an ICC Commissioner has a duty to recuse himself from a rate-making proceeding where he has a friendship with representatives of the utility and had ex parte communications with those representatives. *Id.* at 343. The court imported the rules of the judicial conduct, explaining that "[r]ecusal was required because of the appearance of impropriety and bias" even if there was not evidence of actual impropriety and bias. *Id.* at 343; *see id.* at 345. In that case the Appellate Court determined that phone calls from Chairman Barnisch to the telephones of paid Edison representatives created a sufficient appearance of bias that Chairman Barnisch should have recused himself. Those circumstances pale in comparison to a payment of $4 million, which demonstrates a very deep relationship that would preclude Chairman Randazzo from hearing First Energy cases without bias. The *Caperton* standard of "whether under a realistic appraisal of

psychological tendencies and human weakness the interest poses such a risk of bias or prejudgment that the practice must be forbidden…" also applies when analyzing the magnitude of a $4 million payment for no actual services rendered.

III. While Only One of Five Commissioners Appears to Have Benefitted from FirstEnergy Corporation's Payment, Any Appearance of Corruption Taints the Entire Process.

ELPC also notes that while Chairman Randazzo is only one Commissioner on a five-member panel, his participation taints the entire process. If an objective inquiry reveals a serious risk of actual bias, then the Commission's decision is unacceptably tainted even though Chair Randazzo may not have cast the deciding vote. The U.S. Supreme Court has directly addressed this issue regarding an appellate panel of judges. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016). The *Williams* Court cited Justice Brennan's concurring opinion in *Aetna Life Insurance Co. v. Lavoie* to explain the influence that a single biased judge can have on other members of a panel:

> [W]hile the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition. The participation of a judge who has a substantial interest in the outcome of a case of which he knows at the time he participates *necessarily* imports a bias into the deliberative process. This deprives litigants of the assurance of impartiality that is the fundamental requirement of due process.

Id. (*citing Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 831 (1986) (Brennan, J. concurring)). The Court further explained, "Allowing an appellate panel to reconsider a case without the participation of the interested member will permit judges to probe lines of analysis or engage in discussions they may have felt constrained to avoid in their first deliberations." *Id* at 1910. The same logic applies to any Commission proceeding involving the FirstEnergy Utilities that Chair Randazzo participated in, especially when one considers his strong opinions regarding utility policy expressed in numerous public forums.

Ohio precedent suggesting that bias of one adjudicator on multi-member panels is insufficient to require vacatur predated the *Williams* case discussed above and is distinguishable from the unusual circumstances of this case. In *Ohio Tranport, Inc. v. Pub. Util. Comm'n*, 164 Ohio St. 98 (1955), the Ohio Supreme Court concluded that the potential bias of the chair did not create prejudice where all three members of the commission agreed to the facts in the final order. The Commission has itself acknowledged this precedent in *In re Complaint of the City of Cincinnati v. Cincinnati Gas & Elec. Co. et al.* when denying a motion to vacate an order because of a commissioner's alleged ex parte communications with the parties. *See In re Complaint of the City of Cincinnati*, *supra*, at *1. But those cases predated *Williams* and are therefore no longer controlling law.[7]. Furthermore, the allegations involved here are much more serious. The appearance of impropriety relates to the Chair of the Commission's company possibly receiving $4 million close in time to his appointment to the Commission. For the reasons explained by the Supreme Court in *Williams*, Chair Randazzo's unconstitutional failure to recuse "constitutes structural error that is 'not amendable' to harmless-error review, regardless of whether the judge's vote was dispositive." *Williams*, 136 S. Ct. at 1902.

IV. Conclusion

ELPC respectfully requests this Commission grant its motion to vacate the orders and take whatever additional action justice requires. The additional action required depends on what the Commission finds regarding all of Chairman Randazzo's actions in the docket. The Commission should ascertain exactly what his involvement in the proceeding entailed, starting with the docketing of the case through the final order, including whether he influenced Staff

[7] The U.S. Supreme Court's orders applying the due process requirements of the United States Constitution apply to state proceedings pursuant to the Fourteenth Amendment to the United States Constitution. Indeed, the leading *Caperton* case applying the judicial bias standard involved an appeal to the United States Supreme Court from a final order of the Supreme Court of West Virginia. *Caperton*, 556 U.S. at 872.

positions that may have affected the ultimate outcome of the case. Then it should determine the proper course of action, which may only entail new deliberations but may also require much deeper corrective action to ensure justice.

The Commission's ultimate goal must be to ensure that it protects the interest of FirstEnergy's customers. Moreover, it must ensure that FirstEnergy does not benefit in any way from any undue influence or bias.

November 24, 2020

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Appearance submitted on behalf of the Environmental Law & Policy Center was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on November 24, 2020. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties, and the parties listed below will also be served a copy of the filing via electronic mail. Additionally, parties who do not accept email service will receive paper service via US mail.

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Summary: Motion to Vacate and Conduct New Proceedings and Memorandum in Support electronically filed by Ms. Caroline Cox on behalf of Environmental Law and Policy Center