

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)	
Edison Company, The Cleveland)	
Electric Illuminating Company, and The)	Case No. 12-2190-EL-POR
Toledo Edison Company for Approval of)	12-2191-EL-POR
Their Energy Efficiency and Peak)	12-2192-EL-POR
Demand Reduction Program Plans for)	
2013 to 2015.		

**Memo Contra of Ohio Edison Company, The Cleveland Electric Illuminating Company,
and The Toledo Edison Company To The Environmental Law & Policy Center's
Motion to Vacate and Conduct New Proceedings**

The Environmental Law & Policy Center ("ELPC") asks the Commission to vacate the orders¹ and conduct new proceedings in the above-captioned dockets. ELPC argues that the connection between a "\$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 and requires" the Commission to vacate and reconsider its prior orders. (ELPC Mot. at 5). The Commission should deny ELPC's motion to vacate for two main reasons: (i) the statutory language supports the Commission's Sixth Entry on Rehearing entered June 5, 2019; and (ii) former Chairman Randazzo recused himself from the Sixth Entry on Rehearing, the only decision in this proceeding that took place during his time on the Commission.

¹ While ELPC's motion asks the Commission to vacate "the orders," ELPC can only challenge the Commission's June 5, 2019 Sixth Entry on Rehearing, because it is the only Commission action taken in these proceedings during Chairman Randazzo's term. Indeed, because these proceedings involve an energy efficiency and peak demand reduction ("EE/PDR") portfolio plan for the years 2013 through 2016, earlier orders such as the Commission's Opinion and Order of March 20, 2013 are moot.

The Ohio Supreme Court set forth the standard governing whether vacation of prior Commission orders is necessary in light of allegations of “improper conduct” on the part of a Commissioner. *See Cincinnati v. Pub. Util. Comm.*, 64 Ohio St. 3d 279, 281, 595 N.E.2d 858, 860 (1992).² In *Cincinnati*, the Court began “under the assumption” that the former chairman engaged in the improper conduct—namely, *ex parte* communications with the utilities’ CEOs. *Id.* at 281. Even under this assumption, the Court found that “vacation and reconsideration is an inappropriate remedy where . . . the party complaining has not been prejudiced by the improper conduct.” *Id.* at 282. Even though the “commission’s chairman should have been disqualified from participating in the case,” there was no prejudice when the votes of the other commissioners and the record supported the Commission’s decision. *Id.* (citing *Ohio Transp. v. Pub. Utilities Comm’n*, 164 Ohio St. 98, 108, 128 N.E.2d 22, 29 (1955)). So too here. The unanimous vote of the other commissioners and the language of Senate Bill 310 objectively support the Commission’s June 5, 2019 decision in this case, and ELPC does not allege otherwise. Thus, ELPC’s motion should be denied.

Moreover, former Chairman Randazzo recused himself from the June 5, 2019 decision, the only order that did not predate his time on the Commission. On March 20, 2013, the Commission approved, with modifications, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company’s (the “Companies”) EE/PDR portfolio plans for the period January 1, 2013 through December 31, 2015.³ In light of Senate Bill 310, the Companies

² The Supreme Court in *Cincinnati* considered the Commission’s decision *In re Complaint of the City of Cincinnati v. Cincinnati Gas & Elec. Co.*, No. 91-377, 1991 WL 11811022 (June 27, 1991), which ELPC cites as instructive. (ELPC Mot. at 5–6). The Commission there ultimately determined vacation was not warranted despite later-discovered *ex parte* communications. 1991 WL 11811022. The Commission found “sufficient evidence existed to support the decision the Commission made at the time.” *Id.*

³ Opinion and Order (March 20, 2013).

filed an application to amend their plans for 2015 through 2016,⁴ which the Commission approved on November 20, 2014.⁵ After several rehearings, the Commission issued its Fifth Entry on Rehearing on April 10, 2019—before Chairman Randazzo took his seat.⁶ In that Entry, the Commission reversed its previous ruling and determined that under the language of Senate Bill 310, energy savings provided by mercantile customers who opt out of the utilities’ EE/PDR programs should count toward the utility’s compliance with the statutory EE/PDR benchmarks. Disagreeing with this aspect of the decision, ELPC filed an application for rehearing.⁷ On June 5, 2019, the Commission issued its Sixth Entry on Rehearing denying ELPC’s Application.⁸ As relevant here, Chairman Randazzo recused himself and did not participate in the Sixth Entry on Rehearing⁹—contrary to ELPC’s assertion that Chairman Randazzo did not recuse himself. (ELPC Mot. at 9 (“The failure of Chair Randazzo to recuse himself . . .”).) Neither ELPC nor any other party appealed the Commission’s decision on rehearing. Simply put, ELPC has not and cannot point to any decision in which Chairman Randazzo took part, let alone prove any potential prejudice.¹⁰

Because the language of Senate Bill 310 supports the Commission’s June 5, 2019 Sixth Entry on Rehearing, which the Commission voted unanimously to adopt, the Commission should deny ELPC’s motion to vacate. Moreover, former Chairman Randazzo recused himself from the

⁴ Application for Approval of Amended Energy Efficiency and Peak Demand Reduction Plans for 2015 Through 2016 (September 24, 2014).

⁵ Finding and Order (November 20, 2014).

⁶ Fifth Entry on Rehearing (April 10, 2019).

⁷ ELPC Second Application for Rehearing (May 10, 2019).

⁸ Sixth Entry on Rehearing (June 5, 2019).

⁹ See Attachment 1, Minutes of the Commission Meeting (June 5, 2019, 1:30 p.m.).

¹⁰ For those same reasons and others, ELPC’s reliance on the *Williams* decision is unpersuasive. See *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016) (bias of single Pennsylvania Supreme Court justice who failed to recuse himself violated due process).

only decision in this proceeding during his time on the Commission, which is reason alone to deny ELPC's motion.

Dated: December 9, 2020

Respectfully submitted,

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On behalf of the Companies

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on December 9, 2020. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

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Summary: Memorandum Contra the Environmental Law & Policy Center's Motion to Vacate and Conduct New Proceedings electronically filed by Ryan A Doringo on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company