

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company of a Grid Modernization Business Plan.)
)
) **Case No. 16-481-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 Distribution 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 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**
)
)

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 orders 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 because the record supports the Commission’s unanimous prior orders approving a stipulation among a diverse group of interested parties representing various customer groups, industries and sectors and, therefore, ELPC is not prejudiced by them.

The Ohio Supreme Court has 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).¹ 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. Even assuming Chairman Randazzo should have been disqualified, the record before the Commission supports its July 17, 2019 Opinion and Order unanimously approving the stipulation, as well as its September 11, 2019 Entry unanimously denying rehearing.

ELPC “does not allege that the commission’s order adopting the stipulation . . . is not supported by the record.” *Cincinnati*, 64 Ohio St. 3d at 283. Nor could it. To start, parties

¹ 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.*

representing a wide array of diverse interests entered into a Stipulation on November 9, 2018, which provided for all tax savings associated with the Tax Cuts and Jobs Act of 2017 (“TCJA”) to flow back to customers and for the implementation of the first phase of distribution grid modernization.² The Stipulation included robust customer benefits and protections, including requiring Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the “Companies”) to adhere to rigorous reporting and auditing requirements, and to facilitate a collaborative to provide stakeholders—including ELPC—updates on project status and an opportunity for input and advice. On January 25, 2019, the parties entered into a Supplemental Stipulation that added further customer benefits and protections, and support for the stipulated case broadened to include the Office of the Ohio Consumers’ Counsel, the Northeast Ohio Public Energy Council, and Ohio Partners for Affordable Energy.³ The Commission unanimously approved and adopted the Stipulations by Opinion and Order dated July 17, 2019, and later unanimously denied the rehearing applications filed by three parties, including ELPC.⁴

The record thus amply supports the Commission’s decision approving the stipulated case—indeed, the Commission need look no further than the Stipulations, the parties’ briefs supporting those Stipulations, the hearing conducted on the matter on February 5 and 6, 2019, the 72-page Opinion and Order unanimously approving the stipulated case under the Commission’s three-prong test,⁵ and the Commission’s (again unanimous) decision on rehearing reiterating its earlier

² Stipulation and Recommendation (November 9, 2018).

³ Supplemental Stipulation and Recommendation (January 25, 2019). These parties were signatory parties to all terms of the stipulation except for those relating to grid modernization, which these parties agreed not to oppose in the interests of reaching a global settlement on a variety of issues, including providing the benefits of the TCJA to customers.

⁴ Opinion and Order (July 17, 2019); Entry on Rehearing (September 11, 2019).

⁵ Under Ohio law, the PUCO must consider three criteria when determining whether a stipulation is reasonable and should be adopted:

(1) Is the stipulation the product of serious bargaining among capable, knowledgeable parties?

decision.⁶ Based on that record, the Commission unanimously found, twice, that the stipulation satisfied the three-prong test, i.e., that the stipulation was the product of serious bargaining, benefitted ratepayers and the public interest through, among other things, ensuring that customers are provided approximately \$900 million of tax savings associated with the TCJA and modernization of the Companies' distribution grid, and did not violate regulatory principles or precedents. With voluminous objective record support, there is no prejudice to ELPC—which is what ELPC is required to show in its motion to vacate. *See Cincinnati*, 64 Ohio St. 3d at 283. “Absent any prejudice” “it would be a futile gesture to vacate the commission’s order” here. *Id.*

Finally, ELPC’s reliance on *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), is misplaced. ELPC argues that under *Williams* the Commission must vacate any decision involving the Companies in which former Chair Randazzo participated because the “Commission’s decision is unacceptably tainted even though Chair Randazzo may not have cast the deciding vote.” ELPC Mot. at 11. But *Williams* has nowhere near the sweeping reach ELPC ascribes to it. Rather, the Supreme Court narrowly tailored its holding to the facts before it: “Where a judge has had an earlier significant, personal involvement as a prosecutor in a critical decision in the defendant’s case, the risk of actual bias in the judicial proceeding rises to an unconstitutional level.” *Williams*, 136 S. Ct. at 1910. Put differently, *Williams*, in the Court’s own words, stands for the proposition that “an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case.” *Id.* at 1899. *Williams* says nothing about agency decision making, and contrary to ELPC’s view, does not disturb settled Ohio Supreme Court authority holding that a

(2) Does the stipulation, as a whole, benefit ratepayers and the public interest?

(3) Does the stipulation violate any important regulatory principle or practice?

Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm., 68 Ohio St.3d 559, 629 N.E.2d 423 (1994).

⁶ Transcript – Volume I and II (February 8, 2019); Initial Post-Hearing Briefs (March 1, 2019); Reply Briefs (March 12, 2019); Opinion & Order (July 17, 2019); Entry on Rehearing (September 11, 2019).

party cannot show prejudice—even assuming improper conduct by a commissioner—when the record supports the Commission’s unanimous decision approving a stipulation. *See Cincinnati*, 64 Ohio St. 3d at 282–83; *Ohio Transp.*, 164 Ohio St. at 108.

Because there is ample record support for the Commission’s unanimous decisions and, therefore, no prejudice to ELPC, the Commission should deny ELPC’s motion to vacate.

Dated: December 9, 2020

Respectfully submitted,

/s/ Ryan A. Doringo

Brian J. Knipe (0090299)
Counsel of Record
FirstEnergy Service Company
76 S. Main St.
Akron, Ohio 44308
Tel: (330) 384-5795
bknipe@firstenergycorp.com

Michael R. Gladman (0059797)
Margaret M. Dengler (0097819)
Jones Day
325 John H. McConnell Blvd
Suite 600
Columbus, Ohio 43215
Tel: (614) 469-3939
Fax: (614) 461-4198
mrgladman@jonesday.com
mdengler@jonesday.com

Ryan A. Doringo (0091144)
Jones Day
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Tel: (216) 586-3939
Fax: (216) 579-0212
radoringo@jonesday.com

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.

/s/ Ryan A. Doringo

Attorney for the Companies

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

12/9/2020 4:30:12 PM

in

Case No(s). 16-0481-EL-UNC, 17-2436-EL-UNC, 18-1604-EL-UNC, 18-1656-EL-ATA

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