

**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. 19-0361-EL-RDR
Toledo Edison Company for an Extension)
of the Distribution Modernization Rider)
)**

**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 this case. 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 order. (ELPC Mot. at 5). The Commission’s November 21, 2019 Entry in this proceeding, however, denied the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company’s (the “Companies”) as moot and eliminated any possibility the Companies might rehabilitate Rider DMR with new terms that satisfied the conditions described by the Supreme Court of Ohio.¹

Accordingly, ELPC is not prejudiced by any prior decision. Indeed, the only aspect of the November 21, 2019 Entry challenged on rehearing (and not by ELPC) was paragraph 17, which removed from ESP IV the directive that the Companies file a base distribution rate case at the end of ESP IV (“Paragraph 17”).

¹ See *In re Application of Ohio Edison Co.*, Slip Opinion No. 2019-Ohio-2401.

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).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)).

Even assuming Chairman Randazzo should have been disqualified, ELPC has not identified any prejudice. Indeed, the Commission’s November 21, 2019 Entry denied the Companies’ Application to extend Rider DMR for two years at the same terms and conditions, in light of the Ohio Supreme Court’s June 2019 decision striking down Rider DMR.³ In light of changed circumstances described in the Entry, the Commission added Paragraph 17, in which it found it unnecessary and inappropriate for the Companies to be required to file a new distribution rate case at the conclusion of the Companies’ current ESP. *Id.* at ¶ 17.

Following this, two parties—but, notably, not ELPC—moved for rehearing to challenge Paragraph 17. On January 15, 2020, the Commission issued its Entry denying rehearing. No party

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 *In re Ohio Edison Co.*, 2019-Ohio-2401, 157 Ohio St. 3d 73, ¶¶ 19, 56.

appealed the Commission's decision on rehearing. Nevertheless, if the Commission deems it necessary to reverse Paragraph 17, as well as the January 15, 2020 Entry on Rehearing which upheld it, and restore the directive that the Companies file a base distribution rate case at the end of ESP IV, the Companies would not oppose.

Because the November 21, 2019 Entry and January 15, 2020 Entry on Rehearing did not prejudice ELPC, the Commission should deny ELPC's Motion.

Dated: December 9, 2020

Respectfully submitted,

/s/ Ryan A. Doringo

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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.

/s/ Ryan A. Doringo

Attorney for the Companies

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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