

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**THE ENVIRONMENTAL LAW & POLICY CENTER’S REPLY
IN SUPPORT OF ITS MOTION TO VACATE AND CONDUCT NEW
PROCEEDINGS**

When considering the exceptional circumstances of Chair Sam Randazzo’s resignation from the Public Utilities Commission, the Environmental Law & Policy Center’s (“ELPC”) Motion to Vacate and Conduct New Proceedings is rather modest. All ELPC requests is that the Commission revisits this proceeding—including Chair Randazzo’s involvement—to ensure the due process rights of all parties and to restore public confidence in the Commission’s dealings with the Ohio Edison Company, the Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the “FirstEnergy Utilities”). Ohio public policy and law support such a step from the Commission.

The FirstEnergy Utilities oppose this motion, arguing that the statutory language supports the latest entry in the case and that the issue is moot because Chair Randazzo recused himself from that decision. Memorandum Contra at 1. The FirstEnergy Utilities assert that ELPC cannot show prejudice because “[t]he unanimous vote of the other commissioners and the language of Senate Bill 310 objectively supports the Commission’s June 5, 2019 decision.” Memorandum Contra at 2. The FirstEnergy Utilities further argue that “Chair Randazzo recused himself” for

the only relevant order, citing to the record from the minutes of the June 5, 2019, Commission meeting.

The FirstEnergy Utilities’ argument that ELPC cannot show prejudice because the issue is “moot” ignores the intervening public corruption scandal and Chair Randazzo’s abrupt resignation. When the Commission filed its last entry in this case, ELPC could not have known that a FirstEnergy Corporation filing at the Securities and Exchange Commission would raise questions about Chair Randazzo’s bias nor that the FBI would search his home in the midst of a public corruption scandal tied to regulated utilities. These developments raise questions about the fairness of the proceeding in terms of the influence that Chair Randazzo had—even with his recusal from the relevant entry in this case—and make it difficult to ascertain whether ELPC’s and other parties’ views received due consideration.

That Chair Randazzo recused himself does not necessarily mean that the issue is moot. Even when an adjudicator recuses himself from a decision, it does not inevitably follow that the recused adjudicator had no influence on the ultimate decision. The recused adjudicator may have discussed the case or issues relevant to the case with the remaining adjudicators. Moreover, the June 5, 2019 Commission meeting minutes offer no insight into why Chair Randazzo recused himself or to what extent he participated in the proceedings before that entry.¹ Given the questions about Chair Randazzo’s judgment and possible connections to Commission-regulated entities, it is still important for the Commission to reexamine this proceeding to understand the circumstances of the recusal and the extent to which Chair Randazzo honored that recusal.

¹ The minutes from the June 5, 2019 Commission meeting state only that “Commissioner Randazzo recused himself.” No further explanation is provided. Minutes of Commission Meeting at 2, Ohio Pub. Utils. Comm’n (June 5, 2019), <https://puco.ohio.gov/wps/portal/gov/puco/documents-and-rules/resources/commission-minutes>.

The pertinent issue for the Commission to address is what it must do to accomplish justice given the facts that have come to light regarding Chair Randazzo. Case law interpreting Ohio Rule of Civil Procedure 60(b) and its federal counterpart have framed the question with such a focus on justice. *See Klapprott v. United States*, 335 U.S. 601, 614–15 (1949) (stating that Federal Rule of Civil Procedure 60(b) gives the “power . . . to vacate judgments whenever such action is appropriate to accomplish justice”); *Kay v. Marc Glassman, Inc.*, 76 Ohio St. 3d 18, 20 (1996) (explaining that Ohio Rule of Civil Procedure “60(B) is a remedial rule to be liberally construed so that the ends of justice may be served”). In *City of Cincinnati v. Cincinnati Gas & Electric Co.*, the Ohio Supreme Court concluded that the improper *ex parte* communications of the PUCO Chair did not improperly influence the outcome of the case. 64 Ohio St.3d 279, 283 (1992) (per curiam). However, the Ohio Supreme Court based this decision, in part, on the finding that “the current commission conducted an independent review of the record in that proceeding” and noted that four entirely new commissioners undertook that review. *Id.* at 282 & n.5 (footnote omitted). In other words, before *Cincinnati* appealed, the Commission had already done exactly what ELPC currently requests that this Commission do—take a fresh look at the case.

City of Cincinnati is also instructive in its holding that a Commission entry is not automatically void due to Commissioner misconduct, but is voidable based on whether the inappropriate conduct did in fact influence the entry in some way. *Id.* at 282. The Ohio Supreme Court affirmed the Commission’s conclusion in *City of Cincinnati* in part because the evidence examined by an entirely new Commission supported the conclusion that the inappropriate conduct did not influence the Commission’s entry. *Id.* at 283. ELPC’s request is for the Commission to create that body of evidence. Our Motion states:

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 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.

ELPC Memorandum in Support at 12. ELPC realizes that the Commission may ultimately conclude that Chair Randazzo's recusal was sufficient and that his actions did not unduly affect the decision, but until it examines his influence in a comprehensive way, the public cannot know that.

The FirstEnergy Utilities attempt to paint this motion as out of step with the law. While ELPC does seek what is typically considered an "extraordinary remedy," it is the circumstances leading to this motion, not the modest request itself, that are noteworthy. Ohio is facing its largest public corruption scandal, which has raised questions of bias in these proceedings. ELPC's motion allows the Commission to look into potential bias or influence in this proceeding and reach a new decision freed from any appearance of impropriety. All ELPC seeks is for the Commission to take a small step toward restoring public confidence in its dealings with the FirstEnergy Utilities.

Dated: December 16, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *The Environmental Law & Policy Center's Reply in Support of Its Motion to Vacate and Conduct New Proceedings* was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on December 16, 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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12/16/2020 2:29:38 PM

in

Case No(s). 12-2190-EL-POR, 12-2191-EL-POR, 12-2192-EL-POR

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