

**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

**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 and the Industrial Energy Users-Ohio (“IEU Ohio”) oppose this motion. The FirstEnergy Utilities assert that ELPC cannot show that it will suffer prejudice if there is no vacatur and new proceedings in this docket. FirstEnergy Memorandum Contra at 1–2. They argue that because this proceeding resulted in a stipulation that received support from a wide array of interests and the record shows “ample support” for the stipulation, vacatur is unnecessary. Second, the FirstEnergy Utilities argue that the U.S. Supreme Court’s decision in *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), is inapplicable to this context, leaving undisturbed what they interpret as Ohio precedent holding that unanimous Commission decisions stand even in the face of improper Commissioner conduct. *Id.* at 3–4. IEU Ohio, for its part, simply asserts that the varied groups in support of the stipulation and the prior denial of ELPC’s motion for rehearing on the merits mean that the Commission should deny ELPC’s motion for vacatur. IEU Ohio Memorandum Contra at 2–3. As discussed below, none of these arguments detracts from the need and legal basis for the relief ELPC requests through its motion.

I. Prejudice Exists from the Lack of Examination into Chair Randazzo’s Influence on the Proceedings.

The FirstEnergy Utilities’ and IEU Ohio’s arguments that the record supports the Commission’s decision and that ELPC cannot show prejudice because diverse parties in this proceeding reached a stipulation conveniently ignore the intervening public corruption scandal and Chair Randazzo’s abrupt resignation. ELPC’s motion is focused on due process, not the substance of the stipulation. When the Commission filed its last entry in this case, ELPC and other parties could not have known that a FirstEnergy Corporation filing at the Securities and Exchange Commission would raise questions about Chair Randazzo’s bias. Nor could they have

known that the FBI would search his home in 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 in both approving the stipulation and rejecting the requests for rehearing. Not knowing exactly what Chair Randazzo said and did to influence the ultimate decision makes it difficult to ascertain whether parties' views received due consideration. A failure for the Commission to reconsider decisions in which Chair Randazzo participated will further undermine the public's confidence that the Commission weighed all views fairly.

The focus on the stipulation avoids looking at the question central to ELPC's motion: what does the Commission need to 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 (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 this sense, *City of Cincinnati v. Cincinnati Gas & Electric Co.* is instructive. 64 Ohio St.3d 279 (1992) (per curiam). There, the Ohio Supreme Court concluded that the improper *ex parte* communications of the PUCO Chair did not improperly influence the outcome of the case such that vacatur was necessary. *Id.* at 283. However, the Court noted that "the current commission conducted an independent review of the record in that proceeding" and that four entirely new commissioners undertook the 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 supported a 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 Chairman Randazzo’s action did not unduly affect the decision, but until it examines his influence in a comprehensive way, the public cannot know that.

II. A Fresh Look at Chair Randazzo’s Influence Is Necessary to Ensure the Record Supports the Commission’s Decision.

The FirstEnergy Utilities assert that “the record supports the Commission’s unanimous prior orders approving a stipulation” and that “[e]ven assuming Chairman Randazzo should have been disqualified, the record before the Commission supports” its decisions. FirstEnergy Utilities Memorandum Contra at 2. The FirstEnergy Utilities point to *City of Cincinnati* as evidence that one biased adjudicator is insufficient for vacatur. *See id.* (citing 64 Ohio St.3d 279 (1992) (per

curiam)). However, the FirstEnergy Utilities take the wrong lesson from that case and later developments in the law. In the almost 30 years since that decision, the case law on vacatur due to decisionmaker bias has developed. As ELPC noted in its motion, the U.S. Supreme Court's decision in *Williams v. Pennsylvania* emphasized that in deliberative processes the bias of one participant infects the entire decision. 136 S. Ct. 1899, 1909 (2016). Without further review, we cannot know the influence Chair Randazzo had on the process. Indeed, ELPC does not argue that Chair Randazzo necessarily unfairly influenced the Commission's decision making, only that the Commission must look into what influence he might have had.

The FirstEnergy Utilities attempt to distinguish *Williams*, arguing that it was “narrowly tailored” to address only instances in which a judge acted as a prosecutor before becoming the adjudicator. FirstEnergy Utilities Memorandum Contra at 4. Despite the FirstEnergy Utilities' arguments, the Supreme Court's opinion in *Williams* regarding bias is applicable beyond the precise facts considered in that case. As the Supreme Court explained, the due process violation found when a judge acts as both adjudicator and prosecutor exists based on the objective question of whether “the average judge in [adjudicator's] position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’” 136 S. Ct. at 1905 (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009)). In other words, the issue is whether there is an appearance of bias that weakens the fairness of proceedings. The U.S. Supreme Court has clarified that these due process concerns exist in any adjudicatory proceeding, including agency proceedings like those at the PUCO. *See, e.g., Withrow v. Larkin*, 421 U.S. 35, 46 (1975). And Ohio courts have acknowledged the application of due process protections to the agency context. For example, Ohio courts have cited with approval the Supreme Court's decision in *Withrow v. Larkin*, holding that the “due process requirement applies to adjudications before administrative

agencies.” *Steck’s Buckeye Storage Unit, LLC v. Catawba Island Twp. Bd. of Trs.*, No. OT-17-014, 2018 WL 1226039, ¶ 18 (Ohio Ct. App. 2018) (citing *Withrow*, 421 U.S. at 46–47); see *Cummins v. Minster*, 43 N.E.3d 902, 907 (Ohio Ct. App. 2015). Therefore, *Williams* does reinforce the need for this Commission to revisit the decisions that Chair Randazzo helped make and ensure that there was no improper influence or bias.

IEU Ohio’s Memorandum Contra similarly fails to take on ELPC’s arguments for vacatur and rehearing squarely and misunderstands the relief that ELPC requests. Fundamentally, IEU Ohio asserts that ELPC’s motion is a “draconian overreach” that “simply seeks another opportunity for ELPC to advocate for an increase in the charges FirstEnergy assesses.” IEU Ohio Memorandum Contra at 3. ELPC does not request any substantive outcome from the rehearing. Instead, ELPC merely requests that the Commission vacate orders in which Chair Randazzo participated, consider what influence or involvement he might have had, and assess whether bias tainted these proceedings. The result may well be a renewed approval of the stipulation. ELPC’s motion, therefore, is focused on the procedure leading to the Commission’s decision.

III. Conclusion

The FirstEnergy Utilities and IEU Ohio 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 and other Commission proceedings. ELPC’s motion allows the Commission to vacate any orders involving Chair Randazzo, look into the potential bias, and reach a new decision freed from any appearance of impropriety. All ELPC seeks is for the Commission to take this 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 Advocates' 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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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