

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 FOR APPROVAL OF THEIR
ENERGY EFFICIENCY AND PEAK DEMAND
REDUCTION PROGRAM PLANS FOR 2013
THROUGH 2015.

CASE NO. 12-2190-EL-POR

CASE NO. 12-2191-EL-POR

CASE NO. 12-2192-EL-POR

ENTRY

Entered in the Journal on December 30, 2020

I. SUMMARY

{¶ 1} In this Entry, the Commission denies the motion to vacate and conduct new proceedings filed by the Environmental Law & Policy Center.

II. HISTORY OF THE PROCEEDING

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (FirstEnergy or Companies) are electric distribution utilities as defined in R.C. 4928.01(A)(6) and public utilities as defined in R.C. 4905.02 and, as such, are subject to the jurisdiction of this Commission.

{¶ 3} On July 31, 2012, FirstEnergy filed an application for approval of the Companies' energy efficiency (EE) and peak demand reduction (PDR) program portfolio plan for 2013 through 2015 pursuant to the Revised Code, Ohio Adm.Code 4901:1-39-04, 4901:1-39-05, 4901:1-39-06, and 4901:1-39-07, and the Commission's February 29, 2012 Entry in Case No. 12-814-EL-UNC. Thereafter, on March 20, 2013, the Commission issued an Opinion and Order approving the portfolio plan with modifications. Opinion and Order (Mar. 20, 2013).

{¶ 4} On April 19, 2013, FirstEnergy, Ohio Consumers' Counsel (OCC), Industrial Energy Users-Ohio (IEU-Ohio), and Nucor Steel Marion, Inc. (Nucor), each filed applications for rehearing. In addition, a joint application for rehearing was filed by the

Environmental Law and Policy Center (ELPC) and Ohio Environmental Council (OEC). On May 15, 2013, the Commission granted the applications for rehearing for further consideration of the matters specified in the applications for rehearing. Entry on Rehearing (May 15, 2013). Thereafter, on July 17, 2013, the Commission denied the application for rehearing filed by OCC and the joint application for rehearing filed by ELPC and OEC and granted, in part, and denied, in part, the applications for rehearing filed by FirstEnergy, IEU-Ohio, and Nucor. Second Entry on Rehearing (July 17, 2013) at 18-19.

{¶ 5} Sub. S.B. No. 310 (S.B. 310), effective on September 12, 2014, amended Ohio's renewable energy, energy efficiency, and peak demand reduction requirements. Section 6(A) of S.B. 310 provided that an electric distribution utility (EDU) that had a portfolio plan in effect on the effective date was permitted to seek an amendment to that portfolio plan, pursuant to Section 6(B) of S.B. 310. S.B. 310 also provided an opportunity for certain mercantile customers to opt out of an EDU's EE/PDR programs. R.C. 4928.6611.

{¶ 6} On September 24, 2014, FirstEnergy filed an application to amend its EE/PDR program portfolio plans for 2015 through 2016, pursuant to Section 6 of S.B. 310. Following a comment period, the Commission approved the Companies' application, subject to modifications. Finding and Order (Nov. 20, 2014).

{¶ 7} On December 22, 2014, FirstEnergy, OCC, The Ohio Manufacturers' Association Energy Group (OMAEG), and ELPC, OEC, Sierra Club, and Natural Resources Defense Council (NRDC) filed applications for rehearing regarding the Order. On January 14, 2015, the Commission granted the applications for rehearing for further consideration of the matters specified in the applications for rehearing. Fourth Entry on Rehearing (Jan. 14, 2015). Subsequently, on April 10, 2019, the Commission granted, in part, and denied, in part the application for rehearing filed by the Companies and denied all other applications for rehearing. Fifth Entry on Rehearing (Apr. 10, 2019).

{¶ 8} On May 10, 2019, ELPC, OEC, and NRDC (Environmental Advocates) filed a joint application for rehearing regarding the Commission's decision in the Fifth Entry on

Rehearing. On May 20, 2019, FirstEnergy and IEU-Ohio each filed memoranda contra the applications for rehearing. The Commission denied the joint application for rehearing on June 5, 2020. Sixth Entry on Rehearing (Jun. 5, 2019).

{¶ 9} On November 24, 2020, ELPC filed a motion to vacate and conduct new proceedings. The Companies filed a memorandum contra on December 9, 2020, and ELPC filed its reply on December 16, 2020.

III. DISCUSSION

{¶ 10} In its motion to vacate, ELPC notes that Sam Randazzo recently resigned as Chairman of the Commission and, in his resignation letter, the former chairman cited a raid on his home by the Federal Bureau of Investigation and FirstEnergy Corp.'s November 19, 2020 10-Q filing with the U.S. Securities and Exchange Commission (SEC) as reasons for his resignation. The SEC filing describes a payment of approximately \$4 million made in early 2019 to an individual who was subsequently appointed to a role involved in regulating the Companies. ELPC alleges that the timeline of events suggests that the former chairman is the individual referenced in the filing even though he was not named in the SEC filing. ELPC claims that his departure created an appearance of impropriety. ELPC asserts that the Commission should ascertain the former chairman's involvement in the proceedings and then determine the appropriate course of action to ensure that FirstEnergy doesn't benefit from undue influence or bias.

{¶ 11} ELPC argues that although Commission rules don't address situations where new facts come to light after the Commission issues a final order, the Commission has broad authority to vacate and reconsider its orders. ELPC also reasons that if the Commission determines that it does not have authority to vacate and reconsider its orders, that would entice parties to conceal pertinent facts until after the Commission issues an order.

{¶ 12} ELPC states that the facts surrounding the former chairman's resignation suggest that he was not impartial as he made his decisions on the cases, which creates a

cloud of suspicion that undermines the Commission's work. ELPC cites rules requiring judges to recuse themselves when they have an interest in a case and argues that the commissioners' role is like that of a judge. In support of its argument, ELPC notes that commissioners of the Illinois Commerce Commission must abide by the recusal principles applicable to judges.

{¶ 13} ELPC argues that although he was only one of five Commissioners, Chairman Randazzo's participation taints the entire decision. ELPC also cites a U.S. Supreme Court case for the proposition that Chairman Randazzo's failure to recuse himself was unconstitutional. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909, 195 L.Ed.2d 132 (2016). ELPC acknowledges an Ohio Supreme Court and a Commission decision that state the bias of the chairman did not create prejudice when all members of the commission voted unanimously. *Ohio Transport, Inc. v. Pub. Util. Comm'n*, 164 Ohio St. 98, 128 N.E.2d 22 (1955); *In re Complaint of the City of Cincinnati v. Cincinnati Gas & Elec. Co.*, No. 91-377-EL-CSS (*Zimmer Case*), Finding and Order (June 27, 1991) (holding that alleged ex parte contacts insufficient basis to vacate Commission decision regarding Zimmer Power Station). But ELPC argues that those decisions are no longer controlling law because they predate *Williams*.

{¶ 14} The Companies, in their memorandum contra, cite the standard adopted by the Supreme Court of Ohio for vacating prior Commission orders due to allegations of improper conduct as appropriate only if the complaining party was prejudiced by improper conduct. *Cincinnati v. Pub. Util. Comm.*, 64 Ohio St. 3d 279, 281, 595 N.E.2d 858, 860 (1992). The Companies also argue that ELPC's reliance on *Williams v. Pennsylvania* for the proposition that Chairman Randazzo's participation in the case justifies vacating the order is misplaced. FirstEnergy notes that in *Williams*, the Court ruled that a judge deciding a criminal case who had previously served as prosecutor on the same case violated the constitutional rights of the criminal defendant. FirstEnergy asserts that the case does not apply to agency decision making.

{¶ 15} FirstEnergy further states that the only decision in the proceeding that took place while Chairman Randazzo was on the Commission was the Sixth Entry on Rehearing, dated June 5, 2019. The Companies emphasize that Chairman Randazzo, in fact, recused himself from that decision. FirstEnergy also argues that the statutory language supports the finding in that entry. FirstEnergy notes that neither ELPC nor any other party appealed that decision.

{¶ 16} ELPC replies that in the *Zimmer Case*, four new commissioners undertook an independent review of the record, which is what ELPC is seeking in its present motion. *Zimmer Case*, Finding and Order (June 27, 1991). ELPC also cites the *Zimmer Case* for the proposition that a Commission decision is voidable if inappropriate conduct influenced the entry in some way. ELPC requests that the Commission vacate orders in which Mr. Randazzo participated, consider what influence or involvement he might have had, and assess whether bias tainted the proceedings. ELPC also argues that its failure to apply for rehearing or appeal is immaterial now because the information regarding the former chairman did not become public until recently, at which time ELPC filed its motions to vacate.

{¶ 17} ELPC argues also that the former chairman's recusal doesn't guarantee that he had no influence over the decision. ELPC asserts that the case should be reexamined now in light of the potential bias Mr. Randazzo may have had.

IV. COMMISSION DECISION

{¶ 18} The Commission finds that the motion to vacate should be denied. As a preliminary matter, we find that ELPC's reliance upon *Williams* to be misplaced. The decision in *Williams* is not controlling for our purposes, as it was narrowly tailored to facts not at issue in these proceedings. As such, precedents established by the Supreme Court of Ohio and the Commission remain the controlling law.

{¶ 19} In *Williams*, the United States Supreme Court found the due process rights of a defendant *in a criminal case* were violated when a prosecutor who approved the decision to seek the death penalty later served as a justice on the Pennsylvania Supreme Court in a habeas petition arising from the same crime. “Of particular relevance to the instant case, the Court has determined that an unconstitutional potential for bias exists *when the same person serves as both accuser and adjudicator in a case.*” *Williams*, 136 S.Ct. at 1905-1906 (emphasis added). Thus, the Supreme Court framed its holding very narrowly, stating that “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.” As a result, the Court instructed that “a due process violation arising from the participation of an interested judge is a defect ‘not amenable’ to harmless-error review, regardless of whether the judge's vote was dispositive”, and vacated the decision. *Williams*, 136 S.Ct. at 1910. However, ELPC does not claim in its motion to vacate that the same person served as both a litigant and the adjudicator in this case.

{¶ 20} Moreover, even in subsequent cases that both cite to *Williams* and involve administrative agencies, lower federal and state courts also turned to establishing whether an injury or prejudice stemming from the bias occurred. See, e.g., *Johnson v. Morales*, 946 F.3d 911 (6th Cir.2020) (where the court did not apply the *Williams* recusal standard as the case was factually dissimilar, i.e., did not involve prior personal involvement as a prosecutor, but remanded on the grounds that there was no rational basis for the decision to suspend the business license at issue). This standard, whether the challenged decision was a substantively valid result and supported by substantial evidence, is consistent with current Ohio precedent, which prescribes that “vacation and reconsideration is an inappropriate remedy where * * * the party complaining has not been prejudiced by the improper conduct” and “the record supported the Commission’s decision.” *Cincinnati v. Pub. Util. Comm.*, 64 Ohio St.3d 279, 281-282, 595 N.E.2d 858 (1992); *Ohio Transp. v. Pub. Util. Comm’n*, 164 Ohio St. 98, 128 N.E.2d 22 (1955). Accordingly, we will follow these Ohio precedents in ruling upon the motion to vacate in this case.

{¶ 21} Under the specific facts and circumstances of this case, we find that ELPC has not demonstrated any prejudice from the Commission decision in the Sixth Entry on Rehearing in this case. Mr. Randazzo, in fact, recused himself from the decision. Four other commissioners voted for the Sixth Entry on Rehearing. ELPC's claim that recusal doesn't guarantee that Mr. Randazzo had no influence over the decision is nothing more than baseless speculation, and this speculation is completely undermined by the fact that the Sixth Entry on Rehearing did nothing more than affirm the Commission's prior decision in the Fifth Entry on Rehearing, *which was issued prior to Mr. Randazzo's tenure at the Commission*. Sixth Entry on Rehearing at ¶¶ 10, 15-16; Fifth Entry on Rehearing (Apr. 10, 2020) at ¶ 14. Moreover, we note that, had the Commission never issued the Sixth Entry on Rehearing, ELPC's application for rehearing would have been denied by operation of law. R.C. 4903.10. We also note that neither ELPC nor any other party appealed the Commission's decision.

{¶ 22} Further, consistent with the *Zimmer Case*, we have reviewed the decision in the Sixth Entry on Rehearing, and the evidentiary record in this case, and find that ample evidence supported the Commission's decision. *Zimmer Case* at 9. We note that the Commission decision in this case was based upon the testimony of 15 witnesses over six days of hearing. Accordingly, we find that the motion to vacate filed by ELPC should be denied.

V. ORDER

{¶ 23} It is, therefore,

{¶ 24} ORDERED, That the motion to vacate filed by ELPC be denied. It is, further,

{¶ 25} ORDERED, That a copy of this Entry be served upon all parties of record.

COMMISSIONERS:

Approving:

M. Beth Trombold
Lawrence K. Friedeman
Daniel R. Conway
Dennis P. Deters

GAP/hac

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

Summary: Entry denying the motion to vacate and conduct new proceedings filed by the Environmental Law & Policy Center electronically filed by Heather A Chilcote on behalf of Public Utilities Commission of Ohio