

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. 16-481-EL-UNC

IN THE MATTER OF THE FILING BY OHIO
EDISON COMPANY, THE CLEVELAND
ELECTRIC ILLUMINATING COMPANY AND
THE TOLEDO EDISON COMPANY OF AN
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
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

ENTRY

Entered in the Journal on December 30, 2020

I. SUMMARY

{¶ 1} The Commission denies the motion to vacate and conduct new proceedings filed by the Environmental Law and Policy Center.

II. HISTORY OF THE PROCEEDINGS

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the 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} R.C. 4928.141 provides that an electric distribution utility shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric service to customers, including a firm supply of electric generation service. The SSO may be either a market rate offer in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} On March 31, 2016, in Case No. 14-1297-EL-SSO, the Commission approved FirstEnergy's application for its fourth ESP (ESP IV). *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and the Toledo Edison Co. for Authority to Provide for a Std. Serv. Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Security Plan*, Case No. 14-1297-EL-SSO (*ESP IV Case*), Opinion and Order (Mar. 31, 2016). Moreover, on October 12, 2016, the Commission issued the Fifth Entry on Rehearing in the *ESP IV Case*, further modifying *ESP IV*.

{¶ 5} Among other terms, *ESP IV* required the Companies to undertake grid modernization initiatives that promote customer choice in Ohio and to file a grid modernization business plan. *ESP IV Case*, Opinion and Order at 22, 95-96. Accordingly, on February 29, 2016, the Companies filed a grid modernization plan with the Commission in Case No. 16-481-EL-UNC (*Grid Mod Case*).¹ Specifically, the Companies' plan provided scenarios for the Companies to achieve smart meter installation, as well as other grid modernization investments like distribution automation (DA) and integrated volt-VAR control (Co. Ex. 2 at 5; Co. Ex. 1 at 5-6; business plan application at 13).

¹ The attorney examiner took administrative notice of the plan filed in the *Grid Mod Case* during the evidentiary hearing (Tr. Vol. 1 at 28).

{¶ 6} Subsequently, in the Fifth Entry on Rehearing in the *ESP IV Case*, the Commission noted that we intended to undertake a detailed policy review of grid modernization and that FirstEnergy's grid modernization business plan would be addressed following such review. *ESP IV Case*, Fifth Entry on Rehearing at 96-97. The Commission commenced this detailed policy review in 2017, and, on August 29, 2018, the Commission released *PowerForward: A Roadmap to Ohio's Electricity Future*. In the interim, on December 4, 2017, the Companies filed an application for approval of a distribution platform modernization plan (DPM Plan) in Case No. 17-2436-EL-UNC (*DPM Plan Case*) as a complement to the *Grid Mod Case* initiative (Co. Ex. 1 at 3; Co. Ex. 2 at 5).² According to FirstEnergy, the DPM Plan was designed to be completed over a three-year period to provide enhanced reliability and timelier outage restoration (DPM Plan at 1).

{¶ 7} On January 10, 2018, the Commission opened an investigation into the financial impacts of Tax Cuts and Jobs Act of 2017 (TCJA) on regulated utilities in this state. See *In re the Commission's Investigation of the Financial Impact of the TCJA on Regulated Ohio Utility Companies*, Case No. 18-47-AU-COI, Entry (Jan. 10, 2018). On October 24, 2018, following an extensive comment period and hearing, the Commission directed public utilities to file applications not for an increase in rates, pursuant to R.C. 4909.18, by January 1, 2019, in order to return to consumers the tax impacts resulting from the TCJA. On October 30, 2018, the Companies filed an application to establish a process to resolve TCJA-related issues in Case No. 18-1604-EL-UNC.

{¶ 8} On November 9, 2018, the Companies filed a stipulation and recommendation, along with an application "not for an increase in rates" in Case No. 18-1656-EL-ATA, recommending a resolution for the above-captioned cases. On January 25, 2019, a supplemental stipulation and recommendation was filed, which modified the original stipulation (both stipulations collectively being referred to as the Stipulation).

² The attorney examiner took administrative notice of the plan filed in the *DPM Plan Case* during the evidentiary hearing (Tr. Vol. 1 at 28).

{¶ 9} By Entry issued November 15, 2018, the attorney examiner consolidated the above-captioned cases and set a procedural schedule, including scheduling an evidentiary hearing, which commenced on February 5, 2019. The hearing concluded on February 6, 2019. Timely briefs were filed by several parties, including the Environmental Law & Policy Center (ELPC), the Ohio Environmental Council, and the Natural Resources Defense Council (collectively, the Environmental Advocates).

{¶ 10} The Commission issued its Opinion and Order on July 17, 2019, approving the Stipulation, subject to the Commission's adjustments to the calculation of the total estimated net benefits proposed for Grid Mod I. Opinion and Order at ¶¶ 115-116.

{¶ 11} Environmental Advocates filed an application for rehearing on August 16, 2019. The Companies and Industrial Energy Users-Ohio (IEU-Ohio) filed memoranda contra on August 26, 2019. On September 11, 2019, the Commission denied the application for rehearing.

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

III. DISCUSSION

{¶ 13} 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.

{¶ 14} 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.

{¶ 15} 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.

{¶ 16} 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 by former chairman 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*.

{¶ 17} 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.

{¶ 18} The Companies further argue that ELPC was not prejudiced because the Commission decisions were unanimous. The Companies note that the stipulation was unanimously approved in the July 17, 2019 Opinion and Order, and the application for rehearing was unanimously denied in the September 11, 2019 Entry on Rehearing. FirstEnergy notes that the Commission found that the stipulation satisfied the three-prong test and provided customers with approximately \$900 million of tax savings. The Companies also emphasize that the Commission's order is supported by the record, and parties representing diverse interests entered into the stipulation.

{¶ 19} In its memorandum contra, IEU-Ohio argues that the Commission should deny the motion because vacating that settlement would result in the reversal of approximately \$900 million in credits to customers. IEU-Ohio notes that the stipulation was joined by 12 parties that included diverse interests. IEU-Ohio also states that ELPC's prior request to modify the settlement by increasing the charges to FirstEnergy customers by \$30 million was denied. IEU-Ohio notes that ELPC filed an application for rehearing but did not appeal the Commission's order. IEU-Ohio argues that ELPC's motion to vacate is an

untimely application for rehearing and that approval of that motion would result in undoing significant consumer benefits.

{¶ 20} 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.

IV. COMMISSION DECISION

{¶ 21} 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.

{¶ 22} 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

risers 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.

{¶ 23} 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.

{¶ 24} Under the specific facts and circumstances of this case, we find that ELPC has not demonstrated any prejudice from the Commission decision in the Opinion and Order or the Entry on Rehearing in this case. Notwithstanding Mr. Randazzo’s participation in the decision, four other commissioners voted for both the Opinion and Order and the Entry on Rehearing. Although Environmental Advocates filed an “application for rehearing” in this proceeding, the application for rehearing plainly failed to satisfy the requirements for an application for rehearing under Ohio law, and ELPC did not seek rehearing on the Commission’s determination that the application for rehearing was improper. We also note that neither ELPC nor any other party appealed the Commission’s

decision. On the other hand, vacating the approval of the stipulation in this case would greatly harm ratepayers in this state, as it would undo the return of \$900 million in tax savings to ratepayers resulting from the TCJA.

{¶ 25} Further, consistent with the *Zimmer Case*, we have reviewed the decisions in the Opinion and Order and the Entry on Rehearing, as well as the evidentiary record in this case, and find that ample evidence supported the Commission's decision. *Zimmer Case* at 9. The stipulation in this proceeding, as supplemented, was fully supported by Direct Energy Services LLC and Direct Energy Business LLC, the Environmental Defense Fund, Ohio Energy Group, IEU-Ohio, Ohio Cable Telecommunications Association, Ohio Hospital Association, Interstate Gas Supply, Inc., the Companies and Staff and partially supported by Ohio Consumers' Counsel, Northeast Ohio Public Energy Council and Ohio Partners for Affordable Energy. Co. Ex. 1 at 10. The Commission decision was based upon the testimony of six witnesses over two days of hearing. Accordingly, we find that the motion to vacate filed by ELPC should be denied.

V. ORDER

{¶ 26} It is, therefore,

{¶ 27} ORDERED, That the motion to vacate and conduct new proceedings filed by ELPC be denied. It is, therefore,

{¶ 28} ORDERED, That a copy of this Entry be served upon each party 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). 16-0481-EL-UNC, 17-2436-EL-UNC, 18-1604-EL-UNC, 18-1656-EL-ATA

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