

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 AN EXTENSION OF THE
DISTRIBUTION MODERNIZATION RIDER.

CASE NO. 19-361-EL-RDR

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 ELPC. In addition, the Commission reinstates the requirement that Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company file a distribution rate case by May 31, 2024.

II. HISTORY OF THE PROCEEDING

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (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 August 4, 2014, FirstEnergy filed an application pursuant to R.C. 4928.141 to provide for an SSO to provide generation pricing for the period of June 1, 2016, through May 31, 2019. The application was for an ESP, in accordance with R.C. 4928.143. *In re Ohio*

Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, Case No. 14-1297-EL-SSO (ESP IV Case), Opinion and Order (Mar. 31, 2016) at 9, 120.

{¶ 5} On March 31, 2016, the Commission issued its Opinion and Order in the *ESP IV Case*, approving FirstEnergy's application and stipulations with several modifications. *ESP IV Case, Opinion and Order at 120-121.* As part of that Order, we approved a modified version of FirstEnergy's original proposal for a retail rate stability rider (Rider RRS).

{¶ 6} On April 27, 2016, the Federal Energy Regulatory Commission (FERC) issued an order granting a complaint filed by the Electric Power Supply Association, the Retail Energy Supply Association, Dynegy, Inc., Eastern Generation, LLC, NRG Power Marketing LLC, and GenOn Energy Management, LLC, and rescinding a waiver of its affiliate power sales restrictions previously granted to FirstEnergy Solutions Corporation. 155 FERC ¶ 61,101 (2016).

{¶ 7} On October 12, 2016, the Commission issued its Fifth Entry on Rehearing in the *ESP IV Case*, adopting Staff's alternative proposal to establish a distribution modernization rider (Rider DMR) and eliminate Rider RRS. Among other things, the Commission explained in its Fifth Entry on Rehearing that Rider DMR was valid under R.C. 4928.143(B)(2)(d) because the revenue generated would serve as an incentive for the Companies to modernize their distribution systems. Additionally, the Commission adopted Staff's recommendation that Rider DMR be limited to three years with a possible extension of two years. *ESP IV Case, Fifth Entry on Rehearing (Oct. 12, 2016) at ¶ 210.* The Commission also directed the Companies to file a distribution rate case by the end of ESP IV. *ESP IV Case, Fifth Entry on Rehearing at ¶ 251.* The deadline for FirstEnergy to file an application for an extension of Rider DMR was later adjusted and set for February 1, 2019. *ESP IV Case, Eighth Entry on Rehearing (Aug. 16, 2017) at ¶ 113.* Subsequently, the Commission issued a final, appealable order on October 11, 2017. *ESP IV Case, Ninth Entry on Rehearing (Oct. 11, 2017).*

{¶ 8} On February 1, 2019, FirstEnergy filed an application in the above-captioned proceeding to extend Rider DMR for an additional two years.

{¶ 9} However, on June 19, 2019, the Supreme Court of Ohio issued a decision in the appeals of the *ESP IV Case*, affirming the Commission's order in part, reversing it in part as it relates to Rider DMR, and remanding with instructions to remove Rider DMR from FirstEnergy's ESP. Specifically, the Court held that Rider DMR does not qualify as an incentive under R.C. 4928.143(B)(2)(h) and the conditions placed on the recovery of Rider DMR revenues were not sufficient to protect ratepayers. *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401, ¶¶ 14-29, 131 N.E.3d 906, *reconsideration denied*, 156 Ohio St.3d 1487, 2019-Ohio-3331, 129 N.E.3d 458.

{¶ 10} On August 22, 2019, pursuant to the *Ohio Edison* decision, the Commission directed the Companies to immediately file proposed revised tariffs setting Rider DMR to \$0.00. The Companies were further directed to issue a refund to customers for monies collected through Rider DMR for services rendered after July 2, 2019, subject to Commission review. Once the refund had been appropriately issued, the Companies were instructed to file proposed, revised tariffs removing Rider DMR from the Companies' ESP. *ESP IV Case*, Order on Remand (Aug. 22, 2019) at ¶¶ 14-16. The Companies complied with the Commission's directives as instructed in the Order on Remand and filed tariffs removing Rider DMR from their ESP on October 18, 2019.

{¶ 11} On August 30, 2019, OCC, OMAEG, NOPEC, and NOAC filed a joint motion requesting that the Commission deny FirstEnergy's pending request to continue Rider DMR for an additional two years.

{¶ 12} Subsequently, on November 21, 2019, the Commission ruled that the then pending application in this proceeding to extend Rider DMR for an additional two years should be denied as moot and that the case should be dismissed. Entry, (Nov. 19, 2019) at ¶¶ 1, 19. Further, in light of the changed circumstances, with termination of revenues recovered through Rider DMR, as well as the elimination of any possibility for an extension

of Rider DMR, the Commission held that it is no longer necessary or appropriate for the Companies to be required to file a new distribution rate case at the conclusion of the Companies' current ESP. Entry at ¶ 17.

{¶ 13} On December 23, 2019, applications for rehearing were filed in this proceeding by Ohio Consumers' Counsel (OCC) and Ohio Manufacturers' Association Energy Group (OMAEG). On January 2, 2020, a memorandum contra the applications for rehearing was filed by FirstEnergy. On January 15, 2020, the Commission denied the applications for rehearing. Entry on Rehearing (Jan. 15, 2020).

{¶ 14} 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

{¶ 15} 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.

{¶ 16} 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.

{¶ 17} ELPC claims 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.

{¶ 18} ELPC argues that, although he was only one of five Commissioners, Mr. Randazzo's participation taints the entire decision. ELPC also cites a U.S. Supreme Court case for the proposition that the former chairman'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 vacate Commission decision regarding Zimmer Power Station). But ELPC argues that those decisions are no longer controlling law because they predate *Williams*.

{¶ 19} 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 Mr. 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.

{¶ 20} FirstEnergy further argues that ELPC was not prejudiced in the decision because the Commission denied the Companies' application and instructed the Companies to remove the distribution modernization rider from its electric security plan (ESP). FirstEnergy also notes that the applications for rehearing only challenged one portion of the decision, in which the Commission found it unnecessary for the Companies to be required to file a new distribution rate case at the conclusion of the current ESP. FirstEnergy states that the Commission previously denied rehearing on that issue, but it would not oppose if the Commission reverses that decision and requires the Companies to file a base distribution rate case at the end of the current ESP.

{¶ 21} 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.

{¶ 22} Finally, ELPC notes FirstEnergy's willingness to revisit whether the Companies should be required to file a base distribution rate case at the end of the current ESP and states its support. ELPC argues that the case should be reviewed at this time for that issue and any other bias that may have been introduced in the case.

IV. COMMISSION DECISION

{¶ 23} 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.

{¶ 24} 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.

{¶ 25} 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 Ohio law in ruling upon the motion to vacate in this case.

{¶ 26} The Commission notes that ELPC did not file an application for rehearing of the November 21, 2019 Entry, which terminated the requirement to file a distribution rate case and dismissed this case. Having failed to file for rehearing of the November 19, 2019 Entry, ELPC is in a poor position to demonstrate prejudice from either the November 19, 2019 Entry or the Entry on Rehearing which affirmed that decision. The Companies do not quarrel with the Commission’s decision to dismiss the application for an extension of the DMR, rather than craft a DMR extension which addressed the issues raised by the Supreme Court in *Ohio Edison Co.*, 2019-Ohio-2401. Moreover, we note that three Commissioners, other than the former chairman and constituting a majority of the Commission, voted for both the November 19, 2019 Entry and the Entry on Rehearing. We also note that neither ELPC nor any other party appealed the Commission’s final order. Thus, we find that ELPC has not demonstrated any prejudice from the Commission’s decision in this proceeding.

{¶ 27} Further, consistent with the *Zimmer Case*, we have reviewed the decision in the Entry on Rehearing and find that the record amply supports the Commission’s decision. *Zimmer Case* at 9. Although no evidentiary hearing had been held at the time the Commission dismissed the Companies’ application in this case, the Entry on Rehearing provides sound reasoning supporting the Commission’s decision. Entry on Rehearing at ¶¶ 18-21, 24-27, 30-31. Accordingly, we find that the motion to vacate filed by ELPC should be denied.

{¶ 28} Although we have found that there are not sufficient grounds to vacate the Commission’s orders in this case under Ohio law, the Commission notes that the Companies

represented in their memorandum contra the motion to vacate that the Companies would not oppose a Commission decision to reinstate the requirement that the Companies file a distribution rate case at the end of ESP IV. The Commission should “respect its own precedents in its decisions to assure the predictability which is essential in administrative law.” *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060 at ¶ 16 (quoting *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 402, 431, 330 N.E.2d 1 (1975), superseded on other grounds by statute as recognized in *Babbit v. Pub. Util. Comm.*, 59 Ohio St.2d 81, 89, 391 N.E.2d 1376 (1979)). This does not mean, however, that the Commission may never revisit a particular decision, only that if the Commission does change course, we must explain why. *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio 1788, 947 N.E.2d 655, ¶ 52, citing *Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 18.

{¶ 29} We have noted that, while the Commission is aware of reports containing allegations against FirstEnergy Corp. regarding its conduct in the passage of Am. Sub. H.B. 6 and the subsequent referendum, we are determined to act in a deliberate manner, based upon facts rather than speculation, and with due consideration to the limits on our statutory authority over FirstEnergy Corp. and over the political and charitable activity of all public utilities in this state. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 17-974-EL-UNC, Entry (Nov. 4, 2020) at ¶ 17. However, we also note that it is the policy of this state to ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service. A distribution rate case will ensure a thorough review of the Companies’ rates and service. Therefore, given the unique circumstances at this time and in the interests of both transparency and state policy, we find it necessary and appropriate to revisit our prior decision and reinstate the requirement that the Companies file a distribution rate case by May 31, 2024, the end of ESP IV. Moreover, this decision will not unduly prejudice FirstEnergy given the Companies’ representation that they will not oppose the reinstatement of this requirement.

V. ORDER

{¶ 30} It is, therefore,

{¶ 31} ORDERED, That the motion to vacate and institute new proceedings be denied. It is, further,

{¶ 32} ORDERED, That the Companies file a distribution rate case by May 31, 2024. It is, further,

{¶ 33} 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). 19-0361-EL-RDR

Summary: Entry denying the motion to vacate and conduct new proceedings filed by ELPC. In addition, the Commission reinstates the requirement that Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company file a distribution rate case by May 31, 2024 electronically filed by Heather A Chilcote on behalf of Public Utilities Commission of Ohio