

# THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE REVIEW OF THE  
POLITICAL AND CHARITABLE SPENDING  
BY OHIO EDISON COMPANY, THE  
CLEVELAND ELECTRIC ILLUMINATING  
COMPANY, AND THE TOLEDO EDISON  
COMPANY.

CASE NO. 20-1502-EL-UNC

## ENTRY

Entered in the Journal on May 4, 2022

### I. SUMMARY

{¶ 1} The Commission selects Marcum LLP to assist Staff in its review to determine whether the show cause demonstration submitted by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company is sufficient to ensure that the cost of any political or charitable spending in support of Am. Sub. H.B. 6, or the subsequent referendum effort, were not included, directly or indirectly, in any rates or charges paid by ratepayers in this state.

### II. DISCUSSION

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy Ohio or the Companies) are electric distribution utilities, as defined by 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. 4905.06 states, in relevant part, that the Commission has general supervision over all public utilities within its jurisdiction as defined in R.C. 4905.05, and may examine such public utilities and keep informed as to their general condition, capitalization, and franchises, and as to the manner in which their properties are leased, operated, managed, and conducted with respect to the adequacy or accommodation afforded by their service, the safety and security of the public and their employees, and their compliance with all laws, orders of the Commission, franchises, and charter requirements.

{¶ 4} R.C. 4905.05 states, in relevant part, that the jurisdiction, supervision, powers, and duties of the Commission extend to every public utility, the plant or property of which lies wholly within this state and when the property of a public utility lies partly within and partly without this state to that part of such plant or property which lies within this state; to the persons or companies owning, leasing, or operating such public utilities; and to the records and accounts of the business thereof done within this state.

{¶ 5} The Commission opened this proceeding on September 15, 2020, to review the political and charitable spending by the Companies in support of Am. Sub. H.B.6 and the subsequent referendum effort. On that same date, the attorney examiner directed the Companies to show cause, by September 30, 2020, demonstrating that the costs of any political or charitable spending in support of Am. Sub. H.B. 6, or the subsequent referendum effort, were not included, directly or indirectly, in any rates or charges paid by ratepayers in this state. Further, the attorney examiner directed interested parties to file comments regarding the Companies' response by October 29, 2020, and to file reply comments by November 13, 2020.

{¶ 6} The Companies timely filed their response to the show cause order on September 30, 2020. As part of the response, the Companies included an affidavit of Santino L. Fanelli.

{¶ 7} In a memorandum filed on July 23, 2021, the Companies represented that the Deferred Prosecution Agreement (DFA) entered into between the Companies' parent corporation, FirstEnergy Corp., and the United States Attorney's Office for the Southern District of Ohio may require that the Companies supplement their response to the September 15, 2020 show cause order. Further, the Companies represented that the DFA requires that the Companies supplement certain portions of their discovery responses in this proceeding.

{¶ 8} By Entry issued August 3, 2021, the attorney examiner scheduled a prehearing conference in this proceeding to address a variety of matters, including, but not

limited to, the status of supplementing the original response to the show cause order. Further, the Entry indicated that a new schedule would be established for the filing of comments and reply comments to the Companies' response to the show cause order.

{¶ 9} On August 6, 2021, the Companies filed a motion for leave to file a supplemental response to the September 15, 2020 show cause order. No memoranda contra the Companies' motion were subsequently filed.

{¶ 10} In order to allow additional time to resolve numerous outstanding discovery disputes and other procedural issues, the attorney examiner extended the deadline for filing initial comments and reply comments to the Companies' response to the show cause order on several occasions, both sua sponte and at the request of various parties. See, e.g., Entry (Oct. 20, 2020) at ¶ 10; Entry (Apr. 22, 2021) at ¶¶ 6, 8, 12; Entry (May 13, 2021) at ¶¶ 23, 24, 28; Entry (July 20, 2021) at ¶¶ 15, 17; Entry (July 29, 2021) at ¶¶ 14, 16; Entry (Aug. 3, 2021) at ¶ 17.

{¶ 11} A prehearing conference was held on August 31, 2021, at which the Companies' unopposed motion for leave to supplement its response to the Commission's show cause order was granted, among other matters. Further, in order to provide parties time to adhere to the directives provided during the prehearing conference, the attorney examiner instructed that the initial and reply comment period would be established by subsequent entry. (Tr. (Aug. 31, 2021) at 9, 54).

{¶ 12} By Entry issued October 28, 2021, the attorney examiner established a comment period regarding the Companies' response to the show cause order, as supplemented on August 6, 2021, with initial and reply comments to be filed by November 29, 2021, and December 14, 2021, respectively.

{¶ 13} Initial comments regarding the Companies' show cause order were timely filed by Citizens' Utility Board of Ohio, Ohio Consumers' Counsel (OCC), and the Ohio

Manufacturers' Association Energy Group (OMAEG) on November 29, 2021.<sup>1</sup> Reply comments were timely filed by OCC, Ohio Hospital Association, FirstEnergy Ohio, and OMAEG.<sup>2</sup> The comments generally supported an update from the Companies to ensure that political and charitable contributions are not recovered in rates.

{¶ 14} On March 9, 2022, the Commission directed Staff to issue a request for proposals (RFP) to acquire auditing services to assist the Commission with its review of the political and charitable spending of the Companies. According to the Entry, the auditor's investigation shall determine whether the Companies' show cause demonstration is sufficient to ensure that the cost of any political or charitable spending in support of Am. Sub. H.B. 6, or the subsequent referendum effort, were not included, directly or indirectly, in any rates or charges paid by ratepayers in this state. Entry (Sept. 15, 2020) at ¶ 5.

{¶ 15} The proposals received in response to the RFP have been evaluated and, after consideration of those proposals, the Commission selects Marcum LLP (Marcum). The Commission finds that Marcum has the necessary experience to complete the required work.

{¶ 16} The Companies shall enter into a contract with Marcum by May 18, 2022, for the purpose of providing payment for its auditing services. The contract shall incorporate the terms and conditions of the RFP, the auditor's proposal, and relevant Commission entries in this case.

{¶ 17} The Commission shall solely direct the work of the auditor. Staff will review and approve payment invoices submitted by the auditor.

{¶ 18} Marcum will execute its duties pursuant to the Commission's statutory authority to investigate and acquire records, contracts, reports, and other documentation

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<sup>1</sup> Ohio Energy Group, the Ohio Hospital Association, Natural Resources Defense Council, and Ohio Partners for Affordable Energy filed correspondence indicating they would not be filing initial comments.

<sup>2</sup> Ohio Energy Group filed correspondence indicating it would not be filing reply comments.

under R.C. 4903.02, 4903.03, 4905.06, 4905.15, and 4905.16. Marcum is subject to the Commission's statutory duty under R.C. 4901.16, which provides:

Except in his report to the public utilities commission or when called on to testify in any court or proceeding of the public utilities commission, no employee or agent referred to in section 4905.13 of the Revised Code shall divulge any information acquired by him in respect to the transaction, property, or business of any public utility, while acting or claiming to act as such employee or agent. Whoever violates this section shall be disqualified from acting as agent, or acting in any other capacity under the appointment or employment of the commission.

{¶ 19} Upon request of the auditor or Staff, the Companies shall provide any and all documents or information requested. The Companies may conspicuously mark such documents or information as "confidential" if the Companies believe the documents should be deemed as such. In no event, however, shall the Companies refuse or delay in providing such documents or information.

{¶ 20} Once disclosure is permitted by R.C. 4901.16, the following process applies to the release of any document or information marked as confidential. Three days' prior, a notice of intent to disclose shall be provided to the party claiming confidentiality. Three days after such notice, Staff or the auditor may disclose or otherwise make use of such documents or information for any lawful purpose, unless the Commission receives a request for a protective order pertaining to such documents or information within the three-day notice period. The three-day notice period will be computed according to Ohio Adm.Code 4901-1-07.

{¶ 21} Marcum shall perform its audit and investigation as an independent contractor. Any conclusions, results, or recommendations formulated by Marcum may be examined by any participant to this proceeding. Further, it shall be understood that the

Commission and/or its Staff shall not be liable for any acts committed by Marcum or its agents in the preparation and presentation of the report.

### III. ORDER

{¶ 22} It is, therefore,

{¶ 23} ORDERED, That Marcum be selected to perform the auditing activities set forth above and in the RFP. It is, further,

{¶ 24} ORDERED, That the Companies and Marcum shall observe the requirements set forth herein. It is, further,

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

COMMISSIONERS:

*Approving:*

Jenifer French, Chair

M. Beth Trombold

Lawrence K. Friedeman

Daniel R. Conway

Dennis P. Deters

MJA/mef

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