

**BEFORE  
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 ) Case No. 20-1502-EL-UNC  
Illuminating Company, and the Toledo )  
Edison Company. )  
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**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING  
COMPANY, AND THE TOLEDO EDISON COMPANY’S  
MEMORANDUM CONTRA THE ENVIRONMENTAL ADVOCATES’ AMENDED  
MOTION TO EXPAND THE SCOPE OF THE COMMISSION’S REVIEW**

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**I. INTRODUCTION**

In recent months, the Commission has taken intentional steps to address the concerns surrounding the passage of Am. Sub. H.B. 6 and the later referendum effort. The Commission has, in its own words, “act[ed] in a deliberate manner,” focusing “upon facts rather than speculation” and with “due consideration” for the limits on its statutory authority. Case No. 17-0974-EL-UNC, Entry, at ¶ 17 (Nov. 4, 2020). By any measure, the Commission has acted swiftly and decisively, initiating this proceeding as well as two other audits of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the “Companies”). That is to say, the Commission has employed its suite of procedural tools in a comprehensive effort to exercise the power duly granted to it by the General Assembly.

The Environmental Law & Policy Center (“ELPC”) and the Ohio Environmental Council (“OEC”) (collectively, “ELPC/OEC”) care little, however, for the Commission’s carefully crafted approach. In their “amended motion” (“Mot.”), ELPC/OEC once again ask the Commission to expand the scope of this case—repeating the request they made in their pending September 29, 2020 motion. ELPC/OEC accuse the Commission of not going “far enough” in its ongoing

reviews of the Companies. That accusation is largely based on the misleading assertion that the Companies should be subject to an expansive Commission investigation because of supposed allegations in the federal criminal complaint that forms much of the basis for ELPC/OEC's motion. As ELPC/OEC must by now know, however, that complaint contains no allegations of wrongdoing by the Companies and does not relate to the Companies' provision of retail electric service to customers in this State.

So, like their original motion, ELPC/OEC's "amended motion" must be rejected for several reasons. First, it is untimely and procedurally improper. Second, it requests investigations that would require the Commission to exceed its jurisdiction. Third, it seeks an investigation that would violate the First Amendment. For these reasons and those further explained below, the Commission should deny the amended motion in its entirety and continue on the deliberate course it has set.

## **II. ARGUMENT**

### **A. The Amended Motion Is Procedurally Improper.**

Despite recognizing that the Commission has now opened three distinct proceedings, ELPC/OEC demand—just as they did in their September 29, 2020 motion—that the Commission expand the scope of this case to include matters that ELPC/OEC want to investigate but which, as further explained below, are decidedly outside of the Commission's jurisdiction. As a threshold matter, however, there are numerous procedural deficiencies in ELPC/OEC's so-called "amended motion."

First, ELPC/OEC's filing raises issues that could and should have been dealt with in separate proceedings. One of ELPC/OEC's chief grievances is that the Commission has taken a deliberate approach to its ongoing reviews of the Companies by initiating this proceeding and two

others—the additional corporate separation audit in Case No. 17-0974-EL-UNC and the reopened review of Rider DMR in Case No. 17-2474-EL-RDR. In ELPC/OEC’s opinion, these proceedings “even viewed collectively” are not enough for the Commission to “fulfill its oversight obligations.” (Mem. at 13). But if ELPC/OEC believe that the Commission somehow erred in opening these cases, their proper recourse was to file an application for rehearing in *those* cases, which they have not done. And by now, any rehearing application in either case would be time barred. Rule 4901-1-35(C), O.A.C. (“As provided in section 4903.10 of the Revised Code, all applications for rehearing must be submitted within thirty days after an order has been journalized by the secretary of the commission . . .”).

Second, ELPC/OEC’s supposedly “new” argument relates to speculation regarding the Commission’s former Chairman. (Mem. at 11–13). ELPC has, however, already filed several motions to vacate Commission decisions that the former Chairman supposedly presided over, and the Commission rejected each.<sup>1</sup> Once again, if ELPC believed the Commission’s rejections of its motions to vacate were wrongly decided, it should have timely sought relief in those dockets.

Third, the “amended motion” is in fact an improper surreply in support of ELPC/OEC’s pending September 29 motion. Rule 4901-1-12, O.A.C., permits a single reply within seven days of the filing of a memorandum contra. ELPC/OEC already filed the reply permitted by the rule, and they have neither sought nor been granted leave to file another brief. Instead, they have attempted an end run around the Commission’s rules by filing a purported amended motion which, as ELPC/OEC concede, merely “repeat[s] [their] arguments and add[s] new arguments that support expanding the current investigation.” (Mem. at 2).

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<sup>1</sup> Case Nos. 12-2190-EL-POR, *et al.*, Entry, at ¶¶ 18–22 (Dec. 30, 2020); Case Nos. 16-0481-EL-UNC, *et al.*, Entry at ¶¶ 21–25; Case No. 19-0361-EL-RDR, Entry at ¶¶ 23–27 (Dec. 30, 2020).

In sum, the Commission should deny the amended motion in its entirety and reject ELPC/OEC's improper procedural maneuvering that seeks to subvert Commission rules and assert time-barred arguments.

**B. ELPC/OEC's Requested Scope of Review Reaches Far Outside the Commission's Jurisdiction.**

Even setting its procedural defects aside, the amended motion fails for substantive reasons as well. As noted above, the Commission, recognizing the scope of its authority, has initiated three distinct proceedings to employ the various tools at its disposal. As the Attorney Examiner put it earlier this year, the Commission has acted in a deliberate manner by dividing its reviews of the Companies into three slices of a "jurisdictional pie": "[T]his [proceeding] is one slice of the pie. We have two more slices of the pie in terms of the [Rider] DMR review . . . and also the corporate separation proceeding where the Commission will review whether a competitive advantage or undue preference was given to any affiliates of the companies." No. 20-1502, Prehearing Conference Transcript, at 26:3–10 (Jan. 7, 2021).

But ELPC/OEC ask the Commission to disregard any statutory limitations. Their motion is replete with sweeping calls for the Commission to act outside its authority to investigate not only the Companies, but *all* of their affiliates. ELPC/OEC even insist, in the vaguest and broadest terms possible, that the Commission should address "whether any of the FirstEnergy entities acted improperly." (Mem. at 13).<sup>2</sup> What ELPC/OEC plainly seek is an expansive investigation that disregards entirely "the limits on [the Commission's] statutory authority over FirstEnergy Corp. and over the political and charitable activity of all public utilities in this state." Case No. 17-2474-

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<sup>2</sup> See also Mem. at 5 (the Commission should "investigate the extent to which the [Companies] and their parent company used their money and influence to push for outcomes that could have harmed their customers or the competitive market"), 9 (the Commission should "consider" how the Companies and their affiliates "worked together on political issues.").

EL-RDR, Entry at ¶ 20 (Dec. 30, 2020). ELPC/OEC also ignore decades of Ohio Supreme Court authority, which has repeatedly held that the Commission is a creature of statute and can exercise only the powers and jurisdiction expressly granted to it by the General Assembly. *See, e.g., In re Application of Ohio Edison Co.*, 158 Ohio St.3d 27, 2019-Ohio-4196, 139 N.E.3d 875, ¶ 13; *Canton Storage & Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St.3d 1, 5, 1995-Ohio-282, 647 N.E.2d 136 (1995); *Ohio Public Interest Action Group v. Pub. Util. Comm.*, 43 Ohio St.2d 175, 331 N.E. 2d 730 (1975); *Akron & Barberton Belt Rd. Co. v. Pub. Util. Comm.*, 165 Ohio St. 316, 135 N.E. 2d 400 (1956).

ELPC/OEC's demand that the Commission abandon its deliberate approach and ignore the jurisdictional limitations it has acknowledged and respected should be rejected.

**1. R.C. 4905.05 and 4905.06 Do Not Confer Unbounded Investigatory Authority.**

ELPC/OEC claim the Commission has jurisdiction under R.C. 4905.05 and 4905.06 to probe into the political spending and activities of the Companies *and* FirstEnergy Corp. Not so, for reasons the Companies previously explained in detail in response to similar requests for broad investigations by the Office of the Ohio Consumers' Counsel ("OCC"), as well as ELPC/OEC's initial motion to expand these proceedings.<sup>3</sup>

Starting with FirstEnergy Corp., R.C. 4905.05 defines the Commission's jurisdiction as extending primarily to "public utilities" operating in Ohio as defined in R.C. 4905.03. The Companies are public utilities; FirstEnergy Corp. is not—it does not charge for or provide utility service. Further, while the Commission may have jurisdiction and general supervisory powers

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<sup>3</sup> Case No. 17-0974-EL-UNC, Companies' Memorandum Contra OCC's Application for Rehearing, at 3–6 (Dec. 14, 2020); Case No. 20-1502-EL-UNC, Companies' Memorandum Contra ELPC/OEC's Original Motion to Expand the Scope of Review, at 5–8 (Oct. 14, 2020).

over public utility holding companies and their subsidiaries in narrowly defined circumstances under R.C. 4905.05 and R.C. 4905.06, those circumstances do not apply here for the reasons explained in detail by the Companies in their response to similar arguments by OCC.<sup>4</sup>

Moreover, ELPC/OEC's proposed investigation under R.C. 4905.05 is unrelated to "the costs associated with the provision of electric utility service by any public utility" in this state. Neither the allegations in the federal complaint, nor anything in FirstEnergy Corp.'s public disclosures that ELPC/OEC cite, relates to the Companies' costs of providing retail electric service in Ohio.<sup>5</sup> Thus, R.C. 4905.05 is inapplicable.

R.C. 4905.06 applies to regulated public utilities and "all other companies referred to in section 4905.05 of the Revised Code to the extent of its jurisdiction as defined in that section." Because FirstEnergy Corp. is not one of the companies referenced in R.C. 4905.05, the Commission lacks authority to examine it under R.C. 4905.06 for compliance with all laws and orders of the Commission.

This same reasoning applies to preclude ELPC/OEC's "new" request that the Commission investigate whether the former Chairman's decision making was "improperly influenced." (Mem. at 11–12). ELPC/OEC once again urge the Commission to exceed its statutory authority and institute a broad and vaguely defined investigation of FirstEnergy Corp., which must be rejected for the reasons explained previously. Moreover, as referenced above, ELPC has already filed several motions in other dockets asking the Commission to vacate prior decisions on these grounds, even for decisions in which the former Chairman had recused. The Commission rejected each

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<sup>4</sup> See Case No. 17-0974-EL-UNC, Companies' Memorandum Contra Motions by the Office of the Ohio Consumers' Counsel, at 4–5 (Sept. 23, 2020) (explaining in detail that while the Public Utilities Holding Company Act of 1935 was in effect, FirstEnergy Corp. became a non-exempt registered holding company and thus its records and accounts have not been subject to the Commission's jurisdiction under R.C. 4905.05 for many years).

<sup>5</sup> See also, Case No. 20-1502-EL-UNC, Companies' Memorandum Contra ELPC/OEC's Original Motion to Expand the Scope of Review, at 8–9 (Oct. 14, 2020).

motion, finding that ELPC had failed to show any prejudice. Case Nos. 12-2190-EL-POR, *et al.*, Entry, at ¶¶ 18–22 (Dec. 30, 2020); Case Nos. 16-0481-EL-UNC, *et al.*, Entry at ¶¶ 21–25; Case No. 19-0361-EL-RDR, Entry at ¶¶ 23–27 (Dec. 30, 2020). ELPC/OEC do not, and could not, offer any legal basis for the Commission to revisit those decisions here.

As to the Companies specifically, the Commission has already embarked upon a comprehensive, three-pronged review. And ELPC/OEC’s argument that “[n]othing in the Ohio Revised Code limits the Commission to investigating public utilities on the basis of only their financial dealings,” (Mem. at 4–5), is premised on a misunderstanding of how the Commission derives its authority. The Commission does not have the authority to conduct any investigation that is not expressly prohibited in the Ohio Revised Code. It’s the other way around—the Commission can exercise only the powers and jurisdiction expressly conferred by statute. *See In re Application of Ohio Edison Co.*, 158 Ohio St.3d 27, 2019-Ohio-4196, 139 N.E.3d 875, ¶ 13. ELPC/OEC still do not cite any authority that grants the Commission the power to probe into the political spending of the Companies or FirstEnergy Corp.

To be sure, the Commission generally has jurisdiction to examine the Companies’ compliance with Ohio utility law and orders of the Commission—thereby ensuring rates are “just and reasonable.” R.C. 4905.22. But that jurisdiction does not extend to the type of political activity that is of interest to ELPC/OEC.<sup>6</sup> The Ohio Supreme Court, citing R.C. 4905.05 and R.C. 4905.06, recently emphasized that “the General Assembly has confined the PUCO’s ‘jurisdiction’

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<sup>6</sup> The Commission cannot usurp the management role. *See Elyria Tel. Co. v. Pub. Util. Comm.*, 158 Ohio St. 441, 447-448, 110 N.E.2d 59 (1953) (utility “is subject to extensive control and regulation” but “is still an independent corporation and possesses the right to regulate its own affairs and manage its own business”); *West Ohio Gas Co. v. Pub. Util. Comm.*, 128 Ohio St. 301, 381 (1934); *City of Cleveland v. Pub. Util. Comm.*, 102 Ohio St. 341, 131 N.E. 714 (1921), syllabus para. 2.

to the supervision of ‘public utilities’” when acting as public utilities. *In re Complaint of Direct Energy Business, LLC v. Duke Energy Ohio, Inc.*, 2020-Ohio-4429, ¶ 25 (Sept. 17, 2020).<sup>7</sup>

Indeed, ELPC/OEC have cited to no Commission proceeding in which the Commission investigated a public utility’s support (or a public utility holding company’s support) for legislation. Instead, the cases cited by ELPC involved investigations of a public utility’s provision of utility service or the reasonableness of rates charged for that service. (*See* Mem. at 5–6). In the Dayton Power and Light (“DP&L”) investigation cited by ELPC/OEC, the concern was the impact of the creditworthiness of DP&L’s unregulated parent company on DP&L’s continuing ability to provide adequate *service* to its retail customers. *In re Commission Investigation of the Financial Condition of the Dayton Power & Light Co.*, No. 04-0486-EL-COI, Entry (Apr. 7, 2004). Similarly, the Commission’s investigation of the Companies in Case No. 17-974-EL-UNC involved the Companies’ compliance with R.C. 4928.17 and O.A.C. 4901:1-37.10. And the Commission’s Tax Cuts and Jobs Act of 2017 investigation examined the options for including the benefits of this federal legislation in utility rates (not whether certain public utilities supported or opposed the legislation at the U.S. Congress). In contrast, ELPC/OEC have not made any showing that the political activity they want investigated affected utility rates or threatens the Companies’ ability to provide adequate service.

There is no legal prohibition on public utilities performing non-utility activities, and the Commission should resist ELPC/OEC’s requests, which lack any statutory basis, to open an investigation into such activities.

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<sup>7</sup> ELPC/OEC cite *A&B Refuse Disposers, Inc. v. Ravenna Twp. Bd. of Trs.*, 64 Ohio St.3d 385, 388 (1992), to say that “the test for whether an entity is a public utility focuses on whether the entity ‘conducts its operations in such a manner as to be a matter of public concern.’” (Mem. at 4 n.7). But *A&B* is inapposite, as the court there had to interpret the meaning of “public utility” under Ohio R.C. Chapter 519, which does not provide a definition of the term “public utility.”



**2. ELPC/OEC's Request for the Commission To Investigate Corporate Separation Issues Is Moot and Asks the Commission To Exercise Authority Not Granted by Statute.**

Likewise, ELPC/OEC's reliance on R.C. 4928.17 in their demand for the Commission to conduct an expansive investigation of the Companies and FirstEnergy Corp. is misplaced. For starters, ELPC/OEC's recycled argument on this front is now moot. The Commission has of course ordered an additional corporate separation audit of the Companies that is currently underway. Case No. 17-0974-EL-UNC, Entry (Nov. 4, 2020). Indeed, the Companies have already entered into a contract with the auditor and work has commenced.

In any event, ELPC/OEC's call for a greater investigation into the corporate separation policies of the Companies and their affiliates still fails because R.C. 4928.17 does not grant authority to investigate political activity. As explained above, the Commission lacks jurisdiction over the Companies' or FirstEnergy Corp.'s political and charitable spending. ELPC/OEC's arguments under R.C. 4928.17 do not change that. Nor do ELPC/OEC cite to a single case in which the Commission determined it could investigate the political spending of a utility or its affiliates under the corporate separation statutes and rules. That is hardly surprising given the Commission's earlier determination in the corporate separation context that political spending is outside its purview. *In re Chapter 4901:1-20, Ohio Adm. Code*, 2004 WL 1950732, Case No. 04-48-EL-ORD, Finding and Order at p. 14 (July 28, 2004). In that proceeding OCC sought an amendment to corporate separation rules that would have prohibited electric distribution utilities from making political contributions or donations that might give them a competitive advantage. *Id.* at p. 13. The Commission rejected OCC's request. As the Commission explained, "[a]s for prohibiting and/or restricting political contributions and donations . . . , that issue is a matter outside of our jurisdiction." *Id.* at p. 14 (emphasis added).

With no applicable authority to stand on, ELPC/OEC resort to merely reciting the statutory language of R.C. 4928.17. (Mem. at 8). The problem for ELPC/OEC is that Ohio’s corporate separation statutes—R.C. 4928.17 and R.C. 4928.18—do not grant unfettered authority to investigate all aspects of the Companies’ and their affiliates’ business operations. Rather, R.C. 4928.18 is limited by its own terms to an examination of “such books, accounts, or other records kept by an electric utility or its affiliate *as may relate to the businesses for which corporate separation is required under section 4928.17* of the Revised Code.” R.C. 4928.18(B) (emphasis added). And R.C. 4928.17 is directed at ensuring that no affiliate “*in the business of supplying competitive retail electric service or nonelectric product or service*” gains an unfair market advantage by virtue of its corporate relationship to a regulated utility. (emphasis added). Simply put, the statutes do not reach either the Companies’ or their affiliates’ political spending, which is plainly unrelated to the provision of retail electric service or any other product or service. R.C. 4928.17 is not, in other words, a means for the Commission to exercise authority over non-regulated entities or non-regulated conduct that the General Assembly never conferred upon it.

### **C. ELPC/OEC’s Requested Investigation Would Violate The First Amendment.**

In their request for an expansive investigation of FirstEnergy Corp.’s political activity, ELPC/OEC also ask the Commission to intrude upon territory protected by the First Amendment. That much is obvious even upon a cursory review of the amended motion, which, incredibly, argues that the Commission should investigate “why FirstEnergy entities would support HB6 to begin with.” (Mem. at 10).<sup>8</sup>

The First Amendment guarantees the right to free association for political purposes. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984); *NAACP v. Alabama*, 357 U.S. 449, 462-63

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<sup>8</sup> See also Mem. at 10 (Commission should investigate whether the Companies “influenced” legislation).

(1958). “Implicit” in this right to associate for political purposes “is the right to exchange ideas and formulate strategy and messages, *and to do so in private.*” *Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2010) (emphasis added). State-compelled disclosure of confidential political communications and documents “discourage[es] political association” because it disrupts “the free flow of information” and “mut[es] the internal exchange of ideas.” *Id.* at 1162–63. After all, “[i]f a person knows that her communications will be disclosed to an unintended audience in the future, she may be more cautious in her statements or refrain from speaking entirely.” *Pulte Home Corp. v. Montgomery Cty., Md.*, No. GJH-14-3955, 2017 WL 1104670, at \*8 (D. Md. Mar. 24, 2017). Accordingly, courts recognize a qualified First Amendment privilege against compelled disclosure that could chill associational rights. *Pulte*, 2017 WL 1104670 at \*3. This right extends equally to corporations engaged in political advocacy. *See Citizens United v. FEC*, 558 U.S. 310 (2010); *Eugster v. City of Spokane*, 91 P.3d 117, 122 (Wash. Ct. App. 2004).

The investigation sought by ELPC/OEC directly implicates the Companies’ and FirstEnergy’s associational and speech rights. ELPC/OEC seek to investigate and penalize political speech that “is an essential mechanism of democracy,” *Citizens United*, 558 U.S. at 339, and “at the core of what the First Amendment is designed to protect,” *Morse v. Frederick*, 551 U.S. 393, 403 (2007). The notion put forth by ELPC/OEC that the Companies or their affiliates must refrain from trying to “influence[]” the political process is a direct attack on fundamental First Amendment values. And ELPC/OEC’s request to delve into *why* the Companies or FirstEnergy Corp. took the “positions” they did treads into dangerous territory. The Commission should not accept ELPC/OEC’s invitation to chill constitutionally protected activity.

### III. CONCLUSION

For all these reasons, the Commission should deny ELPC/OEC's amended motion to expand the scope of the Commission's review in this proceeding.

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Respectfully submitted,

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I certify that a copy of the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on February 11, 2021. 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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