

**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)	Case No. 20-1502-EL-UNC
Electric Illuminating Company, and the)	
Toledo Edison Company.)	

**THE ENVIRONMENTAL ADVOCATES’ REPLY
TO THE FIRSTENERGY UTILITIES’ MEMORANDUM CONTRA
THE AMENDED MOTION TO EXPAND THE SCOPE
OF THE COMMISSION’S REVIEW OF FIRSTENERGY’S POLITICAL AND
CHARITABLE SPENDING**

I. INTRODUCTION

The FirstEnergy Utilities’ Memorandum Contra reflects the position they have taken consistently since the House Bill 6 scandal broke. They support the Commission’s piecemeal approach toward addressing the scandal and endorse the Commission staying the course in the limited reviews it has initiated. They argue that “[b]y any measure, the Commission has acted swiftly and decisively, initiating this proceeding as well as two other audits That is to say the Commission has employed its suite of procedural tools in a comprehensive effort to exercise the power duly granted it by the General Assembly.” Memorandum Contra at 1. The Environmental Advocates respectfully disagree. The Commission has not employed its full suite of tools. Much more can be done, but the FirstEnergy Utilities have objected strongly at every turn. And while they urge the Commission to not expand this docket, their parent company just this week expressed its belief “that pursuing an open and comprehensive dialogue with the Public Utilities Commission of Ohio (PUCO) and other key parties will benefit the company as it seeks to resolve a number of PUCO-led proceedings underway in a collaborative manner that

balances the interests of all stakeholders.”¹ Rather than consider the interests of ratepayers in having a transparent and effective investigation, however, the FirstEnergy Utilities and their parent company continue to oppose the Environmental Advocates’ simple request for an expanded investigation. The FirstEnergy Utilities’ actions and those of their parent company require a comprehensive investigation that moves swiftly, sending a strong signal that Ohio does not tolerate corruption.

The FirstEnergy Utilities’ Memorandum Contra also ignores the new evidence regarding the \$4 million payment their parent company made to an entity closely associated with a Commission regulator and referenced in FirstEnergy Corporation’s latest SEC filing:

As previously disclosed, among the matters considered with respect to the determination by the committee of independent members of the Board of Directors to terminate certain former members of senior management for violating certain FirstEnergy policies and its code of conduct related to a payment of approximately \$4 million made in early 2019 in connection with the termination of a purported consulting agreement, as amended, which had been in place since 2013. The counterparty to such agreement was an entity associated with an individual who subsequently was appointed to a full-time role as an Ohio government official directly involved in regulating the Ohio Companies, including with respect to distribution rates. **FirstEnergy believes that payments under the consulting agreement may have been for purposes other than those represented within the consulting agreement.** The matter is a subject of the ongoing internal investigation related to the government investigations.²

Translated into plain English, this appears to say that FirstEnergy Corporation handed a PUCO Commissioner \$4 million right before they became a commissioner. Further, the statement indicates that FirstEnergy Corporation believes making the payment may have been wrong, and it is conducting an internal investigation. However, the Commission, not the Corporation or its

¹ Press Release, *FirstEnergy Taking Decisive Actions to Move the Company Forward*, FirstEnergy Investor Relations (Feb. 16, 2021), <https://investors.firstenergycorp.com/investor-materials/news-releases/news-details/2021/FirstEnergy-Taking-Decisive-Actions-to-Move-the-Company-Forward/default.aspx>.

² FirstEnergy Corp., Current Report (Form 8-K) at 2 (Feb. 16, 2021) (emphasis added), <https://investors.firstenergycorp.com/sec-filings-and-reports/sec-filings/sec-filings-details/default.aspx?FilingId=14714582>.

Companies, must conduct such an investigation. The \$4 million-dollar payment in and of itself represents a violation of the public trust never before seen in Ohio. Moreover, this possible violation of law came to light only after the Environmental Advocates filed their original motion to expand this proceeding on September 29, 2020.

The evidence to date regarding the \$61 million bribery scandal related to House Bill 6 and the \$4 million payment to a regulator supports a comprehensive investigation that includes fact finding overseen by this Commission. The Environmental Advocates agree with the FirstEnergy Utilities that the Commission must act carefully, but it must act now. Additionally, if it cannot act now because of ongoing federal criminal investigations then it should make that clear. However, the Justice Department and SEC enforce criminal laws and laws to protect investors. The Commission has the authority and responsibility to protect Ohio utility customers, and the Commission investigation is every bit as important, if not more so than ongoing federal investigations.

II. ARGUMENT

The FirstEnergy Utilities offer three arguments against the Environmental Advocates' motion. First, they assert that the Amended Motion is "procedurally improper," pointing to unrelated dockets for support while ignoring that this case has no procedural schedule for motions practice. Second, the FirstEnergy Utilities recycle their jurisdictional arguments to claim that the Public Utilities Commission cannot expand the investigation as proposed, even in light of Ohio's most significant public corruption scandal and the FirstEnergy Utilities' clear profit from the alleged corruption scheme. Finally, the FirstEnergy Utilities assert that an investigation into corrupt activities would amount to a violation of their First Amendment rights. The Environmental Advocates respond to each argument in turn.

A. The Amended Motion to Expand the Investigation Is Procedurally Proper.

Despite citing no Commission rule or statutory authority in direct support of their claim, the FirstEnergy Utilities claim “there are numerous procedural deficiencies” with the Amended Motion. They assert that the Commission’s other dockets looking into aspects of the House Bill 6 scandal moot the Environmental Advocates’ Amended Motion and that the Environmental Advocates should have filed the Amended Motion as applications for rehearing in those cases. Memorandum Contra at 3. They further contend that because ELPC “already filed several motions to vacate Commission decisions that the former Chairman supposedly presided over,” the Environmental Advocates “should have timely sought relief in those dockets.” *Id.* Their argument is essentially that the Environmental Advocates should have let those other dockets remain unexamined if they wanted a comprehensive investigation.

These arguments about other open dockets demonstrate the FirstEnergy Utilities’ misreading of the Amended Motion. While the Environmental Advocates acknowledge that there may be some overlap with issues under consideration in these other dockets, the purpose of the Amended Motion is to have a consolidated investigation that fills in all the gaps that can occur from separate proceedings. *See* Amended Motion at 13–14. When someone steals a car, robs a bank, and shoots the guard on the way out, the justice system doesn’t hold three separate investigations. A single investigation looking into all the pertinent issues is the most efficient way forward, as it is with the FirstEnergy Utilities’ situation in Ohio.

The FirstEnergy Utilities fail to cite any authority for their argument that the Environmental Advocates are precluded from requesting a change to the scope of this investigation in this docket—the only new review docket opened in relation to the House Bill 6 scandal. The other two FirstEnergy Utilities’ audit cases may relate to the House Bill 6 scandal,

but the Amended Motion makes specific requests, including an investigation of corporate separation practices with regard to the FirstEnergy Utilities’ House Bill 6 activities and Chair Randazzo’s involvement with the FirstEnergy Utilities. No docket addresses these issues.

The FirstEnergy Utilities also assert that the Environmental Advocates’ Amended Motion is “an improper surreply.” Memorandum Contra at 3. This is a clear mischaracterization. As is the case with their other procedural arguments, the FirstEnergy Utilities offer no statute or rule supporting its supposition that the Amended Motion is a surreply. Instead, they offer only a brief citation to OAC Rule 4901-1-12, which provides general guidance on motions practice. *Id.* The Amended Motion is, as it is labeled, a new request incorporating new arguments and facts brought to light since the initial motion. Parties regularly file amended motions in state and federal courts, and the Commission has entertained an amended motion at least once. *See In re Direct Servs., LLC’s Annual Alternative Energy Portfolio Status Report*, Case No. 12-1233-EL-ACP, Finding and Order at 4–6 (Nov. 13, 2013). An amended motion supersedes the original motion, meaning that there is no surreply to the now mooted original motion.³ The Commission should not endorse the FirstEnergy Utilities’ attempt to avoid a more thorough investigation through a misrepresentation of the Amended Motion.

B. The Commission Has the Requisite Statutory Authority for an Expanded Investigation.

A key theme in the FirstEnergy Utilities’ Memorandum Contra is that the Environmental Advocates’ Amended Motion would undermine the Commission’s “deliberate” approach to the House Bill 6 scandal. Memorandum Contra at 1. The FirstEnergy Utilities attempt to dissuade the Commission from a more thorough investigation by suggesting a narrow statutory

³ For example, a case mentioning how amended motions supersede originally filed motions, see e.g., *Fulgenzi v. Wyeth, Inc.*, No. 5:09-cv-1767, 2010 WL 4923019 (N.D. Ohio Nov. 29, 2010) (noting that an amended motion superseded the original motion, rendering the original motion moot).

construction of the Commission's jurisdiction, while also minimizing the scale and importance of the House Bill 6 scandal. These arguments miss the mark. In actuality, the Environmental Advocates request gets to the heart of what Ohio law directs utility regulators to do and would enhance the Commission's thoughtful steps toward understanding the FirstEnergy Utilities' role in what appears to be Ohio's largest-ever public corruption scandal. A deliberate course of action is one that is "intentional" and "fully considered." Black's Law Dictionary (11th ed. 2019). Should the Commission grant the Environmental Advocates' amended motion, the Commission would be able to conduct a truly deliberate process, matching the magnitude of the scandal leading to this docket's opening in the first place. The FirstEnergy Utilities' jurisdictional arguments are just one more example of their fight to keep the scope of this proceeding as limited as possible. *See* Case No. 20-1502-EL-UNC, FirstEnergy Utilities' Motion for Protective Order (Oct. 16, 2020); Case No. 20-1502-EL-UNC, Prehearing Conference Transcript at 34:21 (Jan. 19, 2021). However, as discussed below, it is both legal and essential for the Commission to broaden the investigation of this docket.

1. The Proposed Investigation Goes to the Heart of the Commission's Statutory Authority.

The FirstEnergy Utilities attempt to dissuade the Commission from investigating this unprecedented corruption scandal by arguing that the investigation proposed in the Amended Motion does not relate to the Commission's traditional oversight of utility rates and services. According to the FirstEnergy Utilities, R.C. 4905.05 limits the Commission's jurisdiction to only "the costs associated with the provision of electric utility service by any public utility" in this state." Memorandum Contra at 6 (quoting R.C. 4905.05). Even with this narrow statutory construction, however, the Environmental Advocates' request for a more thorough investigation is well within jurisdictional bounds. This investigation has everything to do with rates. The

FirstEnergy Utilities conveniently—or willfully—ignore the decoupling provision in House Bill 6 that guaranteed them high revenues. Decoupling is meant to balance utility and ratepayer interests, meaning that utilities are not incentivized to sell unnecessary energy and ratepayers are protected from large swings in temperatures that may impact energy costs. Decoupling works hand-in-hand with energy efficiency, but House Bill 6—the bill at the heart of the criminal complaint that revealed the public corruption scandal—eliminated the energy efficiency programs while creating a windfall for the FirstEnergy Utilities. House Bill 6 allowed the FirstEnergy Utilities to tie decoupling to the hottest summer in recent years, essentially guaranteeing they would collect more revenue than would have been allowed under a rate case. *See United States v. Householder et al.*, No. 1:20-MJ-00526, Criminal Complaint ¶ 169 (S.D. Ohio July 17, 2020). Former FirstEnergy Corporation CEO Chuck Jones even boasted to analysts that decoupling made the utility part of the business recession-proof.⁴ An expanded investigation is necessary to see if this “recession-proofing” of the FirstEnergy Utilities—which is directly tied to utility rates—was the result of the FirstEnergy Utilities’ involvement in the House Bill 6 scandal. Further, an investigation is especially critical in light of FirstEnergy’s recognition that:

We did recently identify certain transactions that were either improperly classified, misallocated to certain companies, or lacked proper supporting documentation. This resulted in amounts collected from customers that were immaterial to FirstEnergy and the companies will be working with the appropriate regulatory agencies to address these amounts.⁵

⁴ *See FirstEnergy Continues to Prep Decoupling Application*, Gongwer (Nov. 7, 2019) (quoting Chuck Jones as saying that the House Bill 6 decoupling provision “fixes our base revenues and essentially it takes about one third of our company and, I think, makes it somewhat recession proof”).

⁵ FirstEnergy, 4Q 2020 Strategic & Financial Highlights, (Feb. 18, 2021) at 8, *available at*: https://s27.q4cdn.com/655807321/files/doc_financials/2020/q4/4Q20-Strategic-and-Financial-Highlights_Final.pdf; see also FirstEnergy Corp., Annual Report (Form 10-K) for FY ending Dec. 31, 2020 at 10 (Jan. 31, 2021), <https://www.sec.gov/ix?doc=/Archives/edgar/data/1031296/000103129621000020/fe-20201231.htm>

This is clearly an issue directly related to rates.

FirstEnergy also misinterprets the law regarding the Commission’s broad authority to investigate the actions of any and all FirstEnergy corporations as their actions relate to the FirstEnergy Utilities. Memorandum Contra at 4. FirstEnergy Utilities selectively read the Ohio Revised Code and ignore Section 4905.05, which provides an expansive list of entities, persons, and objects within the Commission’s jurisdiction. It states that “the jurisdiction, supervision, powers, and duties of the public utilities commission extend to *every public utility*, and railroad.” R.C. 4905.05 (emphasis added). That list also expressly includes under Commission jurisdiction and supervision “persons or *companies owning*, leasing, or operating such public utilities” and “the records and accounts of the business thereof done within this state.” *Id.* (emphasis added). The FirstEnergy Utilities are “public utilities” under R.C. 4905.05, and FirstEnergy Corporation is a company that owns the FirstEnergy Utilities. Thus, the law gives the Commission jurisdiction over both the FirstEnergy Utilities and FirstEnergy Corporation. Even by the FirstEnergy Utilities’ own standard, the investigation the Environmental Advocates request involves rates and utility service—specifically whether a public utility scandal harmed its monopoly utility customers. Therefore, the Commission has the authority to conduct the investigation requested.

2. The FirstEnergy Utilities’ Position Would Make Utility Corruption Virtually Unreviewable.

While the FirstEnergy Utilities go so far as to say the Environmental Advocates “disregard any statutory limitations,” Memorandum Contra at 4, the Environmental Advocates’ Amended Motion requests only that the Commission do its most fundamental job: ensure that public utilities are not abusing their market power to the detriment of customers. The FirstEnergy Utilities’ insistence that the Commission’s statutory authority does not extend to investigating

possible utility corruption would undermine this basic goal of utility regulation. The Commission clearly has statutory authority for a thorough investigation, and a ruling to the contrary would insulate utilities and their parent companies from essential government oversight. The statutory language leaves no room for uncertainty about this Commission’s jurisdiction over FirstEnergy Corporation and the Utilities. “The public utilities commission has general supervision over *all public utilities* within its jurisdiction” and has “general supervision over *all other companies* referred to in section 4905.05 of the Revised Code.” R.C. 4905.06 (emphasis added). As discussed above, both the FirstEnergy Utilities and FirstEnergy Corporation are covered under § 4905.05. Therefore, this Commission has jurisdiction to investigate not only the FirstEnergy Utilities, but also FirstEnergy Corporation.

Nevertheless, the FirstEnergy Utilities assert that the Commission is barred from examining actions that its parent company, FirstEnergy Corporation, may have taken in the House Bill 6 scandal. Beyond the flawed statutory interpretation inherent to that argument discussed above, the FirstEnergy Utilities’ position also would create an enormous loophole for Ohio utilities. Rather than directly dirty their hands, public utilities could funnel customer money to their parent company to use for corrupt activities, all while avoiding Commission oversight because Commission scrutiny would have to stop at the utility. That simply cannot be the case, especially given the statutory authority vested in the Commission to guard against utility abuses of market power.

C. The FirstEnergy Utilities Cannot Use the First Amendment to Block an Investigation into their Role in the House Bill 6 Scandal.

The FirstEnergy Utilities’ final arguments against the Amended Motion attempt to characterize the allegations of FirstEnergy Entities’ involvement in the House Bill 6 scandal as “political activity” protected under the First Amendment. Memorandum Contra 10. The

FirstEnergy Utilities’ arguments rest on mischaracterizing the investigation requested in Environmental Advocates’ motion and misconstruing the case law. These are similar arguments to those the FirstEnergy Entities have made in ongoing federal-court litigation. There, FirstEnergy Corporation argued that the U.S. District Court for the Southern District of Ohio should dismiss civil RICO claims related to the House Bill 6 ballot referendum campaign because there were “fatal First Amendment concerns.” *Smith, v. FirstEnergy Corp.*, No. 2:20-CV-03755, 2021 WL 496415, at *11 (S.D. Ohio Feb. 10, 2021). The district court denied the motion, concluding that “bribes, explicit *quid pro quos*, are not protected by the First Amendment” nor is the intended effect of the intended bribery. *Id.* The Commission should reject the First Amendment arguments here just as the district court has.

As a threshold matter, the FirstEnergy Utilities’ are wrong to assert that the First Amendment prohibits the Commission from investigating whether the FirstEnergy Entities committed wrongdoing through their efforts to support House Bill 6. The First Amendment does protect associational rights and political speech, but “[t]he right to associate for expressive purposes is not, however, absolute.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). The FirstEnergy Utilities ignore these limitations to assert almost blanket First Amendment protection of their actions, no matter whether an investigation reveals illegal conduct. The case law the FirstEnergy Utilities purport supports this broad claim, however, deals exclusively with legal campaign contributions, *Citizens United v. FEC*, 558 U.S. 310 (2010); third parties—not a regulator vested with oversight authority—seeking discovery on political actions, *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 20210), *Pulte Home Corp. v. Montgomery Cty.*, No. GJH-14-3955, 2017 WL 1104670 (D. Md. Mar. 24, 2017); or the ability of schools to restrict student speech, *Morse v. Frederick*, 551 U.S. 393 (2007). The First Amendment’s protections do

not extend to illegal actions, *see Smith*, 2021 WL 496415 at *11, and they do not prevent the Commission from investigating the actions of the FirstEnergy Utilities and their parent company in relation to the House Bill 6 scandal. No matter how much the FirstEnergy Utilities try to frame the issue as one of “political contributions” and “political association,” the proposed expanded investigation is squarely focused on whether and how these FirstEnergy Entities participated in the House Bill 6 scandal, including whether that extended to corrupt efforts to influence the former PUCO Chair. Even if there are associational interests truly at stake, compelling state interests—such as rooting out public utility corruption—can justify such state action. *Roberts*, 468 U.S. at 623. Thus, the Commission must reject FirstEnergy Utilities’ arguments that the First Amendment protects all lobbying as political speech.

The Commission should also reject the FirstEnergy Utilities’ First Amendment arguments that the Environmental Advocates “seek to investigate and penalize political speech.” Memorandum Contra at 11. As discussed above, the conduct that the Environmental Advocates request the Commission examine is not “political speech.” Additionally, the Amended Motion does not seek to penalize the FirstEnergy Utilities. The FirstEnergy Utilities’ argument seems to be that any expanded investigation, in which they would be required to share additional information with the Commission and answer to their conduct during the House Bill 6 scandal, would itself be a penalty. Such a position undermines the entire theory of public utility regulation. The First Amendment simply cannot totally shield the FirstEnergy Utilities from Commission oversight, particularly in light of Companies’ role as regulated monopolies.

III. CONCLUSION

The FirstEnergy Utilities’ Memorandum Contra asks the Commission to minimize its statutorily defined powers and trust that piecemeal investigations will protect customers.

Essentially, FirstEnergy Utilities want the Commission to conduct its investigation(s) in a manner that gives the FirstEnergy Entities the best outcome. Ohio granted the Commission broad authority over public utilities to prevent the type of corruption alleged today, and the Environmental Advocates ask only that the Commission use that power to expand its fact-finding mission in this docket. The Environmental Advocates do not dismiss the importance of the steps taken in this and other dockets, but those steps are not enough. The Commission should grant the Environmental Advocates' Amended Motion to expand this investigation and fulfill its obligation to Ohio consumers. Anything less risks allowing the FirstEnergy Utilities and their parent company to escape the scrutiny necessary to both protect consumers and prevent corruption in the future.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *The Environmental Advocates' Reply to the FirstEnergy Utilities' Memorandum Contra the Amended Motion to Expand the Scope of the Commission's Review of FirstEnergy's Political and Charitable Spending* was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on February 18, 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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