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March 6, 2007

Public Utilities Commission of Ohio
Attention: Docketing Division
180 E. Broad Street
Columbus, OH 43215-3793

*Re: Buckeye Energy Brokers v. Ohio Edison et al.,
Case No. 06-835-EL-CSS*

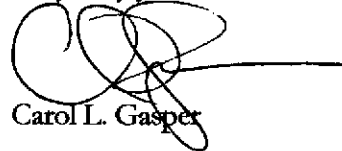
APPLICATION FOR REHEARING

Attention Docketing Division:

Enclosed for filing please find an original together with 12 copies of Complainant's Application for Rehearing.

Thank you for your attention to this matter. Please do not hesitate to contact this office with any questions.

Very truly yours,



Carol L. Gasper

Enclosures

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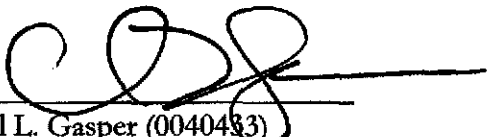
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1. The ruling improperly finds that Complainants cannot prove a set of facts entitling it to relief and considers matters outside the four corners of the complaint; namely, Exhibit A to Respondents' Motion to Dismiss, the NOPEC Agreement and, thereby improperly converting the Motion to Dismiss to a Motion for Summary Judgment without proper notice.
2. The Commission's decision is contrary to Ohio Civ. R 8 insofar as Complainant has set forth a claim for relief and Complainant's pleadings have not been construed to do substantial justice.

For the foregoing reasons, Complainant respectfully requests rehearing on the Commission's February 7, 2007 entry granting Respondents' Motion to Dismiss.

Respectfully submitted,

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Buckeye Energy Brokers, Inc.)	
Complainant,)	
)	
v.)	Case No. 06-835-EL-CSS
)	
Ohio Edison Company,)	
The Cleveland Electric Illuminating)	
Company and FirstEnergy Corp.)	
Respondents,)	

MEMORANDUM IN SUPPORT

I. Introduction

Buckeye Energy's claims against the Respondents are legally sufficient to withstand a motion to dismiss for failure to state a claim upon which relief may be granted. The essence of Buckeye Energy's claims in this action is that the Respondents provided power, directly or indirectly, at discounted generation rates, to customers within the Northeast Ohio Public Energy Council ("NOPEC") aggregated municipalities, contrary to filed rate plans and in violation of statutory prohibitions against unfair advantage, unfair competition, and abuse of market power (Ohio Rev. Code §§ 4905.33, 4905.35, 4928.17, and OAC 4901:1-20-16). The claims are not contractual in nature and, therefore, do not depend upon a showing that the NOPEC Agreement is between the public utilities and NOPEC (as compared to an agreement between FirstEnergy Solutions and NOPEC).

The NOPEC Agreement was referenced specifically for the first time in Respondents' Motion to Dismiss and Motion to Strike "Reply" Pleadings as Respondents argued that the Complaint should be dismissed because the discounts were not being provided by either CEI or OE, but, instead, FES, a CRES provider. The NOPEC Agreement was produced in largely redacted format, with entire pages blacked out.

Buckeye filed a "Reply Response" and "Supplemental Response to Respondent's Answer" respectively on August 4, 2006 and August 8, 2006 (collectively, "Reply Responses"). The Reply

Responses included reference to a copy of an Ohio Edison end user billing showing a NOPEC Generation Discount without reference to FirstEnergy Solutions, thereby setting forth operative facts supporting Buckeye's claims that the discounts were coming from the named public utilities, not FES. Further, the Reply Responses include a claim for "slamming" in violation of 4928.20 insofar as no opt-out notices were docketed to Case Number 00-2317-EL-GAG. The Commission notes in its February 7, 2007 Entry that the Reply Responses are not contemplated by the Commission's rules and that the Commission was not contacted to request permission to make these filings. .

The Commission's February 7, 2007 Entry finds that Complainant failed to state a claim upon which relief may be granted, finding, in pertinent part, at paragraph 10:

"The NOPEC agreement, provided as Exhibit A, is persuasive and supports the Companies' position that CEI and OE do not provide discounted rates to any person or organizationIf an electric distribution utility were to provide below-tariff rates in violation of Ohio law, we would order that EDU to discontinue that practice."

II. Argument

A. The ruling improperly finds that Complainants cannot prove a set of facts entitling it to relief and considers matters outside the four corners of the complaint; namely, Exhibit A to Respondents' Motion to Dismiss, the NOPEC Agreement and, thereby improperly converting the Motion to Dismiss to a Motion for Summary Judgment without proper notice.

Complainant did not attach a copy of the NOPEC Agreement to its pleadings, nor do any of its claims require a NOPEC Agreement (whether between NOPEC and the public utilities or NOPEC and FES) to be legally sufficient. *The claims are based on the statutory requirements and prohibitions as compared to the business practices of the public utilities and its holding company—what they did or did not do. The claims are not contractual in nature.* At this stage of pleadings, Complainant is only required to give notice of the allegations against Respondents. Sufficient facts are plead to support Complainant's claims of unfair advantage, unfair competition, and abuse of market power, Ohio Rev. Code §§ 4905.33, 4905.35, 4928.17, and OAC 4901:1-20-16.

Notably, paragraph 12 of the Complaint references a letter FirstEnergy Solutions (FES) sent to Buckeye in which FES states that it did not provide the discounts. Paragraph 13 states that end users are receiving these discounts through the public utilities. These allegations of the Complaint show that the NOPEC Agreement is simply not the dispositive fact as to whether unfair practices occurred. Sufficient facts are plead to support Complainant's claims of unfair advantage, unfair

competition, and abuse of market power, Ohio Rev. Code §§ 4905.33, 4905.35, 4928.17, and OAC 4901:1-20-16.

Whether the NOPEC Agreement is between the public utilities and NOPEC or FirstEnergy Solutions and NOPEC is an evidentiary matter, not a pleading matter, which may or may not tend to support Complainant's claims of unfair advantage, unfair competition, and abuse of market power, Ohio Rev. Code §§ 4905.33, 4905.35, 4928.17, and OAC 4901:1-20-16. Respondents argue that Complainant's claim that the public utilities provide the discount is "patently false" and offer in support the NOPEC Agreement as an attached Exhibit. The Commission's determination that the NOPEC Agreement is "persuasive" is tantamount to a summary judgment ruling without notice and opportunity to be heard, contrary to law.

A motion to dismiss for failure to state a claim is procedural in nature and merely tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Comm.*, 65 Ohio St.3d 542, 549, 1992-Ohio-73, 605 N.E.2d 378. All factual allegations in the complaint must be accepted as true and all reasonable inferences are to be drawn in favor of the non-moving party. *Mitchell v. Lawson* (1988), 40 Ohio St.3d 190, 194, 532 N.E.2d 753. Dismissal is only appropriate where it appears "beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle plaintiff to relief." *Lindow v. City of North Royalton* (8th Dist. 1995), 104 Ohio App.3d 152, 661 N.E.2d 253. Plaintiff is not required to prove its case at the pleading stage. *Hildreth Mfg., L.L.C. v. Semco, Inc.* (3rd Dist. 2003), 151 Ohio App.3d 693, 2003-Ohio-741, 785 N.E.2d 774. In fact, evidence necessary to prove a claim is often not obtained until the plaintiff has been allowed to conduct discovery. *Id.* at 717.

A court may not rely upon any materials or evidence outside the complaint in considering a motion to dismiss. *State ex rel. Fuqua v. Alexander* (1997), 79 Ohio St. 3d 206, 207, 680 N.E. 2d 985. If a motion to dismiss or opposing memoranda refers to or depends on matters outside the pleadings, the court must convert the motion to dismiss into a Civ. R. 56 (C) summary judgment motion or deny the motion to dismiss. See Civ R. 12 (B); *State ex rel. The V. Cos. V. Marshall* (1998), 81 Ohio St. 3d 467, 470. If the Court converts the motion to dismiss to a motion for summary judgment the court must give the parties notice and a reasonable opportunity to present all the available evidence that Civ. R. 56 (C) permits. Failure to notify parties is reversible error. *Non-Employees of Chateau Estates Resident Assn. v. Chateau Estates, Ltd.* (Ohio App. Dist. 2), not reported in N.E. 2d, 2004 WL 15877234 at ¶ 57 (finding that the trial court erred in granting a motion to dismiss where the judgment entry plainly stated that the court had considered an affidavit attached to the

motion to dismiss). Therefore, as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss. See *Cincinnati v. Beretta U.S.A. Corp.* (2002), 95 Ohio St. 3d 416, 768 N.E. 2d 1136.

Ohio Civ. R. 56 (C) provides an exclusive list of permissible documentary evidence that may be utilized in a summary judgment exercise: affidavits, transcripts of evidence in the pending case, written stipulations. *Manfrass v. Sirgo's*, (11th Dist. 2002), not reported in N.E. 2d, 2002 WL 31886676, at ¶10 (citing *Drawl v. Cornicelli* (1997) 124 Ohio App. 3d 563). Other documentary evidence may be admitted; however, it must be introduced by an affidavit which comports with Ohio Civ. R. 56(E). *Manfrass*, supra

Were the Commission to reconsider its February 7, 2007 Entry and convert this to a summary judgment motion, only then would Complainant be afforded its right to attack the evidence submitted by Respondents – The NOPEC Agreement, Exhibit A to the Motion to Dismiss- not accompanied by an affidavit as would be required under Ohio Civ. R. 56 (C). Further, were the Commission to reconsider its decision, Complainants would be able to put forth evidence showing that the discounts are coming from the public utilities as supported by evidence, including, without limitation: (1) Opt-out forms with terms and conditions were not sent; (2) FES did not send out required environmental disclosures; (3) the Ohio Edison and Cleveland Electric Illuminating Company supplier tariffs effective October 4, 2004 would be violated if FES were the supplier; and, (4) information from end users, including copies of customer billings clearly showing the discount coming from the public utilities.

Alternatively, were the Commission to reconsider its February 7, 2007 Entry by denying Respondents' Motion to Dismiss, this matter could proceed and discovery could be had such that evidence, including the NOPEC Agreement as well as end user billings such as that referenced in Complainant's Reply Responses could be more appropriately considered.

B. The Commission's decision is contrary to Ohio Civ. R 8 insofar as Complainant has set forth a claim for relief and Complainant's pleadings have not been construed to do substantial justice.

As detailed herein, Complainant has set forth a claim for relief in that there is at least one set of facts that supports some or all of its claims in this matter. In addition, Complainant's Reply Responses, though perhaps outside the scope of Commission rules, set forth additional operative facts that should have been considered. The Commission's decision to discount these pleadings,

when coupled with the decision to consider the Respondents' Exhibit A, the NOPEC Agreement, leads to a result in which it appears that the Commission is favoring the Respondents, in derogation of Ohio Civ. R. 8.

Ohio Civ. R. 8 (A) states as follows,

" A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he determines himself entitled. * * *

Ohio Civ. R. 8 (F) provides, "Construction of pleadings. All pleadings shall be so construed as to do substantial justice."

The Commission notes in its Entry, that if it were to find that the public utilities were permitting discounts in violation of filed rates, it would order the practice to discontinue. This seems to be a reference to Respondents' argument that if the practice is illegal, the Complainant would not be able to share in that illegal practice. Complainant is not seeking to share in ill gotten gains. Rather, if the practice is found to be in violation of the law, Complainant is seeking to be made whole to the extent that NOPEC was unjustly enriched by the gain in market share it experienced because of the discounts wrongly passed on by the public utilities.

Although a demand for judgment is an essential element of a complaint, it is not part of the statement of claim (See Ohio Civ. R. 8 (A)) and the demand may be amended prior to trial. Ohio Civ. R. 15. If pleading provides defendant with notice of plaintiff's claims and grounds for those claims, omissions in prayer for relief do not bar redress of meritorious claims. *Pension Benefit Guaranty Corp. v. E. Dayton Tool and Die Co.* (6th Dist., 1994), 14 F.3d 1122.

In this case, Buckeye's demand for relief includes a claim for restitution pursuant to Ohio Revised Code §4928.17. Restitution is an equitable remedy used to make an injured party whole. At the core of the law of restitution is the principal that a person who has been unjustly enriched at the expense of another is required to make restitution to the other ..." Restatement (1937), Restitution, p. 1.

Buckeye is entitled to relief in equity should it prove the matters alleged in its Complaint.

III. Conclusion

Buckeye Energy pursuant to Ohio Revised Code §4903.10 and Ohio Adm. Code 4901-35 (A) respectfully requests that its application for rehearing of the Entry (February 7, 2007) be granted and requests an expedited ruling.

Respectfully submitted,

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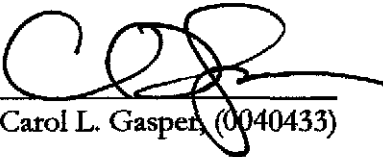
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6th day of March, 2007 a copy of the foregoing was forwarded by regular US mail to

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