

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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Buckeye Energy Brokers, Inc.,

Complainant,

v.

Ohio Edison Company, The  
Cleveland Electric Illuminating Company  
and FirstEnergy Corp.,

Respondents.

Case No. 06-835-EL-CSS

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**RESPONDENTS' MEMORANDUM CONTRA APPLICATION FOR REHEARING**

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**I. INTRODUCTION**

The Complaint in this action was predicated on an agreement among Ohio Edison Company ("Ohio Edison"), The Cleveland Electric Illuminating Company ("CEI"), FirstEnergy Solutions Corp. ("FES"), and Northeast Ohio Public Energy Council ("NOPEC"). According to the Complaint, the NOPEC Agreement calls for Ohio Edison and CEI to provide generation service to NOPEC communities at a discount from tariff rates. In seeking dismissal of the Complaint, Respondents produced a copy of the operative sections of the NOPEC Agreement to demonstrate that Complainant's allegations are not true. Under the NOPEC Agreement, Ohio Edison and CEI provide generation service at full tariff rates. FES, which has no tariffs, is not obligated to provide generation service to Buckeye or anyone else, and whose rates for competitive retail electric generation service are not subject to Commission regulation, is providing the discount that Buckeye complains about. Having found Complainant's unsupported allegations to be contrary to fact, the Commission did the only reasonable thing that it could do; it dismissed the Complaint.

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In seeking rehearing of the Commission's February 7, 2007 Order, Complainant's arguments boil down to this contention: that the Commission is bound by Complainant's unsupported and incorrect assertions concerning the NOPEC Agreement. Complainant posits that what the NOPEC Agreement actually says is not only irrelevant, but that the Commission erred by even looking at it in ruling on Respondents' dismissal motion. If it were correct that the Commission is bound by a complaining party's unsupported assertions, including assertions that are proven false in a dispositive motion, virtually no Complaint could ever be dismissed. A Complainant would be entitled to a hearing merely by filing a complaint. But the Ohio Revised Code states otherwise, requiring a hearing only where a complainant has demonstrated "reasonable grounds for complaint." R.C. 4905.26. And to be sure, it is R.C. 4905.26 that sets the standard for ruling on motions to dismiss, not Ohio Civil Rule 12, as argued by Complainant, and certainly not Civil Rule 56. Simply stated, Complainant cannot show reasonable grounds for its Complaint because the underlying facts alleged in that Complaint have been shown to be incorrect. There is no need (and no legal basis) for Respondents or the Commission to waste additional time and resources litigating Complainant's claims. The Commission did not act unreasonably or unlawfully in dismissing the Complaint.

In further reliance on inapplicable Ohio Civil Rules, Complainant argues that the dismissal of its Complaint amounts to a denial of "substantial justice." But no violence is done to the principal of "substantial justice" by dismissing meritless complaints. Nor is there any support for Complainant's claim that the Commission "favored" Respondents by ignoring Complainant's "Reply Response" – a pleading that Complainant admits is not provided for under Commission rules. But more to the point, a fair reading of the Commission's Order is that it reviewed *all* of the pleadings and motions filed in this case. Even if it did not consider

Complainant's Reply Response, the refusal to consider an improper pleading is not a denial of "substantial justice" under any plausible definition of the term.

Also under the banner of Complainant's "substantial justice" argument is a claim that because the Complaint included a request for restitution under R.C. 4928.17, that prayer for relief somehow salvages Complainant's claims. The point of this argument is not entirely clear. Regardless of whether restitution is, even as a hypothetical matter, an available remedy under the Ohio Revised Code and the circumstances of this case, Complainant has failed to state a cause of action entitling it to *any* remedy.

There is no set of facts that Complainant can prove that would entitle Complainant to relief. The Commission acted neither unreasonably nor unlawfully in dismissing the Complaint. The Application for Rehearing should be denied.

## **II. ARGUMENT**

### **A. The Commission Properly Considered The NOPEC Agreement In Ruling On The Motion To Dismiss.**

Complainant argues that the allegations in its Complaint "show that the NOPEC Agreement is simply not the dispositive fact as to whether unfair practices occurred." (Rehearing App., p. 4.) Complainant characterizes the existence and substance of the NOPEC Agreement as "an evidentiary matter, not a pleading matter, which may or may not tend to support Complainant's claims . . . ." (*Id.* at 5.) According to Complainant, because its claims are "statutory" and not "contractual," its allegations are sufficient to withstand a motion to dismiss, regardless of what the NOPEC Agreement actually says.

Whether Complainant now chooses to characterize its claims as "statutory" instead of "contractual" is beside the point. The Complaint alleges the existence of the NOPEC Agreement and that under that Agreement, CEI and Ohio Edison are providing unlawful discounts to

customers in NOPEC communities. To say that the NOPEC Agreement “is simply not the dispositive fact” is to ignore the Complaint in its entirety. The “Overview” paragraph of the Complaint describes Complainant’s dispute in the following manner:

CEI and OEd, either directly or through an affiliated company, have agreed to provide the customers within the communities for which power is secured by [NOPEC], a government aggregator, a five percent (5%) discount in generation charges for residential consumption and a one percent (1%) discount for commercial and governmental consumption plus payment of NOPEC’s associated administrative fees . . . . Buckeye’s request for the same arrangement for itself and the Buckeye municipalities has been rejected by CEI and OEd. Wherefore, Buckeye requests this Commission to order CEI and OEd . . . to provide to customers within the named municipalities the same discounts and pay to Buckeye a proportionate amount for associated administrative expenses granted by CEI and OEd to NOPEC.

Thereafter, in its “Statement of Facts,” Complainant quotes a press release summarizing the NOPEC Agreement (Complaint, ¶10) and alleges: (a) that Complainant sent a letter to FirstEnergy asking for the same discounts provided under the NOPEC Agreement (*id.* at ¶11); (b) that FES responded that it would not provide the discounts (*id.* at ¶12); and (c) that end-users in NOPEC communities are currently receiving discounts “as provided for under the agreement between NOPEC and FirstEnergy’s operating companies, CEI and OEd.” (*Id.* at ¶ 13.) Each of the three counts of the Complaint are then specifically predicated on the terms of service to NOPEC. The terms of service as allegedly provided for in the Agreement, according to Complainant, violates R.C. 4905.33, 4905.35 and 4928.17.

Given that the factual underpinnings of the Complaint plainly center around the terms and conditions of the NOPEC Agreement, surely the Commission did not err in considering that Agreement in determining whether Complainant had stated “reasonable grounds for complaint,” as Complainant is required to show under R.C. 4905.26 before it is entitled to take discovery and go to hearing. *Ohio Utilities Co. v Public Util. Comm’n* (1979), 58 Ohio St. 2d 153, 158

("R.C. 4905.26 requires that 'reasonable grounds for complaint' be stated before the commission can conduct a hearing and order a utility to produce information."). Complainant made the unsupported allegation that CEI and Ohio Edison agreed to give discounts to customers in NOPEC communities and that these discounts are spelled out in the NOPEC Agreement. There is no better test of the sufficiency of these allegations than by producing the NOPEC Agreement. That is what Respondents did. The Agreement proves that FES provides the funding for the discount at issue, not Ohio Edison or CEI. (Motion to Dismiss, Exhibit A, Agreement ¶ 1.a.) The Agreement makes equally clear that the utilities receive 100% of their tariff rates. (*Id.*) These are the facts, and they are not going to change through discovery and a hearing. The Commission did not act unreasonably or unlawfully in dismissing a Complaint premised on discredited allegations.

Complainant spends several paragraphs discussing the standards under Rule 12 and Rule 56 of the Ohio Rules of Civil Procedure (governing dismissals for failure to state a claim and for summary judgment, respectfully) in an attempt to cobble together an argument that the Commission's consideration of the NOPEC Agreement was "tantamount to a summary judgment ruling without notice and opportunity to be heard, contrary to law." (Rehearing App., p. 7.) This entire discussion is misplaced. The Commission's proceedings are governed by the Rules of Practice set forth in OAC Chapter 4901-1 (as authorized by R.C. Chapter 4903), not the Ohio Rules of Civil Procedure. And even if the Ohio Civil Rules applied to the Commission, courts that are bound by those rules (or analogous federal rules) have interpreted them as providing considerable leeway to go beyond the pleadings to dismiss complaints based on unsupported claims. See *NCS Healthcare, Inc. v. Candelwood Partners, LLC* (Cuyahoga Cty. 2005), 160 Ohio App. 3d 421, 427 (unsupported conclusions of a complaint are not considered and are not

sufficient to withstand a motion to dismiss); *Mezibov v. Allen* (6<sup>th</sup> Cir. 2005), 411 F.3d 712, 716 (conclusory allegations masquerading as fact will not prevent a motion to dismiss).

Additionally, a moving party may introduce documents incorporated by reference into a complaint and central to the complainant's claims (such as the NOPEC Agreement here) if the complainant fails to do so (such as the Complainant failed to do here). *Weiner, D.P.M. v. Klais and Co.* (6<sup>th</sup> Cir. 1997), 108 F.3d 86, 89. "Otherwise, a plaintiff with a legally deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document upon which it relied." *Id.*; see also *Wright v. Assoc. Ins. Cos. Inc.* (7<sup>th</sup> Cir. 1992), 29 F.3d 1244, 1248 (same). Given that Complainant's entire case is predicated on the terms and conditions of the NOPEC Agreement, that Agreement is clearly dispositive of Complainant's claims and was properly considered by the Commission.

**B. The Commission Did Not Deny "Substantial Justice" To Complainant.**

Complainant next takes issue with the Commission's alleged decision to "discount" Complainant's Reply Response pleading, which Complainant argues "set forth additional operative facts that should have been considered." (Rehearing App., p. 6.) Complainant argues that by not considering its Reply Response, the Commission denied "substantial justice" to Complainant and "is favoring the Respondents." (*Id.*, p. 7.) How Complainant would define "substantial justice" under Ohio Civil Rule 8(F) or any analogous Commission rule (and there is none) is left unstated. Under any definition, the refusal to consider a pleading that Complainant admits is "perhaps outside the scope of Commission rules" does not violate any notion of "substantial justice." (Rehearing App., p. 6.)

Additionally, the claim that the Commission "discounted" or ignored Complainant's Reply Response is not supported by the Commission's Order. Although Respondents moved to

strike the Reply Response, the Commission did not specifically rule on this motion. Instead, at paragraph 10 of the Order, the Commission stated that its decision was based on “a careful review of the *pleadings* filed in this proceeding,” without limitation to the Complaint and Answer. (Emphasis added.) Complainant’s Reply Response, although an improvident pleading, was a pleading nonetheless, and presumably considered with the other motions and pleadings of record in this matter.

*Complainant also argues that because R.C. 4928.17 and rules promulgated thereunder provide for restitution, “substantial justice” requires the Commission to allow Complainant to proceed with its claims. But the relief that Complainant would be entitled to if it prevailed on its claims is irrelevant to the question of whether Complainant has stated reasonable grounds to proceed with a complaint to obtain that relief. The Commission found that Ohio Edison and CEI are not providing discounts. What remedies, if any, Complainant would have if the utilities were providing discounts does not solve the underlying deficiency in the Complaint. The Complainant fails to state a claim for any relief and was properly dismissed on that basis.*

### III. CONCLUSION

The Complaint in this case was based on an unsupported claim that the NOPEC Agreement provides for something other than what the Agreement says. The Commission is not required to allow Complaints based on unsupported, discredited allegations to proceed to hearing. Given that there was no error in dismissing the Complaint, the Application for Rehearing should be denied.

Respectfully submitted,



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### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum Contra Application for Rehearing was mailed by ordinary U.S. mail to Carol L. Gasper, Attorney at Law, LLC., 10 W. Streetsboro, Suite 301, Hudson, Ohio 44236, this 16<sup>th</sup> day of March, 2007.

A handwritten signature in black ink, appearing to read 'Mark A. Whitt', is written over a horizontal line.

Mark A. Whitt  
An Attorney for Respondents