

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

City of Toledo,)	
)	Case No. 14-1944-EL-CSS
Complainant,)	
)	MEMORANDUM IN
v.)	OPPOSITION
)	
FirstEnergy Solutions, Corp.,)	
)	
Respondent.)	

Complainant City of Toledo respectfully seeks leave to file the attached Memorandum in Opposition to Respondent's Motion to Dismiss. The reasons that support this motion are more fully explained in the attached memorandum.

Respectfully submitted,
Adam W. Loukx, Director of Law

By: 

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Memorandum

On November 24, 2014 Respondent filed a Motion to Dismiss Toledo's complaint on the basis that Toledo's allegations were all contract based and thus not within the purview of this Commission. However such an interpretation is short-sighted and negates this Commission's stated concerns in opening up its investigation of Respondent's practices in Case No. 14-0568-EL-COI. Toledo will not repeat the concerns raised in its complaint except to say that Respondent's newly created polar vortex pass-through regulatory event charge indiscriminately applied to Toledo when others have had such charges waived meets the reasonable grounds standard articulated in R.C. 4905.26.

The standard for reviewing motions to dismiss requires that Toledo's factual allegations be taken as true:

In a civil case before a court, "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery" before a motion to dismiss can be granted. *O'Brien v. University Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 71 O.O.2d 223, 327 N.E.2d 753, syllabus. Further, in ruling on the motion to dismiss, all material factual allegations of the complaint must be taken as true. See *Vail v. Plain Dealer Publishing Co.* (1995), 72 Ohio St.3d 279, 649 N.E.2d 182. The commission has adopted the same standard in reviewing motions to dismiss brought under R.C. 4905.26, i.e., that all of the complainants' factual allegations must be taken as true. *In re Toledo Premium Yogurt v. Toledo Edison Co.* (Sept. 17, 1992), case No. 91-1528-EL-CSS, at 2.

Cleveland Elec. Illum. Co. v. Pub. Util. Comm., 1996-Ohio-298, 76 Ohio St. 3d 521, 524, 668 N.E.2d 889, 891.

Respondent's motion attempts to portray Toledo's allegations as being solely a contract issue but if that were true Case No. 14-0568-EL-COI would not exist. Moreover

Respondent's argument ignores many of Toledo's properly pled factual allegations that must be taken as true, including but not limited to the fact that the polar vortex ancillary charge does not appear in applicable tariff or SSO supply agreement, that increased ancillary expenses do not qualify as a regulatory pass-through event and that Respondent discriminatorily waived said charges for others but not Toledo.

For these reasons, Toledo respectfully requests the Commission accept this Memorandum in Opposition and deny Respondent's Motion to Dismiss.

Respectfully submitted,
Adam W. Loukx, Director of Law


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CERTIFICATE OF SERVICE

I certify that this Motion for leave to file out of time and accompanying Memorandum in Opposition was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 25th day of February, 2015. The PUCO's e-filing system will electronically serve notice of the filing of this document on all parties.

By: 

Leslie A. Kovacik

Counsel for the City of Toledo

This foregoing document was electronically filed with the Public Utilities

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in

Case No(s). 14-1944-EL-CSS

Summary: Memorandum electronically filed by Ms. Leslie A Kovacik on behalf of Kovacik, Leslie A Ms.