BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Direct Energy Business, LLC,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 14-1277-EL-CSS
	)	
Duke Energy Ohio, Inc.	)	
	)	
Respondent.	)	

POST-HEARING REPLY BRIEF OF DIRECT ENERGY BUSINESS, LLC

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ATTORNEYS FOR DIRECT ENERGY BUSINESS, LLC

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I. INTRODUCTION

Duke does not dispute the essential facts of this case. Within a month or two of SunCoke's switch to Direct, Duke was on notice of meter data irregularities. The fix to the problem was at hand: all Duke needed to do was resume "netting" the SunCoke metering data, just as it had done when Duke was SunCoke's supplier. Duke instead decided to ignore the problem, figuring everything would be sorted out later through the PJM resettlement process. Unfortunately, Duke's hand-wringing and finger pointing caused it to miss the deadlines for resettling the January and February 2013 delivery periods. "Too bad, so sad" is a fair description of Duke's response.

Duke completely glosses over this fundamental point: there would have been no need to resettle *any* delivery periods if Duke had provide accurate hourly load data to PJM. That PJM has a resettlement process in no way absolves Duke of its responsibilities under the Supplier Tariff and Ohio law. Indeed, Duke's admission that resettlement is *not* available to Direct under existing circumstances establishes that this case does not implicate PJM or FERC jurisdiction. This case involves a straightforward Ohio-jurisdictional tariff issue; nothing more and nothing less.

Duke's failure to provide accurate hourly load data to PJM violated Section 14.1 of the Supplier Tariff. Duke violated the Supplier Tariff again when it failed to implement consolidated billing, as required under Section 10.1. By violating the Supplier Tariff, Duke has violated Ohio law. And by violating Ohio law, Duke is liable to Direct for the consequences that naturally flow from the violation. These consequences have been quantified in dollars and should be paid to Direct as restitution.

II. ARGUMENT

Direct is both a transmission customer and load-serving entity (or LSE) within PJM, and must use PJM for various market-clearing services PJM provides.[1] As Duke concedes, "these charges are based upon the load served by each LSE in a PJM load zone."[2] Thus, the more load Direct serves, the greater its charges from PJM. But PJM does not determine or verify how much load Direct serves. PJM relies on hourly load data furnished by Duke to make this determination, and Direct relies on Duke to accurately meter and report that data.[3]

Direct does not allege that PJM calculated its invoices incorrectly. PJM did its part, applying its rates to the load data supplied by Duke. But Duke did not do its part. The load data provided by Duke was wrong; Duke's data told PJM that Direct was serving nearly twice as much load as it actually served.[4] The result? Direct paid for services that PJM did not provide and Direct did not use.

Duke suggests that because it did not benefit from the excess charges paid to PJM, it is not liable for the damages Direct has incurred.[5] That might be relevant in a common-law action alleging unjust enrichment, but this is not such an action and Direct does not have to show that Duke was "unjustly enriched."[6] Direct's loss may not have been Duke's gain, but this does not change the fact that Duke had a duty; it breached that duty; and that breach caused Direct to

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[1] Duke Initial Brief (Duke Br.) at 3.

[2] *Id*.

[3] Direct Exhibit 7, Direct Testimony of Timothy Abbott (Abbot Direct) at 6-7 (explaining information PJM relies on for settlements); Direct Exhibit 4, Certified Supplier Tariff (Supplier Tariff), Sections 9.2 (Duke responsible for metering) and 14.1 (Duke responsible for providing hourly load data to PJM).

[4] Direct Exhibit 2, Direct Testimony of Robert Kennelly (Kennelly Direct) at 7.

[5] Duke Br. at 2.

[6] *Id*.

sustain a significant loss. Ohio law provides a remedy for such losses, and the Commission has full power to order it—indeed, these facts compel it.

Duke attempts to muster a number of arguments against this conclusion, but none of them succeed. Direct will first address an overarching, unsupported assumption that animates Duke's initial brief, and then respond to Duke's arguments in the order presented.

A. Contrary to Duke's initial brief, this case does concern the Commission and does not fall within the administration of PJM or the jurisdiction of FERC.

Duke's initial brief relies repeatedly on the unsupported assumption that this case solely implicates PJM and its processes. "Direct Energy is not a retail customer of Duke Energy Ohio," and "the salient facts underlying its allegations concern the wholesale market settlement processes administered solely by PJM Interconnection LLC."[7] The "appropriate remedies," according to Duke, "are those that are jurisdictional to the Federal Energy Regulatory Commission (FERC) and PJM."[8] Duke's assumption is false, and it is all the more bewildering since the Commission has already ruled that it does have jurisdiction over this case and Duke's administration of its tariff. *See* Jan. 13, 2015 Entry, ¶ 3 ("The tariff was filed with and approved by the Commission, and the Commission maintains jurisdiction over charges based on such a tariff").

At the heart of this case are Duke's violations of the Commission-approved Supplier Tariff—Duke's duty arises under that tariff, Duke's actions and inactions breached those duties, and Direct's harm flows directly from that breach. Undoubtedly, if the Supplier Tariff had been filed with and approved by FERC or some other governmental authority, Duke's jurisdictional argument would carry some weight. But this is an *Ohio* tariff, filed by an *Ohio*-regulated utility

[7] Duke Br. at 1.

[8] *Id*.

and approved by the Public Utilities Commission of *Ohio*. If this case does not belong before the Commission, where does it belong? The evidence demonstrating the existence of the duty, the breach of that duty, and the nature and amount of the harm are all clear and undisputed. The only question is—does Ohio law authorize a remedy when a utility violates its Ohio tariffs and the duty to provide reasonable, adequate service? The answer is undoubtedly yes: the Commission may order restitution under R.C. 4928.16, or an appropriate court may order treble-damages under R.C. 4905.61. In asserting that no remedies are available for violations of the Supplier Tariff, Duke takes no account of these statutes.

What about the fact that some of Direct's harm was remedied through the resettlement process? This does not alter the availability of state-law remedies in the slightest. There is nothing unusual or inappropriate in the fact that a party seeking a complete remedy must pursue more than one avenue of recovery. Harmed parties frequently recoup a partial remedy *outside* of litigation and then must resort to litigation to recoup the rest. A typical situation involves insurance—due to policy limits or deductibles, insurance policies frequently provide an incomplete remedy, and if the remaining damages warrant it, the harmed party has the right to pursue them in an appropriate forum. *See, e.g., Shelton v. United States*, 615 F.2d 713, 715 (6th Cir. 1980) ("The claims of an injured party and his insurance carrier are not always coextensive. An insurer's claim will never exceed that of the injured party; the injured party, however, often seeks recovery for damages not encompassed in the insurer's claim."). Likewise, parties also bear a general duty to mitigate damages if a contract is breached, but no one would ever suggest that the partial mitigation of damages forecloses the right to pursue the remaining damages in a proper forum.

The same principle holds here—Direct recouped a partial remedy through the resettlement process, but the achievement of that partial remedy did not foreclose Direct's right to pursue the remaining damages in an appropriate forum. Duke assumes, but never explains *how*, the availability of a partial remedy through resettlement eliminated remaining remedies available under Ohio law. But Duke has not shown that the resettlement remedy was exclusive, nor that other remedies have been waived. Direct has the right to pursue its remaining damages before the Commission.

B. The Commission's authority to compel resettlement is no longer relevant given Direct's election of remedies in its initial brief.

Turning now to Duke's arguments, it first asserts is that the Commission is "without authority to direct reconciliation of PJM-administered wholesale market processes."[9]

Direct's Complaint asked for two different, alternative forms of relief that would both have accomplished the same result: financial restitution, or an order compelling Duke to require other CRES providers to resettle.[10] Direct's Teresa Ringenbach explained why she believed that forcing Duke to resettle was an appropriate option.[11] As is evident from its initial brief, however, Direct is no longer pursuing this remedy. Direct seeks restitution, or alternatively, if the Commission believes it more appropriate, a damages action in civil court based on the Commission's finding of inadequate service. Consequently, Duke's discussion of the PJM resettlement process and whether the Commission has authority to order resettlement is no longer relevant.

[9] Duke Br. at 11–12.

[10] Complaint, Request for Relief ¶¶ A and B.

[11] Direct Exhibit 1, Direct Testimony of Teresa Ringenbach (Ringenbach Direct) at 5-6.

C. Direct plainly *does* have standing to present a claim under R.C. 4905.26 and R.C. 4928.16.

As to the other remedy requested by Direct (financial restitution under R.C. 4928.16 or a damages action under R.C. 4905.61), Duke takes an extreme and unsupportable position. According to Duke, not only is Direct not entitled to a remedy, Direct is not even entitled to ask for a remedy. Duke claims that Direct lacks "standing to assert any violation of Title 49 or Commission regulation promulgated thereunder."[12]

Duke reads the complaint statute as limiting standing to "customers" of a utility. And "customers" (to Duke) means end-users only: ratepayers that receive electric distribution and other services from Duke may bring a complaint to enforce Duke's tariffs, but CRES providers like Direct may not. (Curiously, the same Supplier Tariff that cannot be enforced *against* Duke may be enforced *by* Duke, including an exculpatory provision expressly invalidated by Commission rule.) In Duke's view, it may violate the Supplier Tariff with impunity, and CRES providers cannot do a thing about it under Ohio law.

But Duke is wrong on all counts. Duke's attempt to distinguish Direct from a "customer" is pure semantics. In the first place, R.C. 4905.26 is not merely limited to "end-use customers." The statute authorizes complaints by "any person, firm, or corporation" against a public utility. *See also* R.C. 1.59(C) ("'Person' includes an individual, corporation, business trust, estate, trust, partnership, and association"). Direct is a "person" and "firm" under R.C. 4905.26, a "person" under R.C. 1.59(C), and the terms are interchangeable under both statutes. Direct is among the persons and entities entitled to bring a complaint before the Commission. Moreover, even if the statute were limited to "customers," Direct *is* a customer for purposes of the Supplier Tariff—it

[12] Duke Br. at 12.

pays Duke for the provision of regulated services.[13] A holding that only end-users could file complaints against public utilities would unsettle decades of established practice and find no support in the authorizing statutes.[14]

What about Duke's implication that complaints under R.C. 4905.32 and R.C. 4905.26 may only be brought if an improper rate is charged? This also runs aground on the statutory texts. R.C. 4905.26 authorizes complaints involving not only "any rate," but also any "schedule, classification, or service rendered" that is "in any respect unjust, reasonable, unjustly discriminatory, unjustly preferential, or in violation of law." Likewise, R.C. 4905.32 not only prohibits the charging of rates that vary from approved tariffs, but also prohibits the application of "rules" and "regulations" "except such as are specified in such schedule and regularly and uniformly extended . . . ." Direct's Complaint involves a "service;" specifically, the "Certified Supplier Services" defined in the Supplier Tariff.[15] These services include acting as Direct's Meter Data Management Agent (MDMA), which entails furnishing hourly load data to PJM. Ohio law explicitly requires Duke to perform these services in accordance with the Supplier Tariff. Duke is "in violation of law" by failing to do so.

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[13] Supplier Tariff, Section VI (credit requirements applicable to suppliers); Section 12.1 (monthly invoicing of Duke's charges to suppliers); Rate CSMS (Sheet No. 53.2) (listing of Duke's charges to suppliers).

[14] Examples of complaints by retail suppliers and other "non-customers" include Case No. 01-0393-EL-CSS (complaint by retail supplier against electric utilities for alleged violations of transition plan), Case No. 01-1331-EL-CSS (complaint by energy broker/marketer against electric utilities for alleged breach of a prior stipulation), Case No. 06-0835-EL-CSS (complaint by energy broker against electric utilities for alleged discrimination), Case No. 09-0161-EL-CSS (complaint by township against electric utility for alleged falure to obtain permits for oversized vehicles), and Case No. 16-1089-EL-CSS (insurer's subrogation claim against electric utility).

[15] Supplier Tariff, Definitions of Terms and Explanations of Abbreviations, Sheet 20.4, page 2 of 5: "Certified Supplier Services" means those services that provide the interface and coordination between the Certified Supplier and the Company in order to effect the delivery of Competitive Retail Electric Service to End-use Customers located within the Company's service territory."

As for the position that the Commission lacks jurisdiction to remedy violations of the Supplier Tariff, again, the Commission has already rejected this position in the Entry denying Duke's motion to dismiss. "Direct's complaint alleges that Duke violated the Certified Supplier Tariff by failing to provide accurate metering data. The tariff was filed with and approved by the Commission, and the Commission maintains jurisdiction over charges based on such a tariff." Jan. 13, 2015 Entry, ¶ 3 *citing Kazmaier Supermarket, Inc. v. Toledo Edison Co*., 61 Ohio St.3d 147 (1991). And as discussed above, Ohio law clearly does authorize remedies for tariff violations. *See, e.g.*, R.C. 4928.16; R.C. 4905.61.

Duke confuses its rights and responsibilities to "customers" under PUCO No. 19 (the tariff which generally applies to end users) with its rights and responsibilities to CRES providers under PUCO No. 20 (the Supplier Tariff). Direct may not be a "customer" under PUCO No. 19, but that is not the tariff Duke violated. Direct's claims are based on Duke's violations of PUCO No. 20. Just as a residential customer has standing to bring a complaint against Duke for violating PUCO No. 19, Direct and other retail suppliers have standing to bring complaints against Duke for violations of PUCO No. 20. The tariffs address different relationships, so compliance with one does not equate to compliance with the other.

In short, Direct has standing to file this complaint.

D. Direct has proven metering regulation violations.

Duke's next argument is that Direct "failed to meet its burden to prove metering violations."[16] Direct disagrees, and to explain why requires some consideration of how this case has necessarily evolved.

[16] Duke Br. at 13.

From the filing of the Complaint until now, the focus of this case has been on Duke's measurement and reporting practices. And the reality is that Duke's measurement and reporting practices were quite complex, requiring multiple paragraphs to explain in Duke's initial brief.[17] The metering arrangement itself was multifaceted and complicated; behind-the-scenes, manual adjustments to the meter-reading data were required; and unless these manual adjustments were properly and timely made, the meter data would be inaccurate.[18] Direct's Complaint was filed without the benefit of discovery or Duke's testimony, and it necessarily hit at each part of this process—whether Duke employed accurate metering equipment and whether Duke adhered to its Supplier Tariff and reported accurate data.

With the benefit of discovery and Duke's testimony, it now appears clear that the fundamental problem with Duke's practices was less with the metering devices, but more with its handling of the metered data.[19] Direct's initial brief accordingly focused on the violations of the Supplier Tariff. This, however, does not exonerate Duke from any and all claims of inadequate service, nor does it mean that Duke necessarily complied with the metering regulations. Duke's admission that "the meters at the SunCoke facility operated correctly and recorded accurate data" does not necessarily prove compliance.[20] The rules require "metering accuracy," and Duke allowed a metering configuration to exist that it *knew* would not automatically report accurate data. Rather, the metering arrangement required steps beyond merely capturing raw data. To accurately determine the customer's hourly load, the raw data recorded by one of the meters had

[17] *Id*. at 7-9.
[18] *Id*.; *see also* Abbott Direct at 3-5, 12-13.
[19] Abbott Direct at 12-13.
[20] Duke Br. at 10.

to be netted against the raw data recorded by the other.[21] For whatever reason, Duke made the necessary adjustments when it provided SSO service to SunCoke, but quit making them when Direct became the supplier.[22]

Whether or not the individual meters worked, the metering arrangement did not. Again, it now seems clear that the fundamental issue was not with the devices, but with Duke's handling of its duties under the Supplier Tariff. If anything, Duke's insistence that the meters were working and that meter data "was properly validated and used for customer billing purposes" only further accentuates the violation of the Supplier Tariff.[23] As explained in Direct's initial brief, SunCoke's load data served two purposes, one of which was "customer billing" (*i.e.*, to calculate Direct's and Duke's charges to the customer), the other of which was to settle the wholesale transactions necessary to provide service to the customer (*i.e.*, to calculate PJM's charges to Direct).[24] The fact that the customer was being billed correctly only served to deepen the mystery as to why Direct was being billed incorrectly. Duke admits that the meter data "validated" for customer billing purposes was *not* validated before being sent to PJM.[25] In fact, even *after* Duke discovered the source of the problem (its failure to validate this data by netting the meter reads), it continued to report invalid data to PJM, relying on the PJM resettlement

[21] Abbott Direct at 4 ("[T]he data generated by the two meters was incorporated into a calculation, performed manually every month by Duke Energy's Complex Billing Group.").

[22] *Id*. at 12-13 ("[I]t was determined that this data was not subjected to the same adjustment that had been done by Duke Energy's Complex Billing Group when issuing Duke Energy Ohio's bill to SunCoke.").

[23] Duke Br. at 10.

[24] Direct Initial Br. at 2-3.

[25] Abbott Direct at 12-13.

process to address the problem after-the-fact instead of fixing the problem to avoid the need for resettlement.[26]

In short, Direct does not concede that Duke complied with the meter regulations. The metering arrangement was certainly a part of problem. But with the benefit of the fully developed record, it is most straightforward to focus on the violations of the Supplier Tariff.

E. Direct has demonstrated a violation of the Supplier Tariff.

Duke also asserts that Direct did not "prove a violation of the Certified Supplier Tariff."[27] But none of its arguments hold up.

1. R.C. 4905.32 applies here.

Duke's lead argument assumes that R.C. 4905.32 is inapplicable because it only pertains to claims that an incorrect rate was charged.[28] To this end, Duke's initial brief quotes the first sentence of R.C. 4905.32—a sentence that, true enough, prohibits charging rates other than those specified in Duke's tariffs. But that is not the only sentence in R.C. 4905.32. The second sentence (which Duke omits to quote) provides, in part, "No public utility shall . . . extend to any person, firm, or corporation, any rule [or] regulation . . . except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service." R.C. 4905.32. So contrary to Duke's selective quotation, R.C. 4905.32 does not merely require the charging of uniform rates, but also that Duke abide by its tariff's rules and regulations.

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[26] *Id*. at 13 ("As an interim remedy and recognizing the time associated with such an IT change, [Duke] relied upon a manual solution that allowed for the PJM invoices for March 2013 through July 2013 to be reconciled under PJM's reconciliation process, or Resettlement B. *For invoices that post-date July 2013*, Duke Energy Ohio has been submitting to PJM load data for SunCoke that was netted . . . .") (emphasis added).

[27] Duke Br. at 14.

[28] *See id*. ("Significantly, there are no rates, rentals, tolls, or charges applicable to the Meter Data Management services performed by Duke . . . .")

Duke also argues that "it did not collect any of the amounts that Direct claims it overpaid PJM," and thus that there was "no financial transaction" involving Duke and the overpayment.[29] This is entirely irrelevant. As Duke acknowledges, this argument was a defense raised against a different cause of action, presented in a different forum, involving different parties—a federal civil suit, claiming unjust enrichment, filed by the FirstEnergy utilities against Direct. In that case, the FirstEnergy utilities alleged "unjust enrichment" based on the alleged receipt of overpayments by PJM. But a direct financial transaction between the plaintiff and defendant is an element of that claim, and the absence of such a transaction between the utilities and Direct was thus fatal to the complaint. That complaint was thus dismissed for failure to state a claim.[30] But Direct is not alleging unjust enrichment in this case, so the fact that Direct's overpayment does not appear to have ended up with Duke is irrelevant.

2. Direct did not waive its right to pursue remedies in this case.

Duke also argues that it cannot be held liable even if it did violate its tariff. Its very brief argument on this point contains two different concepts, neither of which provides legal support. First, Duke claims that its "tariff expressly provides that it shall be held harmless relative to its performance of meter data management activities."[31] Direct has already refuted this position in its initial brief. The Commission's rules are clear:

> ***No tariff*** of an electric utility shall incorporate exculpatory clauses that purport to limit or eliminate liability on the part of the electric utility to its ***customers or others*** as a result of its own negligence when providing a regulated service. No electric utility tariff shall incorporate provisions which purport to establish liability on the part of the electric utility's customers for acts or failures to act involving an electric utility's facilities, which are beyond the control of the customer. ***Any contrary provisions in an electric utility's tariff now on file with the commission shall be eliminated***.

[29] *Id*.

[30] *See* Order, U.S. Dist. Ct., ND Ohio Case No. 5:17CV746, attached as Exhibit A.

[31] Duke Br. at 15.

Ohio Admin. Code 4901:1-10-02(G) (emphases added).

Regardless of whether Direct is considered a "customer" under the Supplier Tariff, the rule against exculpatory clauses is not limited to customers. Clauses that limit or eliminate liability to "customers *or others*" are invalid. Nor did the Commission limit its rule to tariffs for distribution service. "*No* tariff of an electric utility" may include an exculpatory clause. A tariff is a tariff; the services Duke provides under the Supplier Tariff are "regulated," just as the services it provides to distribution customers are regulated. If they were not regulated, they would not be governed by Commission-approved tariffs. The exculpatory language in Section 14.1 simply cannot limit or eliminate Duke's liability for the consequences of its negligence in failing to properly perform a tariffed service.

Duke also suggests that Direct waived the right to review hourly load data. Assuming for sake of argument that this is true,[32] Duke does not explain how or why this should absolve Duke, other than asserting (without explanation) that this should resurrect an otherwise illegal exculpatory clause. Nothing in the Commission's rules contemplates such an exception. And Duke cannot seriously suggest that even if Direct waived the right to review hourly data, it also knowingly discharged Duke from the obligation to measure and report that data accurately. Had Duke expressed this understanding up front and in writing, suffice it to say that this matter (and Duke's views of its obligations under the Supplier Tariff) would have been elevated to the Commission a long time ago.

[32] Duke claims that Direct executed a "buyer unilateral" confirmation in establishing its PJM subaccount (*see* Duke Br. at 15–16), but offers no writing or other proof for this assertion. *See id*. at 5. When asked about this in her deposition, Ms. Ringenbach testified that she did not know whether Direct had executed a buyer unilateral confirmation. Duke Exhibit 9, Deposition of Teresa Ringenbach, at 16 ("*Q*- Do you know if Direct Energy and Duke Energy Ohio entered into a buyer unilateral confirmation? *A*- I do not.").

Direct has not waived its claims. The Supplier Tariff requires Duke to furnish accurate hourly load data to PJM. Not only do the parties agree that Duke failed to provide accurate load data to PJM, but Duke admits that after it learned the data was inaccurate and discovered the root cause of the inaccuracy, it kept sending inaccurate data to PJM.[33] Rather than admit to its mistake, Duke blames Direct. The problem (according to Duke) was not that Duke knowingly sent inaccurate data to PJM, but that Direct did not independently monitor, verify, and correct hourly load data before Duke sent this information to PJM. In other words, if Direct had done Duke's job for it—a job Direct paid Duke to do—Direct would have avoided Duke's errors and the bills it received from PJM would have been correct. Whether this is true as a matter of logic, it does not stand as a legal defense.

The Supplier Tariff forces Direct to use Duke as its MDMA.[34] The tariff also forces Direct and its customers to rely on Duke's meters and metering data.[35] The Supplier Tariff neither authorizes nor requires Duke to consider or even look at load data independently gathered by a CRES provider. Moreover, Duke's own evidence acknowledges that Direct promptly followed up to determine what had led to the billing discrepancy.[36]

To suggest that Direct is to blame ignores both the evidence and the fact that it is *Duke's* duty under the law and its tariff to provide these services in a reasonable manner. Duke cannot seriously claim that Direct either had a duty to prevent, or practically could have prevented, Duke's own errors.

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[33] Abbot Direct at 13.

[34] Supplier Tariff, Section 14.1.

[35] *Id*., Sections 9.2, 10.1, 10.4, 10.7.

[36] Abbott Direct at 12 ("As I understand, Direct Energy contacted Duke Energy's Accounting Group and inquired into the load information reflected in the first PJM invoice sometime in February 2013.") Dana Adams, the Duke employee brought in to devise a solution to the metering issues, did not become aware of the problem until April 2013, and did not reach out to Direct until May. Direct Exhibit 9, Deposition of Dana Adams (Adams Deposition) at 30-31.

F. The Commission does have authority to directly remedy the financial harm caused by Duke; but even if it did not, it is irrelevant to whether Duke violated its duties.

Duke finally asserts that the "Commission cannot award monetary damages."[37] Duke relies on, without ever explaining, a "general prohibition against the Commission awarding monetary damages."[38]

Duke's argument is not clear, but what is clear is that it fails ever to address the statutory provision that expressly authorizes the Commission to remedy the financial harm caused by Duke. R.C. 4928.16(B)(1) states that the Commission may "[o]rder . . . restitution to customers including damages due to electric power fluctuations, in any complaint brought pursuant to division (A)(1) or (2) of this section." Duke briefly hints that this statute only permits an order of restitution if a complaint involves "power surges"[39], but the statute clearly is not so limited—its power to award restitution "*includ[es]* damages due to electric power fluctuations," and is not *limited to* such an event.

Direct explained in its initial brief that this statute permits a remedy, and none of Duke's arguments rebut Direct's explanation. But regardless, this issue is irrelevant to whether Duke provided inadequate service. Because Duke provided inadequate service, in violation of R.C. 4905.32 and other statutes, Direct has a remedy: either restitution under R.C. 4928.16 or through a treble damages action in court under R.C. 4905.61. But given that the evidence of the amount of the harm is precise and undisputed, there is no reason not to provide a remedy here and now.

III. CONCLUSION

There are no mysteries in this case about what happened or why. Duke netted SunCoke's metering data when Duke was the supplier, quit netting the data when Direct became the

[37] Duke Br. at 16.
[38] *Id*. at 17.
[39] *See id.*

supplier, and resumed netting the data after a half-year's worth of finger pointing and denials. Direct was partially made whole through the PJM resettlement process, but that process is not Direct's exclusive remedy. The very need to resettle was a consequence of Duke's violation of the Supplier Tariff. Duke is therefore liable for the remaining loss sustained by Direct that could not be remedied through resettlement.

The law and the evidence compel the Commission to hold that Duke violated its duties under the Supplier Tariff and that this violation inflicted significant harm on Direct. The Commission should either order restitution or acknowledge Direct's right to seek treble damages in civil court.

Dated: September 1, 2017

Respectfully submitted,

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ATTORNEYS FOR DIRECT ENERGY BUSINESS, LLC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Post-Hearing Reply Brief was served by electronic mail this 1st day of September, 2017, to the following:

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/s/ Rebekah J. Glover
One of the Attorneys for Direct Energy Business, LLC

Direct Exhibit A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

OHIO EDISON COMPANY, *et al.,*	)	Case No.: 5:17 CV 746
	)	
Plaintiffs	)	
	)	
v.	)	JUDGE SOLOMON OLIVER, JR.
	)	
DIRECT ENERGY BUSINESS, LLC,	)	
	)	
	)	
Defendant	)	ORDER

Currently pending before the court is Defendant Direct Energy Business, LLC's ("Direct," or "Defendant"), Motion to Dismiss (ECF No. 6). For the following reasons, the court grants Defendant's Motion to Dismiss.

I. FACTUAL BACKGROUND

A. Parties

In Ohio, three separate entities – each with their own specific functions – make up the regulated electric service industry. (*See* Complaint, ECF No. 1, at ¶¶ 6,7,9.) First, certified electric service suppliers ("Certified Suppliers") generate and supply electricity to be sold and purchased in the wholesale energy market. (*Id*. at ¶¶ 6,8.) Second, the wholesale energy market is operated by regional transmission organizations ("RTOs") who also operate the electric grids that carry energy from the Certified Suppliers to the electric distribution companies ("Distributors"). (Def.'s Motion to Dismiss, ECF No. 6, at 4.) Third, Distributors distribute electricity to customers. (*Id.* at ¶ 8.) Additionally, Distributors carry the responsibility of providing customer usage data to the RTOs, and

the RTOs function as "clearinghouses" for settling the transactions between Certified Suppliers and customers. (Compl., ECF No. 1, at ¶ 9.)

The parties in this case are each categorized as one of the above-described entities. Defendant is a Certified Supplier that generates and sells electricity in the wholesale market. (*Id.* at ¶ 6.) Plaintiffs, Ohio Edison Company ("OE") and The Cleveland Electric Illuminating Company ("CEI") (collectively, "Plaintiffs"), are Distributors responsible for distributing the electricity that Defendant, and other Certified Suppliers, generate. (*Id.* at ¶ 7.) PJM Interconnection LLC ("PJM"), though not a party to this case, is the RTO which operates the wholesale market in which Plaintiffs and Defendant operate. (*Id.* at ¶¶ 6, 9.) Here, Plaintiffs are responsible for providing PJM with accurate customer energy usage data so that PJM can correctly charge the responsible Certified Supplier for the energy used by each customer. (*Id.* at ¶ 11.)

B. Supplier Mismatch Issue

If a customer transfers services from one Certified Supplier to another, the customer's load,[1] and the Certified Supplier's associated load costs, should also transfer. (*Id.* at ¶ 11.)

Plaintiffs allege that in 2013 and 2014, three customers switched their electric service from their previous Certified Supplier ("Harmed Supplier") to Direct. (*Id.* at ¶ 12.) When these customers switched services, the Plaintiffs' computer system erroneously continued to report their load costs to PJM as associated with the Harmed Supplier instead of with Direct. (*Id.* at ¶ 13.) This error allegedly continued through late 2015 when Plaintiffs discovered and corrected it. (*Id.*) Thus, Plaintiffs claim that because of the computer error (the "Supplier Mismatch Issue"), PJM charged the Harmed Supplier a total of $5,602,981.39 for energy that should have been charged to Direct.

[1] The load refers to a customer's energy usage.

(*Id.* at ¶ 14.) Plaintiffs maintain that, during this time, Direct received revenues from the three new customers without incurring charges for their corresponding load costs. (*Id.*)

On January 27, 2017, Plaintiffs entered into separate settlement and release agreements with the Harmed Supplier, whereby Plaintiffs became the successors-in-interest to any claims the Harmed Supplier may have had against Direct in connection with the Supplier Mismatch Issue. (*Id*. at ¶ 16.) Plaintiffs allege that they contacted Direct "on numerous occasions" seeking to recover the $5,602,981.39 that they believe Direct should have paid to PJM; however, they maintain that Direct has "refused to pay for the services that were incorrectly charged to the Harmed Supplier." (*Id*. at ¶ 17.)

C. Legal Claims

On April 10, 2017, Plaintiffs filed a Complaint against Defendant, alleging a single claim for unjust enrichment. Plaintiffs request compensatory damages in an amount not less than $5,602,981.39, plus interest and costs, reasonable attorney's fees, and any other additional relief to which the Companies may be entitled. (*Id.* at ¶ 22.)

On May 12, 2017, Defendant filed a Motion to Dismiss Plaintiffs' Complaint for failure to state a claim upon which relief can be granted in accordance with Rule 12(b)(6). On June 12, 2017, Plaintiff filed a Memorandum in Opposition (ECF No. 7) to Defendant's Motion to Dismiss.

II. LEGAL STANDARD

In ruling on a Rule 12(b)(6) motion to dismiss, the court must construe the complaint in a light most favorable to the plaintiff and accept all well-pleaded factual allegations in the complaint as true. *Erickson v. Pardus*, 551 U.S. 89, 94, (2007); *Bishop v. Lucent Technologies, Inc.*, 520 F.3d 516, 519 (6th Cir. 2008); *Harbin-Bey v. Rutter*, 420 F.3d 571, 575 (6th Cir. 2005). The court is not,

however, "bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp v. Twombly*, 550 U.S. 554, 555 (2007)). Thus, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Bihn v. Fifth Third Mortg. Co.*, 980 F. Supp. 2d 892, 897 (S.D. Ohio 2013) (citing *Twombly*, 550 U.S. at 555). The court may also "disregard allegations contradicted by facts established by exhibits and attached to the pleading." *Girgis v. Countrywide Home Loan, Inc.*, 733 F. Supp. 2d 835, 843 (N.D. Ohio 2010) (quoting *HMS Property Mgmt. Group Inc. v. Miller*, 69 F.3d 537 (Table), 1995 WL 641308 at *3 (6th Cir. Oct. 31, 1995)).

To survive a motion to dismiss, the "complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005). A complaint must contain facts sufficient "to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. While "[t]he plausibility standard is not akin to a 'probability requirement,'. . . it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 557). Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

III. LAW AND ANALYSIS

Unjust enrichment occurs when "a party retains money or a benefit that in equity or justice belongs to another." *Savett v. Whirlpool Corp.*, No. 12 CV 310, 2012 WL 3780451, at *6 (N.D. Ohio Aug. 31, 2012) (citations omitted). In Ohio, a plaintiff must allege three elements to state a claim for unjust enrichment: "(1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge

by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment." *Hambleton v. R.G. Barry Corp.*, 465 N.E.2d 1298, 1302 (Ohio 1984). Without addressing the third element, the court finds Plaintiffs' Complaint insufficient in regard to elements one and two.

A. Benefit Conferred by Plaintiff Upon a Defendant

Plaintiffs allege that "[t]he Harmed Supplier conferred a benefit upon Direct Energy by paying for Direct Energy's load costs in the amount of $5,602,981.39." (Compl., ECF No. 1 at ¶ 4.) If PJM under-billed Defendant by approximately $5.6 million, Defendant undoubtedly received a benefit. However, Plaintiffs have not provided any case law to support their argument that the benefit was conferred upon Defendant by Harmed Supplier. Furthermore, Plaintiffs have not alleged any facts showing that the Harmed Supplier and Direct engaged in an economic transaction with each other.

In Ohio, an unjust enrichment claim is intended "not to compensate the plaintiff for any loss or damage suffered by him but to compensate him for the benefit he has conferred on the defendant." *Johnson v. Microsoft Corp.*, 834 N.E.2d 791, 799 (Ohio 2005) (quoting *Hughes v. Oberholtzer*, 123 N.E.2d 393, 397 (Ohio 1954)). It is not enough that a plaintiff suffers a loss and a defendant receives a benefit; rather, "a plaintiff must establish that a benefit has been conferred upon that defendant *by that particular plaintiff*." *Bihn*, 980 F. Supp. 2d at 904 (emphasis added). To show that a plaintiff conferred a benefit upon a defendant, "an economic transaction must exist between the parties." *Caterpillar Fin. Servs. Corp. v. Harold Tatman & Son's Ents., Inc.*, 50 N.E.3d 955, 967 (Ohio Ct. App. 2015); *see also In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 684 F. Supp. 2d 942, 952 (N.D. Ohio 2009) ("[F]or a plaintiff to confer a benefit on a defendant, an economic

transaction must exist between the parties"), as amended (Nov. 4, 2009).

Notably, courts have permitted "indirect economic transactions" in limited circumstances. *Front-Loading Washer Prod. Liab. Litig.*, 684 F. Supp. 2d at 953. For instance, in *Randleman v. Fid. Nat. Title Ins. Co.*, 465 F. Supp. 2d 812, 823-825 (N.D. Ohio 2006), the court allowed the plaintiffs, who refinanced their homes through various mortgage lenders, to maintain an unjust enrichment claim against the defendant insurer, who allegedly charged those lenders excessive title insurance premiums. The plaintiffs maintained that though they did not transact directly with the defendant, they were actually the defendant's direct customers; the mortgage lenders served as nothing more than pass-through entities. *Id.* at 825. The court held that in that scenario, a sufficient "transactional nexus" existed between the plaintiffs and the defendant, such that the plaintiffs conferred a benefit directly on the defendant. *Id. But see Davis v. Lawyers Title Ins. Corp.*, No. 1:06 CV 357, 2007 WL 782158, at *6 (N.D. Ohio Mar. 13, 2007) (explaining that if one party sells its services to a "retailer or other middleman" "without regard to who the final consumer might be, and there is no allegation that the Defendant had any control over who the retailer chose to sell its products to," a sufficient economic transaction between the parties does not exist).

In contrast to *Randleman*, the court in *Johnson* found that a plaintiff who purchased a Gateway computer could not sue Microsoft for unjust enrichment because she only transacted directly with Gateway. 834 N.E.2d at 799 ("The rule of law is that an indirect purchaser cannot assert a common-law claim for restitution and unjust enrichment against a defendant without establishing that a benefit had been conferred upon that defendant by the purchaser."). In other words, Gateway served as a middleman who severed any direct link between the customer and Microsoft.

Plaintiffs in this case do not allege a direct transaction between Harmed Supplier and Direct. Rather, Plaintiffs' Complaint describes PJM as a middleman that engaged in separate transactions with each party. Though Plaintiffs attempt to argue that PJM is a passthrough entity like the mortgage lenders in *Randelman*, (Pls.' Opp'n to Def.'s Mot. to Dismiss, ECF No. 7, at 9) (arguing that "PJM is merely a financial clearinghouse"), they allege no facts and provide no argument to support the idea that Harmed Supplier actually sent any money to Direct. Accordingly, the court finds an insufficient transactional nexus between Harmed Supplier and Direct.

Plaintiffs next argue that because the Harmed Supplier and Direct both operate in the same wholesale market, an "obvious economic transaction" exists between the parties. (*Id.* at 7.) However, Plaintiffs provide no caselaw to support this argument, and the court finds it unavailing. As an analogous example, if a transportation company tasked with transporting goods from a manufacturer to a retail store incorrectly billed both the manufacturer and the store, it does not follow that the manufacturer and the store entered into an economic transaction with each other. Rather, each entered into a transaction with the transportation company, and each would expect to remedy their respective billing errors directly with the transportation company. Similarly, in the present case, it does not follow that Harmed Supplier and Direct engaged in an economic transaction with one another simply by operating in the same wholesale energy market.

From the facts Plaintiff has alleged, Direct and the Harmed Supplier did not engage with one another directly or indirectly. Thus, Plaintiff cannot base an unjust enrichment claim where no economic transaction exists. *See City of Cleveland v. Sohio Oil Co.*, No. 78860, 2001 WL 1479233, at *7 (Ohio Ct. App. Nov. 21, 2001) (holding that where a defendant breached its contract with the city by allowing customers to park in its parking lot overnight, the wrongfully obtained parking revenues had been conferred on the defendant by its customers and not by the city.); *Metro Life Ins.*

Co. v. Franks, No. 98AP-8. 1998 WL 514134, at *2 (Ohio Ct. App. Aug. 20, 1998) (holding that where a life insurance company mistakenly overpaid one beneficiary to the detriment of the another, the insurance company – not the underpaid beneficiary – conferred the benefit).

Since Plaintiffs fail to allege that the Harmed Supplier entered into any economic transaction with Direct, as required to state a claim for unjust enrichment in Ohio, the court finds that Plaintiffs failed to plead the first element of their unjust enrichment claim.

B. Knowledge by Direct of the Benefit

Plaintiffs allege that Defendant "knew that it was obliged to pay for its actual customer load, and Direct Energy knew that it received a $5,602,981.39 windfall by not paying for its actual customer load that was paid for by the Harmed Supplier." (Compl., ECF No. 1, at ¶ 20.) However, Plaintiffs allege no facts to show *how* Defendant had knowledge of the benefit. In particular, Plaintiffs' Complaint alleges that *Plaintiffs* had the responsibility to track customer usage data, not Defendant. (Compl., ECF No. 1, at ¶ 11.) Thus, on the facts provided by Plaintiff, the court cannot even infer that Direct had knowledge that it failed to pay for its full customer load. Consequently, the court finds that Plaintiffs allege an improper legal conclusion with no factual support.

Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Additionally, the complaint must contain facts sufficient to "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Although "detailed factual allegations" are not required under the Rule, "[a] pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 556 U.S. at 678 (internal quotations omitted). A complaint is insufficient "if it tenders naked assertions devoid of further factual enhancement." *Id.* (internal quotations omitted). Furthermore, to survive a motion to dismiss, the "complaint must contain either direct or inferential

allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Mezibov*, 411 F.3d at 716. The Supreme Court has held that, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged–*but it has not shown*–that the pleader is entitled to relief." *Iqbal*, 556 U.S. at 679 (emphasis added) (internal quotations omitted).

Simply put, the mere recitation of an element of a claim, without more, is insufficient to survive a motion to dismiss. Here, Plaintiffs allege that Direct knew it received a "windfall," but offer no facts to support their allegation. (Compl., ECF No. 1, at ¶ 20.) Thus, Plaintiffs provide no facts from which the court can infer more than the "mere possibility" that Defendant had the requisite knowledge. *Iqbal*, 556 U.S. at 679. The court finds that Plaintiffs' allegation of knowledge is merely a recitation of the required element, and consequently, Plaintiffs have not sufficiently plead the element of their claim.

IV. CONCLUSION

For the foregoing reasons, the court grants Direct Energy Business, LLC's Motion to Dismiss (ECF No. 6).

IT IS SO ORDERED.

/s/ SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

July 26, 2017

Summary: Reply Brief electronically filed by Ms. Rebekah J. Glover on behalf of Direct Energy Business, LLC