

FILE

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September 20, 2006

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*

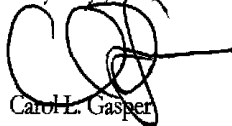
Attention Docketing Division:

Enclosed please find an original together with 12 copies of the following pleadings:

1. Consolidated Motion to Strike and Memorandum in Opposition to Motion to Dismiss/Motion to Strike Filed By Respondents Ohio Edison Company, The Cleveland Electric Illuminating Company, and FirstEnergy Corp. This pleading was previously filed via facsimile transmission on September 19, 2006;
2. Memorandum in Opposition to Motion to Stay Filed By Respondents Ohio Edison Company, The Cleveland Electric Illuminating Company, and FirstEnergy Corp. This pleading was previously filed via facsimile transmission on today's date.

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

cc: Tom Bellish **This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business**
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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 OPPOSITION TO MOTION TO STAY FILED BY
RESPONDENTS OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY, AND FIRSTENERGY CORP.**

I. INTRODUCTION

Complainant, Buckeye Energy Brokers, Inc., hereby files this Memorandum in Opposition to the Motion to Stay filed by Respondents, Ohio Edison Company, The Cleveland Electric Illuminating Company and FirstEnergy Corporation (collectively herein, "Respondents").

On August 3, 2006, Complainant mailed its Request for Production of Documents to Respondents. Complainant's Notice of Service reflecting this discovery request was filed with the Commission on August 8, 2006. On August 24, 2006, Respondent's filed a Motion to Dismiss and Motion to Strike "Reply" Pleadings attaching a largely blacked out (redacted) purported agreement between NOPEC and some of the Respondents as well as FirstEnergy Solutions (not a party in this matter). Complainant recently filed a Consolidated Motion to Strike and Memorandum in Opposition to Respondents' Motion to Dismiss. On August 25, 2006, in lieu of any response to Complainant's discovery request, Respondents filed a Motion to Stay.¹

¹ Apparently, Respondents' Motion to Stay excludes the portions of the otherwise blacked out agreement that they have chosen to reveal to the Commission in its Motion to Dismiss. Complainant, in its Consolidated Motion to Strike and Memorandum in Opposition to Respondents' Motion to Dismiss, requests that the Commission not consider this attachment since it is a matter outside the pleadings and, as presented, has no

To date, Respondents boldly have chosen to abuse the discovery process by ignoring specific rules that require responses – either production or specific objection – within twenty days. Accordingly, Respondents Motion to Stay should be denied in its entirety and Respondents should be compelled to respond to Complainant's outstanding discovery requests.

II. ARGUMENT

The Commission affords parties liberal discovery rights. Ohio Rev. Code § 4903.082 provides:

All parties and intervenors shall be granted ample rights of discovery. The present rules of the public utilities commission should be reviewed regularly by the commission to aid full and reasonable discovery by all parties. Without limiting the commission's discretion, the Rules of Civil Procedure should be used wherever practicable.

Moreover, Ohio Admin. Code § 4901-1-16(A) provides that:

The purpose of rules 4901-1-16 to 4901-1-24 of the Administrative Code is to encourage the prompt and expeditious use of prehearing discovery in order to facilitate thorough and adequate preparation for participation in commission proceedings. These rules are also intended to minimize commission intervention in the discovery process.

Respondents' approach simply ignores Ohio Admin. Code § 4901-1-20(C) providing that:

The party upon whom the request is served shall serve a written response within twenty days after the service of the request, or within such shorter or longer time as the commission, the legal director, the deputy legal director, or the attorney examiner assigned to the case may allow. The response shall state, with respect to each item or category, that the inspection and related activities will be permitted as requested, unless the request is objected to, in which case the reason for the objection shall be stated. If an objection is made to part of an item or category, that part shall be specified. The party submitting the request may move for an order under rule 4901-1-23 of the Administrative Code with respect to any objection or other failure to respond to a request or any part thereof, or any failure to permit inspection as requested. stated time deadlines.

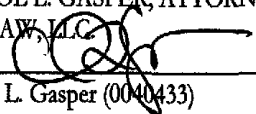
probative value. Further, the agreement as presented, is not responsive to Complainant's outstanding discovery request and only serves to taint the discovery process by advancing the self-interests of Respondents.

Respondents have not offered any basis for objecting to or refusing to answer the discovery requests propounded by Complainant. Complainant's counsel attempted to resolve this matter by providing Respondents' additional time to respond to the discovery requests. Instead of providing the responses, however, Respondents filed a Motion to Stay. As of this writing, the Respondents, by ignoring clear requirements of the Public Utilities Commission, have granted themselves an unofficial stay of approximately thirty days. Further, the Respondents approach will force the Complainant to file motions to compel discovery and other costly pleadings in an effort to gain information that it has every right to obtain.

Respondents have identified no support in either the Commission rules or legal precedent supporting a stay of discovery in this matter. Respondents have not sought any sort of protective order from the Commission. As already explained, Respondents have not made any specific or general objections to the discovery requests propounded by Complainant. They simply seek to avoid compliance with discovery obligations by pointing to what they feel are fatal flaws in the Complainant's complaint. Such subjective assessment is unsupported, does not provide a basis for refusing to provide requested information and is in direct contravention of the Commission's policy in favor of ample discovery.

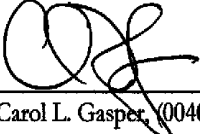
III. CONCLUSION

For all of these reasons, Complainant respectfully requests that the Commission enter an order denying Respondents' Motion to Stay and compelling Respondents to provide the requested information.

Respectfully Submitted,
CAROL L. GASPER, ATTORNEY
AT LAW, LLC
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 20, 2006, a copy of the foregoing was forwarded by regular US mail to James W. Burk, Esq., FirstEnergy Service Company, 76 South Main Street, Akron, OH 44308, Helen L. Liebman, Esq., Jones Day, 325 John H. McConnell Boulevard, Suite 600, PO Box 165017, Columbus, Ohio 43216-5017.


Carol L. Gasper, (0040433)

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

CONSOLIDATED MOTION TO STRIKE AND MEMORANDUM IN
OPPOSITION TO MOTION TO DISMISS/MOTION TO STRIKE FILED BY
RESPONDENTS OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY, AND FIRSTENERGY CORP.

1. INTRODUCTION

Complainant, Buckeye Energy Brokers, Inc., hereby files this Consolidated Motion to Strike and Memorandum in Opposition to the Motion to Dismiss/Motion to Strike filed by Respondents ("Respondents' Motion to Dismiss"), Ohio Edison Company, The Cleveland Electric Illuminating Company and FirstEnergy Corporation (collectively "Respondents"). Respondents' Motion to Dismiss does not meet procedural or substantive requirements and should be withdrawn in its entirety. Respondents' Motion to Dismiss improperly includes and refers to matters outside the pleadings, to wit: a largely blacked out (redacted) purported agreement between NCPUC and some of the Respondents as well as FirstEnergy Solutions (not a party in this matter). Conveniently, Respondents have also filed a Motion to Stay discovery, the merits of which will be addressed separately. The net effect is that Respondents are requesting this Commission kind credence to take the ball away that would have Complainant paying the ultimate price. In any event, should the Commission decline to strike Respondents' Motion to Dismiss in its entirety, Respondents'

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Motion to Dismiss should be overruled because Complainant has stated claims for which relief may be granted.

II. Motion to Strike the Respondents' Motion to Dismiss

As already mentioned, attachment of or reference to any matters beyond the face of the pleadings is an improper basis for a Motion to Dismiss. *Moore v. Ohio Dept. of Rehab. & Corr.* (Nov. 4, 1980), 80AP 405, 1980 W.T. 353871.¹ Even assuming that this Commission is inclined to consider the merits of Respondents' Motion to Dismiss, however, it must do so without reference to or consideration of the attachment.

The attachment is defective and should be stricken for various reasons. First, the unilateral redaction of most of the document lacks any rationale basis and defies basic rules of evidence. Second, Respondents have completely ignored the discovery requests propounded by Complainant and seek to have a "stay" imposed in connection with discovery. Respondents have not offered a single explanation or objection to the materials sought, nor have they interposed specific objections to portions of the attachment in justification of their self-serving revelation. To the extent that a party objects to disclosure of a particular document, the Commission affords a procedure for seeking protection from disclosure, which Respondents here ignore. Finally, the attachment itself is not authenticated and has been so marked up as to render it meaningless to inform the Commission or the Complainant as to its true terms.

For these reasons, Complainant respectfully requests that the Commission strike the Respondents' Motion to Dismiss completely or, at a minimum, partially.

¹ Respondents cite case law alleged to stand for the proposition that matters outside the pleadings may be considered if they are referred to in the plaintiff's complaint and are central to plaintiff's claim. This is not a correct statement of the law. Rather, the cases Respondents reference stand for the proposition that documents attached to or incorporated in the complaint may be considered on a Ohio Civil Rule 12(b)(6) motion to dismiss. In this case, however, Complainant did not attach a copy of any agreement between NRPCC and the Respondents because it did not—and still does not—have a copy of the blacked out agreement attached to Respondents' Motion to Dismiss or any other agreement or correspondence that might be relevant to resolving this matter, all despite a proper discovery request. What is happening here is that Respondents are attaching a copy of a largely blacked out (redacted) agreement, and asking the Commission to consider it as if it were the matter referred to by Complainant and central to its case. It is clearly a document offered up by Respondents in a manner that plainly violates the applicable Ohio Civil Rule 12(b)(6) rule at play: matters outside the pleadings shall not be considered. Moreover, a largely blacked out agreement has no probative value for this case, though it may have some negative value in terms of what Respondents are trying to hide.

III. Specific Objections to Respondents' Motion to Dismiss

Assuming that the Commission is inclined to proceed to the merits of Respondents' Motion to Dismiss, the Respondents fail to present any valid argument supporting dismissal.

A. Standard on Motion to Dismiss

The standards applied to a motion to dismiss are well settled. 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. Hinton v. Cosmopolitan City 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." *Lawson v. City of North Royalton* (8th Dist. 1995), 104 Ohio App.3d 152, 661 N.E.2d 733. A plaintiff is not required to prove its case at the pleading stage. *Hildreth Mfg., LLC v. Simon, 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.

Respondents ignore the foregoing standards and urge the Commission to reject Complainant's allegations out of hand as a "slam" and "masquerade." Moreover, Respondents boldly attach a redacted "document" in support of their Motion as supposed "proof" of the inadequacy of Complainant's allegations. This is clearly improper and warrants an order striking the Motion to Dismiss in its entirety.

Even assuming that the Commission proceeds to evaluate the merits of Respondents' Motion to Dismiss, dismissal at this juncture is unwarranted. Respondents offer four bases for seeking dismissal of the Complainant's Complaint. As addressed below, applying the appropriate standard of review to the Motion, none of the Respondents' claims of inadequacy withstand scrutiny.

B. FirstEnergy is a Proper Respondent

The first argument by Respondents in support of dismissal is that the Commission lacks standing over Respondent FirstEnergy, as a holding company. Specifically, Respondent claims that in a "rates-for-service" or "service-related" case, a holding company is not a "public utility" pursuant to R.C. § 4905.26. Respondent cites *Alliant Global Risks US Inc. Co., et al. v. FirstEnergy Corp., et al.*, Case No. 05-1011-JEL-SS in support of this proposition. In the first instance, *Alliant* involved a completely different type of complaint than the instant one. *Alliant* consisted of several consolidated complaints that each sought to fix responsibility for the massive power outage that occurred in August 2003.

Alliant stands for the proposition that for "service-related" or "service quality" complaints, a holding company is not a "public utility." *Alliant* did not recognize a specific prohibition against exercising jurisdiction over a holding company in an alleged price discrimination scheme. *Alliant* also did not recognize a blanket prohibition against the Commission's jurisdiction over a holding company, like Respondent FirstEnergy. Additionally and importantly, the Commission permitted amendment of the complaints at issue in order to correct whatever deficiencies existed, rather than dismissing the complaints outright. *Id.* at ¶ 57.

Another important distinction, as already alluded to, between the *Alliant* case and this one is the nature of the allegations and source of alleged liability. *Alliant* related to the failure of service experienced by countless individuals on the day of the power outage. Complainant's complaint alleges unfair competitive advantage and abuse of market power. *Complaint*, ¶ 24-28. In fact, these allegations arose out of O.R.C. § 4926.17 and O.A.C. § 4901.1-20-16. The claimed liability of FirstEnergy in *Alliant* arose out of its alleged failure to provide adequate service.

The allegations against FirstEnergy are sufficient to state a claim and dismissal is inappropriate. Nothing in Respondents' Motion to Dismiss compels an alternative conclusion. Moreover, the scope of the Commission's jurisdiction, as stated in O.R.C. § 4905.05 clearly extends to holding companies.²

² The Commission plainly has jurisdiction over all parties named hereinafter. To the extent that the Commission is inclined to treat FirstEnergy as falling outside its jurisdiction, however, that would not be a basis for dismissing the Complaint as it relates to the other named parties.

C. Complainant Has Standing to Pursue This Action

Complainant brought this action in its capacity as a Certified Retail Electric Supplier (CRES) provider and holds PUCO license number 00 002. Complainant is not a municipality attempting to prosecute a complaint on behalf of countless, unknown residents. Thus, the *City of Solon v. Cleveland Elec. Rl. Co.*, Case No. 01-1407-13, 42SS opinion precluding a municipality from having standing to pursue an action on behalf of its citizens is neither analogous to nor dispositive of Complainant's standing here. Respondents' sweeping reliance on *Solon* is unpersuasive.

Furthermore, this complaint has none of the earmarks of a class action. Respondents' characterization notwithstanding, Complainant acts as a broker for a finite number of entities. Once again, the cases cited by Respondents bear no resemblance to the factual issues or procedural posture of this case. In *Winn v. Cleveland Elec. Rl. Co.*, Case No. 97-876-13, 42SS, for example, the Commission did not dismiss the case based on a finding that the complainant was an improper class action. Rather, the Commission concluded in the *Winn* case that the complainant failed to establish that the respondent's classification system was "unreasonable." In *Industrial Energy Users Ohio*, Case No. 04 1129 Rl, 42SS, the Commission did not outright dismiss the complaint, but allowed the complainant, an "association" and "electric aggregator," additional time to amend the complaint and specifically name members who suffered the alleged harm.

The Complainant here has alleged sufficient facts demonstrating an action that is not strictly on behalf of end user customers, but emanates from its own alleged harm, i.e. that Complainant, in its capacity as an approved aggregator, has been denied the same pricing offered by Respondents to NOPAC, another aggregator. *Complaint at ¶¶ 10 15, 16 18, 21 23.* 26. Thus, the harm alleged by Complainant is its own.³

D. The Complaint States a Claim Sufficient to Withstand a Motion to Dismiss

³ Complainant clearly has standing to allege violations of O.R.C. § 4905.33 (Count I), O.R.C. § 4905.35 (Count II) and § 4926.11 and Ohio Administrative Code § 4901:1-20-16 (Count III). The language of the referenced provisions of the Ohio Revised Code and the Ohio Administrative Code give standing to persons, a term defined in O.R.C. § 1.59 to include corporations, like the Complainant.

In the first instance, Respondents contend that the "Agreement" at the center of the complaint does not have the effect of discriminatory or unfair pricing and competition that Complainant alleges. As already discussed at length, Respondents' attachment and reference to one "Agreement" is inappropriate for a Motion to Dismiss. Moreover, to say that the "attachment" is incomplete in its current form and should be stricken is perhaps the biggest understatement possible. The "attachment" has, without any discernible basis or rationale, been so redacted that it has been rendered nonsensical, uninformative and useless for determining any fact at issue, let alone whether the allegations of the complaint are sufficient to state a claim. Respondents' interpretation and representation to this Commission of the contents of the attachment and the alleged discriminatory pricing scheme overall is not authoritative or determinative of the Motion to Dismiss.

Respondents claim the Complainant's allegations are "in-sufficient" or "baseless," is equally disingenuous and similarly fails. Respondents have steadfastly refused to provide requested discovery, which Complainant has sought in an effort to clarify and otherwise flesh out the allegations in the complaint. To that end, Respondents filed a Motion to Stay in the hopes that the Commission would lend legitimacy to their lack of cooperation.

Respondents' suggestion that the Complaint is an attempt to participate in an illegal pricing scheme is absurd. What Complainant quite clearly seeks is the right to receive the same pricing arrangement offered to similarly situated aggregators or brokers and their customers. Whatever "illegalities" has been alleged relates to the Respondents' discriminatory application of a pricing program. Complainant merely seeks equal treatment.

E. Complainant's Reply Response Should Not be Stricken

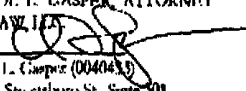
While Complainant acknowledges that a reply response is an extraordinary step, Complainant reasonably believed that it was necessary to address the outrageous details contained in Respondents' Answer. The Public Utilities rules do provide complainants an opportunity to file reply responses. In fact, OAC 4901-9-01 (F) *requires* complainants to file responses where a public utility asserts that a complaint has been satisfied or that the case has been settled. Moreover, since Respondents have continued to deny Complainant its "ample rights of discovery," Complainant had no alternative but to file its reply in an effort to alert this Commission that the matter is far from settled and that Respondents are

providing discounts and collecting administrative fees to certain parties and excluding others in violation of Ohio law.

IV. Conclusion

Each of the Respondents is properly before this Commission and the Commission may properly exercise jurisdiction over each of them. Respondents' Motion to Dismiss should be stricken because it improperly refers to materials outside the pleadings.


Alternatively, even if this Commission were to accept the defective Motion to Dismiss, it should nonetheless deny the motion because the Complaint contains sufficient allegations of Respondents' violations of Title 49 of the Ohio Revised Code. The Complainant respectfully requests entry of an order denying Respondents' Motion to Dismiss/Motion to Strike. Complainant further requests that the Commission order Respondents to respond promptly to its outstanding discovery requests.

Respectfully Submitted,
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Buckeye Energy Brokers, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 19, 2006, a copy of the foregoing was forwarded by regular US mail to James W. Burk, Esq., FirstEnergy Service Company, 76 South Main Street, Akron, OH 44308, Helen L. Laebman, Esq., Jones Day, 325 John H. McConnell Boulevard, Suite 600, PO Box 165017, Columbus, Ohio 43216-5017


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