

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of)	
Buckeye Energy Brokers, Inc.,)	
)	
Complainant,)	
)	
v.)	Case No. 06-835-EL-CSS
)	
Cleveland Electric Illuminating Company,)	
Ohio Edison Company, and FirstEnergy)	
Corp.,)	
)	
Respondent.)	

ENTRY

The Commission finds:

- (1) Buckeye Energy Brokers, Inc. ("Buckeye") filed a complaint against The Cleveland Electric Company ("CEI"), Ohio Edison ("OE") and FirstEnergy Corporation, on June 26, 2006. Buckeye alleges that CEI and OE agreed to provide power at discounted generation rates, either directly or through an affiliate, to customers within the Northeast Ohio Public Energy Council ("NOPEC") aggregated municipalities. Buckeye seeks an order from the Commission directing CEI and OE to provide customers in Buckeye's aggregated municipalities with the same generation discounts and terms.
- (2) On July 17, 2006, CEI, OE and FirstEnergy (together, the "Companies") filed an answer to Buckeye's complaint. The Companies assert that neither CEI nor OE provides a five percent discount on generation charges for residential customers who reside in communities that belong to NOPEC. The Companies also assert that neither OE nor CEI provides a one percent discount on generation charges for commercial customers in the same NOPEC communities. Further, the Companies deny that CEI or OE paid administrative fees to NOPEC. The Companies state that the NOPEC agreement is between NOPEC and FirstEnergy Solutions Corp. ("FES"). Last, the Companies admit that OE and CEI provide electric distribution service to customers in NOPEC communities.

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- (3) Buckeye submitted a "reply response" to the Companies answer on August 4, 2006. Also, Buckeye submitted a "supplement to reply response" on August 8, 2006. The Commission notes that neither of these pleadings was contemplated by the Commission's rules, nor was the Commission contacted to request permission to file the pleadings.
- (4) On August 24, 2006, the Companies moved to dismiss this complaint and also moved to strike Buckeye's subsequent "reply" pleadings. The Companies present four arguments in support of their motion to dismiss. First, the Companies assert that FirstEnergy is improperly named as a respondent because FirstEnergy, as a holding company, does not provide services and does not charge rates. The Companies contend that, because this case arose from allegedly discriminatory rates that FirstEnergy does not charge, FirstEnergy should be dismissed as a respondent in this case.
- (5) Second, the Companies assert that Buckeye lacks standing to bring service or rate-related claims on behalf of the communities listed in the complaint. The Companies contend that Buckeye's position, as a power broker (aggregator), is analogous to that of a municipality attempting to represent the interests of the individual citizens in that municipality. Based on this proposition, the Companies contend that Buckeye fails to have standing in the same manner that a municipality has no standing before this Commission.
- (6) Third, the Companies assert that CEI and OE are not providing illegal, below-tariff rates to any customer under the NOPEC agreement referenced in Buckeye's complaint. The Companies assert that FES, a competitive retail electric service ("CRES") provider, is providing the discount alleged in Buckeye's complaint. The Companies further assert that, because FES is a CRES provider, FES is not subject to Sections 4905.33 or 4905.35, Revised Code. (The Companies provided a redacted copy of this agreement as Exhibit A to its motion.) Based on this fact, the Companies contend that the complaint fails to state reasonable grounds and should be dismissed.
- (7) Fourth, the Companies contend that Buckeye's complaint alleges that CEI and OE are providing illegal, below-tariff rates to NOPEC customers, which Buckeye also wants for its aggregated customers. The Companies asserts that, if these

false facts were true, then Buckeye is seeking a further violation of Ohio law as its relief in this complaint. The Companies argue that the appropriate remedy, under Buckeye's allegations, would be for the Commission to order CEI and OE to discontinue any illegal, below-tariff rates. The Companies contend, therefore, that this complaint must be dismissed because Buckeye could not obtain the relief that it seeks.

- (8) On September 26, 2006, Buckeye filed its memorandum in opposition to the Companies' August 24, 2006 motion to dismiss. Buckeye objects to each of the Companies' arguments asserted above as bases for dismissal of this complaint. Buckeye contends that the Companies erred in attaching a redacted copy of the NOPEC (and FES) agreement to its motion to dismiss, because the document references matters beyond the face of the complaint. Buckeye argues that the only relevant document, for this complaint, is the agreement between the Companies and NOPEC, which the Companies' have refused to produce in response to its discovery requests. Last, Buckeye asserts that, rather than redacting attachment Exhibit A to the point of rendering it meaningless, the Companies could have used the Commission's rules for seeking protection of confidential documents.
- (9) The Companies filed a reply on October 2, 2006. In its reply, the Companies argue that the NOPEC agreement (Exhibit A to its motion to dismiss) is not a matter outside of the pleadings that must be stricken, but is an essential part of its response to Buckeye's complaint. The Companies assert that the NOPEC agreement states, in pertinent part: "CEI and OE will provide service at utility standard offer tariff rates and FES will provide NOPEC customers a discount as set forth below and subject to the terms and conditions hereof." (August 24, 2006 Motion to Dismiss, Exhibit A, Agreement at ¶ 1. Discount.) Further, the Companies contend that it redacted only the portions of the NOPEC agreement that were confidential and not relevant to the complaint.
- (10) After a careful review of the pleadings filed in this proceeding, the Commission finds that Buckeye has failed to state a claim upon which relief may be granted. We find that the NOPEC agreement, provided as Exhibit A, is persuasive and supports the Companies' position that CEI and OE do not provide

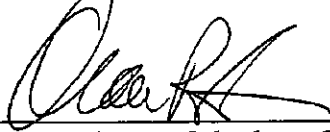
discounted rates to any person or organization. Rather, we find that the NOPEC discount is provided by FES, a CRES provider. We also find that, under the terms of the agreement, CEI and OE are receiving 100 percent of their tariff rates, as required by Ohio law. Further, if an electric distribution utility (EDU) were to provide below-tariff rates in violation of Ohio law, we would order that EDU to discontinue that practice. Accordingly, the Companies' motion to dismiss should be granted.

It is, therefore,

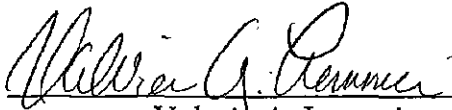
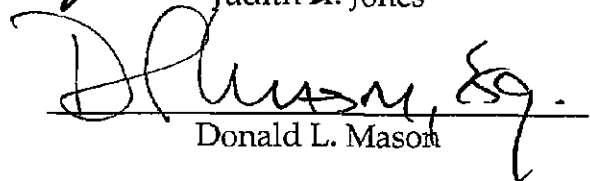
ORDERED, That CEI, OE, and FirstEnergy's joint August 24, 2006 motion to dismiss Case No. 06-835-EL-CSS is granted. It is, further,

ORDERED, That a copy of this Entry be served upon all parties in this proceeding.

THE PUBLIC UTILITIES COMMISSION OF OHIO




Alan R. Schriber, Chairman


Ronda Hartman Fergus
Judith A. Jones
Valerie A. Lemmie
Donald L. Mason

JKS:ct

Entered in the Journal

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Renee J. Jenkins
Secretary