

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

BUCKEYE FRESH LLC,

Complainant,

CASE NO.: 20-1607-EL-CSS

v.

OHIO EDISON COMPANY,

Respondent.

COMPLAINANT, BUCKEYE FRESH LLC'S MERIT BRIEF

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I. INTRODUCTION AND STATEMENT OF FACTS.

Buckeye Fresh, LLC (“Complainant”) is a commercial greenhouse operator located in Medina, Ohio who uses vertical farming (growing crops in vertical stacked layers) and hydroponic growing systems to grow leafy greens year-round for retail wholesale. This case presents due to the improper delay and failure to pay amounts due and owing in accordance with rebate applications presented by Complainant to Ohio Edison Company (“Respondent”). At issue are six applications for energy efficiency rebates filed by Complainant, a mercantile customer. Two of the six applications were processed and jointly submitted by Claimant and Respondent with data verified and rebate amount agreed. The other four applications were equally complete and on the cusp of submission when Respondent improperly processed an alleged ‘Opt-Out’ filled out by Claimant’s representative without knowledge of the impact on its pending application. Importantly, by its own stated procedure for processing the Opt-Out

A. The Complainant’s Rebate History and Investment Towards the Rebates.

R.C. 4928.66 imposes certain energy efficiency and peak demand reduction requirements upon Ohio’s electric distribution utilities, but also enables mercantile customers to commit their peak demand reduction, demand response, and energy efficiency programs for integration with an electric utility’s programs in order to meet the statutory requirements.

R.C. 4928.01(A)(19), defines a mercantile customer as a commercial or industrial customer that consumes more than 700,000 kilowatt hours of electricity

per year or that is part of a national account involving multiple facilities in one or more states. Ohio Adm.Code 4901:1-39-05(G) permits a mercantile customer to file, either individually or jointly with an electric utility, an application to commit the customer's demand reduction, demand response, and energy efficiency programs for integration with the electric utility's programs. When enacted, the intent of the energy efficiency and peak demand reduction rules is to establish clear and distinguishable requirements relating to the reporting, verification and design of cost effective energy efficiency and demand response programs, as well as the establishment of a transparent Commission-review process.

Complainant had previously succeeded in two rebate applications and was certified as an 'Energy Efficiency Customer.' **See Complainant's Exhibits A-B.** As a result of those successful rebates, Complainant received rebates from Respondent totaling at least \$234,547. **See Complainant's Exhibit C.** Beginning in early 2019, Complainant engaged in a process to invest in additional, updated lighting in pursuit of additional rebates. Record of Proceedings ("Tr.") At 25: 22-3.

With the assistance of consultants specializing in energy efficiency and rebate programs, Complainant undertook significant investment in changing and modernizing its lighting systems. Complainant has invested over \$2 Million in lighting alone. The investment was for the purpose of achieving the rebates at issue. Tr. 23:2-7. **See also Complainant's Exhibit D.**

B. The Rebate Application Process.

Ohio Adm.Code 4901:1-39-05(G) permits a mercantile customer to file, either individually or jointly with an electric utility, an application to commit the customer's demand reduction, demand response, and energy efficiency programs for integration with the electric utility's programs. Between 2018 and 2020, Complainant prepared and implemented various processes and equipment over the course of the multi-phase rebate project. Despite completion by Complainant of all necessary conditions, acceptance was delayed due to factors outside of Complainant's control. Tr. 41:9-25. Further, the application process was delayed due to Respondent's internal processes regarding what baseline standard to implement regarding savings. Respondent's own testimony confirms a 'back and forth' process that lasted 19 months. Tr. 141:2-10.

While Complainant had worked with another energy advisor LEDDC Ltd., Design & Consulting ("LEDDC") on the Rebate Projects, the necessary work to satisfy the conditions of the rebate project was complete. Complainant had a total of 6 applications in process for rebates from FirstEnergy's Energy Efficiency / Peak Demand Response Programs totaling \$346,189.

The applications and Mercantile Rebate amounts as identified in available public records amount as follows:

Phase	Case #	Rebate
Buckeye Fresh Phase 6 A & B	20-0853	\$70,412
Buckeye Fresh Phase 6 C and D	20-0854	\$61,623
Buckeye Fresh	20-0065	\$35,719
Buckeye Fresh	20-0066	\$87,538
Buckeye Fresh e-g	20-1267	\$47,074
Buckeye Fresh Phase 3	20-0852	\$31,823
TOTAL		\$346,189

C. The Completed, Jointly Submitted Applications.

As it stands, the Application to Commit Energy Efficiency/Peak Demand Reduction Programs Case # 20-0852-EL-EEC and Application to Commit Energy Efficiency/Peak Demand Reduction Programs Case # 20-0065-EL-EEC were both jointly submitted by Claimant and Respondent to the Commission. Tr. At 121:10-15.

For Case # 20-0065-EL-EEC, \$35,789 was the agreed amount of the incentive/rebate. Respondent reviewed and approved the stated rebate amount. Tr. 122:10-20. For Case # 20-0852-EL-EEC, \$31,823 was the agreed amount of the incentive/rebate. Respondent reviewed and approved the stated rebate amount. Tr. 123:24-3. Respondent's Manager of its Energy Efficiency Evaluation Verification --

Evaluation, Measurement and Verification Team, Diane Rapp, testified that jointly submitted applications had never been denied by the Commission. Tr. At 123:10-23.

D. The Opt-Out Form.

On or about May 11, 2020, Community Energy Advisors (“CEA”) solicited Buckeye via email and encouraged Buckeye to sign documents to effectuate the CEA Rebate. Following assurances by CEA of its intent to consider relevant materials and Buckeye’s customary reliance on CEA’s expertise and knowledge in the subject matter, Buckeye moved forward with the CEA Rebate. Following CEA’s review of the most recent utility bill and Buckeye’s execution of the requested forms, CEA advised Buckeye, “Based on your recent bill, you will save almost \$6,000. On or about May 13, 2020, Complainant sent to CEA the executed LOA and Intent to Opt-Out. CEA then processed the forms to finalize the CEA Rebate.

The Opt-Out Form, sent to the Respondent on or about May 13, 2020, contained language whereby Respondent was obligated to provide a confirmation letter within 5 days of receiving the Opt-Out form. See. Complainant’s Exhibit M (as excerpted below).

Process for Submitting This Form

Please fill out the required information on this form, sign the form and have it notarized, and email the form to **EEOptOut@firstenergycorp.com**. Additionally, please submit a copy of this Verified Notice of Intent to Opt Out to the Secretary of the PUCO at the following address: **Secretary of the Public Utilities Commission of Ohio, Attn: Opt Out Submission, 180 East Broad Street, Columbus, Ohio 43215**. FirstEnergy will confirm the eligibility of the account numbers listed and either provide you confirmation letter or inform you of any problems in the form within five business days. **Verification**

However, despite this stated obligation on the form, a confirmation letter was not issued until June 23, 2020.

E. Withdrawal of the Jointly Submitted Applications and Suspension of Review.

Despite the June 23 letter, Respondent proceeded working cooperatively with Complainant and on or about July 27, 2020, jointly submitted applications for Cases# # 20-0852-EL-EEC and 20-0065-EL-EEC. On or about July 29, 2020 Respondent withdrew the jointly filed applications.

On September 29, 2020, PUCO suspended all 6 of Complainant's pending rebate applications "in order to obtain additional data or examine deviations from the guidelines approved by the Commission..." As it stands, the Opt-Out Form is the only factor impacting Complainant's eligibility for the rebate projects.

On October 16, 2020, Complainant filed the subject Complaint with PUCO against Respondent.

II. Law and Argument

A. Ability of Public Utility Commission of Ohio to Review and Approve the Applications.

"Ohio law requires electric distribution utilities to decrease the amount of energy that their customers use and reduce their demand on the electric grid." In Re Application of OHIO EDISON COMPANY, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2017 through 2019., 2018 WL 3862343 (Ohio), 2. Citing R.C. 4928.66(A)(1). "These required reductions are referred to as energy efficiency and peak demand reduction "mandates" or "benchmarks." Electric utilities meet these mandates by offering energy efficiency

and peak demand reduction programs to their customers and charging customers for the cost of those programs, plus “shared savings,” which is a surcharge for utility profits.” *Id.* Customers can opt out of the surcharge (rider) and the corresponding program benefits, this commences on the effective date of the election. R.C. § 4928.6613.

B. The Commission’s Authority to Review and Grant Relief

R.C. 4905.26 confers exclusive jurisdiction on the commission to determine whether any charge or service rendered by a public utility “is in violation of law.” See also *State ex rel. Illum. Co. v. Cuyahoga Cty. Court of Common Pleas*, 97 Ohio St.3d 69, 2002-Ohio-5312, 776 N.E.2d 92, ¶ 18; *State ex rel. Columbia Gas of Ohio, Inc. v. Henson*, 102 Ohio St.3d 349, 2004-Ohio-3208, 810 N.E.2d 953, ¶ 16. *State ex rel. Duke Energy Ohio, Inc. v. Hamilton Cty. Ct. of Common Pleas*, 2010-Ohio-2450, ¶ 19, 126 Ohio St. 3d 41, 46, 930 N.E.2d 299, 304. Citing R.C. 4905.2, See also *State ex rel. Illum. Co. v. Cuyahoga Cty. Court of Common Pleas*, 97 Ohio St.3d 69, 2002-Ohio-5312, 776 N.E.2d 92, ¶ 18; *State ex rel. Columbia Gas of Ohio, Inc. v. Henson*, 102 Ohio St.3d 349, 2004-Ohio-3208, 810 N.E.2d 953, ¶ 16.

The ability of a utility to refund *rates* was abrogated by statute because only PUCO and the Supreme Court of Ohio may set rates according to statute. *Keco Indus., Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 257, 141 N.E.2d 465, 468 (1957) (emphasis added). During proceedings to determine rates both the utility and consumer must continue to pay rates under the statute. *Id.* 259. “Thus, while keeping its broad objectives in mind, the Legislature has attempted to keep the

equities between the utility and the consumer in balance.” *Id.* The powers of the Public Utilities Commission are conferred by statute, and it possesses no authority other than those powers vested in it. *City of Lima v. Pub. Utilities Comm'n*, 100 Ohio St. 416, 422, 126 N.E. 318, 320 (1919).

PUCO has the power to determine if the refusal to issue a refund to Complainant under its Energy Efficiency and Peak Demand Reduction Program was a violation of the law. Although PUCO can not order a utility to refund *rates* that were later found to be excessive, it can order a Utility to follow the statutory provisions for providing energy efficiency refunds. This case is different from those where a refund was prohibited because in those cases the utilities were *following* the rates set by law, here the utility *failed* to provide rebates as set by the law.

C. The Opt-Out Form is Ineffective

The enforcement of the Opt-Out is unconscionable. The Opt-Out provided no benefit to Complainant, certainly in the face of losing \$346,000+ dollars in rebates. Here, there is no justification for accepting the Opt-Out to the detriment of Complainant. Respondent confirms a cooperative process had been engaged for at least two years towards rebates. Indeed, Respondent cannot identify any similar situation occurring where an Opt-Out had been accepted to the detriment of an applicant in the process of seeking EE/PDR rebates. Tr. At 154-155.

Ohio courts have held the right to contract freely with the expectation that the contract shall endure according to its terms is fundamental to our society. *Royal Indem. Co. v. Baker Protective Servs., Inc.*, 33 Ohio App. 3d 184, 186, 515 N.E.2d 5, 7

(1986); *Brandon/Wiant Co. v. Teamor*, 125 Ohio App. 3d 442, 448, 708 N.E.2d 1024, 1028 (1998). “The terms of the contract with the law applicable to such terms must govern the rights and remedies of the parties.” *Schultheiss v. Heinrich Ents. Inc.*, 2016-Ohio-121, ¶ 17, 57 N.E.3d 361, 366, abrogated by *Rudolph v. Viking Int’l Res. Co.*, 2017-Ohio-7369, ¶ 17, 84 N.E.3d 1066. Specifically opt out forms must meet certain requirements including containing an alternative energy waste reduction plan and an effective date and will not commence until that date O.R.C. § 4928.6611-13.

The submitted rebates were governed by the parties’ contract executed following the submission of the opt out form. It did not provide notice of the discontinuation of the relationship or acceptance of the opt out form to Complainant via the agreed upon method in the parties’ contract, the Mercantile Customer Project Commitment Agreement. Tr. at 33:10-23, 38:2-16. **See Complainant’s Exhibit P.**

“It is elementary that no valid contract may be made contrary to statute, and that valid, applicable statutory provisions are part of every contract.” *Bell v. Northern Ohio Tel. Co.* (1948), 149 Ohio St. 157, 158, 78 N.E.2d 42. The right to contract with the public utility necessarily includes the right and authority to negotiate the terms of said contract. *City of Lima v. Pub. Utilities Comm’n*, 100 Ohio St. 416, 421, 126 N.E. 318, 319 (1919), (Where the party was granted the statutory right to contract with PUCO, change in rates by order of PUCO was violation of existing contract terms). “Time is of the essence” may be implied “whenever a definite date is fixed for compliance.” *Lake Ridge Academy v. Carney*, 9th Dist. No. 91CA005063, 1991 WL

215024, 4 (Oct. 16, 1991). Meaning that where there is a date fixed in a contract one party's performance is dependent on the other's performance by said date. *Id.*

Respondent suggests that it was bound by the statute to exclude Complainant, from the program because of the opt-out form. This is not the case. As supported by the hearing testimony and the public application submissions of record, the applications for rebates were substantially completed prior to the effective date of the opt out form. **See Claimant's Exhibit K.** As such and according to O.R.C. 4928.5513 those rebates should be considered effective.

Respondent's Opt Out form provides that Respondent will provide a response within 5 days of receipt, but the confirmation was not provided until June 23, 2021, 40 days after the form was signed and sent. Tr. at 34, 171. At the very least, the effective date of the form should reflect this delay and become effective upon Respondent's response date. The Commitment Agreement and the opt out form created additional contract duties that Respondent did not comply with, the opt out form has consequences that Complainant did not intend, and which were outside the purview of the legislation, the opt out form is therefore void.

D. Respondent Will Be Unjustly Enriched Without Approval of the Applications.

Even where an "entity is a creature of statute with powers and obligations dictated by the General Assembly" it may still be liable, as a private party would be, for unjust enrichment. *Liberty Mut. Ins. Co. v. Indus. Comm'n of Ohio*, 40 Ohio St. 3d 109, 112, 532 N.E.2d 124, 126 (1988). (Plaintiff allowed to recover from Commission for Unjust Enrichment, even though Commission followed statute). Unjust

Enrichment occurs when (1) a benefit is conferred by a plaintiff upon a defendant; (2) the defendant knows of the benefit; and (3) the defendant retains the benefit under circumstances where it would be unjust to do so without payment. *Hambleton v. R.G. Barry Corp.*, 12 Ohio St. 3d 179, 183, 465 N.E.2d 1298, 1302 (1984). A person is unjustly enriched by retaining money or benefits which in justice and equity belong to another and it causes such person loss and expense. *Hummel v. Hummel*, 133 Ohio St. 520, 528, 14 N.E.2d 923, 927 (1938). The return of specific funds wrongfully held by another is a claim in equity for unjust enrichment. *Santos v. Ohio Bur. of Workers' Comp.*, 2004-Ohio-28, ¶ 17, 101 Ohio St. 3d 74, 78, 801 N.E.2d 441, 446. Unjust Enrichment provides restitution measured not by plaintiffs' loss, but by defendant's gain, although the two may be the same. *Cirino v. Ohio Bureau of Workers' Comp.*, 2018-Ohio-2665, 153 Ohio St. 3d 333, 340, 106 N.E.3d 41, 49 (where Agency allowed third party bank to collect fees from money owed to plaintiffs the plaintiffs could not recover in restitution because the Agency did not retain the money).

Complainant conferred a benefit on Respondent through its continued efforts to increase energy efficiency by reducing the load on the electric grid and increasing the savings on portfolio status reports to PUCO. Tr. at 116:12, 131:9. It is unjust to allow Respondent to withhold rebates for a customer that contributed to energy reductions that Respondent reported to PUCO for its own benefit.

Respondent knew of this benefit because it worked with Complainant for over a year to understand the energy savings and submit applications to PUCO for rebates. Tr. at 36, 138-139. It further refused to process applications after the opt out

form was received even though it was aware of Respondent's investments in equipment and grow trials and its desire to rescind the opt out form as evidence by the July 29th letter to Respondent clarifying and rescinding any effect the Opt-Out form may have had. Tr. at 36-37, 171:12-20. **See also Complainant's Exhibit Q.**

It is unjust to allow Respondent to retain rebates for these projects which were initiated in 2018 and early 2019 and should have been timely submitted and granted rebates. Tr. at 25: 127.

Respondent delayed the submission of rebates by requiring grow trials which they ultimately didn't use in place of the Illinois Technical Reference Manual grow trials, which proved less favorable to Complainant. Tr. at 41-42, 69-70, 136, 147. Complainant did not apply without Respondent because the commission has never rejected a joint application before. Tr. at 123. After the opt out form had been received and confirmed, Respondent continued to work with Complainant on previously submitted and newly submitted applications (all of which arose from savings created in 2018 and 2019 prior to the opt out effective date). Tr. at 121. This continuing relationship benefited Respondent in the form of increased energy savings Tr. at 116:12, 131:9 and harmed Complainant by draining its resources and delaying the rebate process. Tr. at 29, 41-42. Respondent should not be allowed to retain rebates that would have been paid to Complainant absent Respondent's delay and acceptance of the opt-out form.

III. CONCLUSION

For the reasons stated above, Complainant prays for relief from the Commission to lift the suspension of review and approve the applications that were properly submitted. Specifically, Complainant urges the Commission to expedite the approval of Cases # 20-0852-EL-EEC and 20-0065-EL-EEC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On November 4, 2022, the foregoing document was filed on the Public Utilities Commission of Ohio's Docketing Information Systems. The PUCO's e-filing system will electronically serve notice of the filing of this document on all parties of records in this proceeding.

A courtesy copy has been sent via email to Respondent's counsel below:

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Summary: Brief [Complainant, Buckeye Fresh LLC's Merit Brief] electronically filed
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