

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

BUCKEYE FRESH, LLC,)	
)	
Complainant,)	
)	
vs.)	CASE NO. 20-1607-EL-CSS
)	
OHIO EDISON COMPANY,)	
)	
Respondent.)	

OHIO EDISON COMPANY’S POST-HEARING REPLY BRIEF

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I. INTRODUCTION

Complainant Buckeye Fresh, LLC (“Buckeye Fresh”) filed its post-hearing brief (“Complainant’s Brief”) on November 4, 2022. Buckeye Fresh, however, failed to demonstrate that it met its burden to prove that Respondent Ohio Edison Company (“Ohio Edison”) provided unreasonable service. Instead, Buckeye Fresh raises contractual claims that were not raised in its Complaint and are outside of the Commission’s jurisdiction.

Buckeye Fresh asserts that because Ohio Edison did not process its Notice of Intent to Opt Out of FirstEnergy’s Energy Efficiency/Peak Demand Response Programs (“Opt Out Notice”) within five business days of receipt, it can either avoid the effect of the Opt Out Notice or push the effective date past the date by which Buckeye Fresh submitted its applications to the Commission. Buckeye Fresh provides no legal authority to authorize either request for relief.

Buckeye Fresh further asserts that Ohio Edison “delayed” consideration of Buckeye Fresh’s applications, but the only “evidence” Buckeye Fresh cites is that Ohio Edison did not utilize the data from the grow test and therefore the entire test was a waste of time. Buckeye Fresh did not address that (1) it failed to support its initial savings calculations with empirical data (necessitating the grow test), and (2) it failed to provide the grow test data to Ohio Edison. Ohio Edison did not delay the applications when it insisted on conducting its due diligence on the claimed energy savings before agreeing to jointly file an application at the Commission for approval. If Buckeye Fresh thought Ohio Edison was taking too long, Buckeye Fresh could have applied directly to the Commission.

Finally, Buckeye Fresh raises several contract-based claims for unconscionability, unjust enrichment, and breach of contract. These claims were not raised in the Complaint and they also are not within the Commission’s jurisdiction to adjudicate. These claims are also unsupported by the evidence in the record and fail on their merits.

Accordingly, the Commission should dismiss Buckeye Fresh's Complaint with prejudice and/or render a decision in Ohio Edison's favor.

II. The Commission Does Not Have Jurisdiction to Hear Buckeye Fresh's Purported Contract Claims¹

For the first time in its post-hearing brief, Buckeye Fresh raises new claims based on contract law that (1) the Opt Out Notice is unconscionable, (2) Ohio Edison did not comply with the Mercantile Customer Project Commitment Agreement, and (3) Ohio Edison was unjustly enriched. These contract-based claims were not raised until Buckeye Fresh's post-hearing brief, and therefore should be excluded from consideration.² Additionally, the Commission does not have jurisdiction to adjudicate controversies between parties as to contract rights.³ Finally, these claims are meritless.

A. The Opt Out Notice Is Not a Contract and Is Not Unconscionable

Buckeye Fresh made a business decision it regrets. Based on that decision, it claims that it can avoid the effects of the Opt Out Notice by claiming that the Opt Out Notice is unconscionable.⁴ This position fails.

¹ Ohio Edison notes that Buckeye Fresh's citations to *In re Application of Ohio Edison Company* on pages 8-9 of Complainant's Brief, are to the Merit Brief and Appendix of Intervening Appellee the Office of the Ohio Consumers' Counsel, *In re Application of Ohio Edison Company*, 2019-Ohio-4196, 158 Ohio St. 3d 27, 139 N.E.3d 875, (No. 2018-0379), 2018 WL 3862343 (2018), not to any legal authority. The Ohio Supreme Court rejected the Office of the Ohio Consumer's Counsel's position. *In re Application of Ohio Edison Co.*, 2019-Ohio-4196, ¶¶ 6-7, 15, 158 Ohio St. 3d 27, 29, 139 N.E.3d 875, 877. Ohio Edison does not dispute that the Commission has jurisdiction to determine whether Ohio Edison unreasonably delayed the applications or whether Buckeye Fresh opted out of the energy efficiency programs. Ohio Edison contends that the Commission lacks jurisdiction to hear Buckeye Fresh's newly raised contractual claims.

² See *In the Matter of the Complaint of Ohiotelnet.com, Inc. v. Windstream Ohio, Inc.*, PUCO No. 09-515-TP-CSS, 2010 WL 5055080, Entry ¶ 6 (Dec. 1, 2010) (striking testimony outside scope of the complaint).

³ *New Bremen v. Pub. Util. Comm'n*, 103 Ohio St. 23, 30-31, 132 N.E. 162 (1921) ("The Public Utilities commission ... has no power to judicially ascertain and determine legal rights and liabilities, or adjudicate controversies between parties as to contract rights or property rights."); *In the Matter of the Complaint of K. Hovnanian Forest Lakes, LLC v. Aqua Ohio, Inc.*, PUCO No. 20-1726-WS-CSS, Entry ¶ 13 (Sept. 7, 2022).

⁴ See *In the Matter of Buckeye Fresh LLC vs Ohio Edison Company*, PUCO No. 20-1607, Buckeye Fresh's Merit Brief 10 (Nov. 4, 2022) ("Complainant's Brief") ("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.")

First, Buckeye Fresh asserts that the Opt Out Notice is a contract and therefore is interpreted under contract law.⁵ Even if true, the Commission does not have jurisdiction to hear breach of contract claims.⁶ However, the Opt Out Notice is not a contract between Ohio Edison and Buckeye Fresh—it is merely a form by which Buckeye Fresh (and other customers) may elect to exercise a statutory right. The Opt Out Notice is not a bilateral contract voluntarily entered into by two parties—Ohio Edison’s obligations were determined by the General Assembly and the Opt Out Notice was not an offer from Ohio Edison for Buckeye Fresh to accept.

Second, even if the Opt Out Notice was a contract (which it is not), one party’s regrettable business decision does not render a contract unconscionable. As the Northern District of Illinois aptly stated:

[A] court will not set aside the contract merely because that agreement later turns out to be a bad bargain for one of the parties.⁷

In addition, to establish unconscionability in Ohio, the party seeking to avoid the contract must prove both substantive and procedural unconscionability.⁸ Buckeye Fresh failed to address either element and therefore failed to satisfy its burden (even if it could to present such a claim here).⁹

Finally, the General Assembly did not grant the Commission or Ohio Edison discretion to void a properly submitted Opt Out Notice.¹⁰ Regardless of whether Buckeye Fresh now regrets

⁵ See Complainant’s Brief at 10 (“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.”).

⁶ See, e.g., *New Bremen*, 103 Ohio St. at 30-31; *In the Matter of the Complaint of K. Hovnanian Forest Lakes, LLC v. Aqua Ohio, Inc.*, PUCO No. 20-1726-WS-CSS, Entry ¶ 13 (Sept. 7, 2022).

⁷ *Lake Forest Acad. v. Am. Language Acad.*, 777 F. Supp. 610, 618 (N.D. Ill. 1991) (citations omitted) (“A court will not set aside a contract merely because the agreement is not a wise one from the standpoint of the party seeking rescission. Nor will a court set aside a contract merely because it is unfair”).

⁸ *Hayes v. Oakridge Home*, 2009-Ohio-2054, ¶ 20, 122 Ohio St. 3d 63, 67, 908 N.E.2d 408, 412.

⁹ Buckeye Fresh conceded that prior to signing the document, Kim Hookway did not discuss the Opt Out Notice with anyone at Ohio Edison, and Ohio Edison made no representation to Buckeye Fresh regarding the Opt Out Notice. Tr. 72:6-10, 14-21, 74:17-20, 81:5-8, 82:2-20. Buckeye Fresh therefore cannot establish procedural unconscionability.

¹⁰ See Ohio Edison’s Initial Brief at 14-20.

its decision to opt out, there is no statutory authority to rescind that decision other than through the provisions of R.C. 4928.6614. Any claim of unconscionability fails.

B. Any Claim Related to the Mercantile Customer Project Commitment Agreement Is Not Properly Before the Commission

While not clear, Buckeye Fresh appears to assert that the Opt Out Notice is void because the Mercantile Customer Project Commitment Agreement somehow applied to the Opt Out Notice.¹¹ Buckeye Fresh's position is misguided. The Opt Out Notice is an election of a statutory right—once Buckeye Fresh exercised that right, it was barred from participating in Ohio Edison's energy efficiency programs. It is an elementary principal of contract law that two parties cannot contract in contravention of the law.¹² Because Buckeye Fresh is prohibited by statute from participating in Ohio Edison's energy efficiency programs, it cannot contract around the statutory prohibition to allow it to participate. Any contract attempting to do so is void.¹³

Furthermore, even if the parties could contract around the statute, the Mercantile Customer Project Agreement does not govern the Opt Out Notice or Ohio Edison's notification to Buckeye Fresh that it processed the Opt Out Notice. Ohio Edison notified Buckeye Fresh on June 23, 2020 that it processed the Opt Out Notice.¹⁴ The Mercantile Customer Project Agreement, by its terms, would not be effective until 21 days later, on July 13, 2020.¹⁵ It therefore would not apply to the Opt Out Notice.

¹¹ Complainant's Brief at 11.

¹² *Holdeman v. Epperson*, 2006-Ohio-6209, ¶ 18, 111 Ohio St. 3d 551, 555, 857 N.E.2d 583, 587 ("It is elementary that no valid contract may be made contrary to statute..."); *Bernard v. Lloyd*, No. CA-6053, 1983 WL 7369, at *4 (Ohio Ct. App. May 23, 1983) ("As a general rule, a contract which violates a statute is unlawful and void, and will not be enforced. The law is supreme and no contract between individuals can make it lawful to do that which the statute positively commands shall not be done.").

¹³ *Holdeman*, 2006-Ohio-6209, ¶ 18; *Bernard*, 1983 WL 7369, at *4.

¹⁴ Demiray Testimony, Company Ex. 2, 8:10-12.

¹⁵ Complainant's Ex. P, at 1, 6 (stating that the agreement "is effective on the date last executed by the parties as indicated below" and was signed by Ohio Edison on July 13, 2020).

Finally, any allegation related to Ohio Edison's compliance with the Mercantile Customer Project Agreement was not raised in the Complaint and, to the extent Buckeye Fresh is attempting to make a breach of contract claim, such a claim falls outside the Commission's jurisdiction. Its allegations regarding the Mercantile Customer Project Agreement fail.

C. Ohio Edison Was Not Enriched (Unjustly or Otherwise) By Buckeye Fresh's Opt Out Notice

Buckeye Fresh also makes the unfounded claim that Ohio Edison was unjustly enriched through the six applications in dispute here, and therefore the Commission should order Ohio Edison to pay the rebates. Unjust enrichment is a quasi-contract legal principle that is not within the Commission's jurisdiction to adjudicate. Even if it were jurisdictionally permissible, Buckeye Fresh's claim for unjust enrichment nevertheless fails.

In its brief, Buckeye Fresh argues that Ohio Edison reported Buckeye Fresh's energy reductions to the Commission in its portfolio status reports:

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*.¹⁶

But this assertion is patently false,¹⁷ and Buckeye Fresh did not introduce any evidence at the hearing in support of its contention. The two passages of the hearing transcript that Buckeye Fresh cites do not support its argument.

¹⁶ Complainant's Brief at 13 (emphasis added).

¹⁷ *In the Matter of the Application for the Energy Efficiency and Peak Demand Reduction Program Portfolio Status Report*, PUCO No. 21-0536-EL-EEC, Application at 39-40 (App'x C) (May 14, 2021) (noting that only Commission-approved mercantile applications were included in its portfolio status report).

First, when questioning Ms. Rapp, Buckeye Fresh's counsel asked her to describe the "general scenario" of what type of information her team would provide to Mr. Demiray's team to be reported to the Commission:

Q. So what sort of information would -- when you say other than projects that had been approved for reporting, give me -- again, *leaving out specific examples* or entities' confidential information -- give me a *general scenario* of what that would look like.

A. So once applications were either jointly filed with the customer by Ohio Edison or independently filed by a customer at the PUCO, and the PUCO would approve that application, we would then report those savings on our portfolio status reports that we would have to submit at the PUCO. We would feed that information over to his reporting team for him to do those reports.¹⁸

Accordingly, rather than be specific to what Ohio Edison did with Buckeye Fresh's alleged savings, her testimony concerned the *general scenario* "leaving out specific examples" of what Ohio Edison did *after* the commission "approve[d an] application." The Commission has not approved Buckeye Fresh's application and therefore the "general scenario" Ms. Rapp described does not apply. She further testified that Ohio Edison stopped reviewing Buckeye Fresh's applications upon learning that Buckeye Fresh opted out.¹⁹ There is no evidence (because it does not exist) that Ohio Edison submitted Buckeye Fresh's alleged energy savings to the Commission to meet its statutory benchmarks.

Second, Buckeye Fresh's citation to page 131 of the Record also does not support its contention that Ohio Edison used Buckeye Fresh's savings to meet its statutory benchmarks. There, Ms. Rapp was discussing why it was important that Ohio Edison conduct its due diligence on applications where a customer sought to apply jointly with Ohio Edison:

So you need to understand effectively what you're counting the savings against. We were very careful, we wanted it as accurate as

¹⁸ Tr. 116:1-14 (emphasis added).

¹⁹ Rapp Testimony, Company Ex. 1, 12:19-13:9.

we could possibly make it because, ultimately, it's a program that is counted towards our energy efficiency savings and it's a program that the costs are borne by other customers.²⁰

Ms. Rapp was explaining why Ohio Edison could not just rubber stamp Buckeye Fresh's application, because ultimately Ohio Edison would recover the rebates through cost recovery mechanisms.²¹ This is not evidence that Ohio Edison utilized *Buckeye Fresh's* savings in its portfolio reports. Indeed, such evidence does not exist.

There is no evidence in the record that Ohio Edison benefited from Buckeye Fresh's six applications at issue here. There is no evidence that Ohio Edison utilized the savings (1) to meet its statutory benchmarks, or (2) in its reports to the Commission. Accordingly, Ohio Edison received no benefit from Buckeye Fresh's energy efficiency upgrades.

Buckeye Fresh's claim for unjust enrichment must fail.

III. Buckeye Fresh Failed to Prove that Ohio Edison Unreasonably Delayed the Six Applications at Issue Here

Although the focus of its Complaint and the Evidentiary Hearing was that Ohio Edison unreasonably delayed consideration of the six applications at issue here,²² Buckeye Fresh spends scant time trying to support this assertion in Complainant's Brief.²³ Instead, it merely makes the conclusory statement that Ohio Edison delayed submission of the rebates by requiring grow trials that were ultimately not used to calculate the energy savings.²⁴

Buckeye Fresh did not address its own failures that prevented Ohio Edison from agreeing to submit a joint application. As Ohio Edison's witness, Ms. Rapp, testified, and as Ohio Edison explained in its initial brief, by submitting a joint application, Ohio Edison represents to the

²⁰ Tr. 131:5-11.

²¹ Rapp Testimony, Company Ex. 1, 5:1-9.

²² *In the Matter of Buckeye Fresh LLC vs Ohio Edison Company*, PUCO No. 20-1607, Complaint at 3 (Oct. 16, 2020)

²³ See generally Complainant's Brief.

²⁴ Complainant's Brief at 14.

Commission that it agrees with the calculation of energy savings.²⁵ Prior to the submission of the Opt Out Notice, Ohio Edison could not make such a representation as it had not yet received the required data from the Complainant, nor did it agree that the calculations provided by the Complainant's consultant, Lonnie Curtis, were supportable.²⁶ Buckeye Fresh could have, however, applied directly to the Commission.

Ohio Edison could not agree to the claimed energy savings because Buckeye Fresh did not provide Ohio Edison with the empirical data it needed to validate Buckeye Fresh's calculations.²⁷ After Buckeye Fresh, via its consultant Lonnie Curtis, rejected Ohio Edison's calculations of the proposed savings,²⁸ the parties eventually agreed to have Buckeye Fresh conduct a grow test to establish a baseline for energy savings and provide the empirical data Ohio Edison needed.²⁹

However, Buckeye Fresh never provided this data to Ohio Edison to review.³⁰ In an attempt to move the project forward, Ohio Edison's consultant identified that the Illinois Technical Reference Manual recently added a Commercial Grow Lights section that could provide the baseline that Ohio Edison needed.³¹ Absent any other baseline to use (including from the results of the grow test), the parties agreed to use the Illinois Technical Reference Manual.³² However, before Buckeye Fresh submitted its applications to Ohio Edison for its review pursuant to the Manual's calculations, Buckeye Fresh elected to opt out of the energy efficiency programs.³³

²⁵ Tr. 123:10-14.

²⁶ Rapp Testimony, Company Ex. 1, 9:11-17, 10:3-18.

²⁷ Rapp Testimony, Company Ex. 1, 9:15-17.

²⁸ Rapp Testimony, Company Ex. 1, 10:12-17.

²⁹ Rapp Testimony, Company Ex. 1, 10:19-22; Complainant's Ex. L ("This test should generate enough empirical data comparing the grow performance of HPS [high pressure sodium] vs. LED lights to facilitate final calculations of energy savings for this project); Tr. 29:10-19.

³⁰ Rapp Testimony, Company Ex. 1, 10:23-11:5.

³¹ Rapp Testimony, Company Ex. 1, 11:6-12.

³² Tr. 146:23-147:5; Rapp Testimony, Company Ex. 1, 11:6-12.

³³ Compare Complainant's Ex. K, with Complainant's Ex. M.

Ohio Edison did not delay the applications by conducting its due diligence to validate the proposed energy savings. Had Buckeye Fresh thought Ohio Edison was delaying the applications, it could have applied directly to the Commission—it did not.

Although Buckeye Fresh contends that it did not apply directly to the Commission “because the [C]ommission has never rejected a joint application before,”³⁴ this position mischaracterizes the applicable evidence and Commission jurisprudence. *First*, there is no evidence for the stated reason *why* Buckeye Fresh did not directly apply to the Commission. Ms. Hookway testified that she relied on her consultants to inform Buckeye Fresh of its options, and, when directly asked on cross-examination why Buckeye Fresh did not apply directly to the Commission, she testified that she was unaware that it could do so until informed by Ohio Edison after Buckeye Fresh had opted out.³⁵ The stated reason in the record contradicts Buckeye Fresh’s assertion in Complainant’s Brief. *Second*, Buckeye Fresh’s support for its contention is Ms. Rapp’s testimony that she did not have *personal experience* with the Commission rejecting a joint application.³⁶ She testified that she could not comment on how the Commission ruled prior to 2018.³⁷ Indeed, the Commission has rejected joint applications in at least two circumstances pre-dating Ms. Rapp’s experience—in Case No. 09-1231-EL-ECC³⁸ and Case No. 12-1076-EL-

³⁴ Complainant’s Brief at 14.

³⁵ Tr. 61:13-62:15 (“Q. ... why didn't you apply directly to the Commission? A. I was not aware I could do that. That was only brought to light at the end of the program coming to an end that our last resort was to apply directly to the PUCO once FirstEnergy said, you can apply directly if you want, and that's what we chose to do, but I was not aware that was an option.”).

³⁶ Tr. 123:15-23 (“Q. Has it ever happened? A. Not to my knowledge, but again, I can’t speak for historical going back.”).

³⁷ Tr. 123:15-23.

³⁸ *In the Matter of the Joint Application of Ohio Edison Company and AK Steel, LLC – Mansfield Works for Integration of a Mercantile Customer Energy Efficiency or Peak Demand Reduction Programs*, PUCO No. 09-1231-EL-EEC, Finding & Order ¶ 7 (May 2, 2012).

ECC.³⁹ The Commission does not merely rubber stamp joint applications as Buckeye Fresh implies.

There is no evidence that Ohio Edison unreasonably delayed the applications by conducting its due diligence on the applications, especially in light of Buckeye Fresh's failure to provide Ohio Edison with the empirical data it needed to assess Buckeye Fresh's claimed savings. Moreover, Buckeye Fresh could have applied, at any time, directly to the Commission. Buckeye Fresh failed to carry its burden.

IV. The Opt Out Notice Is Binding on Ohio Edison and Buckeye Fresh

Buckeye Fresh failed to prove that either the Commission or Ohio Edison have the ability to ignore the plain language of the governing statute. The evidence is undisputed that Buckeye Fresh opted out of Ohio Edison's energy efficiency programs effective May 22, 2020.⁴⁰ Instead, Buckeye Fresh attempts to avoid the effects of its Opt Out Notice by distorting the controlling statutory language.

A. Buckeye Fresh Is Eligible to Opt Out of Ohio Edison's Energy Efficiency Programs

As demonstrated by the evidence of record, Buckeye Fresh is eligible to opt out of Ohio Edison's energy efficiency programs, and it submitted a valid Opt Out Notice.⁴¹ Buckeye Fresh does not reasonably dispute this. Instead, Buckeye Fresh misstates the controlling statute and attempts to insert additional requirements not found within the statute in an effort to void its Opt Out Notice.

³⁹ *In the Matter of the Application of Ohio Edison Company and the City of Akron for Integration of a Mercantile Customer Energy Efficiency or Peak Demand Reduction Programs*, PUCO No. 12-1076-EL-EEC, Finding & Order ¶ 8 (Dec. 11, 2013).

⁴⁰ Complainant's Ex. M.

⁴¹ Ohio Edison's Initial Brief at 14-16.

Buckeye Fresh wants the Commission to find that the Opt Out Notice must “contain[] an alternative energy waste reduction plan.”⁴² No language regarding an “alternative energy waste reduction plan” is found in R.C. 4928.6610 *et seq.*⁴³ At best, the only requirement of this nature is that the customer must have established or plan to establish “a process and implement, cost-effective measures to improve its energy efficiency savings and peak demand reductions.”⁴⁴ As evident by this Complaint proceeding, Buckeye Fresh has done so and further verified that it did so in its Opt Out Notice.⁴⁵ Buckeye Fresh therefore met the criteria to opt out of Ohio Edison’s energy efficiency programs.

B. Ohio Edison Was Not Obligated by Statute to Respond Within Five Business Days

Buckeye Fresh’s primary complaint is that Ohio Edison did not respond within “5 days of receipt” of the Opt Out Notice.⁴⁶ However, as explained in Ohio Edison’s initial brief, and the testimony of Eren Demiray, the reference to five-business days was not a statutory requirement, and therefore cannot be a basis for Buckeye Fresh to void its Opt Out Notice in contravention of the statute.⁴⁷

Finally, even had Ohio Edison processed the Opt Out Notice by May 20, 2020, there is no evidence or argument that the positions of the parties would have changed. When asked whether this Complaint proceeding would exist had Ohio Edison processed the application within five business days, Ms. Hookway testified “I don’t know.”⁴⁸

⁴² Complainant’s Brief at 11. There is no evidence on the record regarding an “alternative energy waste reduction plan.”

⁴³ Westlaw and Google searches for the phrase “alternative energy waste reduction plan” do not return any results.

⁴⁴ R.C. 4928.6612(E).

⁴⁵ Complainant’s Ex. M.

⁴⁶ Complainant’s Brief at 12.

⁴⁷ Ohio Edison’s Initial Brief, at 19-20; Demiray Testimony, Company Ex. 7:25-8:21.

⁴⁸ Tr. 78:7-10.

Buckeye Fresh failed to demonstrate that its circumstances would have changed (much less improved) had Ohio Edison processed the Opt Out Notice by May 20, 2020. Ohio Edison still would have removed Rider DSE2 from Buckeye Fresh's bills effective May 22, 2020.⁴⁹ Buckeye Fresh would still be prohibited from participating in Ohio Edison's energy efficiency programs (the subject of this dispute). It is also likely that the parties would have continued working on the rebate applications until July 29, 2020, because even after receiving notice that Ohio Edison processed the Opt Out Notice on June 23, 2020, Ms. Hookway did not mention it to anyone and continued working on the rebate applications for another month.⁵⁰ There is no evidence that Buckeye Fresh would have been in a different position had Ohio Edison processed the Opt Out Notice by May 20, 2020. Any alleged processing "delay" of the Opt Out Notice by Ohio Edison was harmless.

C. The Effective Date of the Opt Out Is May 22, 2020

Buckeye Fresh suggests that the delay in Ohio Edison's processing of the Opt Out Notice should extend the time before the Opt Out Notice becomes effective.⁵¹ This position directly violates to the plain language of the statute, which provides that

Upon a customer's election to opt out under section 4928.6611 of the Revised Code and *commencing on the effective date of the election to opt out*, no account properly identified in the customer's verified notice under division (C) of section 4928.6612 of the Revised Code shall be subject to any cost recovery mechanism under section 4928.66 of the Revised Code or eligible to participate in, or directly benefit from, programs arising from electric distribution utility portfolio plans approved by the public utilities commission.⁵²

⁴⁹ Demiray Testimony, Company Ex. 2, 7:21-8:2, 10:7-12.

⁵⁰ Tr. 82:2-20.

⁵¹ Complainant's Brief at 12 ("At the very least, the effective date of the form should reflect this delay and become effective upon Respondent's response date.").

⁵² R.C. 4928.6613. R.C. 4928.6612(B) provides that the notice of intent to opt out must include "[t]he effective date of the election to opt out."

Accordingly, Buckeye Fresh cannot participate in Ohio Edison's energy efficiency programs effective the date it selected: May 22, 2020.⁵³ There is no statutory provision (and Buckeye Fresh identified none) to allow Buckeye Fresh, Ohio Edison, or the Commission to modify the effective date of the Opt Out Notice based on when Ohio Edison processed the Opt Out Notice. The statute requires the opt out to "commenc[e] on the effective date of the election to opt out." Allowing the effective date to change based on when Ohio Edison processed the Opt Out Notice would allow Ohio Edison to avoid the statute (and a customer's election to opt out) merely by not processing the Opt Out Notice. This is not allowed. Accordingly, the effective date is May 22, 2020 as required by the General Assembly.

Although Buckeye Fresh attempts to assert that its applications were completed prior to the effective date of the Opt Out Notice and therefore Ohio Edison is not bound by statute to exclude Buckeye Fresh from its energy efficiency program,⁵⁴ this position is not supported by the evidence.

It is indisputable that the effective date chosen by Buckeye Fresh on its Opt Out Notice was May 22, 2020⁵⁵:

The effective date of the opt out is: 5 22 2020
Month Day Year

Buckeye Fresh's sole citation to support its contention that the applications were completed prior to the effective date of its Opt Out Notice is a reference to Complainant's Exhibit K.⁵⁶ Exhibit K demonstrates that each of the applications were submitted to Ohio Edison after the effective date of the Opt Out Notice:

⁵³ Complainant's Ex. M.

⁵⁴ Complainant's Brief at 12 ("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.").

⁵⁵ Complainant's Ex. M.

⁵⁶ Complainant's Brief at 12.

Application	Docket #	Submission date to FE
Buckeye Fresh	20-0066	7/27/2020
Buckeye Fresh A & B	20-0853	6/16/2020
Buckeye Fresh C	20-0854	6/16/2020
Buckeye Fresh	20-0065	6/16/2020
Buckeye Fresh e-g	20-1267	6/16/2020
Buckeye Fresh Phase 3	20-0852	5/28/2020

Accordingly, these applications were not complete and ready to be submitted to the Commission for review prior the effective date of Buckeye Fresh's Opt Out Notice, because they were not even submitted to Ohio Edison for review prior to the effective date of Buckeye Fresh's Opt Out Notice.

Based on the plain language of the statute and the evidence in the record, Buckeye Fresh opted out of Ohio Edison's energy efficiency programs effective May 22, 2020. There is no legal mechanism to change this.

V. CONCLUSION

Buckeye Fresh did not meet its burden to prove that Ohio Edison provided unreasonable service. Ohio Edison did not delay its consideration of Buckeye Fresh's applications when Ohio Edison conducted its due diligence, and the grow test was not used because Buckeye Fresh never provided the data to Ohio Edison. Any delay was the result of Buckeye Fresh not providing the requisite data to Ohio Edison. Additionally, the General Assembly did not grant Ohio Edison or the Commission discretion to void or modify a validly submitted Opt Out Notice. Finally, Buckeye Fresh's contract-based claims are not within the Commission's jurisdiction, and even if they were, they cannot be raised for the first time in briefs after the record is closed. These claims also fail on their merits.

For the foregoing reasons, the Commission should dismiss Buckeye Fresh's Complaint and/or find in Ohio Edison's favor.

Respectfully submitted,

/s/ Christopher A. Rogers

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CERTIFICATE OF SERVICE

On November 18, 2022, the foregoing document was filed on the Public Utilities Commission of Ohio's Docketing Information System. The PUCO's e-filing system will electronically serve notice of the filing of this document on all parties of record in this proceeding. A courtesy copy has been sent by email on this 18th day of November 2022 to the Complainant's attorney at the following address:

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Case No(s). 20-1607-EL-CSS

Summary: Reply OHIO EDISON COMPANY'S POST-HEARING REPLY BRIEF
electronically filed by Mr. Christopher Rogers on behalf of Ohio Edison Company