

**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 REPLY BRIEF

I. INTRODUCTION

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 Respondent.

Ohio Edison (“Respondent”) suggests its, and the Commission’s, hands are tied and there exists no mechanism to remedy the harm Complainant has incurred. However, Respondent continued to work with Complainant and did jointly submit by Complainant and Respondent with data verified and rebate amount agreed. 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 Complainant 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. At a minimum, these two applications must be processed and the applicable rebate distributed to Complainant.

The other four applications were equally complete and on the cusp of submission when Respondent improperly processed an alleged 'Opt-Out' filled out by Complainant's representative without knowledge of the impact on its pending application.

Regardless, the Opt-Out should be deemed invalid. By its own stated procedure for processing the Opt-Out Ohio Edison ("Respondent") failed to confirm verification of the opt-out, thus invalidating same. Additionally, Respondent reaped a benefit at the expense of Complainant and in contradiction of the intent of the Opt-Out statute.

II. THE COMMISSION IS EMPOWERED TO REVIEW AND GRANT RELIEF

A. Respondent Has Been Unjustly Enriched

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 evidenced 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.

B. Respondent is Bound By its Contractual Duties in Addition to the Statutory Requirements

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 11 (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.

“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. Where a statute grants the right to contract with a public utility, it necessarily includes the right and authority to negotiate the terms of said contract even where it may seem that terms are determined by statute. *City of Lima v. Pub. Utilities Comm’n*, 100 Ohio St. 416, 421, 126 N.E. 318, 319 (1919).

Respondent has the power to contract with customers in order to effectuate the EE/PDR programs. Respondent’s ability to contract is specifically granted by the statute and can impose terms that are not directly in violation of the statute. Complainant contracted with the utility, specifically to receive a reply within 5 days of submission of their opt-out form and to receive correspondence at Kim Hookway’s email address. Now Respondent seeks to claim that the contract is invalid because it

adds additional criteria to the statutory requirements. This act would not be effective if not for the ability to contract rebates in exchange for EE/PDR projects. The statute's requirements for opting out do not preclude Respondent from submitting itself to additional duties under a contract. It is fundamental that Respondent's duty to respond within 5 days and direct correspondence to Kim Hookway's email did in fact create an obligation for Respondent.

C. RC 4928.6611 et seq. Does Grant Ohio Edison Discretion in Processing Opt-Out Requests.

Respondent contends that "Buckeye Fresh has yet to identify statutory or regulatory authority that would allow Ohio Edison or the Commission to ignore its Opt Out Notice" (Respondents Brief p. 14). "[W]hen reading a statute, the court must first give effect to the words the general assembly has chosen, and we may neither add to nor delete from the statutory language. When the statutory language is unambiguous [the court] appl[ies] it as written without resorting to rules of statutory interpretation or considerations of public policy." *Gabbard v. Madison Loc. Sch. Dist. Bd. Of Edu.*, 2021-Ohio-2067, 165 Ohio St. 3d. 390, 179 N.E. 3d 1169, 13. In ascertaining the plain meaning of [a] statute, the court must look to the language and design of the statute as a whole. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988). "Remedial laws shall be liberally construed in order to promote their object and assist the parties in obtaining justice." R.C. 1.11.

In order to understand the R.C. 4928.6612-3 governing opt-outs, we must consider R.C. 4928.6611 as a whole. As it was originally enacted, the act required a customer who had opted out to submit reports on the customer's energy reduction

projects for the utility to include in its report to PUCO. Ohio Rev. Code Ann. § 4928.6616 (effective September 12, 2014 to October 21, 2019); Sub. S.B. 310 As Passed by the General Assembly. If the customer was not meeting its energy efficiency targets, PUCO could suspend the opt-out for the time needed for the customer to achieve the target reduction. Ohio Rev. Code Ann. § 4928.6616 (West) (effective September 12, 2014 to October 21, 2019); Sub. S.B. 310 As Passed by the General Assembly. The repeal of that section contemplated that a utility's requirements were reduced to compensate for the lack of reporting of opted-out-customer's energy reductions. Ohio Bill Analysis, 2019 H.B. 6.

The Legislatures contemplated that a company that was not achieving energy reductions *could be opted-in by the utilities*. The law requires that the companies have an *alternative* energy efficiency plan in order to opt out. Because Buckeye Fresh could not achieve these energy reductions without the rebates to help them grow they should not have been opted out. Although the section allowing a utility to opt out was repealed, the requirement to continue energy efficiency projects remains, the onus is just no longer on the utility to ensure efficiency of that customer after an opt out.

Respondent even contends, "In interpreting a statute, a court's 'paramount concern is the legislative intent in enacting the statute.'" (Respondents Initial Post Hearing Brief p. 19.) Therefore, it is against the spirit and intent of the legislation to reduce a customer's ability to increase energy efficiency by excluding them from the program and Ohio Edison does have the power to reject opt-out forms.

D. The Notice of Intent to Opt-Out is Invalid

The opt out form did not meet the requirements of R.C. 4928.6612 because it did not provide a date upon which Complainant established cost-effective measures to improve its energy efficiency savings peak demand reductions because it was not possible for Complainant to do so without the rebate program. Further the opt out form's statement of intent is not valid because it was rescinded. Complainant promptly notified Respondent of these deficiencies, in the July 29, 2020, letter. Respondent contends that it has never seen a customer attempt to file applications and an opt-out form at the same time. Complainant's rescission of the opt-out and Respondent's experience should suggest that the statement of intent on the form was invalid.

E. Respondent Unreasonably Delayed Review and Approval of Complainant's Applications.

Complainant demonstrated that Ohio Edison unreasonably delayed the approval of its applications. Tr. At 139-141. The record reveals a 19-month process by which Respondent delayed the identification of a baseline standard by which to evaluate Complainant's efficiency. Tr. At 137:22-25. Thus, Complainant contends Respondent did not properly apply the provisions of R.C. 4928.66 in implementing energy efficiency programs as that section requires the utility to apply baselines to determine energy efficiency. The opportunity for rebates induced significant investment by Complainant in energy efficiency. Respondent's failure to identify and implement the baseline in a timely manner has harmed Complainant.

F. The Application are All Validly Pending.

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. Complainant worked for almost two years to provide evidence Respondent deemed sufficient to justify the energy reductions garnered by the efficiency projects undertaken by Complainant. Tr. at 36, 138-139. Complainant was reliant on consultants and Respondents in regard to the applications and wished to submit jointly to ensure that the applications would be approved. Tr. At 56:9- 60:2. When Respondent refused to jointly submit applications to PUCO, Complainant did submit the applications directly itself. Tr. At 56:9- 60:2. PUCO is still empowered to review and grant relief on this independently submitted applications.

Respondent points out that the applications have not been approved by PUCO. Respondent's Brief at 24. The applications have not been processed because of Respondents delay and unjustly opting Complainants out of the program. This opting out has allowed Respondents a windfall on the energy savings that Complainant has produced because of its grow light improvements. Tr. at 116:12, 131:9. Respondents claim that there is nothing that can be done. However, because the applications have been submitted to PUCO, the Commission has the power to review and approve them. The Commission may still serve an equitable outcome and honor the intent/purpose of the statute and grant Complainant's review and rebates on its applications before the Commission.

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,

/s/ Brandon T. Pauley

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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 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: Reply Re-filed from Friday afternoon per request of PUCO Docketing team. electronically filed by Brandon T. Pauley on behalf of Buckeye Fresh LLC