THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMPLAINT OF BUCKEYE FRESH, LLC,

COMPLAINANT,

v. **CASE NO. 20-1607-EL-CSS**

OHIO EDISON COMPANY,

RESPONDENT.

OPINION AND ORDER

Entered in the Journal on July 12, 2023

I. SUMMARY

{¶ 1} The Commission finds that Buckeye Fresh, LLC failed to carry the burden of proving that Ohio Edison Company provided unreasonable service or violated its statutory obligations.

II. PROCEDURAL BACKGROUND

{¶ 2} On October 16, 2020, Buckeye Fresh, LLC (Complainant or Buckeye Fresh) initiated a complaint alleging that Ohio Edison has unnecessarily delayed and terminated approval of energy efficiency programs of Complainant and resulted in the loss of nearly $400,000 in potential savings.

{¶ 3} Ohio Edison (Respondent or the Company) filed its answer on November 4, 2020. In its answer, Ohio Edison admits some allegations in the complaint and further states that it is without knowledge or information sufficient to form a belief as to the truth of certain other allegations. Respondent generally denies the remaining allegations. Further, Ohio Edison sets forth in the answer several affirmative defenses.

{¶ 4} A settlement conference was held on January 7, 2021; however, the parties were unable to settle this matter. A hearing was scheduled for and held on June 14, 2022. At the hearing, Ms. Kimberly Hookway (Ms. Hookway) testified on Complainant's behalf. Ohio Edison presented the testimony of the Manager of Energy Efficiency Evaluation, Measurement, and Verification Team, Ms. Diane Rapp (Ms. Rapp),[1] and Manager of Reporting in the Energy Efficiency Compliance and Reporting Group, Mr. Eren Demiray (Mr. Demiray). The hearing was continued and concluded virtually on August 29, 2022.

{¶ 5} A briefing schedule was established at the conclusion of the virtual hearing, allowing each party to file an initial brief and reply brief by November 4, 2022 and November 18, 2022, respectively. On November 4, 2022 both Complainant and Respondent timely filed initial briefs and filed reply briefs on November 18, 2022.[2]

III. DISCUSSION

A. Applicable Law

{¶ 6} In complaint proceedings, the complainant has the burden of proving the allegations in the complaint by a preponderance of the evidence. *Grossman v. Public Util. Comm.*, 5 Ohio St.2d 189, 214 N.E. 2d 666 (1966).

{¶ 7} The General Assembly enacted R.C. 4901.01 et seq. to regulate the business activities of public utilities and created the Commission to administer and enforce these provisions. *Corrigan v. Illum. Co.,* 122 Ohio St.3d 265, 2009-Ohio-2524 *(Corrigan)* at ¶ 8, citing *Kazmaier Supermarket, Inc. v. Toledo Edison Co.* (1991), 61 Ohio St.3d 147, 150, 573 N.E.2d 655.

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1 Ms. Rapp is employed with FirstEnergy Service Company, which is a direct subsidiary of FirstEnergy Corporation, the parent company of Ohio Edison. FirstEnergy Service Company provides support services to all three electric distribution utilities under FirstEnergy Corporation (FirstEnergy), including Ohio Edison.

2 Buckeye Fresh originally filed a timely reply brief on November 18, 2022, but upon the request of the Commission's Docketing Division, Complainant's reply brief was refiled on November 21, 2022.

{¶ 8} R.C. 4905.04 provides that the Commission "is vested with the power and jurisdiction to supervise and regulate public utilities * * * to require all public utilities to furnish their products and render all services exacted by the commission or by law."

{¶ 9} R.C. 4905.26 establishes the Commission's jurisdiction over complaints as to service. It states, in pertinent part:

> Upon complaint in writing against any public utility by any person * * * that any rate, * * * service, * * * or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, * * * if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof.

{¶ 10} In *Corrigan*, the Ohio Supreme Court held that the "jurisdiction specifically conferred by statute upon the Public Utilities Commission over public utilities of the state * * * is so complete, comprehensive and adequate as to warrant the conclusion that it is likewise exclusive." *Corrigan* at ¶ 8. Nevertheless, the Commission does not have exclusive jurisdiction over every claim brought against a public utility. In this regard, the Ohio Supreme Court has held that the Commission has no power to judicially ascertain and determine legal rights and liabilities or to adjudicate controversies between parties as to contract rights or property rights, since such power has been vested in the courts by the General Assembly pursuant to Article IV of the Ohio Constitution. Thus, claims sounding in contract and tort have been regarded as reviewable in a court of common pleas, although brought against corporations subject to the authority of the Commission. *Incorporated Village of New Bremen v. Pub. Utilities Comm.* 103 Ohio St. 23, 132 N.E. 162 (1921); *Milligan v. Ohio Bell Tel Co.,* 56 Ohio St.2d 191, 383 N.E. 2d 575, 578 (1978) (*Milligan*).

{¶ 11} Explaining that the Commission's broad jurisdiction over service-related matters does not affect "the basic jurisdiction of the court of common pleas * * * in other areas of possible claims against utilities, including pure tort and contract claims," the Ohio Supreme Court, in *Corrigan*, found that, in complaint cases, a determination must be made "whether the claims raised * * * are within [the Commission's] exclusive jurisdiction or are pure tort and contract claims that do not require a consideration of statutes and regulations administered and enforced by the Commission." *Corrigan* at ¶ 9. In making such determinations, said the Court, the substance of the claims must be reviewed. The Court specified that "'casting the allegations in the complaint to sound in tort or contract is not sufficient to confer jurisdiction upon a trial court' when the basic claim is one that the commission has exclusive jurisdiction to resolve." *Corrigan* at ¶ 10.

{¶ 12} In *Allstate Ins. Co v. Cleveland Elec. Illum. Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, 893 N.E.2d 824 (*Allstate*), the Ohio Supreme Court considered whether a subrogation claim presented in that case amounted to a claim over which the Commission has exclusive jurisdiction or, rather, involved a common law tort within the basic jurisdiction of the court of common pleas. In *Allstate*, as in *Corrigan*, the Court applied its two-part test, asking: first, is the Commission's administrative expertise required to resolve the issue in dispute; and second, does the act complained of constitute a practice normally authorized by the utility. In *Allstate*, the Court reiterated that, if the answer to either question is in the negative, the claim is not within the Commission's exclusive jurisdiction. *Allstate* at ¶ 11-13.

{¶ 13} Under R.C. 4928.6612, any customer electing to opt out from a utility's portfolio plan, pursuant to R.C. 4928.6611, shall do so by providing a verified written notice to opt out to the electric distribution utility from which it receives service and submitting a complete copy of the opt out notice to the secretary of the Commission. The notice provided to the utility shall include all of the following elements:

(A) A statement indicating that the customer has elected to opt out;

(B) The effective date of the election to opt out;

(C) The account number for each customer account to which the opt out shall apply;

(D) The physical location of the customer's load center;

(E) The date upon which the customer established, or plans to establish a process and implement, cost-effective measures to improve its energy efficiency savings and peak demand reductions.

{¶ 14} Further, R.C. 4928.6613 establishes the effect of opting out of a utility's portfolio plan. It states:

> 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.

B. Summary of Testimony and Evidence

{¶ 15} During hearing, Ms. Hookway, president and co-owner of Buckeye Fresh, testified about its energy efficiency rebate process with Ohio Edison. Ms. Hookway explained that Complainant sought to use Ohio Edison's energy efficiency rebate funds for an approximate 15,000 square-foot addition that cost about one million dollars (Tr. at 13). Ms. Hookway noted that six joint rebate applications with Ohio Edison are at issue in this proceeding (Tr. at 16). Ms. Hookway stated that she shares invoicing and pertinent information with Complainant's rebate consultant, Lonnie Curtis, who then completes Complainant's rebate applications and sends them to Ohio Edison (Tr. at 17-18). Prior to

the joint applications at issue, Buckeye Fresh participated in Ohio Edison's mercantile rebate process and received checks for corresponding energy efficiency rebate amounts. The rebate amounts that were already awarded to Complainant totaled to at least $234,547. (Tr. at 19-20; Complainant Exs. A, B, C.) Ms. Hookway testified that around early 2019, Buckeye Fresh engaged in the process to invest in additional, updated energy efficient lighting in pursuit of more rebates from Respondent (Tr. at 25). Ms. Hookway explained that to achieve a rebate, an investment is required and for the six rebates at issue, Buckeye Fresh invested "over $2 million […] in lighting, along with the infrastructure to support the lighting and grow systems" (Tr. at 23).

{¶ 16} Witness Hookway confirmed that it was her impression that when rebate applications were submitted by her consultant, they would have been completed (Tr. at 27). Ms. Hookway described the rebate application process as cooperative between Buckeye Fresh and Ohio Edison (Tr. at 28). Ms. Hookway explained that even though Buckeye Fresh was working on the applications in early 2019, they were submitted during the summer of 2020 because the applications were modified once Ohio Edison and Complainant's rebate consultant agreed upon reference numbers to be used (Tr. at 28; Buckeye Fresh Ex. K). Ms. Hookway stated that Buckeye Fresh performed a grow trial from which its results could be used for the rebate applications, but to Ms. Hookway's knowledge they were either rejected or it was agreed upon to use other numbers for the documentation (Tr. at 28).

{¶ 17} During hearing, Ms. Diane Rapp explained that there was no standard industry protocol to measure the energy savings of a "Phase 3 project," which determines Complainant's rebate amount (Tr. at 127-28). Ms. Rapp stated that without an agreed upon measurement for the energy savings, Ohio Edison could not immediately sign off on the joint rebate applications with Buckeye Fresh. She noted that at any time, Complainant could have filed the application directly with the Commission. However, because Buckeye Fresh chose to file jointly with Respondent, Ms. Rapp said that the Ohio Edison team undertook extensive back-and-forth communications to try to determine the best way to implement

energy efficiency measures for Buckeye Fresh's project, especially because the program costs are borne by other customers. (Tr. at 130-31, 138.)

{¶ 18} Buckeye Fresh witness Hookway testified that she was presented an Opt-out Form by her broker, Community Energy Advisers, to opt out of FirstEnergy's Energy Efficiency/Peak Demand Response Programs (Opt-out Form). Ms. Hookway testified that she believed that signing the Opt-out Form would save Complainant an additional $4,000 and would not impact the six pending rebate applications (Tr. at 32, 71; *See* Buckeye Fresh Ex. M). Her signature was notarized on May 13, 2020 (Tr. at 33). Ms. Hookway stated that after she signed the Opt-out Form, Buckeye Fresh continued with the rebate application process; the rebates were submitted from May 28 to July 27, 2020 at the latest (Tr. at 33; Buckeye Fresh Ex. K). Ms. Hookway testified that on June 23, 2020, she received notification that the Opt-out Form was processed by Ohio Edison (Tr. at 33-34).

{¶ 19} Upon reviewing FirstEnergy's notification that the Opt-out Form was processed, Ms. Hookway read a clause in the form that states "FirstEnergy will confirm the eligibility of the account numbers listed and either provide you [a] confirmation letter or inform you of any problems in the form within five business days" (Tr. 35; Buckeye Fresh Ex. M at 2). During hearing, Ms. Hookway took issue with the fact that Buckeye Fresh submitted the Opt-out Form in mid-May 2020 and did not receive confirmation that the form was processed until June 23, 2020 (Tr. at 35). Ms. Hookway testified that sometime after receiving the confirmation regarding the Opt-out Form, she was also notified that the six pending joint applications were terminated by Respondent (Tr. at 36). On July 29, 2020, Ms. Hookway sent a letter articulating Complainant's intent to never stop pursuing the rebate applications, despite her signing the Opt-out Form. Ms. Hookway testified that in response to her correspondence, Ohio Edison said that it was unable to reverse the effect of the opt out. (Tr. at 36-37; Buckeye Fresh Ex. Q.)

{¶ 20} In rebuttal, FirstEnergy Service Company's Manager of Reporting in the Energy Efficiency Compliance and Reporting Group, Eren Demiray, testified that R.C.

4928.6613 is very clear about the impacts of an opt out. He explained that the Company does not have any authority as to the resulting impact on Buckeye Fresh, based on those statutory requirements. (Tr. at 165.) Mr. Demiray confirmed that there was no statutory requirement under R.C. 4928.6613 to process Opt-out Forms within five days, as stated in the Opt-out Form. He clarified that the five-day period is an internal goal set by the Company, not a statutory requirement (Tr. at 163; Ohio Edison Ex. 2). When asked if the Company considers anything outside of R.C. 4928.6612 for processing Opt-out Forms, Mr. Demiray affirmed that the totality of the applicable provisions contained in R.C. 4928.6610 to 4928.6613 were reasonable for evaluating Opt-out Forms' validity (Tr. at 163).

{¶ 21} Further, Buckeye Fresh alleges that regardless of the Opt-out Form, Ohio Edison representatives were still cooperating with Buckeye Fresh for the pending rebate applications, and that there was delay in their processing (Tr. at 39, 41). Ms. Hookway indicated that the Mercantile Agreement for the rebate applications was signed by Buckeye Fresh on May 27, 2020 and later signed by Ohio Edison's representative on July 13, 2020. Ms. Hookway emphasizes that the July 13, 2020 signature took place after Ms. Hookway was notified that the joint application process was terminated by the Company. (Tr. at 38-39; Buckeye Fresh Ex. P.) Ms. Hookway further argues that there was undue delay in processing the six rebate applications. She states that compared to previous joint rebate processes that were timely in her opinion, "nothing happened for a year" with the applications at issue, and that time was wasted conducting a grow trial for figures that were not utilized in the joint applications. (Tr. at 41-42.) Ms. Hookway admitted that Buckeye Fresh completed the grow trial and shared the end results with Lonnie Curtis, who was in communication with Ohio Edison representatives (Tr. at 68). Ms. Hookway claims that had it not taken 19 months to process the applications, there would not have been any cause to initiate this proceeding, since the Opt-out Form and application termination would not have coincided (Tr. at 41-42, 137).

{¶ 22} In response, witness Demiray stated that he has never delayed the processing of a customer's opt out (Tr. at 165). In brief, Respondent discussed that because

Complainant's rebate applications at issue implicated a novel lighting method, there was an exchange of technical grow information with Lonnie Curtis between February 2019 and December 2019. From Ohio Edison's perspective, there was a deadlock as of December 2019 on how to calculate the baseline energy savings of the project, and it was then agreed upon to conduct a grow test between March 16, 2020 and April 3, 2020. Further, witness Rapp testified that Respondent never received the results of Buckeye Fresh's grow tests, or the final report as agreed to by the parties (Ohio Edison Initial Br. at 9 citing Ohio Edison Ex. 1 at 10:19-13, Buckeye Fresh Ex. L; Ohio Edison Ex. 1 at 10-11.) Mr. Demiray believed that Opt-out Forms become effective on their "effective date" as defined in R.C. 4928.6613, and any rebates that were applicable after that date would not be applicable to that customer. He stated that he was unaware of retroactivity for rebates when customers opted out. (Tr. at 168.)

{¶ 23} During cross-examination, witness Rapp clarified that there had never been a situation in which a customer seeking mercantile rebates was simultaneously going through the opt out process. Ms. Rapp explained that her group processes the mercantile customer applications and, at the time period relevant in this proceeding, she was unaware that Buckeye Fresh opted out prior to filing the applications. She confirmed that she and Mr. Demiray did not discuss Buckeye Fresh's pending mercantile applications or the company's signed Opt-out Form. Ms. Rapp noted that other than giving Mr. Demiray's team information on the projects that were approved by the Commission for reporting purposes, Ms. Rapp's team does not work cooperatively as it pertains to energy efficiency projects. Moreover, witness Rapp stated that her team would not have thought that a customer would choose to opt out of a program when her team was actively working on rebate applications. (Tr. at 114-15).

{¶ 24} Finally, in its post-hearing brief, Buckeye Fresh alleges that Ohio Edison's Opt-out Form as a contract is invalid for several reasons. Buckeye Fresh argues that the submitted rebate applications were governed by the parties' Mercantile Agreement for the rebates, which was executed after Buckeye Fresh's submission of the Opt-out Form on

May 13, 2020. Complainant contends that Respondent did not provide notice of the discontinuation of the relationship or acceptance of the Opt-out Form to Buckeye Fresh via the "agreed upon method in the parties' contract" (Buckeye Fresh Initial Br. at 11 citing Tr. at 33, 38; Buckeye Fresh Ex. P.) In addition, Buckeye Fresh highlights that Ohio Edison's opt out notice contains a clause that states Respondent will provide a response within five days of receipt of the form. According to Complainant, Buckeye Fresh did not receive a confirmation until June 23, 2021, which was 40 days after the form was signed by Ms. Hookway and sent to Respondent. (Tr. at 32, 171.) Therefore, Complainant argues that the Mercantile Agreement for the rebates and the Opt-out Form created additional contractual duties that Ohio Edison did not perform. Additionally, Buckeye Fresh alleges that Ohio Edison would be unjustly enriched if the Commission did not reverse the opt out. Complainant claims that Buckeye Fresh conferred a benefit onto Ohio Edison through its continued efforts to increase energy efficiency, and it would be unjust to allow Respondent to withhold rebates for a customer that contributed to energy reductions that Respondent reported to the Commission for its own benefit. (Buckeye Fresh Initial Br. at 13 citing Tr. at 116, 131.)

{¶ 25} In reply to Buckeye Fresh's contract and unjust enrichment claims, Ohio Edison avers that these arguments were not sufficiently raised by Complainant until the post-hearing brief. Further, Ohio Edison asserts that the Commission does not have jurisdiction to make a determination regarding controversies between parties as to contract rights. (Ohio Edison Reply Br. at 2, citing *In re Complaint of Ohiotelnet.com, Inc. v. Windstream Ohio, Inc.*, Case No. No. 09-515-TP-CSS, Entry at ¶ 6 (Dec. 1, 2010); *New Bremen v. Pub. Util. Comm'n*, 103 Ohio St. 23, 30-31, 132 N.E. 162 (1921); *In re the Complaint of K. Hovnanian Forest Lakes, LLC v. Aqua Ohio, Inc.*, Case No. 20-1726-WS-CSS, Entry at ¶ 13 (Sept. 7, 2022).) Even if the Opt-out Form was a contract between the parties, Ohio Edison argues that one party's regrettable business decision should not render a contract unconscionable (Ohio Edison Reply Br. at 2-3).

{¶ 26} Lastly in brief, Ohio Edison notes that by Entry on September 29, 2020, the Commission suspended its automatic approval of the applications at issue. *See, In re Buckeye Fresh LLC,* Case No. 20-852-EL-EEC, et al., Entry (Sept. 29, 2020) at ¶ 4. Respondent states that no further action has taken place on the dockets and that it is not up to Ohio Edison's discretion to approve or reject these applications. Respondent claims that a complaint proceeding is not the proper forum to determine whether the applications should be approved by the Commission. (Ohio Edison Initial Br. at 24-25.)

C. Commission Conclusion

{¶ 27} At the outset of our determination, we find it beneficial to note that the following timeline of events is undisputed by the parties:

Date	Event
On or about May 13, 2020	Buckeye Fresh's consultant sent Ohio Edison Opt-out Form (Tr. at 33)
May 27, 2020	Mercantile Agreement for the rebate applications signed by Buckeye Fresh (Buckeye Fresh Ex. P)
May 28, 2020	Buckeye Fresh submitted completed mercantile application to Ohio Edison in Case No. 20-0852-EL-EEC (Tr. at 137)
June 16, 2020	Buckeye Fresh submitted completed mercantile application to Ohio Edison in Case Nos. 20-0065-EL-EEC, 20-0853-EL-EEC, 20-0854-EL-EEC, and 20-1004-EL-EEC (Tr. at 137, Ohio Edison Initial Br. at 10)
June 23, 2020	Ohio Edison processed Buckeye Fresh's Opt-out Form (Tr. at 171)
July 13, 2020	Ohio Edison's representative signed off on Buckeye Fresh's rebate applications (Tr. at 125)
July 27, 2020	Buckeye Fresh submitted completed mercantile application to Ohio Edison in Case No. 20-0066-EL-EEC (Tr. at 124, Ohio Edison Initial Br. at 10)
July 29, 2020	Buckeye Fresh sent a letter stating it did not intend to stop pursing rebate applications (Tr. at 36; Buckeye Fresh Ex. Q)

{¶ 28} Initially, we acknowledge that the energy efficiency programs at issue in this case have subsequently been eliminated and the entirety of Ohio Adm.Code Chapter 39 has been rescinded. See R.C. 4928.66(G); *In re the Application of Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 16-743-EL-POR, et al., Entry (Dec. 30, 2020); *In re the Commission's Review of the Rules in Ohio Adm.Code Chapter 4901:1-39*, Case No. 22-869-EL-ORD, Finding and Order (Nov. 30, 2022). However, this does not prevent the Commission from evaluating whether Buckeye Fresh received unreasonable service in its pursuit of various energy efficiency rebates from Ohio Edison, as alleged in its complaint. Upon review of the record, we ultimately find that Complainant was unable to provide sufficient evidence that Respondent provided unreasonable service. The record does not contain evidence sufficient to show that Ohio Edison improperly delayed the rebate applications or that it maintains an invalid Opt-out Form pursuant to R.C. 4928.6610 to 4928.6613. As such, Buckeye Fresh has failed to prove the allegations raised in its complaint.

{¶ 29} As the Supreme Court of Ohio has stated numerous times, the Commission "is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute." *Penn Central Transportation Co. v. Pub. Util. Comm.*, 35 Ohio St.2d 97, 298 N.E.2d 97 (1973). In construing a statute, our paramount concern is legislative intent. In determining legislative intent, the Commission first looks to the plain language in the statute and the purpose to be accomplished. If the meaning of the statute is unambiguous and definite, it must be applied as written, and no further interpretation is necessary. *WorldCom, Inc. v. City of Toledo*, Case Nos. 02-3207-AU-PWC, 02-3210-EL-PWC, Opinion and Order (May 14, 2003) at 53, citing *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Ed.*, 74 Ohio St. 543, 660 N.E.2d 463 (1996). In this case, the General Assembly provides clear parameters that a customer must meet in order to opt out of an electric distribution utility's (EDU) energy efficiency program and the subsequent effect of such a decision. There is no express (or even implied) authority granted to the Commission to void such an opt out election once it has been made. As such, we agree that the Opt-out Form merely serves as the customer's election to opt out of an EDU's portfolio plan, pursuant to R.C. 4928.6611 and

4928.6612. Further, as provided in R.C. 4928.6613, upon a customer's election to opt out, no account in the customer's verified notice to opt out is "eligible to participate in, or directly benefit from, programs arising from electric distribution utility portfolio plans" approved by the Commission. With this clear and unambiguous statutory language in mind, we may now move on to the merits of the complaint.

{¶ 30} In line with the above discussion, we believe this case is one of statutory interpretation and the contractual arguments raised by Buckeye Fresh serve as a distraction from the real issues at hand, evidenced by the parties' considerable dispute as to whether a contract even exists in this case. However, we will first turn to Buckeye Fresh's contractual claims and consider whether we hold the authority to adjudicate such claims. As noted above, the issue of whether a matter falls within the jurisdiction of the Commission depends on two interrelated inquiries. First, whether the Commission's administrative expertise is required to resolve the issue in dispute; and second, whether the act complained of constitutes a practice normally authorized by the utility. As applied in *Allstate*, if the answer to either question is in the negative, the claim is not within the Commission's exclusive jurisdiction. As such, the Commission does not have jurisdiction to make a determination related to such contract claims. *See Incorporated Village of New Bremen v. Public Utilities Commission* 103 Ohio St. 23, 132 N.E. 162 (1921). As to the *Allstate* test, we do not find that our administrative expertise is required to resolve an issue of unjust enrichment in this particular dispute. Buckeye Fresh contends that the Commission's expertise is needed and that R.C. 4928.6611 must be understood as a whole, to understand the ramifications of R.C. 4928.6612 and 4928.6613, which govern proper opt out notices. However, we disagree and determine that both statutes can be sufficiently understood independently, as R.C. 4928.6612 governs the way in which Opt-out Forms are to be formatted and R.C. 4928.6613 determines the effect of an opt out. Here, the Commission's expertise is unnecessary to further discuss a contractual damages theory of unjust enrichment. For such reasons, and upon thorough review of the substance of the claims presented, we find that unjust enrichment issues raised by Buckeye Fresh are not within the Commission's exclusive jurisdiction. Despite this

finding, we will quickly note that no evidence was presented to establish Ohio Edison utilized the alleged energy efficiency savings contained in the six mercantile applications to meet its statutory benchmarks. As explained by Company witness Rapp, the Company would report the savings in their portfolio status reports submitted to the Commission *only after* an application had been approved (Tr. at 116). The mercantile applications were, indeed, filed with the Commission, but the automatic approval process was suspended and there has been no subsequent activity in those dockets. *In re Applications of Buckeye Fresh LLC for Integration of Mercantile Customer Energy Efficiency or Peak-Demand Reduction Programs (Mercantile Application Cases*), Case Nos. 20-65-EL-EEC, 20-66-EL-EEC, 20-852-EL-EEC, 20-853-EL-EEC, 20-854-EL-EEC, and 20-1267-EL-EEC, Entry (Sept. 29, 2020). As such, there appears to be no evidence that Ohio Edison "counted" these commitments toward its statutory benchmarks or otherwise reported the savings to the Commission.

{¶ 31} Nevertheless, as Ohio Edison correctly noted in its reply brief, the alleged unjust enrichment to Respondent was not sufficiently raised until Complainant's initial post-hearing brief. In past proceedings we have disregarded claims that have been raised in briefs for the first time in complaint cases. See *In re Complaint of Pat Nussle v. Ohio Power Company d/b/a AEP Ohio*, Case No 14-1659-EL-CSS, Opinion and Order (Jan. 15, 2020) at ¶ 51 (the Commission emphasized that raising issues after the hearing in brief was prejudicial to the public utility, as the utility had no opportunity during the hearing to address the issues). For the case at bar, we are persuaded that Buckeye Fresh's argument regarding alleged unjust enrichment only raised in brief was not properly brought before the Commission and will not be considered.

{¶ 32} As to Complainant's claim that Ohio Edison's Opt-out Form is invalid pursuant to the requirements in R.C. 4928.6612, the Commission is satisfied that Respondent's form meets the statutory requirements for a verified opt out written notice. During hearing, it was not disputed that Ms. Hookway's signature was notarized on the Opt-out Form (Tr. at 31-32; Buckeye Fresh Ex. M). Pursuant to Commission practice, a verified notice is "sworn to as being true in the presence of and verified by a notary public."

See In re the Establishment of Terms and Conditions of an Interconnection Agreement Amendment Pursuant to the Federal Communications Commission's Triennial Review Order and its Order on Remand, Case No. 05-887-TP-UNC, Entry (July 21, 2005) at 6-7. Next, Respondent's Opt-out Form completed by Complainant included a: 1) statement of intent to opt out; 2) effective date of opt out; 3) customer account number that will be opted out; 4) physical address of Complainant's load center; and 5) the date that Buckeye Fresh indicated it established or plans to establish, its own cost-effective energy efficiency and/or peak demand reduction measures (Buckeye Fresh Ex. M). We determine that all statutory requirements pursuant to 4928.6612(A)-(E) are sufficiently provided on Ohio Edison's Opt-out Form. Therefore, as far as complying with R.C. 4928.6612, Ohio Edison's Opt-out Form is valid for customers.

{¶ 33} With respect to Ohio Edison's five-day notification clause on its Opt-out Form, we note that, despite the Company not complying with this voluntary obligation, the Complainant's outcome does not change. The components Ohio Edison is required to meet by law under R.C. 4928.6613 remain intact, regardless of its added internal policy to notify customers of processing an opt out within five business days. Further, Buckeye Fresh does not offer compelling evidence to demonstrate that the five-day notification period runs counterintuitive with the effective date language contained in R.C. 4928.6613, which *would* change the Complainant's outcome. Buckeye Fresh was prohibited from participating in Ohio Edison's energy efficiency programs on the effective date it selected: May 22, 2020.[3] Nonetheless, we acknowledge that in this case, the delivery of Buckeye Fresh's confirmation several days after five business days was inconvenient and contrary to the Company's internal benchmarks. While not a violation of the statute or the Commission's then-existing rules governing energy efficiency programs, the Commission disapproves of the actions of any utility for failing to meet the express timelines or expectations it has communicated to its customers. This instance is no exception.

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[3] Again, the Mercantile Agreement was not signed by Buckeye Fresh until May 27, 2020, and was not signed by Ohio Edison's representatives until July 13, 2020.

{¶ 34} Next, we address Complainaint's claim that but for Ohio Edison's delays processing the six rebate applications at issue, Buckeye Fresh's applications would have been approved by the Commission without interference from the Opt-out Form.[4] Buckeye Fresh began working on the six rebate applications at issue on October 28, 2018 (Ohio Edison Ex. 1 at 8). As Complainant opted for a joint submission, rather than submitting a rebate application on its own, Ohio Edison indicated that it needed to validate Buckeye Fresh's project efficiency to justify the calculated savings to the Commission and other Ohio Edison customers (Ohio Edison Ex. 1 at 9-10). It was explained during hearing that Ohio Edison had "no clear protocol" as to how to assess the effectiveness of Complainant's Phase 3 project (Tr. at 128). Due to the novelty of Buckeye Fresh's project, Ohio Edison and Complainant's consultant exchanged technical grow information between February 2019 and December 2019 (Ohio Edison Ex. 1 at 10-11). As of December 2019, Ohio Edison and Buckeye Fresh were still at a technical standstill on how to calculate the baseline measurement for energy savings for the joint rebate applications. To resolve this conflict, both parties signed onto a grow test between March 16, 2020 and April 3, 2020 to generate the reference line against which to compare the Complainant's energy savings. In her testimony, witness Rapp noted that Ohio Edison never received the results of the grow test or the final report as agreed to by the parties (Ohio Edison Ex. 1 at 11). We recognize that while Respondent was waiting for communication from Buckeye Fresh, Ohio Edison's representatives discovered Illinois Technical Reference Manual's new protocol to measure the energy savings on April 28, 2020. (Ohio Edison Ex. 1 at 10.) Buckeye Fresh and Ohio Edison agreed on using the manual's baseline numbers and approximately a month later, a joint submission was filed with the Commission on May 28, 2020, and then on June 16, 2020 and July 27, 2020 for the rest of the six rebate applications (Ohio Edison Ex. 1 at 11; Buckeye Fresh Ex. K).

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4 We note the Opt-out Form specifically stated that "However, customers who opt out will be prohibited from participating in or benefitting from any of FirstEnergy's EE/PDR programs."

{¶ 35} Given the timeline as expounded in the record, it took 11 months of communication between Ohio Edison and Complainant's consultant, from February to December 2019, to discuss baseline comparisons. Then, it was approximately three months after that when the grow study commenced on March 16, 2020 until April 3, 2020. Further, 25 calendar days had lapsed while Ohio Edison was waiting for Buckeye Fresh's end results to be compiled in a final report, during which FirstEnergy learned of Illinois Technical Reference Manual's methodology. Once the two parties agreed upon the methodology in the Illinois Technical Reference Manual, approximately a month later on May 28, 2020, the first of the six joint mercantile applications were filed with Commission and the next five were soon submitted in June and July (Buckeye Fresh Ex. K).

{¶ 36} Given the context that Complainant's project presented novel measurement challenges and that Ohio Edison did not have sufficient empirical evidence to justify Complainant's originally estimated figures, the timeline of events is not unreasonable. Moreover, this is supported by the record that indicates Complainant and its consultant may have contributed to the perceived delay, as there were instances in which grow results or final reports were not shared with Respondent, and nor was there communication that the rebate applications were submitted to Respondent (Tr. at 167; Ohio Edison Ex. 1 at 11). Further, when Complainant delayed sending end results and a final report, Ohio Edison continued to search for methodology and offered to use another expert source's baseline numbers. Once the two parties agreed upon a baseline number, the first of six applications were submitted within a month.

{¶ 37} During hearing, Ms. Hookway appeared to imply that Ohio Edison personnel should have been communicating across departments to notify one another that Buckeye Fresh had pending applications for rebates and that the concurrent processing of an Opt-out Form was improper. It appears that due to FirstEnergy Service Company's departmental organization, contrary to Complainant's inferences, it would be abnormal for Ms. Rapp's team to notify Mr. Demiray's team of any ongoing rebate applications prior to processing Opt-out Forms. This is demonstrated by Mr. Demiray's testimony that he was

unaware of a situation in which a customer seeking mercantile rebates was simultaneously going through the opt out process (Tr. at 114). Therefore, Buckeye Fresh does not offer a compelling reason or evidence that these business practices were improper in processing the concurrent mercantile rebate applications within its own department and the Opt-out Form within the separate team. While the Commission would have likely ordered a more cohesive processing of such applications on a prospective basis, we again note that the energy efficiency programs have been terminated.

{¶ 38} By the preponderance of the evidence, we do not find that Ohio Edison provided unreasonable service in processing the applications at issue or violated its statutory obligations relating to the Opt-out Form. Though the Commission does not want to discourage mercantile consumers from partnering with their respective utilities to invest in improved energy efficiency practices, the Commission does not have discretionary power to void valid written opt out notices from electric distribution utility energy efficiency and peak load reduction programming due to customer error. Ohio Edison processed the valid Opt-out Form and the effect of this opt out on other customer projects proceeded as outlined in the relevant statutes.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 39} On October 16, 2020, Buckeye Fresh initiated a complaint against Ohio Edison alleging that the Company has unnecessarily delayed approval of energy efficiency programs of Complainant.

{¶ 40} On November 4, 2020, Ohio Edison filed its answer in which it admits some and denies some of the complaint's allegations; seeks additional clarifying information; and sets forth several affirmative defenses.

{¶ 41} A settlement conference was held on January 7, 2021, but the parties were unable to settle this matter. A hearing was held on June 14, 2022. The hearing was continued and concluded virtually on August 29, 2022.

{¶ 42} As is the case in all Commission, complaint proceedings, Complainant had the burden of proving the allegations of the complaint. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966).

{¶ 43} Buckeye Fresh has not carried its evidentiary burden of proving that Ohio Edison provided unreasonable service in processing the applications at issue or violated its statutory obligations.

V. ORDER

{¶ 44} It is, therefore,

{¶ 45} ORDERED, That this matter be decided in favor of Ohio Edison, as Complainant has failed to sustain its evidentiary burden of proof. It is, further,

{¶ 46} ORDERED, That a copy of this Opinion and Order be served upon all interested persons and parties of record.

COMMISSIONERS:
Approving:
Jenifer French, Chair
Daniel R. Conway
Lawrence K. Friedeman
Dennis P. Deters
John D. Williams

IMM/DMH/dr

Summary: Opinion & Order finding that Buckeye Fresh, LLC failed to carry the burden of proving that Ohio Edison Company provided unreasonable service or violated its statutory obligations electronically filed by Debbie S. Ryan on behalf of Public Utilities Commission of Ohio.