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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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PUCO

In the Matter of the Complaint of
Advantage Energy, Inc.,

Complainant

v.

Case No. 01-1331-EL-CSS

FirstEnergy Corp. Ohio Edison Company,
The Cleveland Electric Illuminating Company,
and The Toledo Edison Company,

Respondents.

**REPLY MEMORANDUM TO ADVANTAGE ENERGY, INC.'S MEMORANDUM
CONTRA MOTION TO DISMISS**

Pursuant to Rule 4901-1-12(B)(1), FirstEnergy Corp., Ohio Edison Company, The
Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively,
"FirstEnergy") file this reply to Advantage Energy, Inc.'s Memorandum Contra Motion to
Dismiss.

I. INTRODUCTION

The Memorandum Contra filed by Advantage Energy, Inc. ("Advantage") makes
FirstEnergy's point. The very first argument in the Memorandum Contra is that the Ohio
Supreme Court and the Commission have interpreted the test for the sufficiency of a complaint
"quite liberally." (Memorandum Contra, p. 3.) By arguing that the Commission must liberally
apply the "reasonable grounds" requirement of R.C. Section 4905.26, Advantage admits that
nothing short of a liberal reading of the test will save its Complaint from dismissal for failure to
state reasonable grounds. But even a liberal reading of the "reasonable grounds" test won't save
Advantage's Complaint. There are no facts that, if proven, will support a claim that FirstEnergy

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has violated any statute, rule, or Commission order. The Complaint should therefore be dismissed, with prejudice.

II. ARGUMENT

A. The Cases Cited in the Memorandum Contra are Inapposite

Advantage cites several cases in support of its argument that the test for the sufficiency of a complaint has been liberally construed by the court and this Commission. But the cases cited by Advantage do not support its position that this Complaint meets the test.

Allnet Communications Services, Inc. v. Pub. Util. Comm., 32 Ohio St.3d 115 (1987), is cited for the proposition that Section 4905.26 "is broad in scope as to what kinds of matters may be raised by complaint before the PUCO." *Allnet* does, indeed, say that. But the issue of what matters may be raised by a complaint under R.C. Section 4905.26 is different from the issue of whether the matters raised are sufficient to meet the "reasonable grounds" test of the statute. *Allnet* makes that very point. After discussing the types of matters that could be addressed in the complaint process, the court went on to say that "[n]otwithstanding the broad scope of the statute . . . the 'reasonable grounds for complaint' requirement of R.C. 4905.26 must still be met before the PUCO is required to order a hearing." *Allnet*, 32 Ohio St.3d at 117. Citing *Allnet* gets Advantage nowhere.

Neither do the Commission complaint cases cited by Advantage. Although the Commission did, in *Consumers' Counsel v. West Ohio Gas Co.*, Case No. 89-275-GA-CSS (Entry, April 18, 1989), permit OCC to do discovery before evaluating the sufficiency of the complaint, it did so based on the particular nature of that complaint. That case involved an excess earnings complaint; the question presented in that case was whether "the existing rates exceed rates which would be determined under the statutory formula." *Consumers Counsel v. West Ohio Gas Co.*, April 18, 1989 Entry, p. 6. Given the complexity of the statutory

ratemaking formula, the Commission decided that it would not grant the respondent's motion to dismiss at that point in the process, but that it would give OCC the opportunity to conduct discovery and, if appropriate, file an amended complaint. The Commission took that position based on the fact that it was a complex excess earnings complaint: "Given the nature of this complaint, the Commission is not prepared to find, at this stage in the proceedings, that reasonable grounds for complaint have been stated by OCC . . . The Commission believes that OCC needs to present a more detailed and reasoned complaint in order to allow the Commission to determine if reasonable grounds for complaint have been stated." *Id.* The Commission did not find that the motion to dismiss should be denied.

Consumers' Counsel v. Dayton Power & Light Co., Case No. 88-1744-EL-CSS was also an excess earnings complaint. In its June 6, 1989 Entry in that case, cited by Advantage, the Commission was not even ruling on a motion to dismiss. The issue before the Commission was whether to grant OCC's motion to compel. The Commission did state that it did not agree with respondent's argument "that the threshold question of whether OCC has stated reasonable grounds for complaint must be resolved before broad discovery is granted." But saying that discovery may begin at any time after a complaint has been filed is not the same as saying that reasonable grounds do not have to be shown until after discovery has been undertaken.

Clearly, there is a difference between the Complaint in this case and those excess earnings complaints, and that difference is significant. While the Commission may have allowed OCC, in one case, to do discovery and amend its excess earnings complaints before ruling on the respondents' motions to dismiss, that is not the norm. Under R.C. Section 4905.26, a complaint must set out more than mere allegations of wrongdoing to be supported with factual allegations after discovery has been undertaken. The complaint must be more than simply a request for

discovery, which is all Advantage's Complaint amounts to.

The only case cited by Advantage that has any relevance here is *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 521 (1996), which states that "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery before a motion to dismiss can be granted." FirstEnergy does not disagree. But, contrary to Advantage's claim, it certainly can "fairly be said that it appears beyond doubt from the allegations of the complaint that Advantage can prove no set of facts which will support a finding that FirstEnergy has acted unreasonably or unlawfully." (Quoting from Memorandum Contra, p. 4.) FirstEnergy said it in the Motion to Dismiss, and says it again here: Advantage's complaint does not meet that standard and it should therefore be dismissed.

B. The Complaint Does Not State Reasonable Grounds

1. The allocation of MSG is not utility service.

Advantage claims that the allegations regarding the "fundamental flaws" in the MSG allocation process support the allegation that FirstEnergy violated Section 4905.22, which requires utilities to provide necessary and adequate service. The allocation of MSG is not utility service. FirstEnergy was under no statutory obligation to provide MSG; it agreed to do so as part of the Stipulation. Consequently, the Commission has very limited jurisdiction over the award of MSG. It can determine whether the requirements of the Stipulation were met -- that is, whether the MSG was awarded on a first-come, first-served basis for committed capacity sales, and whether FirstEnergy applied the Protocol in a non-discriminatory manner. But the Commission does not have jurisdiction over the Protocol or over any other aspects of the allocation process.

Even assuming, for the sake of argument, that all aspects of the MSG allocation process were subject to Commission review, the fact that FirstEnergy could not provide information as to the MSG available at any given time was the fault of the claimants, not of FirstEnergy. The

inaccurate information on the website and the inability to provide information regarding the specific allocation of MSG had to do with the fact that overstated and duplicate claims were filed, and that claims were filed without committed capacity sales. FirstEnergy had no control over the validity of the MSG claims it received, and thus could not give accurate information at any given time about the amount of MSG still available. That would certainly not amount to inadequate service even if the allocation process were jurisdictional.

2. There are no allegations that support the claim that FirstEnergy violated the "first-come, first-served" requirement of the Stipulation.

As discussed above, there is no merit to Advantage's claim that it has the right to do discovery before being held to the requirement that it allege facts that support its claim that FirstEnergy violated the "first-come, first-served" provision of the Stipulation and the Commission's order adopting the Stipulation. In making that argument, it admits that it has not stated facts to support its claim.

3. There are no allegations that support the claim that FirstEnergy violated R.C. Sections 4928.36 or 4905.35.

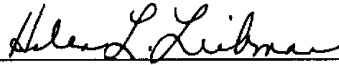
The remaining claims are based on the fact that FirstEnergy did not have all of the MSG allocated by January 1, 2001. But there is nothing that required the MSG to be allocated by January 1, 2001. There was certainly no such statutory requirement, because MSG was not even addressed in S.B. 3. And nothing in the Stipulation or in the Commission's order approving the Stipulation required the allocation process to be complete by January 1, 2001. Thus, the facts alleged in the Complaint -- that the full amount of MSG was not flowing on January 1, 2001 or even on June 5, 2001, the date the Complaint was filed -- do not support a claim that FirstEnergy has violated the Commission's order approving the Stipulation, or that it has violated any provision of Title 49.

III. CONCLUSION

Advantage claims that it wants "an allocation of MSG capacity on a fair, just, reasonable, and nondiscriminatory basis." (Memorandum Contra, p. 10.) There is nothing in its Complaint to support allegations that the allocation of MSG capacity has not been fair, just, reasonable, and nondiscriminatory. That's not what this Complaint is all about. Consider again the prayer for relief: Advantage asks that it be allocated MSG capacity "sufficient to enable it to serve the customers with whom it contracted to supply electricity" (Complaint, Prayer for Relief, ¶ G.) Advantage doesn't want MSG allocated fairly; it wants MSG.

But there is no basis for allocating MSG to Advantage in addition to what FirstEnergy is prepared to allocate following completion of the review of Advantage's claims. There is not even a basis for proceeding with the Complaint. The Complaint does not state facts, that, if true, would support a claim that FirstEnergy's allocation of MSG is in some respect unjust, unreasonable, unjustly discriminatory, or in violation of law. The Complaint should be dismissed, with prejudice.

Respectfully submitted,



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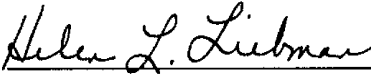
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ILLUMINATING COMPANY, AND THE
TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Memorandum to Advantage Energy, Inc.'s Memorandum Contra Motion to Dismiss was delivered to the following via regular U.S.

Mail this 8th day of August, 2001:

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