

<b>Ohio Schools Council, Ohio School Boards</b>	)	
<b>Association, Ohio Association of School</b>	)	
<b>Business Officials, and Buckeye</b>	)	
<b>Association of School Administrators, dba</b>	)	
<b>Power4Schools</b>	)	<b>CASE NO. 14-1182-EL-CSS</b>
	)	
<b>Complainants,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>FirstEnergy Solutions Corp.</b>	)	
	)	
<b>Respondent.</b>	)	

The Complaint asks the Commission to interpret the price term in the retail contracts between a CRES provider (FirstEnergy Solutions Corp.) and its customers (the Participating Customer member schools). However, R.C. §§ 4928.03 and 4928.05 make it clear that the Commission does not have jurisdiction over these issues of contract interpretation. Instead, these issues of general contract interpretation are left solely to Ohio courts. Therefore, since the Commission does not have jurisdiction over this claim, the Complaint should be dismissed for lack of subject matter jurisdiction.

Respectfully Submitted,

/s/ Mark A. Hayden

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Mark A. Hayden (0081077)  
Jacob A McDermott (0087187)  
Christine M. Weber (0032245)  
FIRSTENERGY SERVICE COMPANY  
76 South Main Street  
Akron, OH 44308  
(330) 761-7735, 384-5038  
(330) 384-3875 (fax)  
haydenm@firstenergycorp.com  
[jmcdermott@firstenergycorp.com](mailto:jmcdermott@firstenergycorp.com)  
cweber@firstenergycorp.com

James F. Lang (0059668)  
N. Trevor Alexander (0080713)  
CALFEE, HALTER & GRISWOLD LLP  
The Calfee Building  
1405 East Sixth Street  
Cleveland, OH 44114  
(216) 622-8200  
(216) 241-0816 (fax)  
jlang@calfee.com  
talexander@calfee.com

*Attorneys for FirstEnergy Solutions Corp.*

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## I. INTRODUCTION

There is only one real claim in this case. Complainants<sup>1</sup> allege that FES's interpretation of a clause in its contracts with Participating Member schools is not correct and, thus, FES is not permitted to pass through certain PJM charges under the terms of those contracts. Therefore, Complainants allege that the Participating Member schools are being overcharged under the terms of those contracts. This is a question of contract interpretation, and R.C. §§ 4928.03 and 4928.05 make clear that the Commission does not have jurisdiction over questions of contract interpretation. Instead, such questions are the exclusive province of Ohio courts. As the Commission does not have jurisdiction over this claim, the Complaint should be dismissed.

1 Though not clear from the Complaint, the relevant contracting parties are FES and the Participating Member schools, not P4S or other any other groups purporting to act on behalf of the Participating Member schools. As the Complaint specifically alleges that the Participating Members have authorized P4S to prosecute this complaint on their behalf, this issue is not ripe for a motion to dismiss. Complaint ¶ 7. However, FES intends to investigate this claim in discovery and may raise this issue at a later date if P4S does not have authority to act on behalf of the Participating Members.

Complainants have attempted to draft their way around this obvious flaw in their argument. Complainants turn one simple price dispute into fourteen separate counts in an attempt to stay within the Commission’s jurisdiction. Complainants generally allege that these contracts, and communications about the contracts, violate Ohio law by referring to the prices as “fixed” and then passing through the extraordinary PJM ancillary charges at issue. However, this does not change a contract interpretation issue under the jurisdiction of the Ohio courts into an issue subject to the Commission’s jurisdiction. Well-established Ohio authority makes clear that artful drafting cannot create subject matter jurisdiction.<sup>2</sup> Instead, the Commission’s jurisdiction is limited by statute and cannot be expanded through drafting.

The Commission does not have jurisdiction to interpret the terms of CRES providers contracts, as is established by extensive Ohio authority. The Complaint should be dismissed for lack of subject matter jurisdiction.

## **II. ARGUMENT**

### **A. The Commission Does Not Have Jurisdiction Over CRES Prices.**

Before S.B. 3, Ohio law granted the Commission wide-ranging power to regulate the rates charged by electric utilities.<sup>3</sup> Despite this broad grant of power, even before S.B. 3 Ohio still recognized that general contract and tort claims were within the jurisdiction of state courts.<sup>4</sup>

The traditional separation of powers regarding electric rate regulation changed after S.B. 3. After S.B. 3, the Ohio Supreme Court recognized that generation was no longer under the exclusive jurisdiction of the Commission.<sup>5</sup> R.C. § 4928.05(A)(1) provides that:

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<sup>2</sup> See Section II(C) below.

<sup>3</sup> See, e.g., *State ex rel N. Ohio Tel. Co. v. Winter*, 23 Ohio St. 2d 6, 9 (1970).

<sup>4</sup> See, e.g., *Kohli v. Pub. Util. Comm.*, 18 Ohio St. 3d 12 (1985) (court had jurisdiction over tort claim for failure to warn of dangers); *McComb v. Suburban Natural Gas Co.*, 85 Ohio App. 3d 397 (1993) (court had jurisdiction over breach-of-contract claim in lease dispute between gas company and village).

“(1) On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric utility or electric services company shall not be subject to supervision and regulation by . . . the public utilities commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except sections 4905.10 and 4905.31, division (B) of section 4905.33, and sections 4905.35 and 4933.81 to 4933.90; except sections 4905.06, 4935.03, 4963.40, and 4963.41 of the Revised Code only to the extent related to service reliability and public safety; and except as otherwise provided in this chapter. The commission's authority to enforce those excepted provisions with respect to a competitive retail electric service shall be such authority as is provided for their enforcement under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter.” (emphasis added)

This language clearly demonstrates that the Commission’s authority over CRES is limited. Competitive retail electric service is not subject to supervision by the Commission outside of certain specifically defined areas. This conclusion is also supported by R.C. § 4928.03, which defines and guarantees customers access to competitive retail electric service.<sup>6</sup> As price is not one of the specifically defined areas of retail electric service still subject to Commission jurisdiction, the Commission has no jurisdiction to regulate the prices charged by FES under its contracts with Participating Members.

The Commission has previously recognized the limits of its jurisdiction in similar situations. In the AEP Ohio Sporn 5 retirement proceeding, the Commission held that:

“Upon consideration of this request, the Commission concludes that the closure of Sporn Unit 5 is not subject to our approval. Pursuant to Sections 4928.03 and 4928.05(A)(1), Revised Code,

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<sup>5</sup> *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St. 3d 486, 487 (2008) (“Pursuant to R.C. 4928.03 and 4928.05, electric generation is an unregulated, competitive retail electric service, while electric distribution remains a regulated, noncompetitive service pursuant to R.C. 4928.15(A).”)

<sup>6</sup> R.C. § 4928.03 (“Beginning on the starting date of competitive retail electric service, retail electric generation, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers.”).

retail electric generation service is a competitive retail electric service and, therefore, not subject to Commission regulation, except as otherwise provided in Chapter 4928, Revised Code. Just as the construction and maintenance of an electric generating facility are fundamental to the generation component of electric service, we find that so too is the closure of an electric generating facility. Additionally, although there are exceptions in Section 4928.05(A)(1), Revised Code, that permit Commission regulation of competitive services in some circumstances, the enumerated statutory exceptions do not include Sections 4905.20 and 4905.21, Revised Code, which otherwise govern applications to abandon or close certain facilities.”<sup>7</sup>

Similar to the Sporn 5 proceeding, the Complainants here are asking the Commission to exceed its statutory authority. R.C. § 4928.05(A)(1) does not grant the Commission authority over price, and no statutory exception applies. Therefore, the Commission does not have subject matter jurisdiction and the Complaint should be dismissed.

#### **B. Ohio Courts Have Jurisdiction Over Contracts.**

Ohio courts have long acknowledged their authority over breach of contract claims.<sup>8</sup> Courts have recognized the essential difference between service complaints, which are subject to the jurisdiction of the Commission, and contract claims, which fall outside the Commission’s jurisdiction.

The broad jurisdiction of PUCO 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.”<sup>9</sup>

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<sup>7</sup> 2012 Ohio PUC LEXIS 36; Case No. 10-1454-EL-RDR, Opinion and Order dated January 11, 2012, pp. 16-17 (emphasis added).

<sup>8</sup> See, e.g., *State ex rel. Ohio Power Co. v. Harnishfeger*, 64 Ohio St. 2d 9, 10 (1980) (courts of this state are available to supplicants who have claims sounding in contract against a corporation coming under the authority of the [Commission]); *Milligan v. Ohio Bell Tel. Co.*, 56 Ohio St. 2d 191, 195 (1978); *McComb v. Suburban Natural Gas Co.*, 85 Ohio App. 3d 397 (1993) (court had jurisdiction over breach-of-contract claim in lease dispute between gas company and village).

<sup>9</sup> *Corrigan v. Illuminating Co.*, 122 Ohio St. 3d 265, 2009-Ohio-2524, ¶ 9 (quoting *State ex rel. Ohio Edison Co. v. Shaker*, 68 Ohio St. 3d 209, 211 (1994)).

The jurisdiction of courts over certain types of contracts has been extensively litigated, and courts have recognized that they have a role in interpreting contracts.<sup>10</sup> Since at least 1921, Ohio courts have acknowledged that the Commission “is in no sense a court. It has no power to judicially ascertain and determine legal rights and liabilities, or adjudicate controversies between parties as to contract rights or property rights.”<sup>11</sup>

As shown through this extensive authority from the Ohio Supreme Court, the law is clear.<sup>12</sup> Ohio courts have jurisdiction over contract claims and, conversely, such claims are beyond the jurisdiction of the Commission. The Complaint, here, puts at issue the meaning of a clause in a contract between a CRES provider and its customers. This contract interpretation question is beyond the jurisdiction of the Commission. The Commission “has no power to judicially ascertain and determine legal rights and liabilities, or adjudicate controversies between parties as to contract rights.”<sup>13</sup> The Complaint should therefore be dismissed for lack of subject matter jurisdiction.

### **C. Artful Drafting Does Not Create Jurisdiction**

The Complaint in this case asserts fourteen separate counts against FES. Each of these counts asserts one essential claim, namely, that FES is misinterpreting a clause in its contracts with the Participating Member schools. FES anticipates that Complainants will claim they are not asking the Commission to adjudicate their rights under the contract. Instead, Complainants

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<sup>10</sup> See *Cleveland v. Cleveland Elec. Illuminating Co.*, 115 Ohio App. 3d 1 (8th Dist. 1996)(finding that lower court should have retained jurisdiction in complaint over FERC contract).

<sup>11</sup> *New Breman v. Pub. Util. Comm.*, 103 Ohio St. 23 (1921).

<sup>12</sup> See, e.g., *New Breman v. Pub. Util. Comm.*, 103 Ohio St. 23 (1921); *State ex rel. Ohio Power Co. v. Harnishfeger*, 64 Ohio St. 2d 9, 10 (1980); *Milligan v. Ohio Bell Tel. Co.*, 56 Ohio St. 2d 191, 195 (1978); *Corrigan v. Illuminating Co.*, 122 Ohio St. 3d 265, 2009-Ohio-2524, ¶ 9 (quoting *State ex rel. Ohio Edison Co. v. Shaker*, 68 Ohio St. 3d 209, 211 (1994)).

<sup>13</sup> *New Breman v. Pub. Util. Comm.*, 103 Ohio St. 23 (1921).

will claim that they are seeking an adjudication that FES's actions were unfair or deceptive pursuant to R.C. § 4928.10 and certain rules adopted by the Commission. However, there is one essential flaw in this position. Complainants are sophisticated parties, who are represented by sophisticated trade groups, who utilized experienced counsel to negotiate the contracts at issue. Nowhere in the Complaint is it alleged that Complainants were surprised or deceived by the inclusion of the clause at issue in their contracts. This specific clause has been in FES's contracts for years. Complainants knew the clause was in the contracts entered into by the Participating Member schools; they simply disagree with FES's interpretation of that clause. That makes this an issue for Ohio courts, not an issue for the Commission.

Complainants never go so far as to allege that someone was deceived by these contracts. By walking this fine line, Complainants acknowledge that the facts do not support this claim. Instead, Complainants allege that simply including a contingency clause in a CRES contract violates Ohio law and is inherently unfair and deceptive. Not only are Complainants incorrect as a matter of law,<sup>14</sup> but their argument is disingenuous at best. The contracts at issue were signed by the Complainants with the clause included, and the clause expressly authorizes the pass-through of PJM-imposed charges. It is disingenuous for Complainants to sign a contract which includes this clause, receive lower pricing because FES reasonably relies on this clause to address unforeseen future contingencies, and then claim the contract is inherently deceptive. Complainants knew what they were signing and have benefitted from that bargain.

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<sup>14</sup> Commission rules expressly identify that pass-through charges and conditions precedent are appropriate. OAC 4901:1-21-05(A) allows CRES to provide customers with a statement of any contract contingencies or conditions precedent. OAC 4901:1-21-12(B)(8) requires CRES to include any terms and conditions, contingencies, or conditions precedent in their contracts. Neither of these provisions would be necessary if contracts were prohibited from addressing contingencies as claimed by Complainants.



Regardless of how the Complainants caption their Complaint, they cannot escape one essential fact. Each of their claims relates to whether FES is properly interpreting a clause in the Participating Members' contracts. In light of this inescapable fact, the substance of the Complaint is controlling. Both the Commission and Ohio courts have consistently rejected attempts to inappropriately trigger their jurisdiction. Instead, they have examined the substance of the Complaint to determine where there was jurisdiction.<sup>15</sup> The Commission should do the same here, and deny Complainants' attempt to game the system.

### **III. CONCLUSION**

Ohio law is clear. The Commission is not a court. It does not have jurisdiction to interpret the pricing or terms of a CRES contract. Therefore, it should dismiss the Complaint for lack of subject matter jurisdiction.

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<sup>15</sup> See *Hull v. Columbia Gas*, 110 Ohio St. 3d 96 (2006) (denying Plaintiff's claim that a service complaint was a breach of contract claim, and finding the Commission had jurisdiction); Case No. 10-1454-EL-RDR, Opinion and Order dated January 11, 2012, pp. 16-17 (Commission rejecting AEP Ohio's request that it find jurisdiction over the retirement of Sporn 5); *State ex rel. Illuminating Co. v. Cuyahoga County Court of Common Pleas*, 97 Ohio St. 3d 69 (2002) (finding that local judge did not have authority to examine claims purporting to be brought in tort when they were within the exclusive province of the Commission).

Respectfully Submitted,

/s/ Mark A. Hayden

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Mark A. Hayden (0081077)  
Jacob A McDermott (0087187)  
Christine M. Weber (0032245)  
FIRSTENERGY SERVICE COMPANY  
76 South Main Street  
Akron, OH 44308  
(330) 761-7735, 384-5038  
(330) 384-3875 (fax)  
haydenm@firstenergycorp.com  
[jmcdermott@firstenergycorp.com](mailto:jmcdermott@firstenergycorp.com)  
cweber@firstenergycorp.com

James F. Lang (0059668)  
N. Trevor Alexander (0080713)  
CALFEE, HALTER & GRISWOLD LLP  
The Calfee Building  
1405 East Sixth Street  
Cleveland, OH 44114  
(216) 622-8200  
(216) 241-0816 (fax)  
jlang@calfee.com  
talexander@calfee.com

*Attorneys for FirstEnergy Solutions Corp.*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *FirstEnergy Solutions Corp.'s Motion To Dismiss* was served this 4th day of August, 2014, via e-mail upon the parties below.

/s/ N. Trevor Alexander  
One of the Attorneys for FirstEnergy Solutions Corp.

Dane Stinson  
BRICKER & ECKLER  
100 South Third Street  
Columbus, OH 43215  
dstinson@bricker.com

Glenn S. Krassen  
BRICKER & ECKLER  
1001 Lakeside Avenue, Suite 1350  
Cleveland, OH 44114  
gkrassen@bricker.com

Frank P. Darr  
Matthew R. Pritchard  
McNees Wallace & Nurick  
21 East State St., 17th Floor  
Columbus, OH 43215  
fdarr@mwncmh.com  
mpritchard@mwncmh.com

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