

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

<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>	)	

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**REPLY IN SUPPORT OF RESPONDENT FIRSTENERGY SOLUTIONS CORP.’S  
MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

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**I. INTRODUCTION**

FES moved to dismiss the Complaint (the “Motion”) because the Commission does not have statutory authority to regulate the prices charged by FES. 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.

Complainants<sup>1</sup> and OMA have opposed FES’s Motion, arguing that the Commission’s power to interpret this contract (and even regulate the prices charged by CRES providers) is

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<sup>1</sup>It is unclear from the text of the Complaint whether P4S claims to be representing the Participating Members, the trade groups identified in the caption of the Complaint, or both. The Participating Members are the entities billed the charges at issue, and the contracts between FES and the Participating Members are the primary focus of the Complaint. *See* Complaint ¶ 7. However, the Complaint is captioned in the name of the trade groups purporting to represent the Participating Members, who are also parties to agreements with FES. The claims of these trade groups are even further removed from Commission jurisdiction, because these trade groups are not FES customers being charged the disputed fee. As the Complaint has been drafted on behalf of both the Participating Members and the named party

unlimited if the Complainants allege that the contract was somehow deceptive, or that the contract somehow violates the Commission's rules. Complainants' argument fails as a matter of Ohio law because contract interpretation is simply not within the Commission's jurisdiction. Complainants' argument also fails factually because there is no allegation that Complainants were ever actually deceived by FES. Indeed, both Complainants and OMA are sophisticated entities, whose large members are assisted by sophisticated advisors and legal counsel. There is no allegation that FES's marketing materials were dishonest, or that Complainants and their sophisticated counsel did not understand what they were signing.

Complainants and OMA object only to FES's interpretation of the price term of their contracts. This is an issue beyond the jurisdiction of the Commission, and therefore the Complaint should be dismissed.

## **II. ARGUMENT**

### **A. Ohio Courts Have Jurisdiction Over Traditional Contract Claims.**

In the Motion, FES showed that Ohio courts have jurisdiction over traditional breach of contract claims against entities coming under the jurisdiction of the Commission.<sup>2</sup> The cases cited by FES show the difference between complaints within the jurisdiction of the Commission and breach of contract claims within the jurisdiction of the courts.<sup>3</sup> Since at least 1921, Ohio

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trade groups (the Participating Members and the named party trade groups are referred to collectively as "Complainants"), FES hereby responds to claims made on behalf of all Complainants.

<sup>2</sup> See Motion, pp. 6-7 (citing *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>3</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); *Corrigan v. Illuminating Co.*, 122 Ohio St. 3d 265 (2009).

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>4</sup>

Complainants do not dispute that Ohio courts have authority over their breach of contract claims. OMA goes so far as to admit that “this proposition may be true.”<sup>5</sup> Accordingly, it is undisputed that Ohio courts have jurisdiction over contract claims and, conversely, such claims are beyond the jurisdiction of the Commission. The Complaint should therefore be dismissed for lack of subject matter jurisdiction.

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

Rather than contesting the jurisdiction of Ohio courts over contract claims, Complainants and OMA argue that the Commission also has jurisdiction over contract price interpretation because Complainants have included allegations that these price provisions also violate Commission rules. This analysis ignores both Ohio law and the changes made by S.B. 3.

### **1. Price Is Beyond The Jurisdiction Of The Commission**

Even before S.B. 3, Ohio law recognized that general contract and tort claims were within the jurisdiction of state courts.<sup>6</sup> With the enactment of S.B. 3, retail electric generation service was deregulated and, in particular, exempted from any rate regulation under Chapter 4909 of the Revised Code.<sup>7</sup> Prices charged by CRES providers are not subject to Commission

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<sup>4</sup> *New Breman v. Pub. Util. Comm.*, 103 Ohio St. 23 (1921) (emphasis added).

<sup>5</sup> OMA Memorandum In Opposition, p. 6.

<sup>6</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).

<sup>7</sup> R.C. §§ 4928.03 and 4928.05(A)(1); *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,

jurisdiction.<sup>8</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.

Any dispute between FES and the trade groups regarding their Master Agreement, which defined the terms of the affinity program offered to the Participating Members, is even further removed from the Commission's jurisdiction.<sup>9</sup> FES is not providing any form of electric generation service to the trade groups under the Master Agreement, and the trade groups themselves are not providing any service regulated by the Commission.<sup>10</sup> The Commission has no statutory basis for intervening in the contractual relationship between FES and the trade groups.

Complainants attempt to manufacture jurisdiction where there is none by arguing that R.C. § 4928.05(A)(1) limits the Commission's jurisdiction over retail electric service "except as otherwise provided in this chapter."<sup>11</sup> Complainants then assert that, because other portions of Chapter 4928 apply to things such as pricing disclosures, the Commission retains jurisdiction to

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competitive retail electric service, while electric distribution remains a regulated, noncompetitive service pursuant to R.C. 4928.15(A).")

<sup>8</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."); R.C. § 4928.05(A)(1) (with exceptions not applicable here, "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").

<sup>9</sup> See Complaint ¶¶ 5, 23.

<sup>10</sup> See Complaint ¶ 6 (alleging that Palmer Energy acted as a governmental aggregator and power broker, not the trade groups).

<sup>11</sup> P4S Memorandum, pp. 2-3; OMA Memorandum, p. 3.

regulate the prices to be charged by CRES providers.<sup>12</sup> This interpretation fails because it ignores the substantial changes made by S.B. 3, as well as the text of R.C. §§ 4928.03 and 4928.05. In S.B. 3, the legislature intentionally removed competitive retail electric service from the Commission's jurisdiction. There is no reason to believe the general clause in R.C. § 4928.05(A)(1) was intended to reverse S.B. 3's switch to market mechanisms and to create Commission jurisdiction over what is supposed to be a competitive market for electric service.

Complainants' reading also fails based on the allegations in the Complaint. Nowhere in the Complaint is it alleged that Complainants were surprised or deceived by the inclusion of the clauses at issue in their contracts – either the Master Agreement or the supply contracts entered into with individual school districts. Complainants are large entities, who are represented by sophisticated trade groups, who utilized experienced counsel to negotiate the contracts at issue. Since there is no allegation that Complainants or OMA were actually deceived by anything FES did, there is no reason to believe this provision is triggered so that the Commission has jurisdiction over these claims.

**2. Complainants Have Failed To Identify Any Case Where The Commission Exercised Authority Over A Contract Interpretation Issue In Similar Circumstances.**

Complainants rely on a series of Commission rules regulating CRES providers and argue that if the Commission had authority to issue rules regulating CRES pricing, then the Commission must have authority to interpret contracts.<sup>13</sup> As discussed above, this analysis ignores the changes to the legislative scheme by S.B. 3. Unsurprisingly, Complainants have

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<sup>12</sup> *Id.*

<sup>13</sup> P4S Memorandum, pp. 3-4; OMA Memorandum, p. 4.

failed to cite any authority where the Commission retained jurisdiction in similar circumstances in support of their position.

On the other hand, FES's Motion to Dismiss directed the Commission to a decision in extremely similar circumstances, the AEP Ohio *Sporn* 5 retirement proceeding.<sup>14</sup> In *Sporn*, the Commission held that the legislature limited the Commission's jurisdiction over competitive retail electric service and concluded the closure of an electric generating facility was not subject to Commission regulation.<sup>15</sup> Complainants failed to even address this case.

OMA attempted to distinguish *Sporn*, but OMA's argument actually supports FES, not OMA. OMA argues that *Sporn* is not similar to this case because the "Sporn Case concerned the closure of an electric generating facility and, by extension, implicated Sections 4905.20 and 4905.21, Revised Code, which are not sections over which the Commission retains jurisdiction related to competitive services."<sup>16</sup> OMA's conclusion is incorrect because, just like the retirement provisions at issue in *Sporn*, the Commission also does not retain jurisdiction over CRES pricing under R.C. § 4928.05(A)(1). Therefore, just like *Sporn*, the Commission should find that it has no jurisdiction over this dispute.

*Sporn* also defeats the arguments asserted by Complainants and OMA that the Commission's jurisdiction over deceptive marketing practices somehow gives it authority over pricing. In *Sporn*, AEP Ohio argued that the Commission had jurisdiction to consider its request due to a wide range of issues which were within the jurisdiction of the Commission, including distribution charges. The Commission rejected AEP Ohio's attempt to take something which

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<sup>14</sup> Motion, pp. 5-6.

<sup>15</sup> 2012 Ohio PUC LEXIS 36; Case No. 10-1454-EL-RDR, Opinion and Order dated January 11, 2012, pp. 16-17 ("*Sporn*").

<sup>16</sup> OMA Memorandum, p. 5.

was within its authority (distribution charges) and use it to leverage a decision on something outside its authority (recovery of closure costs for plant retirement).<sup>17</sup> This same analysis applies here. The Complainants do not include any allegations that FES's marketing was inherently deceptive or that they were deceived. Instead, just like AEP Ohio, Complainants are attempting to take something within the jurisdiction of the Commission (marketing practices) and use that to leverage something beyond the Commission's jurisdiction (CRES pricing and contract interpretation). The Commission should make the same decision it did in *Sporn* and dismiss the Complaint.

### **3. Supreme Court Precedent Supports The Motion To Dismiss.**

Complainants argue that their Complaint is appropriate under the Supreme Court's analysis in *Allstate Insur. Co. v. Cleveland Elec. Illuminating Co.*, 119 Ohio St. 3d 301 (2008) ("*Allstate*"). In *Allstate*, the Court was asked to determine whether a tort claim was service related (and thus subject to Commission jurisdiction) or a pure common law tort claim (subject to courts of general jurisdiction).<sup>18</sup> *Allstate* first discussed the general legal standard, finding that the "PUCO is not a court and has no power to judicially ascertain and determine legal rights and liabilities."<sup>19</sup> The *Allstate* Court concluded that the common pleas court properly exercised jurisdiction over the claims at issue in that case, adopting a two-part test for cases "involving a public utility alleged to have committed a **tort**."<sup>20</sup>

Complainants have structured their entire argument around the two-part test provided in *Allstate*. First, this test is inapplicable because *Allstate* was limited to tort claims, as opposed to

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<sup>17</sup> *Sporn*, supra, pp. 16-17.

<sup>18</sup> 119 Ohio St. 3d at 301.

<sup>19</sup> *Id.* at 302 (collecting cases).

<sup>20</sup> *Id.* at 304 (emphasis added).

contract claims. Second, the Commission is a creature of statute and has only that authority granted to it by the General Assembly.<sup>21</sup> If the Commission does not have authority over a certain item, then the *Allstate* analysis (which anticipates potential jurisdiction in either the Commission or the courts) is simply irrelevant. As shown above, the Commission has no authority to interpret contracts in this circumstance. Therefore, the *Allstate* balancing test is never triggered and is irrelevant to this dispute.

Finally, even if the *Allstate* test were relevant, Complainants argument simply does not make sense. Complainants have reversed and misstated the *Allstate* test, which actually states:

‘First, is PUCO’s administrative expertise required to resolve the issue in dispute? Second, does the act complained of constitute a practice normally authorized by the utility?’ If the answer to either question is in the negative, the claim is not within PUCO’s exclusive jurisdiction.<sup>22</sup>

Complainants claim that the first prong of the *Allstate* test is satisfied because the Complainants will ask the Commission to interpret several complex issues within the competence of the Commission.<sup>23</sup> Under this standard, literally any wholesale contract entered into by a CRES provider would be subject to the Commission’s jurisdiction. Obviously, this is incorrect, as these contracts are either unregulated or are within the exclusive jurisdiction of FERC. Moreover, Ohio courts regularly interpret sophisticated contracts with intricate terms. There is no reason to believe that the PUCO’s special expertise is needed to interpret one clause in the supply contracts between FES and Complainants.

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<sup>21</sup> *Montgomery County Bd. of Commrs. v. Pub. Util. Comm.*, 28 Ohio St. 3d 171, 176, 503 N.E.2d 167 (1986).

<sup>22</sup> *Id.* at 304 (emphasis added) (internal citations omitted).

<sup>23</sup> P4S Memorandum, p. 6.



Complainants allege the second prong of the *Allstate* test is satisfied whenever a CRES provider “performs the underlying act complained of under authority of R.C. Title 49 and the regulations promulgated thereunder.”<sup>24</sup> Complainants conclude that since FES is authorized as a CRES provider, then all FES’s acts are necessarily related to the regulations under which FES was authorized as a CRES provider.<sup>25</sup> Once again, Complainants’ interpretation is unreasonable. All of FES’s actions are not by definition a “practice normally authorized by the utility” just because FES is certified by the Commission.<sup>26</sup> This is precisely the type of overbroad interpretation which was specifically rejected when the *Allstate* Court “categorically rejected” CEI’s argument that all of its actions were service related because it is regulated by the PUCO.<sup>27</sup> Complainants’ interpretation of *Allstate* has been “categorically rejected” by the Ohio Supreme Court, and the entirety of their argument based on *Allstate* likewise should be rejected by the Commission.

Finally, Complainants allege that courts only have jurisdiction over “pure” contract claims, defined by Complainants as those that do not require any understanding or consideration of R.C. Title 49 or of Commission regulations. In support of this claim, Complainants overstate the holding of *DiFranco v. FirstEnergy Corp.*, 134 Ohio St. 3d 144 (2012). In *DiFranco*, all-electric customers challenged filed rates being appropriately charged by CEI and Ohio Edison

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<sup>24</sup> P4S Memorandum, p. 5.

<sup>25</sup> *Id.*

<sup>26</sup> Notably, Complainants’ recitations of the *Allstate* test omit the important words “by the utility.” P4S Memorandum, pp. 1-2, 5.

<sup>27</sup> *Id.* at 303 (citing *Harris v. Ohio Edison Co.*, 1995 Ohio App. LEXIS 3381, 1995 WL 494584 (Mahoning App. Aug. 17, 1995) (PUCO does not have exclusive jurisdiction over every action of a public utility)).

Company.<sup>28</sup> The Court found that all claims were appropriately within the jurisdiction of the Commission, and that the Commission had jurisdiction to determine if the utility was billing tariffed rates appropriately.<sup>29</sup> *DiFranco* does not state, or even imply, that any case arguably involving commission regulations is within the jurisdiction of the Commission, only that non-competitive tariffed rates are within the Commission's jurisdiction.

The Commission should follow its precedent from the *Sporn* decision, and dismiss the Complaint for lack of subject matter jurisdiction.

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

As discussed in the FES Motion, and extensively in the *Allstate*<sup>30</sup> and *DiFranco*<sup>31</sup> decisions relied on by Complainants, the Commission should ignore artful drafting attempting to trigger its jurisdiction.<sup>32</sup> Instead, both the Commission and Ohio courts have examined the substance of the complaint to determine where there was jurisdiction.<sup>33</sup> Complainants do not

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<sup>28</sup> *DiFranco v. FirstEnergy Corp.*, 134 Ohio St. 3d 144, 144-45 (2012).

<sup>29</sup> *Id.* at 153.

<sup>30</sup> FES Motion, pp. 7-9; *Allstate*, supra, p. 303 ("We have held, however, that in cases involving public utilities, jurisdiction is not conferred based solely on pleadings. *State ex rel. Columbia Gas of Ohio, Inc. v. Henson*, 102 Ohio St.3d 349, 2004 Ohio 3208, 810 N.E.2d 953, P 19 (mere fact that allegations were cast so as 'to sound in tort is insufficient to confer jurisdiction upon the common pleas court'). *See State ex rel. Illum. Co. v. Cuyahoga Cty. Court of Common Pleas*, 97 Ohio St.3d 69, 2002 Ohio 5312, 776 N.E.2d 92, P 21.).

<sup>31</sup> *DiFranco v. FirstEnergy Corp.*, 134 Ohio St. 3d 144 (2012), pp. 149-50. ("In sum, jurisdiction is not conferred in cases involving public utilities based solely on the form of action. Instead, courts must look to the substance of the allegations in the complaint to determine the proper jurisdiction.") (internal citations omitted).

<sup>32</sup> The concept that artful drafting may not be used to create jurisdiction is also widely used beyond Commission cases. *See, e.g., Spiros v. GMC*, 1987 Ohio App. LEXIS 9087, \*9 (9th Dist. 1987) ("the 'artful pleading' doctrine which provides that, although a plaintiff is the 'master' of his complaint, he may not purposely frame his action under state law and omit federal questions.")

<sup>33</sup> *See* FES Motion, p. 9.

contest this legal standard, and acknowledge that the Commission should consider the “true substance of the complaint to determine if it is one of ‘pure’ contract.”<sup>34</sup>

As explained in detail by the FES Motion, Complainants bring fourteen separate counts in their Complaint. Each of those counts is based on one issue – is FES contractually authorized to pass through the extraordinary charges which were imposed by PJM? Because Complainants do not even allege that they or their counsel were deceived in any way by these contracts, the remainder of the Complaint is an artfully drafted attempt to obtain Commission jurisdiction over these claims.

Apparently acknowledging this inescapable fact, Complainants argue that the Complaint should be dismissed only if it appears “beyond doubt” that the complainant can prove no set of facts entitling relief with all factual allegations taken as true.<sup>35</sup> After stating this legal standard, Complainants then fail to identify any factual allegations which allegedly defeat FES’s motion. Indeed, there are no factual allegations in the Complaint which would create Commission jurisdiction over this claim. The Commission should look at the substance of the Complaint. Because the Complaint focuses entirely on interpreting the price term of a contract between sophisticated entities represented by counsel, there is no material factual allegation which is relevant to the FES Motion. The Complaint should be dismissed.

**D. Decisions From Other States Are Irrelevant To The Jurisdiction Of The Commission.**

In light of the lack of Ohio authority supporting Complainants, Complainants have relied upon an Interim Order from Pennsylvania.<sup>36</sup> This Interim Order by the Pennsylvania

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<sup>34</sup> P4S Memorandum, p. 7.

<sup>35</sup> P4S Memorandum, p. 7.

<sup>36</sup> P4S Memorandum p. 2.

Administrative Law Judge (which is currently subject to appeal) is irrelevant. The jurisdiction granted to the Pennsylvania PUC by the Pennsylvania legislature has nothing to do with the jurisdiction granted to the Commission by the General Assembly. This is simply a desperate attempt by Complainants to muddy the waters, and it should be rejected by the Commission.

### **III. CONCLUSION**

The Commission does not have jurisdiction to interpret the pricing or terms of a CRES contract, either with an affinity group or with individual school districts. Therefore, it should dismiss the Complaint for lack of subject matter jurisdiction.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *FirstEnergy Solutions Corp.'s Reply In Support of Motion To Dismiss* was served this 26th day of August, 2014, via e-mail upon the parties below.

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