

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

<b>City of Toledo</b>	)	
	)	
<b>Complainant,</b>	)	
	)	
<b>v.</b>	)	<b>CASE NO. 14-1944-EL-CSS</b>
	)	
<b>FirstEnergy Solutions Corp.</b>	)	
	)	
<b>Respondent.</b>	)	

**REPLY IN SUPPORT OF FIRSTENERGY SOLUTIONS CORP.'S  
MOTION TO DISMISS**

Even if Complainant the City of Toledo (“Toledo”) is granted permission to file its delinquent Memorandum In Opposition, the FirstEnergy Solutions (“FES”) Motion to Dismiss (the “Motion”) should be granted. Toledo has failed to address any of the extensive authority cited in the Motion showing that the Commission does not have jurisdiction over questions of contract interpretation. Instead, Toledo presents only two irrelevant arguments which fail to acknowledge the difference between factual allegations and legal conclusions. Accordingly, the Motion should be granted.

**II. ARGUMENT**

**A. Toledo Has Failed To Address The Arguments Raised By FES In The Motion.**

In the Motion, FES presents extensive authority and analysis showing that issues of contract interpretation are exclusively within the jurisdiction of Ohio courts,<sup>1</sup> and not within the

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<sup>1</sup> *New Breman v. Pub. Util. Comm.*, 103 Ohio St. 23 (1921); R.C. § 4928.05(A)(1); R.C. § 4928.03; *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).

jurisdiction of the Commission.<sup>2</sup> Toledo has failed to address any of this authority or the arguments raised by FES, therefore, the Complaint should be dismissed.

**B. Toledo's Complaint Does Not Assert Any Factual Allegations Which Create Commission Jurisdiction.**

Rather than responding to the actual arguments raised in the Motion, Toledo claims that the Motion should be denied because Toledo has properly pled *factual allegations* which must be taken as true.<sup>3</sup> Toledo's argument fails because Toledo confuses factual allegations (which must be accepted as true) with legal conclusions (which do not need to be accepted as true).<sup>4</sup> Each of Toledo's "properly pled factual allegations" are, in fact, legal conclusions. In contrast to factual allegations, "unsupported conclusions of a complaint are not considered admitted . . . and are not sufficient to withstand a motion to dismiss. Legal conclusions, deductions, or opinions couched as factual allegations are not given a presumption of truthfulness."<sup>5</sup> None of the issues raised by Toledo are actually factual allegations. They are legal conclusions, and therefore, no deference to Toledo's interpretation of those issues is warranted.

Toledo has identified only three alleged "factual allegations" which it claims create Commission jurisdiction.<sup>6</sup> Each of these factual allegations is actually a legal conclusion, and therefore no deference is warranted. For example, Toledo claims that the charge at issue in this

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<sup>2</sup> See Motion, pp. 3-6.

<sup>3</sup> Memorandum In Opposition, pp. 2-3.

<sup>4</sup> *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 193, 532 N.E.2d 753 (1988) (unsupported legal conclusions are not sufficient to withstand a motion to dismiss); *Cnty. Hous. Network, Inc. v. Stoyer*, 2006-Ohio-5094, ¶ 9, 2006 Ohio App. LEXIS 5014, \*7 (10th Dist. 2006) ("Legal conclusions unsupported by any factual allegations are insufficient to withstand a motion to dismiss.").

<sup>5</sup> *Bush v. Cleveland Mun. Sch. Dist.*, 2013-Ohio-5420, P4, 2013 Ohio App. LEXIS 5675, 2-3, 2013 WL 6571821 (8th Dist. 2013) (citing *State ex rel. Hickman v. Capots*, 45 Ohio St.3d 324, 324, 544 N.E.2d 639 (1989); *Allstate Ins. Co. v. Electrolux Home Prods. Inc.*, 8th Dist. Cuyahoga No. 97065, 2012-Ohio-90, ¶ 8, *Williams v. U.S. Bank Shaker Square*, 8th Dist. Cuyahoga No. 89760, 2008-Ohio-1414, ¶ 9.).

<sup>6</sup> Memorandum in Opposition, p. 3.

case “does not appear in the applicable tariff or SSO supply agreement.”<sup>7</sup> This is not a factual allegation which must be accepted as true. The factual allegation is the existence of the tariff and SSO supply agreement. The legal conclusions to be drawn from the language of that contract and tariff are not factual allegations subject to deference. This is similar to attaching a contract to a complaint in a civil case and claiming that the Plaintiff’s interpretation of the contract must be accepted as true. That is simply not the case. The interpretation of contracts is a legal issue not subject to deference in the context of a motion to dismiss.<sup>8</sup> Therefore, this allegation is not a factual assertion subject to deference.

The other two issues raised by Toledo fail under the same analysis. Whether or not “increased ancillary expenses” qualify as a regulatory pass-through event under the contract is a legal conclusion rather than a factual assertion.<sup>9</sup> The factual assertions relate to whether a charge was imposed and what the written terms of the contract are, not the legal interpretation of those facts. Similarly, whether FES “discriminatorily waived such charges for others but not Toledo” is also a legal conclusion rather than a factual assertion. The factual assertions are whether FES waived the charges for residential customers but not Toledo. Whether waiving charges for some customer types but not others is improper or within the Commission’s jurisdiction are legal conclusions not subject to deference.

As Toledo’s legal conclusions are not subject to deference, and Toledo has offered no analysis in support of its legal conclusions, the Motion should be granted.

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<sup>7</sup> Memorandum In Opposition, p. 3.

<sup>8</sup> *Carasalina, LLC v. Smith Phillips & Assocs.*, 2014-Ohio-2423, ¶ 10, 2014 Ohio App. LEXIS 2420, \*5-6 (10th Dist. 2014) (“The interpretation and construction of a written contract is a question of law and, therefore, appellate courts will review de novo the trial court’s interpretation of a contract.”) (The court found that the unsupported legal interpretations of a contract contained in the Complaint were not subject to deference and upheld judgment on the pleadings for defendant.).

<sup>9</sup> Memorandum in Opposition, p. 3.

**C. The Commission Investigation Has Nothing To Do With Whether The Commission Has Jurisdiction Over Breach Of Contract Claims.**

Finally, Toledo argues in a single sentence that its allegations are not solely a contract issue because “if that were true Case No. 14-0568-EL-COI would not exist.”<sup>10</sup> Toledo misunderstands the posture of that case and the grounds for the Motion. Case No. 14-0568-EL-COI involves a Commission investigation, not the Commission interpreting the terms of a contract between two parties. As explained in detail in the Motion, Ohio law is clear that the Commission has no jurisdiction over issues of contract interpretation.<sup>11</sup> The Commission can have authority to conduct an investigation without having the authority to decide a specific contractual dispute between parties. Accordingly, this incomplete argument should be rejected.

**III. CONCLUSION**

The Commission does not have jurisdiction to interpret the terms of the CRES contract at issue here. Therefore, the Complaint should be dismissed.

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<sup>10</sup> Memorandum in Opposition, p. 2.

<sup>11</sup> See Motion, pp. 3-6.

Respectfully Submitted,

/s/ Mark A. Hayden

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### **CERTIFICATE OF SERVICE**

I certify that this *Reply In Support of Motion to Dismiss* was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 4th day of March, 2015. The PUCO's e-filing system will electronically serve notice of the filing of this document on all parties.

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Summary: Reply in Support of Motion to Dismiss electronically filed by Mr. Nathaniel Trevor Alexander on behalf of FirstEnergy Solutions Corp.