

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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|---|-------------------------|
| Carbo Forge, Inc., Wyandot, Inc.,) | |
| Plaskolite, Inc., American Trim, LLC,) | |
| Whirlpool Corporation, McWane, Inc.,) | |
| Navistar, Inc., Sauer Woodworking Co.,) | |
| McDonald Steel Corporation, Henny) | |
| Penny Corporation, Lima Refining) | |
| Company, Campbell Soup Supply) | |
| Company, LLC, Cooper Tire & Rubber) | |
| Company, Mantaline Corporation,) | |
| Republic Steel, Jay Industries, Inc., Sun) | Case No. 14-1610-EL-CSS |
| Chemical Corporation, and 3M Company,) | |
|) | |
| Complainants,) | |
|) | |
| v.) | |
|) | |
| FirstEnergy Solutions Corp.,) | |
|) | |
| Respondent.) | |

ENTRY

The Commission finds:

- (1) FirstEnergy Solutions Corp. (FES) is an electric services company as defined in R.C. 4928.01(A)(9), and, as such, is subject to the jurisdiction of this Commission.
- (2) Pursuant to R.C. 4905.26, the Commission has authority to consider written complaints filed against a public utility by any person or corporation regarding any rate, service, regulation, or practice furnished by the public utility that is in any respect unjust, unreasonable, insufficient, or unjustly discriminatory. Pursuant to R.C. 4928.16, the Commission has jurisdiction under R.C. 4905.26, upon complaint of any person, regarding the provision by an electric services company subject to certification under R.C. 4928.08 of any service for which it is subject to certification.

- (3) On September 12, 2014, pursuant to R.C. 4905.26, Carbo Forge, Inc., Wyandot, Inc., Plaskolite, Inc., American Trim, LLC, Whirlpool Corporation, McWane, Inc., Navistar, Inc., Sauder Woodworking Co., McDonald Steel Corporation, Henny Penny Corporation, Lima Refining Company, Campbell Soup Supply Company, LLC, Cooper Tire & Rubber Company, Mantaline Corporation, Republic Steel, Jay Industries, Inc., Sun Chemical Corporation, and 3M Company (collectively, Complainants), filed a complaint against FES. Complainants alleged several counts relating to their fixed-price competitive retail electric service (CRES) contracts with FES. Complainants asserted that they were assessed an "RTO Expense Surcharge" in June and July 2014 relating to an alleged pass-through event of costs and charges assessed on FES by PJM, occurring due to extremely cold weather in January 2014. FES' actions of passing through these costs, Complainants allege, amounts to engaging in unfair, misleading, deceptive, or unconscionable acts or practices in violation of R.C. 4928.02 and 4928.10 and Ohio Adm.Code 4901:1-21-03, 4901:1-21-05, 4901:1-21-11, 4901:1-21-12, 4901:1-21-14, 4901:1-21-18, and is unjust and unreasonable pursuant to R.C. 4905.26 and 4928.02.

Contemporaneously, Complainants filed a motion and memorandum in support for assistance to prevent termination of service.

- (4) On September 19, 2014, FES filed a memorandum in opposition to the motion for assistance. Contemporaneously, FES filed a motion to dismiss the complaint for lack of subject matter jurisdiction.
- (5) On September 22, 2014, Duke Energy Ohio, Inc. (Duke), filed correspondence in the docket. In its letter, Duke explains that Complainants' motion to prevent termination of service, if granted, will essentially direct Duke, as the electric distribution utility (EDU) for a number of the Complainants, to refrain from engaging in certain activities even though Duke is a nonparty. Duke asserts that it offers no comment on the merits of the complaint, motions, or responses, but asserts that Duke should not be subject to a blanket order from the Commission restricting it from disconnecting unpaid bills or charging a late fee for the same.

- (6) Similarly, on September 23, 2014, Ohio Power Company (AEP Ohio) filed a similar letter asserting that it too should not be subjected to a blanket order prohibiting it from disconnecting the Complainants. AEP Ohio further advises that it plans to mark the disputed charges on affected customers' accounts so that the amounts contested do not cause late payments or disconnection, provided that FES and Complainants jointly identify the accounts involved and charges in dispute.
- (7) On October 6, 2014, FES filed its answer to the complaint, denying Complainants' allegations. Additionally, on October 6, 2014, Complainants filed a memorandum contra FES' motion to dismiss.
- (8) On October 14, 2014, FES filed a reply in support of its motion to dismiss.
- (9) In its motion to dismiss, FES asserts that R.C. 4928.05(A)(1) and 4928.03 provide the Commission with very limited jurisdiction over CRES suppliers. FES asserts that the Commission has made this determination previously in *In re Ohio Power Co.*, Case No. 10-1454-EL-RDR, Opinion and Order (Jan. 11, 2012) at 16-17. In these particular circumstances, FES contends that the complaint asks the Commission to interpret the price term in retail contracts between CRES providers and Complainants, which is beyond the Commission's jurisdiction.

FES continues that the complaint lies in contract, which is the jurisdiction of the courts. FES asserts that the courts have long held that the Commission lacks authority to hear breach of contract claims, citing *Corrigan v. Illum. Co.*, 122 Ohio St.3d 265, 2009-Ohio-2524, 910 N.E.2d 1009, ¶ 9, and *New Bremen v. Pub. Util. Comm.*, 103 Ohio St. 23, 132 N.E. 162 (1921).

- (10) In its memorandum contra FES' motion to dismiss, Complainants assert that FES has mischaracterized the basis of the complaint, which Complainants assert has arisen in connection with practices over which the Commission has exclusive subject matter jurisdiction. More specifically, Complainants point out that the complaint directly alleges

violations of rules and regulations appearing in or authorized by R.C. Chapter 4928, over which the Commission maintains jurisdiction; and that the rules appearing in Ohio Adm.Code 4901:1-21 and 4901:1-24 set forth regulations over CRES providers over which the Commission maintains jurisdiction. Complainants argue that the issues presented in the complaint directly concern whether FES' assessment of the RTO expense surcharge was permissible under these regulations, lying in the exclusive jurisdiction of the Commission.

- (11) In its reply in support of its motion to dismiss, FES asserts that, in their memorandum contra, Complainants have failed to describe their claims without referencing the dispute over the pass-through clause, which is a purely contractual question, over which the courts have jurisdiction.
- (12) Recently, in *In re Ohio Schools Council d.b.a. Power4Schools v. FES*, Case No. 14-1182-EL-CSS, Entry (Nov. 18, 2015) (*Power4Schools Case*), the Commission examined a nearly identical issue. In *Power4Schools Case*, the Commission initially noted that "[i]t is the responsibility of the Commission to ensure the state's policy of protecting customers against unreasonable sales practices from retail electric services is effectuated[.]" citing R.C. 4928.02(I) and 4928.06(A). *Power4Schools Case* at 4. R.C. 4905.26 confers upon the Commission jurisdiction to hear complaints against public utilities regarding whether a charge is unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law. Additionally, R.C. 4928.16 provides that the Commission's jurisdiction pursuant to R.C. 4905.26 extends to CRES providers. R.C. 4928.16(A)(2) bestows upon the Commission jurisdiction to hear complaints against CRES providers, including whether a CRES meets the minimum service requirements for competitive services, which are set forth in R.C. 4928.10 and Ohio Adm.Code Chapter 4901:1-21. The statutes and associated rules provide the Commission with jurisdiction to ensure that consumers are afforded adequate protection. R.C. 4928.10 specifically requires that the Commission rules include prohibitions against unfair, deceptive, and unconscionable acts and practices in the marketing, solicitation, and sales of CRES

and in the administration of any contract for CRES. Further, the statute provides the Commission with jurisdiction over rules for disclosure of terms in CRES contracts. Ohio Adm.Code 4901:1-21-11 and 4901:1-21-12 set forth the standards of contract administration and contract disclosure required of CRES providers. *Power4Schools Case* at 4-5.

As discussed in *Power4Schools Case*, the Supreme Court of Ohio established a two-prong test to determine whether the Commission has exclusive jurisdiction over a public utility issue in *Allstate Ins. Co. v. Illum. Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, 893 N.E.2d 824 (*Allstate*). The first prong of the test inquires whether the act complained of is something typically authorized by the utility. The second prong queries whether the Commission's administrative expertise is necessary to settle the disputed issues. Only where both prongs are affirmatively satisfied does the Commission have exclusive jurisdiction over an issue.

- (13) Here, as in *Power4Schools Case*, the Commission finds that, based upon statutory authority, state policy, and Ohio Supreme Court precedent, the issues raised within the complaint are within the Commission's jurisdiction and, consequently, the motion to dismiss should be denied. As we stated in *Power4Schools Case*, "[i]t is the state's policy to safeguard consumers against unreasonable sales practices from CRES providers, and it is the Commission's responsibility to ensure those protections are in place." *Power4Schools Case* at 5, citing R.C. 4928.02(I) and 4928.06. This is not a matter of the Commission deciding matters of contract interpretation regarding Complainants' CRES contracts; rather, at issue is how the CRES provider is administering its contracts and the CRES provider's practices related to the contract disclosures. Further, the Commission has both extensive regulations regarding CRES contracts and the expertise necessary to interpret the law at issue in this case. See *Power4Schools Case* at 5, citing Ohio Adm.Code 4901:1-21-02; 4901:1-21-03; 4901:1-21-11; and 4901:1-21-12.

R.C. 4905.26 imparts with the Commission exclusive jurisdiction over service-related issues regarding public utilities. *Power4Schools Case* at 5, citing *Corrigan*, 122 Ohio

St.3d 265, 2009-Ohio-2524, 910 N.E.2d 1009, at ¶ 8-10. Additionally, R.C. 4928.16 extends the Commission's jurisdiction to service-related issues involving CRES providers. In *Power4Schools Case*, the Commission held that, in light of these statutes, the *Allstate* test may be applied to CRES providers in addition to public utilities. *Id.* Consequently, the pertinent test will first inquire whether the issues alleged constitute a practice that FES is typically authorized to do; and, secondly, whether the Commission's expertise is necessary to resolve the issues alleged by Complainants.

The Commission finds that the first prong of the *Allstate* test is satisfied, as the issues alleged by Complainants constitute a practice that FES is typically authorized to do. Complainants have alleged that they contracted for fixed rates with FES and that FES has imposed charges in addition to the fixed rates. Pursuant to R.C. Chapter 4928 and Ohio Adm.Code Chapter 4901:1-21, FES is authorized to provide fixed-rate contracts. Further, FES is a certified CRES provider under R.C. Chapter 4928, authorizing it to contract with customers and administer resulting contracts. Consequently, Complainants' allegations involve matters that FES is normally authorized to do.

The Commission further finds that the second prong of the *Allstate* test is satisfied. Complainants allege that FES has unfairly administered charges under their contracts. In order to address these allegations, the Commission's expertise is necessary to interpret the regulations and statutes that govern Ohio's CRES market. As set forth in *Power4Schools Case*, a purpose of the regulations set forth in R.C. Chapter 4928 and the rules promulgated thereunder "is to protect consumers against misleading, deceptive, unfair, and unconscionable acts in the administration of any CRES contract. Ohio Adm.Code 4901:1-21-03(A)(2) requires that CRES providers administer contracts fairly. Pursuant to R.C. 4928.10, how CRES contracts are administered and what specifics need to be included in those contracts are outlined in Ohio Adm.Code 4901:1-21-11 and 4901:1-21-12, respectively." *Power4Schools Case* at 6. Further, the Commission has jurisdiction to hear any complaint

regarding an alleged violation of R.C. 4928.10 and any rules promulgated under that code section. R.C. 4928.16(A)(2) and 4905.26. Consequently, as resolving the issues in this complaint requires interpretation of the statutes and regulations administered and enforced by the Commission, the Commission's expertise is necessary—preventing the complaint at issue from lying purely in contract. In conclusion, as the allegations set forth in the complaint fall within the Commission's statutory authority and the two-prong *Allstate* test is satisfied, the Commission finds that this complaint is within its jurisdiction.

For the reasons set forth above, the Commission finds that FES' motion to dismiss should be denied. Additionally, the Commission directs the attorney examiner assigned to the case to issue a procedural schedule setting this matter for hearing.

- (14) Next, the Commission will consider Complainants' motion for assistance to prevent termination of service. Complainants' motion, filed pursuant to Ohio Adm.Code 4901-9-01, asserts that the Commission should direct FES and the applicable Ohio EDUs to not disconnect or otherwise terminate service to any of the Complainants through the pendency of this matter for reasons associated with the non-payment of amounts in dispute between FES and the Complainants regarding the RTO Expense Surcharge. Further, Complainants request relief from any late fee payments or charges assessed on the disputed charges.
- (15) In its memorandum contra, FES asserts that the issue in this case is a contract issue beyond the Commission's authority and, further, that the motion for assistance is unsupported. FES elaborates that Complainants have failed to explain why they are entitled to the requested relief.
- (16) The Commission finds that Complainants' motion to stay termination of service is reasonable and should be granted until otherwise ordered. The Commission finds that FES and the EDUs shall not terminate service to any of the Complainants on the basis of the amounts disputed in this case until otherwise ordered by the Commission, the legal

director, or an attorney examiner. Should any questions arise regarding the amounts in dispute, Complainants, the EDUs, or FES should contact the attorney examiner.

It is, therefore,

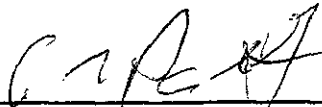
ORDERED, That FES' motion to dismiss for lack of subject matter jurisdiction be denied as set forth in Finding (13). It is, further,

ORDERED, That Complainants' motion for assistance to prevent termination of service should be granted as set forth in Finding (16). It is, further,

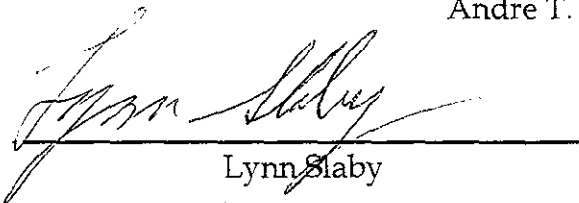
ORDERED, That a copy of this Entry be served upon Duke and AEP Ohio. It is, further,

ORDERED, That a copy of this Entry be served upon each party of record.

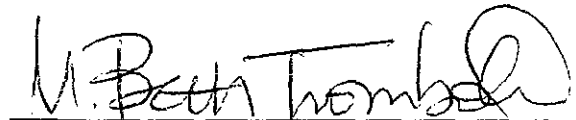
THE PUBLIC UTILITIES COMMISSION OF OHIO



Andre T. Porter, Chairman



Lynn Slaby



M. Beth Trombold



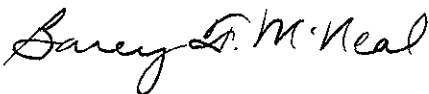
Asim Z. Haque



Thomas W. Johnson

MWC/sc

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Barcy F. McNeal
Secretary