

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| Ohio Schools Council, Ohio School Boards Association, Ohio Association of School Business Officials, and Buckeye Association of School Administrators, dba Power4Schools, | ) |                         |
|   | ) |                         |
| Complainants,   | ) | Case No. 14-1182-EL-CSS |
|   | ) |                         |
| v.  | ) |                         |
|   | ) |                         |
| FirstEnergy Solutions Corp.,  | ) |                         |
|   | ) |                         |
| Respondent.   | ) |                         |

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**OHIO MANUFACTURERS ASSOCIATION’S MEMORANDUM CONTRA  
FIRSTENERGY SOLUTIONS’ MOTION TO DISMISS**

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**I. Introduction and Procedural History**

On July 3, 2014, the Ohio Schools Council, Ohio School Boards Association, Ohio Association of School Business Officials, and Buckeye Association of School Administrators, dba Power4Schools (collectively, Power4Schools), filed a complaint (Complaint) with the Public Utilities Commission of Ohio (Commission) against FirstEnergy Solutions Corp. (FES), asserting, inter alia, that FES improperly assessed, in participating members' June 2014 electric utility bills, additional charges for ancillary services based upon usage during the month of January 2014. Subsequently, numerous parties which have similarly been assessed pass-through costs from FES, including The Timken Company, Marathon Petroleum Company, Wausau Paper Towel & Tissue LLC, ASHTA Chemicals Inc., Columbus Castings, The Lincoln Electric Company, Delphi Corporation, and Landmark Plastic Corporation, Navco Enterprises.Com, Inc., Navco Enterprises of P.V., Inc., Navco Enterprises, Inc., Foodlife International, Inc., Navco

Enterprises of O.V., Inc., and Navco of York Road, Inc. (collectively, Industrial Customers) and the Ohio Manufacturers' Association (OMA), on behalf of its member companies purchasing electric generation services from FES, filed motions to intervene in the matter.

On August 4, 2014, FES filed its Answer to Power4Schools' Complaint and, additionally, filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction (Motion to Dismiss), arguing generally that the basis of Power4Schools' Complaint is an issue of contract interpretation over which the Commission does not have jurisdiction.<sup>1</sup> Further, on August 4, 2014, FES filed a memorandum contra the Industrial Customers' motion to intervene, and Power4Schools filed a memorandum contra the motions to intervene filed by Industrial Customers and OMA (collectively, Intervenors). On August 11, 2014, OMA and the Industrial Customers separately filed replies to Power4Schools' memorandum contra their motions to intervene, and the Industrial Customers also filed a reply to FES' memorandum contra their motion to intervene. On August 13, 2014, FES filed a memorandum contra OMA's motion to intervene, to which OMA will be submitting a reply later this week.

## **II. Argument**

Despite FES' assertion that the question for consideration in this proceeding is strictly one of contract interpretation,<sup>2</sup> the facts and scenario for which Power4Schools has requested Commission resolution has arisen in connection with practices over which the Commission has exclusive subject matter jurisdiction. Accordingly, FES' assertion that the issues in the Complaint strictly concern interpretation of the contracts between itself and Power4Schools' participating member schools, and/or FES' contracts with the Intervenors or their representative

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<sup>1</sup> Motion to Dismiss at 1.

<sup>2</sup> Id. at 3.

members, distorts and oversimplifies the counts of the Complaint and the issues at play therein, and should be denied by the Commission.

In support of its contention that the Commission has no jurisdiction over the instant matter, FES refers to the language of Section 4928.05(A)(1), Revised Code, which provides as follows:

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.<sup>3</sup>

FES also cites Section 4928.03, Revised Code, which designates “retail electric generation, aggregation, power marketing, and power brokerage services” as competitive retail electric services which consumers may obtain from certified suppliers in support of its contention that the Commission has no jurisdiction over the issues presented in the Complaint.<sup>4</sup> Referencing both of these statutory sections, FES argues that the price of competitive retail electric service is not one of the “specifically defined areas still subject to Commission jurisdiction.”<sup>5</sup>

FES misconstrues the specifics of the Complaint in an effort to characterize Power4Schools’ assertions as a mere disagreement over the prices charged by FES. FES’ mischaracterization of the basis of the Complaint is disingenuous and attempts, though unsuccessfully, to recast the issues at the heart of the Complaint in a light favorable to its claims,

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<sup>3</sup> Motion to Dismiss at 5, citing Section 4928.05(A)(1), Revised Code (emphasis added).

<sup>4</sup> Motion to Dismiss at 5.

<sup>5</sup> Id.

as an issue of price. The Commission should not be distracted from the main assertions of the Complaint, namely, that FES has unlawfully, unreasonably, deceptively, and unconscionably assessed on customers' bills specific charges relating to ancillary services in violation of the Commission's rules and the language of the contracts between the customers and FES.<sup>6</sup> The allegations in the Complaint deal directly with violations of rules and regulations appearing in or authorized by Chapter 4928 of the Revised Code, over which, as expressly provided in Section 4928.05(A)(1), Revised Code, the Commission maintains jurisdiction.<sup>7</sup> The rules appearing in Chapters 4901:1-21 and 4901:1-24, Ohio Administrative Code (O.A.C.), concerning Competitive Retail Electric Service (CRES) Providers and the Certification of CRES Providers, are statutorily authorized by numerous provisions in Chapter 4928, Revised Code, and explicitly set forth rules and regulations for CRES providers which pertain to matters such as those asserted in the Complaint, and over which the Commission maintains jurisdiction. For example, Section 4928.06, Revised Code, vests in the Commission explicit authority to effectuate the policy of the state delineated in Section 4928.02, Revised Code, and to adopt rules to carry out Chapter 4928, Revised Code. Section 4928.07, Revised Code, pertains to pricing of competitive retail electric services and billing requirements, and Section 4928.08, Revised Code, requires CRES suppliers to obtain certification and vests suspension and rescission authority in the Commission if a CRES supplier fails to comply with certification standards or has engaged in anticompetitive or unfair, deceptive, or unconscionable acts or practices in the state. Furthermore, Section 4928.10, Revised Code, directs the Commission to adopt rules that set forth the minimum service

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<sup>6</sup> See, e.g., Rules 4901:1-21-12 and 4901:1-21-18, O.A.C.

<sup>7</sup> See 4928.05(A)(1), Revised Code (" . . . 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 . . . except sections . . . and **except as otherwise provided in this chapter**") (emphasis added). See Page 3 (supra) for full text of pertinent statutory passage.

requirements for CRES providers, including, but not limited to, contract disclosure, billing practices, marketing practices, minimum service quality standards, and customer information requirements.

As Section 4928.05(A)(1), Revised Code, indicates, issues that may arise under Chapter 4928, Revised Code, and, by extension, Chapters 4901:1-21 and 4901:1-24, O.A.C., continue to be subject to “supervision and regulation” by the Commission. Thus, FES’ assertion that the Commission does not have jurisdiction over the issues implicated herein is meritless.

FES cites numerous cases in support of its contention that the Commission does not have jurisdiction over the Complaint. However, the cases upon which FES depends are largely distinguishable from the instant matter. First, FES cites the Commission’s decision in the AEP Ohio Sporn Unit 5 Shutdown proceeding<sup>8</sup> (Sporn Case) as evidence that the Commission has “previously recognized the limits of its jurisdiction in similar situations.” Contrary to FES’ assertion, however, the situation faced by the parties in the instant proceeding is in no way similar to the situation at issue in the Sporn Case. 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>9</sup> In contrast, as specifically recognized in the language FES cited from the Sporn Case, “there are exceptions in Section 4928.05(A)(1), Revised Code, that permit Commission regulation of competitive services in some circumstances.”<sup>10</sup> Those exceptions

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<sup>8</sup> See *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Finding and Order at 16-17 (January 11, 2012).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*; see also Motion to Dismiss at 6.

include scenarios, like those asserted in the Complaint, arising under Chapter 4928, Revised Code, and, by extension, Chapters 4901:1-21 and 4901:1-24, O.A.C.

FES further cites a number of cases in support of the proposition that “Ohio courts have long acknowledged their authority over breach of contract claims.”<sup>11</sup> While this proposition may be true, the allegations at issue in this proceeding are not strictly contract claims. As discussed previously, the allegations and any outcome in this matter hinge upon a determination of whether certain actions taken by FES are lawful under the Commission’s regulatory scheme. Specifically, the counts of the Complaint either expressly or implicitly require a determination of whether FES’ actions comply with the requirements of the Ohio Administrative Code, including, but not limited to, the following: Rule 4901:1-21-02, O.A.C. (stating that the rules of Chapter 4901:1-21, O.A.C., are intended to provide consumers with sufficient information to make informed decisions about CRES and protect consumers against deceptive, unfair, and unconscionable acts and practices in the marketing, solicitation, and sale of CRES and in the administration of any contract for that service); Rule 4901:1-21-03, O.A.C. (stating that CRES providers shall not engage in unfair, misleading, deceptive, or unconscionable acts or practices related to, without limitation, the marketing, solicitation, or sale of a CRES, the administration of contracts for CRES, and the provision of CRES, including interactions with consumers); Rule 4901:1-21-05, O.A.C. (providing minimum requirements regarding marketing and solicitation of a CRES); Rule 4901:1-21-11, O.A.C. (setting forth minimum compliance thresholds for contract administration by CRES providers); and Rule 4901:1-21-15 (setting forth possible consequences to which CRES providers who have not complied with Commission rules or orders may be subject). Given the numerous Commission regulations implicated by the allegations of the

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<sup>11</sup> Motion to Dismiss at 6, citing *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), *McComb v. Suburban Natural Gas Co.*, 85 Ohio App.3d 397 (1993); see also, Motion to Dismiss at 7, citing *New Bremen v. Pub Util. Comm.*, 103 Ohio St. 23 (1971).

Complaint, and the necessity for the Commission to determine whether FES' actions comply with these regulations, it is clear that the issues arising from the complaint are not solely issues of contract interpretation.

Further, FES asserts that "artful drafting does not create [Commission] jurisdiction"<sup>12</sup> over the Complaint. As noted by the Supreme Court of Ohio in *Corrigan v. Illuminating Company*, however, casting the allegations in the Complaint, as FES has attempted to do in its Motion to Dismiss, "to sound in tort or contract is not sufficient to confer jurisdiction upon a trial court when the basic claim is one that the commission has exclusive jurisdiction to resolve."<sup>13</sup> Thus, FES' attempt to oversimplify the issues in the complaint in order to cast the matter as a mere issue of contractual interpretation does not divest the Commission of its jurisdiction. As further noted in *Corrigan*, "[w]hen an issue raised in a complaint requires that statutes and/or regulations administered and enforced by PUCO be considered, the issue is not pure contract and is within the exclusive jurisdiction of PUCO."<sup>14</sup> This authority is directly applicable to the issues raised in the matter under consideration, which also require, as discussed above, that statutes and regulations administered and enforced by the Commission be considered. Therefore, as determined in *Corrigan*, the issues raised in the Complaint and under consideration in this proceeding are within the exclusive jurisdiction of the Commission.

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<sup>12</sup> Motion to Dismiss at 7.

<sup>13</sup> See *Corrigan v. Illuminating Company* (2009), 122 Ohio St.3d 265, 267, 910 N.E.2d 1009 (internal citations omitted).

<sup>14</sup> Id., citing *DeLost v. FirstEnergy Corp.*, 7th Dist. No. 07 MA 194, 2008-Ohio-3086, and subsequent agreement at 268 ("We agree with the *DeLost* court that this type of case falls within the exclusive jurisdiction of PUCO").

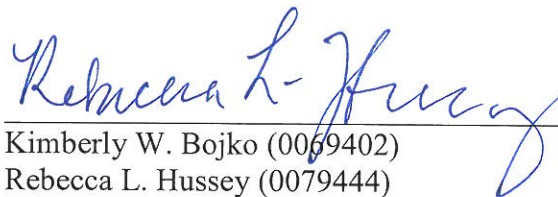


### III. Conclusion

As explained above, the issues presented in Power4Schools' Complaint require the Commission to determine whether FES' assessment of the RTO Expense Surcharge on customers' bills was permissible under its regulations and is not, as FES represents, solely an issue of contract interpretation. Because the issues raised in the Complaint require statutes and/or regulations administered and enforced by the Commission to be considered, they are not purely contractual, and, therefore, are within the exclusive jurisdiction of the Commission.

Because the Commission's expertise is necessary for the proper resolution of this matter, FES' Motion to Dismiss is without merit. Accordingly, the Commission should deny FES' Motion to Dismiss.

Respectfully submitted,



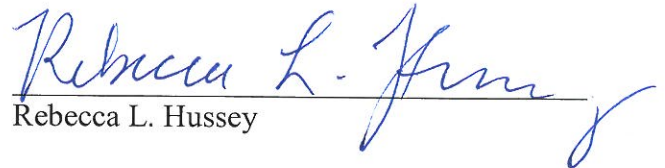
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## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on August 19, 2014.

  
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