BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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.	)	

POWER4SCHOOLS' MEMORANDUM CONTRA FIRSTENERGY SOLUTIONS' MOTION TO DISMISS

I. INTRODUCTION

By motion filed August 4, 2014, FirstEnergy Solutions Corp. ("FES") seeks dismissal of the complaint filed in this proceeding on July 3, 2014 by Ohio Schools Council, Ohio School Boards Association, Ohio Association of School Business Officials, and Buckeye Association of School Administrators, dba Power4Schools ("P4S"). FES argues that the complaint involves matters of pricing and contract interpretation that are beyond this Commission's subject matter jurisdiction and are more appropriately reserved for Ohio's courts. FES is simply wrong.

The Ohio Supreme Court repeatedly has stated that the Commission is divested of jurisdiction only over matters of "pure" contract, and fashioned a two-part test to guide its deliberation. The test considers (1) whether the act complained of constitutes a practice normally authorized (*i.e.*, authorized under R.C. Title 49 and the Commission's rules), and (2) whether the Commission's expertise is required to resolve the issue in dispute. *Allstate Insur.*

Co. v. Illum. Co., 119 Ohio St.3d 301, 2008-Ohio-3917 ("*Allstate*"). FES, in its motion to dismiss, fails to mention or address this current legal test created by the Ohio Supreme Court. However, P4S's analysis in this memorandum contra clearly shows that the complaint satisfies *Allstate's* two prongs.

Significantly, a recent interim order of the Pennsylvania Public Utility Commission used the same analysis in denying a motion to dismiss a sister complaint filed against FES, which involved the same conduct as alleged in this proceeding. See *FES Industrial & Commercial Customer Coalition v. FirstEnergy Solutions Corporation*, C-2014-2425989 (First Interim Order, August 6, 2014 ("*Interim Order*") (Attached hereto as Attachment A). FES sought dismissal, as in this case, alleging that the issues involved matters of contract over which the Pennsylvania Commission lacked subject matter jurisdiction. The *Interim Order* denied FES's motion, finding that the issues presented in the case (1) involved allegations that FES had violated the rules and statutes governing the provision of its service and (2) that the Pennsylvania Commission was uniquely qualified to resolve the issues. *Interim Order*, at 8-9.

P4S urges the Commission, under the *Allstate* test and the sound reasoning of the *Interim Order* in the Pennsylvania proceeding, to deny FES's motion to dismiss this complaint.

II. THE STATUTORY BASIS FOR THE COMMISSION'S JURISDICTION

The statutory basis for the Commission's subject matter jurisdiction over CRES providers is straightforward. R.C. § 4928.05(A)(1) provides, in part:

> 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 ; *** **and**

> **except as otherwise provided in this chapter.** [Emphasis supplied.]

R.C. § 4928.16(A)(1) provides the Commission with jurisdiction over the services provided by a CRES provider, and gives the Commission jurisdiction to consider whether the provision of fixed-rate or discounted generation service violated its regulations, including Ohio Admin. Code § 4901:1-21-12(B)(7)(a) and (b).[1]

Moreover, R.C. § 4928.16(A)(2) provides the Commission with jurisdiction over a CRES provider's violation of any provision of R.C. §§ 4928.01 to 4928.10, or any rule or order issued under those sections. R.C. § 4928.10 prohibits a CRES provider from engaging in unfair, deceptive, and unconscionable acts and practices, as do a litany of related rules, including Ohio Admin. Code §§ 4901:1-21-03; 4901:1-21-05(A)(1) and (2); 4901:1-21-05(C); 4901:1-21-11(A); and 4901:1-21-12(B)(7)(a) and (b). Thus, the Commission has jurisdiction to determine whether FES's conduct violated these provisions.

Finally, Ohio Admin. Code § 4901:1-21-02(E) grants the Commission the authority to review CRES contracts. If their provisions violate the Commission's rules, it has authority to void the offensive provisions (*Id.*) and provide relief in the form of restitution. R.C. § 4928.16(B)(1).

A. FES's Pricing Claim

In its motion to dismiss, FES vaguely[2] claims that R.C. § 4928.05(A)(1) divests the Commission of jurisdiction over a CRES provider's pricing. FES's argument ignores that, while R.C. § 4928.05(A)(1) exempts CRES providers from many provisions of R.C. Title 49, including

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[1] Through typographical error, P4S's complaint filed July 3, 2014, inadvertently refers to this provision as R.C. 4901:1-21-12(A)(7)(a) and (b), instead of R.C. 4901:1-21-12(B)(7)(a) and (b).

[2] P4S assumes that FES is saving the substance of its arguments for its reply to this memorandum contra, effectively denying P4S the opportunity to rebut FES's allegations. P4S reserves the right to move to strike inappropriate arguments made on reply.

the pricing provisions of R.C. Chapter 4909, that section provides an important exception – that CRES providers are subject to regulation as provided in R.C. Chapter 4928. As stated above, R.C. §§ 4928.16(A)(1) and (2) provide the Commission with jurisdiction over FES's services and violations of various statutes and regulations, including those that govern specific pricing information that CRES providers are required to provide to their customers. See, *e.g.,* Ohio Admin. Code § 4901:1-21-12(B)(7)(a) and (b). The purpose of such provisions is to enforce R.C. § 4928.10 and prohibit CRES providers engaging in unfair, misleading and unconscionable acts and practices.

P4S is not asking the Commission to regulate FES's pricing, but to enforce FES's violation of the Commission's rules.

B. FES's Contract Claim

FES broadly asserts that P4S members' complaint actually involves a "contract" claim over which only Ohio's courts have jurisdiction. However, the case law is clear that the courts have jurisdiction only over "pure" contract claims, defined as those that do not require consideration of R.C. Title 49 or commission regulations. See *DiFranco v. FirstEnergy Corp.*, 134 Ohio St.3d 144, 2012-Ohio-5445, ¶ 20 ("DiFranco"), citing *State ex rel. Illum. Co. v. Cuyahoga Cty. Court of Common Pleas*, 97 Ohio St.3d 69, 2002 Ohio 5312, ¶32 ("*CEI*"). Although FES cites a series of vintage Ohio Supreme Court cases that struggle with whether a claim is one of "pure" contract, it ignores the current two-part test the Ohio Supreme Court has more recently formulated to address the question. The test asks: (1) whether the act complained of constitutes a practice normally authorized, and (2) whether the Commission's expertise is required to resolve the issue in dispute. *Allstate, supra.*

1. Whether the Act Complained of is Authorized

The first prong of the *Allstate* test incorporates the *CEI* standard and considers whether the utility or, in this case CRES provider, performs the underlying act complained of under authority of R.C. Title 49 and the regulations promulgated thereunder. See, *e.g.*, *DiFranco* (discounted rates under R.C. § 4905.31); *State ex rel. Duke Energy Ohio v. Hamilton Cty. Court of Common Pleas*, 126 Ohio St.3d 41, 2010-Ohio-2450 (termination of service under R.C. § 4933.122); *Corrigan v. Illum. Co.*, 122 Ohio St.3d 265, 2009-Ohio-2524 (vegetation management under Ohio Admin. Code § 4901:1-10-27(E)(2)).

The underlying act complained of in this proceeding is the manner in which FES provided fixed-rate or discounted service to P4S members. FES, clearly, is authorized to provide CRES pursuant to R.C. Chapter 4928 – but that authority is subject to the extensive regulations the Commission has promulgated to ensure that customers are properly informed as to the pricing of those services. For example, for fixed-rate services, a CRES contract must include the cost/kWh for generation and the "amount" of any other charge (Ohio Admin. Code § 4901:1-21-12(B)(7)(a)); and for discounted service, a CRES contract must include an explanation of the discount and the "amount" of any other charges (Ohio Admin. Code § 4901:1-21-12(B)(7)(b)). The complaint properly alleges that FES violated the regulations under which it was authorized to provide these services. Because FES's actions giving rise to this complaint clearly were performed pursuant to the authority of Title 49 and the rules promulgated thereunder, the first prong of the *Allstate* test is met.

2. Whether the Commission's Expertise is Required

The thrust of P4S members' complaint is that FES entered into contracts with them that had fixed or discounted rates, and no other recurring or non-recurring charges were disclosed.

Nevertheless, relying on the contracts' "Pass-Through Clause," FES imposed a new "RTO Surcharge" for alleged "additional" ancillary costs it incurred from the PJM Interconnection ("PJM") for January 2014. FES knew at the time it entered into contracts with P4S members that the costs of the ancillary services varied monthly, and during the term of contacts, FES never varied its charges to customers when PJM's charges increased – until it arbitrarily did so for January 2014. At issue is whether FES violated the Commission's rules by imposing additional charges on P4S members' who had entered into fixed or discounted rate contracts. The Commission has the authority to review a CRES contract to determine if the pass-through clause is consistent with its rules (Ohio Admin. Code § 4901:1-21-02(E)), and whether FES's imposition of the additional charges was unfair, deceptive and unconscionable under R.C. § 4928.10 and related rules. A part of that determination considers whether the fluctuating ancillary costs at issue already were included in the fixed or discounted rates. To resolve this complaint, the trier of this case will be required to interpret and apply:

- the Commission's own rules,
- FirstEnergy Corp.'s operating companies' tariffs,
- AEP Ohio's operating companies' tariffs,
- FirstEnergy Corp.'s operating companies' electric security plans and standard service offer supply agreements,
- AEP Ohio's operating companies' electric security plans,
- PJM's rules, regulations, and tariffs,
- The consequences of FES's unplanned outages at three of its generating units during this same time period in January 2014.

This Commission is uniquely qualified to consider these matters. It was created to provide its expertise on complex regulatory issues involving the electric and other utility industries. Indeed, this prong of the *Allstate* test recognizes the Ohio Supreme Court's reliance

on that expertise, and the Court's oft-stated deference to the Commission on issues of fact. See, *e.g., FirstEnergy Corp. v. Pub. Util. Comm.* 96 Ohio St. 3d 371; 2002-Ohio-4847. The resolution of this complaint clearly requires the Commission's expertise; thus, the second prong of *Allstate* is met.

C. FES's Allegations that P4S "Artfully" Drafted the Complaint

FES also argues that P4S is attempting to "game the system" by "artfully" drafting the complaint to allege violations of the Revised Code and Ohio Administrative Code, when actually the complaint involves a contractual issue for the courts. The above analysis under the *Allstate* test, as well as the *Interim Order* in the sister Pennsylvania proceeding, shows that FES's argument lacks merit.

Considering that the *Allstate* test considers the true substance of the complaint to determine if it is one of "pure" contract (*i.e.*, those that do not require consideration of R.C. Title 49 or commission regulations), FES improperly uses this argument to support its position on the facts and merits of this case. As the Commission is well aware, a motion to dismiss a complaint under R.C. § 4905.26 for lack of subject matter jurisdiction is governed by the same standard as in civil cases. The complaint may be dismissed only if it appears "beyond doubt" that the complainant can prove no set of facts entitling relief. In making that determination, all material factual allegations of the complaint must be taken as true. See, *e.g., Illum. Co. v. Pub. Util. Comm.* (1996), 76 Ohio St.3d 521, 668 N.E.2d 889. Accordingly, P4S respectfully requests the Commission, when ruling on this motion to dismiss, to disregard P4S's improper attempts to inject its alleged facts and merit arguments at this stage of the proceedings.

III. CONCLUSION

FES's conduct which gives rise to this complaint is governed by R.C. Title 49 and related rules and the Commission's expertise is needed to resolve the complex issues presented. Accordingly, P4S respectfully request this Commission, under the authority of *Allstate* and the guidance of the *Interim Order* in the Pennsylvania proceeding, to deny FES's motion to dismiss this complaint.

Respectfully submitted,

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ATTACHMENT A

FES Industrial & Commercial Customer Coalition v. FirstEnergy Solutions Corporation,

C-2014-2425989 (First Interim Order, August 6, 2014)

Pennsylvania Public Utility Commission

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

FES Industrial & Commercial Customer Coalition	:	
	:	
v.	:	C-2014-2425989
	:	
FirstEnergy Solutions Corporation	:	

FIRST INTERIM ORDER

Disposition of Preliminary Objections

On June 9, 2014, FES Industrial & Commercial Customer Coalition (FES ICCC or Complainant) filed a formal complaint against FirstEnergy Solutions Corporation (FES). FES ICCC seeks a stay of FES' proposed action to implement a "pass-through event" clause in fixed-price agreements due to alleged "ancillary costs" incurred in January 2014. Furthermore, FES ICCC seeks a directive from the Commission to FES that FES is not permitted to implement such charges, and to review the appropriateness of FES' licensure as an electric generation supplier in Pennsylvania.

On June 17, 2014, the Office of Consumer Advocate (OCA) filed a Notice of Intervention and Public Statement. OCA agrees with FES ICCC that the Commission needs to issue a determination to provide guidance to the parties, to consumers and to all electric generation suppliers concerning whether an electric generation supplier has the right to impose a RTO Expense Surcharge on industrial and/or commercial ratepayers but not on residential ratepayers. OCA seeks to ensure that consumers' interests are represented in this proceeding.

On July 1, 2014, FES filed an Answer and New Matter, and also filed Preliminary Objections. In its Answer, FES admits it is imposing a surcharge on industrial and commercial ratepayers but asserts the charges were contemplated in the fixed-price contracts. FES asserts in New Matter the Commission lacks "subject matter jurisdiction to decide disputes involving

private contractual matters between electric generation suppliers (EGSs) and their customers." FES asks the Commission to dismiss the formal complaint filed by FES ICCC.

On July 11, 2014, FES ICCC filed an Answer to FES' Preliminary Objections. FES ICCC asserts FES does meet the definition of a "public utility" and the Commission has subject matter jurisdiction over these contracts between FES and the small business customers. FES ICCC requests the Commission exercise its authority to oversee electric generation suppliers in order to determine if an electric generation supplier (in this case, FES) engaged in deceptive and potentially fraudulent billing practices.

Also on July 11, 2014, OCA filed an Answer to the Preliminary Objections of FES, which OCA asserts the integrity of the retail electric market in Pennsylvania hinges on the ability of the Commission to not only license and authorize a particular electric generation supplier to enter into the retail electric market but also has the authority to ensure that the same electric generation supplier provides, *inter alia*, adequate and accurate information to customers in an understandable format that enables consumer to compare prices and services. OCA points to a recent Commission proceeding[1] and points out FES participated as a party in that proceeding and did not dispute the Commission's jurisdiction. OCA states the matter concerns the billing practices of FES and whether the Commission should permit FES to pass through to fixed-price customers these additional fees billed to FES by PJM Interconnection for ancillary services. OSBA asserts the Commission's jurisdiction is pursuant to 66 Pa.C.S.A. § 2809(b).[2]

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[1] See *Use of Fixed Price Labels for Products with a Pass-Through Clause,* Docket No. M-2013-2362961 (Order entered November 14, 2013).

[2] "An application for an electric generation supplier license must be made to the commission in writing, be verified by oath or affirmation and be in such form and contain such information as the commission may in its regulations require. A license shall be issued to any qualified applicant, authorizing the whole or any part of the service covered by the application, if it is found that the applicant is fit, willing and able to perform properly the service proposed and to conform to the provisions of this title and the lawful orders and regulations of the commission under this title, including the commission's regulations regarding standards and billing practices, and that the proposed service, to the extent authorized by the license, will be consistent with the public interest and the policy declared in this chapter; otherwise, such application shall be denied." 66 Pa.C.S.A. § 2809(b).

On July 16, 2014, the Office of Administrative Law Judge assigned the undersigned Administrative Law Judge with responsibility to resolve all issues arising during the preliminary phase of the proceeding.

Discussion

FES objects to the formal complaint filed by FES ICCC, and asks the Commission to dismiss the formal complaint for lack of subject matter jurisdiction. Respondent is a licensed electric generation supplier in Pennsylvania and serves, *inter alia*, industrial and commercial customers. FES alleges in its Preliminary Objections the Commission lacks subject matter jurisdiction to decide the issue raised in the Petition because FES is not a "public utility" and the declaration sought by FES ICCC involves an interpretation of terms in FES' fixed price contracts with its industrial and commercial customers, and does not involve any provision of the Public Utility Code or a Commission regulation.

Subject Matter Jurisdiction

FES avers it is an EGS and as such is not regulated as a public utility function, pursuant to provisions in the Electricity Generation Customer Choice and Competition Act (Competition Act).[3] FES asserts that, because it is not a public utility, its contracts with small business customers are private contracts over which the Commission lacks authority. FES contends the Commission lacks the authority to decide private contractual disputes between an EGS and its customers, or to interpret the terms and conditions of private contracts, because that authority was not given to the Commission by the Legislature, and the Commission can only exercise the powers specifically conferred upon it by statute.[4]

As authority for its position, FES cites to Allport Water Authority v. Winburne Water Co., 258 Pa. Super. 555, 393 A.2d 673 (Pa. Super. 1978 and Adams et al. v. Pa. Pub. Util.

[3] 66 Pa.C.S.A. § 2802(14).

[4] Small v. Horn, 554 Pa. 600, 772 A.2d 664 (1998); Grimaud v. Pa. Insurance Dept., 995 A.2d 391 (Pa. Cmwlth. 2010); Feingold v. Bell, 477 Pa. 1, 383 A.2d 791 (1977).

Comm'n, 819 A.2d 631 (Pa. Cmwlth. 2003) as authority for its objection. FES acknowledges the Commission consistently rules that 66 Pa.C.S.A. § 2809(e) gives the Commission the authority to impose requirements needed to maintain quality of service including assuring that billing regulations are followed. Even so, FES cites to six cases as authority for its assertion the Commission lacks the authority to decide disputes arising from contracts between an EGS and non-jurisdictional third parties: Bracken v. Champion Energy Services, LLC, Docket No. C-2011-2256514 (Opinion and Order entered June 12, 2012)[5]; Bosche v. Direct Energy Services, LLC, Docket No. C-2013-2361740 (Initial Decision dated November 21, 2013)[6]; Perrige v. Metropolitan Edison Co., Docket No. C-00004110 (Order entered July 3, 2003)[7]; Fiorillo v. PECO Energy Co., Docket No. C-00971088 (Order entered September 15, 1999); and Petition of PECO Energy for Approval of its Default Service Plan, Docket No. P-2012-2283641 (Order entered March 12, 2014)[8]. Furthermore, FES asserts the Commission previously acknowledged its limited authority to regulate the quality of service from an EGS in Bracken v. Champion Energy Services, LLC, supra, and Bosche v. Direct Energy Services, LLC, supra.

In the alternative, FES argues the Commission should stay proceedings before the Commission on this issue until such times as a civil court of competent jurisdiction can render a decision as to whether FES violated the terms of the private contracts. FES contends civil courts have primary jurisdiction over the Commission because the issue involves complex subjection matter which is beyond the knowledge of the Commission[9], namely whether FES engaged in deceptive billing practices.

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[5] In its Opinion and Order, the Commission found it had subject matter jurisdiction over whether an EGS complied with 52 Pa.Code § 56.14 concerning how the EGS handled a make-up bill.

[6] In an Initial Decision, the Administrative Law Judge found the Commission had jurisdiction over whether an EGS complied with various provisions of Chapter 54 at Title 52 of the Pennsylvania Code concerning billing requirements including what rate is charged and the specific terms of service including whether the rate can vary.

[7] In its Opinion and Order, the Commission found it had no subject matter jurisdiction over real property issues involving an electric distribution company.

[8] Proceeding initiated by petitions seeking reconsideration, wherein the Commission ruled it found no statutory authority authorizing it to set a limit on what price an EGS could charge for the commodity, and the Commission also saw no statutory authority to prohibit an EGS from charging early termination or cancellation fees.

[9] See In re Insurance Stacking Litigation, 754 A.2d 701 (Pa. Super. 2002); Pettko v. Pa. American Water Co., 39 A.3d 473 (Pa. Cmwlth. 2012), allocator denied, 51 A.3d 839 (Pa. 2012).

FES ICCC answers the Preliminary Objections of FES and asks the Commission to deny the Preliminary Objections. FES ICCC asserts the Commission should interpret the meaning of the pass-through clause in the fixed price contracts and points out the Commission devoted an entire proceeding to examining and understanding the terms and conditions contained in fixed price contracts used by EGSs.[10] However, FES ICCC denies private contracts (as referenced by FES) are beyond the Commission's jurisdiction. FES ICCC argues this proceeding does not involve a private contract between an EGS and its customers, but instead concerns the billing practices of an EGS and if an EGS is permitted to pass through to fixed-price customers the additional fees billed to the EGS by PJM for ancillary services. FES ICCC references the Commission's recent decision to exercise jurisdiction over the billing practice of EGSs in a proceeding in which FES was a party and did not dispute the authority of the Commission to resolve a controversy surrounding pass-through clauses in fixed price contracts.

The Commission's Rules of Administrative Practice and Procedure permit the filing of Preliminary Motions. 52 Pa. Code § 5.101 and § 5.103. Commission preliminary motion practice is similar to Pennsylvania civil practice respecting the filing of preliminary objections.[11] Commission regulations permit the filing of a preliminary motion questioning the jurisdiction of the Commission. 52 Pa. Code § 5.101(a)(1). In ruling on a motion to dismiss, the Commission must assume, for decisional purposes only, that the factual allegations of the complaint are true.[12] The motion may be granted only if the moving party prevails as a matter of law.[13]

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[10] See *Use of Fixed Price Labels for Products With a Pass-Through Clause*, Docket No. M-2013-2362961 (Order entered November 14, 2013).

[11] Equitable Small Transportation Interveners v. Equitable Gas Company, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (1994).

[12] County of Allegheny v. Commonwealth of Pa., 490 A.2d 402 (1985); Commonwealth of Pa. v. The Bell Telephone Co. of Pa., 551 A.2d 602 (Pa. Cmwlth. 1988).

[13] Roc v. Flaherty, 527 A.2d 211 (Pa. Cmwlth. 1985).

A preliminary objection seeking dismissal of a pleading will be granted only where relief is clearly warranted and free from doubt.[14] FES, as the moving party, may not rely on its own factual assertions, but must accept all well-pleaded, material facts of FES ICCC, as well as every inference fairly deducible from those facts.[15] Preliminary objections may be granted only if FES prevails as a matter of law.[16] Any doubts should be resolved in favor of FES ICCC, as the non-moving party.[17]

Pursuant to Section 501 of the Code, 66 Pa.C.S.A. § 501, the Commission must "enforce, execute and carry out, by its regulations, orders or otherwise" all the provisions of the Code. Section 701 of the Code, 66 Pa.C.S.A. § 701, allows any person, having an interest in the subject matter, to file a formal complaint in writing with the Commission setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the Commission has jurisdiction to administer.[18]

Pursuant to 66 Pa.C.S.A. § 2804(7), the Commission "shall require that restructuring of the electric utility industry be implemented in a manner that does not unreasonably discriminate against one customer class to the benefit of another."

The Legislature directed, under "Requirements for electric generation suppliers,"[19] that electricity suppliers must have a license, which is obtained by completing an application process with the Commission. The Legislature directed the Commission to issue a license to "any qualified applicant, authorizing the whole or any part of the service covered by the application, if it is found that the applicant is fit, willing and able to perform properly the

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[14] See Interstate Traveler Services, Inc. v. Pa. Dep't of Environmental Resources, 486 Pa. 536, 406 A.2d 1020 (1979).

[15] See County of Allegheny v. Commonwealth of Pa., 507 Pa. 360, 490 A.2d 402 (1985).

[16] See Rok v. Flaherty, 527 A.2d 211 (Pa. Cmwlth. 1987).

[17] See Dept. of Auditor General, et al. v. State Employees' Retirement System, *et al.*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003) (citing Boyd v. Ward, 802 A.2d 705 (Pa. Cmwlth. 2002)).

[18] *See also*, 52 Pa.Code § 5.21(a).

[19] See 66 Pa.C.S.A. § 2809.

service proposed and to conform to the provisions of [66 Pa.C.S.A. § 2801, et seq.], including the commission's regulations regarding standards and billing practices, and that the proposed service, to the extent authorized by the license, will be consistent with the public interest and the policy declared in this chapter;...."[20]

In addition, the Legislature specified in 66 Pa.C.S.A. § 2809(e) that the Commission "may forbear from applying requirements of [66 Pa.C.S.A. § 2801, et seq.] which it determines are unnecessary due to competition among electric generation suppliers. In regulating the service of electric generation suppliers, the commission shall impose requirements necessary to ensure that the present quality of service provided by electric utilities does not deteriorate, including assuring that adequate reserve margins of electric supply are maintained and assuring that 52 Pa.Code Chapter 56 (relating to standards and billing practices for residential utility service) are maintained."

Furthermore, in the Commission's proceeding concerning *Use of Fixed Price Labels for Products With a Pass-Through Clause*, Docket No. M-2013-2362961 (Order entered November 14, 2013), the Commission discussed the problem for customers when a supplier includes a "pass-through" clause in a supply contract identified as a "fixed price contract." In that context, the Commission made the following statements:

> Pursuant to Section 2807(d)(2) of the Public Utility Code (Code), 66 Pa. C.S. § 2807(d)(2), the Commission shall establish regulations to require each EDC, EGS, marketer, aggregator and broker to provide adequate and accurate customer information to enable customers to make informed choices regarding the purchase of all electricity services offered by that provider. Information shall be provided to consumers in an understandable format that enables consumers to compare prices and services on a uniform basis. The customer information regulations that apply to the electric industry and residential customers (some sections are also applicable to small business customers) are found in Chapter 54 of Title 52 of the Commission's regulations. Section 54.1(a) explains that the purpose of the subchapter is "to require that electricity providers enable customers to make informed choices regarding the purchase of electricity services offered by providing adequate and accurate customer information." Specifically, it provides that "[i]nformation shall be provided to customers in an understandable format that enables customers to compare prices and services on a uniform basis." 52 Pa. Code § 54.1(a).

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[20] See 66 Pa.C.S.A. § 2809(b).

Section 54.5 addresses what information an EGS is expected to include in the disclosure statements that are provided to new residential and small business customers. This includes pricing information. When disclosing the price and other terms in the disclosure, the EGS should refer to Section 54.3. This regulation requires EGSs to use terms as defined in the Commission's "Electric Competition Dictionary". The relevant definitions for the purposes of our discussion are as follows:

Fixed Price: A fixed electricity rate will remain the same, for a set period of time.
Variable Price: A variable electricity rate can change, by the hour, day, month, etc. according to the terms and conditions in the supplier's disclosure statement.

EGS offers describing the product as a "fixed price" product but including provisions allowing for price changes do not clearly fall within the current definition of "fixed price" since the prices are subject to change during the term of the contract. This raises many different concerns from both legal and policy perspectives.

Conclusion

Upon review of the applicable statutes and regulations, and in light of the Commission's Final Order in *Use of Fixed Price Labels for Products With a Pass-Through Clause*, Docket No. M-2013-2362961 (Order entered November 14, 2013), FES's Preliminary Objections must be denied on the grounds alleged – lack of jurisdiction over contracts and lack of primary jurisdiction. As a matter of law, the formal complaint does not fail on its face solely on the argument the Commission lacks the jurisdiction to consider a contract provision for how an EGS bills a ratepayer; and when an EGS can vary what it bills a ratepayer. The case authority cited by FES does not hold, as FES asserted, that the Commission has conceded it lacks subject matter jurisdiction over the terms of a contract with industrial and commercial ratepayers. Further, the Commission did not concede it lacks authority to review how ratepayers are billed. To the contrary, the Commission has held consistently that its subject matter jurisdiction includes, *inter alia*, the authority to impose reasonable and necessary requirements upon an EGS if needed to maintain the quality of service experienced with the EGS as co-equal with the quality of service experienced with the EDS.

At its core, the formal complaint concerns whether a supplier may apply an allegedly arbitrary variable charge to a fixed price supply contract for industrial and commercial

ratepayers. This issue is a complicated issue that the Commission is uniquely qualified to accurately ascertain which path is consistent with the Commission's statutes and regulations. Complainant should be permitted to make the argument, through the pendency of this proceeding, that FES violated the Commission's regulatory and statutory provisions that suppliers, *inter alia*, must provide adequate and accurate customer information to enable customers, including industrial and commercial customers, to make informed choices regarding the purchase of all electricity services and to have that information provided in an understandable format that enables the ratepayer to compare prices and services.

Therefore, the undersigned Administrative Law Judge enters the following Order and makes the following provisions:

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties to this dispute and over the subject matter of this dispute to the extent the formal complaint involves allegations of a failure by Respondent to comply with the Commission's regulations and statutes.

2. The Petition raises claims that, if proven, might show Respondent failed in some way to provide adequate and accurate customer information to enable industrial and commercial customers to make informed choices regarding the purchase of all electricity services and to have that information provided in an understandable format.

ORDER

THEREFORE,

IT IS ORDERED:

1. The Preliminary Objections filed by FirstEnergy Solutions Corporation at Docket No. C-2014-2425989 are denied.

2. The Office of Administrative Law Judge Scheduler will schedule a telephonic Prehearing Conference, consistent with this Interim Order, as soon as practicable.

Date: August 6, 2014

Katrina L. Dunderdale
Administrative Law Judge

C-2014-2425989 - FES INDUSTRIAL & COMMERCIAL CUSTOMER COALITION v. FIRSTENERGY SOLUTIONS CORP.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of a copy of *Power4Schools Memorandum Contra FirstEnergy Solutions' Motion to Dismiss* was served upon the following parties of record by e-mail and/or regular U.S. mail, this 19th day of August 2014.

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