

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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)	Case No. 14-1610-EL-CSS
Corporation, and 3M Company,)	
)	
Complainants,)	
)	
v.)	
)	
FirstEnergy Solutions Corp.,)	
)	
Respondent.)	
)	

**COMPLAINANTS' MEMORANDUM CONTRA
FIRSTENERGY SOLUTIONS' MOTION TO DISMISS**

I. Introduction and Procedural History

On September 12, 2014, 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 (Complaint) with the Public Utilities Commission of Ohio (Commission) against FirstEnergy Solutions Corp. (FES), asserting, inter alia, that FES

improperly assessed, in Complainants' June 2014 and/or July 2014 electric utility bills, additional charges for ancillary services based upon usage during the month of January 2014.

Prior to formally responding to the Complaint, on September 19, 2014, FES filed a Motion to Dismiss the Complaint and Memorandum in Support (Motion to Dismiss), arguing generally that the basis of the Complaint is an issue of contract interpretation over which the Commission does not have jurisdiction.¹ Subsequently, FES filed its Answer on October 6, 2014.

Complainants hereby file their Memorandum Contra FES' Motion to Dismiss (Memorandum Contra), disputing FES' narrow characterization of the issues raised in the Complaint and its argument that the Commission has no jurisdiction over the instant matter. In connection with their arguments, Complainants respectfully request that the Commission deny FES' Motion to Dismiss, find that reasonable grounds for complaint exist, and fix a time for hearing pursuant to Section 4905.26, Revised Code.

II. Argument

Despite FES' assertion that the question for consideration in this proceeding is strictly one of contract interpretation,² the facts and scenario for which Complainants request Commission resolution have 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 Complainants distorts and oversimplifies the numerous counts and allegations set forth in the Complaint and the issues at play therein, and should be denied by the Commission.

¹ Motion to Dismiss at 1.

² Id. at 3.

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.³

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.⁴ 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.”⁵

FES misconstrues the specifics of the Complaint in an effort to characterize Complainants’ 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 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

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

⁴ Motion to Dismiss at 5.

⁵ Id.

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 Complainants and FES.⁶ The Complaint directly alleges 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.⁷ 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 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 requirements for CRES providers, including, but not limited to, contract disclosure, billing practices, marketing practices, minimum service quality standards, and customer information

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

⁷ 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. Complainants assert, in good faith, violations of these provisions in the Complaint. The Commission has jurisdiction over matters arising under these rules.

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, and blatantly ignores the statutorily grounded jurisdiction that the Commission has over disputes such as those described in the Complaint. Additionally, Rule 4901:1-21-02(E), O.A.C., specifically grants the Commission jurisdiction over the provisions, terms, and conditions of CRES providers’ contracts and other documents describing service offerings for customers or potential customers in Ohio.

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 proceeding⁸ (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.⁹ In contrast, as specifically recognized in the language FES cited from the

⁸ 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).

⁹ Id.

Sporn Case, “there are exceptions in Section 4928.05(A)(1), Revised Code, that permit Commission regulation of competitive services in some circumstances.”¹⁰ Those exceptions 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.”¹¹ While Ohio courts have jurisdiction over basic breach of contract claims, the allegations at issue in this proceeding are not, as FES has attempted to cast them, 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); Rules

¹⁰ Id.; see also Motion to Dismiss at 6.

¹¹ 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).

4901:1-21-11 and 4901:1-21-02, 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 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. The Commission's jurisdiction over the instant matter is, therefore, proper.

Further, FES asserts that "artful drafting does not create [Commission] jurisdiction"¹² 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."¹³ 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.**"¹⁴ 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,

¹² Motion to Dismiss at 4, 7.

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

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

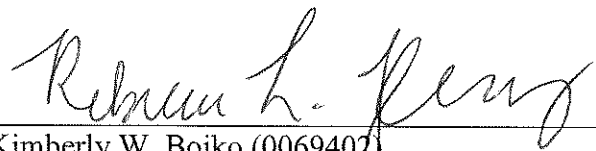
as determined in *Corrigan*, the issues raised in the Complaint and under consideration in this proceeding are within the exclusive jurisdiction of the Commission.

III. Conclusion

As explained above, the issues presented in the Complaint require the Commission to determine whether FES' assessment of the RTO Expense Surcharge on Complainants' 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,

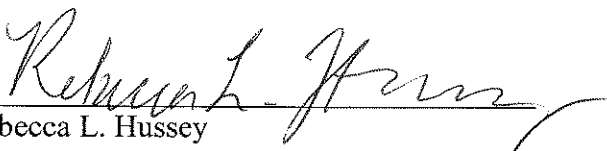


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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on October 6, 2014.


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Summary: Memorandum Contra FirstEnergy Solutions' Motion to Dismiss electronically filed by Ms. Rebecca L Hussey on behalf of Carbo Forge, Inc., et al.