

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Carbo Forge, Inc., <i>et al.</i>,)	
)	
Complainants,)	
)	
v.)	CASE NO. 14-1610-EL-CSS
)	
FirstEnergy Solutions Corp.)	
)	
Respondent.)	

**RESPONDENT FIRSTENERGY SOLUTIONS CORP.’S REPLY IN SUPPORT OF
MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

I. INTRODUCTION

Even when disputing FES’s Motion to Dismiss (the “Motion”), Complainants are unable to describe their claims without referencing the dispute over the pass-through clause which forms the heart of this case. That inability is the reason the Motion should be granted. Despite all the window dressing, this case is about whether certain ancillary services costs imposed by PJM on FES qualify as a Pass-Through Event under paragraph 31 of the parties’ contracts. That is a purely contractual question, over which Ohio’s courts have jurisdiction. The Commission has no jurisdiction over that question, and should accordingly dismiss the Complaint.

II. ARGUMENT

A. The Commission Does Not Have Statutory Jurisdiction Over CRES Charges.

Complainants were unable to provide any case law or Commission precedent suggesting that the Commission has jurisdiction over CRES charges. Instead, the Complainants rely solely

on R.C. § 4928.05(A)(1) to argue that the Commission has authority over CRES providers as provided in Chapter 4928.¹

Complainants' interpretation of the statute is incorrect. R.C. § 4928.05(A)(1) provides that:

“(1) 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.” (emphasis added)

This statute shows that the Commission's jurisdiction over CRES providers is limited. The Commission has no general jurisdiction over competitive retail electric service except for certain statutorily defined areas. Complainants attempt to use this limited statutory exception to provide the Commission with jurisdiction over any contract dispute since it would “effectuate the policy of the state delineated in Section 4928.02,” “pertains to pricing of competitive retail electric services,” or relates to “minimum service requirements for CRES providers.”² Under this reading of R.C. § 4928.05(A)(1), the Commission would have jurisdiction to regulate all aspects of competitive retail electric service, including the CRES providers' charges, because CRES charges would be encompassed by these overbroad general topics.

Accordingly, Complainants' misinterpretation of R.C. § 4928.05(A)(1) would result in the exception swallowing the rule. The “except as otherwise provided in this chapter” language

¹ See Memorandum In Opposition, p. 4 (relying on the phrase “except as otherwise provided in this chapter”).

² Memorandum In Opposition, p. 4.

in the statute does not give the Commission jurisdiction over standard contract disputes. Instead, this statutory exception provides the Commission with the authority to fulfill its statutory duties regarding things like real allegations of deceptive conduct. There is no justification for claiming that the “except as otherwise provided in this chapter” language gives the Commission authority over the competitive pricing that S.B. 3 was intended to create.

The statutory scheme is clear. Competitive retail electric service is not subject to supervision by the Commission outside of certain specifically defined areas. This conclusion is also supported by R.C. § 4928.03, which defines and guarantees customers access to competitive retail electric service.³ As CRES charges are not one of the specifically defined areas of retail electric service still subject to Commission jurisdiction, the Commission has no jurisdiction to regulate FES’s charges under its contracts with Complainants.

B. Complainants Have Failed To Cite Any Authority Suggesting The Commission Has Jurisdiction Over Their Claims.

In the Motion, FES pointed out that the Commission has previously recognized the limits of its jurisdiction in similar situations. In the AEP Ohio Sporn 5 retirement proceeding, the Commission relied upon O.R.C. §§ 4928.03 and 4928.05(A)(1) to hold that “retail electric generation service is a competitive retail electric service and, therefore, not subject to Commission regulation.”⁴ FES asks that the Commission follow this reasoned decision and find that it has no authority over retail electric generation service contract disputes.

³ R.C. § 4928.03 (“Beginning on the starting date of competitive retail electric service, retail electric generation, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers.”).

⁴ 2012 Ohio PUC LEXIS 36; Case No. 10-1454-EL-RDR, Opinion and Order dated January 11, 2012, pp. 16-17 (emphasis added).

Complainants have failed to cite a single case suggesting that the Commission has jurisdiction over this contract dispute. Instead, Complainants attempt to distinguish the Sporn 5 decision on the grounds that the retirement of a generation facility involves sections over which the Commission does not retain jurisdiction.⁵ This distinction is not correct based on Complainants' reading of R.C. § 4928.05(A)(1) discussed above. Complainants allege that the Commission has jurisdiction over an extremely wide amount of competitive retail electric service issues, including things as broad as the general policy of the state delineated in R.C. § 4928.02.⁶ If the Complainants' interpretation were truly correct, then the Commission would have had jurisdiction over the Sporn 5 retirement under a wide variety of the policy provisions in this statute.⁷ Indeed, AEP Ohio made a similar argument based on R.C. § 4928.143(B)(2)(c).⁸ The Commission did not find it had jurisdiction on these grounds. Instead, the Commission followed the plain language of R.C. §§ 4928.03 and 4928.05(A)(1) to hold that its jurisdiction was limited. The Commission did not adopt Complainants' overbroad interpretation in the Sporn 5 proceeding, and should not do so here either.

⁵ Memorandum In Opposition, p. 5.

⁶ Motion, p. 4.

⁷ *See, e.g.* O.R.C. § 4928.02:

(A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;

(C) Ensure diversity of electricity supplies and suppliers. . . ;

(G) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;

(I) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power; and

(N) Facilitate the state's effectiveness in the global economy.

⁸ 2012 Ohio PUC LEXIS 36; Case No. 10-1454-EL-RDR, Opinion and Order dated January 11, 2012, p. 7

C. This Case Involves A Simple Contract Interpretation Issue Subject Solely To The Jurisdiction Of Ohio Courts.

Complainants do not contest that Ohio courts have authority over breach of contract claims.⁹ In fact, Complainants do not even address the cases cited by FES involving breach of contract claims against utilities which have been tried in the courts.¹⁰ There is no dispute that the claims in the Complaint can be asserted in Ohio courts against entities regulated by the Commission.

Instead of contesting this authority, Complainants allege that this dispute hinges on whether FES's actions were lawful under the Commission's regulatory regime involving things like deceptive or misleading conduct.¹¹ Complainants even cite a contract disclosure requirement – Rule 4901:1-21-12(A)(7)(a) – that doesn't apply just so they can accuse FES of violating it.¹² However, just as they did in the Complaint, Complainants fail to allege that anyone was deceived by FES in this case. There is good reason for this silence, because Complainants are large businesses who were represented by sophisticated advisors and lawyers. There is no reason to believe, or any allegation raised with specificity, that Complainants were ever deceived by FES in any way. Accordingly, Complainants' claims regarding deceptive

⁹ Memorandum In Opposition, p. 6.

¹⁰ See, e.g., *State ex rel. Ohio Power Co. v. Harnishfeger*, 64 Ohio St. 2d 9, 10 (1980) (courts of this state are available to supplicants who have claims sounding in contract against a corporation coming under the authority of the [Commission]); *Milligan v. Ohio Bell Tel. Co.*, 56 Ohio St. 2d 191, 195 (1978); *McComb v. Suburban Natural Gas Co.*, 85 Ohio App. 3d 397 (Henry App. 1993) (court had jurisdiction over breach-of-contract claim in lease dispute between gas company and village).

¹¹ Memorandum In Opposition, p. 6.

¹² Rule 4901:1-21-12(B)(7)(a), which presumably is what is intended since (A)(7)(a) does not exist, applies only to residential and small commercial customers, not Complainants here. And 4901:1-21-12(B)(8) expressly provides that contracts with those customers may include contingency clauses, such as the pass-through clause at issue here.

conduct are merely a transparent attempt to gain Commission jurisdiction by cloaking the underlying contract interpretation issue in a deceptive or misleading marketing issue.

D. Artful Drafting Does Not Create Jurisdiction

Both the Commission and Ohio courts have consistently rejected attempts to inappropriately trigger their jurisdiction. Instead, they have examined the substance of the Complaint to determine where there was jurisdiction.¹³ The Commission should do the same here, and deny Complainants' attempt to gain jurisdiction through artful drafting.

Complainants cannot, simply by referencing Commission rules, invoke the Commission's jurisdiction. The facts alleged must invoke the Commission's jurisdiction. Thus, the relevant question for the Commission to answer is, do the facts alleged state a claim under the Commission's rules prohibiting deceptive marketing? Or do the facts alleged complain that FES is incorrectly interpreting what "additional" means in its contract with each Complainant? The answer is obvious from the Complaint itself. Complainants did not attach to the Complaint even one example of deceptive marketing, nor could they. Instead, they attached the contract language put at issue by each Complainant. Complainants' exhibits to the Complaint, as well as the factual allegations of the Complaint, make obvious that the substance of the dispute is one of contract interpretation.

¹³ See *Hull v. Columbia Gas*, 110 Ohio St. 3d 96 (2006) (denying Plaintiff's claim that a service complaint was a breach of contract claim, and finding the Commission had jurisdiction); Case No. 10-1454-EL-RDR, Opinion and Order dated January 11, 2012, pp. 16-17 (Commission rejecting AEP Ohio's request that it find jurisdiction over the retirement of Sporn 5); *State ex rel. Illuminating Co. v. Cuyahoga County Court of Common Pleas*, 97 Ohio St. 3d 69 (2002) (finding that local judge did not have authority to examine claims purporting to be brought in tort when they were within the exclusive province of the Commission).

Even while arguing that this case is about deceptive conduct,¹⁴ Complainants are forced to admit that the dispute is really about the fact that FES “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.”¹⁵ As Complainants are unable to even explain their claims without pointing to the contractual interpretation issue, there can be no legitimate dispute that this case is really about the contractual price of power. Alleging that a contract was breached in bad faith, or with deception, or generally with tortious intent, does not magically convert a contract claim into a tort claim. *See Labate v. National City Corp.*, 113 Ohio App. 3d 182, 190 (Summit App. 1996) (citing multiple cases for proposition that “ it is ‘no tort to breach a contract, regardless of motive.’”). Accordingly, the Commission has no jurisdiction over this dispute. Since at least 1921, Ohio courts have acknowledged that the Commission “is in no sense a court. It has no power to judicially ascertain and determine legal rights and liabilities, or adjudicate controversies between parties as to contract rights or property rights.”¹⁶

As shown through extensive authority from the Ohio Supreme Court, the law is clear.¹⁷ Ohio courts have jurisdiction over contract claims and, conversely, such claims are beyond the jurisdiction of the Commission.

Finally, Complainants cite the *Corrigan* case first relied on by FES to claim that the Motion attempts to divest the Commission of jurisdiction. Complainants misread *Corrigan*. In

¹⁴ Memorandum In Opposition, pp. 2-4.

¹⁵ Memorandum In Opposition, p. 2.

¹⁶ *New Breman v. Pub. Util. Comm.*, 103 Ohio St. 23 (1921).

¹⁷ *See, e.g., New Breman v. Pub. Util. Comm.*, 103 Ohio St. 23 (1921); *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); *Corrigan v. Illuminating Co.*, 122 Ohio St. 3d 265, 2009-Ohio-2524, ¶ 9 (quoting *State ex rel. Ohio Edison Co. v. Shaker*, 68 Ohio St. 3d 209, 211 (1994)).

that case, the plaintiffs alleged that the Court of Common Pleas had jurisdiction over a service issue related to tree trimming. The utility then successfully challenged that court's subject matter jurisdiction. Accordingly, when *Corrigan* discusses an attempt to cast the allegations in a certain light, it is referring to the complaint's attempt to cast the allegations to sound in a certain light, not how the complaint was discussed in a motion. The FES Motion does not and cannot cast the allegations in any light. Rather the FES Motion discusses the allegations as they are presented in the Complaint, which are a disputed interpretation of a clause of the Complainants' contracts. Accordingly, this argument does not make sense. Additionally, Complainants mistakenly claim that *Corrigan* concluded that when a complaint requires that regulations administered by the PUCO be considered, the claim is not purely contractual and is therefore within the Commission's jurisdiction.¹⁸ Once again, Complainants' argument misses the point. If the substantive allegations in the case involve deceptive marketing, then the Commission may have jurisdiction over a Complaint against a CRES provider. However, this is not that case, because the substantive allegations in the Complaint do not allege that any of the Complainants were deceived by FES's marketing. Instead, the Complainants got the contracts they bargained for, and now disagree with FES's interpretation of those contracts. This does not create a claim subject to the Commission's jurisdiction.

III. CONCLUSION

Ohio law is clear. The Commission is not a court. It does not have jurisdiction to interpret the charges or terms of a CRES contract. Therefore, it should dismiss the Complaint for lack of subject matter jurisdiction.

¹⁸ Memorandum In Opposition, p. 7.

Respectfully submitted,

/s/ Mark A. Hayden

Mark A. Hayden (0081077)
Jacob A McDermott (0087187)
Christine M. Weber (0032245)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 761-7735, 384-5038
(330) 384-3875 (fax)
haydenm@firstenergycorp.com
jmcdermott@firstenergycorp.com
cweber@firstenergycorp.com

James F. Lang (0059668)
N. Trevor Alexander (0080713)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth Street
Cleveland, OH 44114
(216) 622-8200
(216) 241-0816 (fax)
jlang@calfee.com
talexander@calfee.com

Attorneys for FirstEnergy Solutions Corp.

CERTIFICATE OF SERVICE

I certify that this Reply Brief was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 14th day of October, 2014. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all Complainants.

/s/ James F. Lang
One of the Attorneys for FirstEnergy Solutions Corp.

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

10/14/2014 3:00:27 PM

in

Case No(s). 14-1610-EL-CSS

Summary: Reply in Support of Motion to Dismiss electronically filed by Mr. James F Lang on behalf of FirstEnergy Solutions Corp.