

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Joint Complaint)	
of the)	
)	
Central Ohio Technical College)	
Cleveland State University)	
Kent State University)	
Northwest State Community College)	
Ohio University)	
University of Akron)	Case No. 15-0455-EL-CSS
University of Toledo,)	
)	
Complainants,)	
)	
v.)	
)	
FirstEnergy Solutions Corp.)	
The Toledo Edison Company)	
Ohio Edison Company)	
The Cleveland Electric Illuminating)	
Company)	
Ohio Power Company,)	
)	
Respondents,)	
)	
Relative to Alleged Unlawful Pass-Through)	
of RTO Expense Surcharges.)	
)	

COMPLAINANTS' MEMORANDUM CONTRA
FIRSTENERGY SOLUTIONS CORP. MOTION TO DISMISS

On March 2, 2015, the Complainants (Central Ohio Technical College, Cleveland State University, Kent State University, Northwest State Community College, Ohio University, University of Akron, and University of Toledo) filed a Complaint against FirstEnergy Solutions Corp., The Toledo Edison Company, Ohio Edison Company, The Cleveland Electric Illuminating Company and Ohio Power Company relative to alleged unlawful pass-through of RTO Expense Surcharges. On March 26, 2015, FirstEnergy Solutions Corp. ("FES") filed a

motion to dismiss. This memorandum contra fully addresses the arguments raised by FES. The Complainants respectfully request that the Commission deny FES' motion to dismiss.

I. INTRODUCTION

In its April 9, 2014 Entry in Case No. 14-568-EL-COI, the Commission initiated an investigation of the marketing practices in the competitive retail electric service market. Specifically, the Commission opened this investigation to determine whether it is unfair, misleading, deceptive or unconscionable to market contracts as fixed-rate contracts or as variable contracts with a guaranteed percent of the SSO rate when the contracts include pass-through clauses. The Commission asked for and received both initial and reply comments from various stakeholders.

This complaint case is the fourth in a series of complaint cases that seeks a Commission adjudication on the very question raised in Case No. 14-0568-EL-COI.

This is not a breach of contract case. This is a complaint case where seven universities are alleging that under the facts of this case the practice of a CRES supplier including a pass-through clause in a fixed-rate contract that serves to collect a regional transmission organization (RTO) charge to be an unfair, misleading, deceptive or unconscionable practice.

If the Commission had the authority to open up an investigation in Case No. 14-568-EL-COI, then it has the subject matter jurisdiction to adjudicate a complaint case on this very issue.

II. SUMMARY OF FACTS

The facts of this case are very straightforward. Each of the Universities entered into a uniform fixed-price Customer Supply Agreement with FirstEnergy Solutions. The agreement indicates that all electric energy metered at the specified delivery point shall be billed at a fixed price per kilowatt-hour. The agreements between the Complainants and FirstEnergy Solutions

contains language that allows the pass-through of certain costs if there is any change to either the terms of the agreement, the result of an imposition upon the supplier of new or additional charges or requirements, or as a result of any change in the method or procedure for determining charges or requirements relating to the electric supply under the Agreement.

In the June/July billing cycle to the Universities, there was an itemized surcharge entitled “RTO Expense Surcharge”. This RTO Expense Surcharge represented FirstEnergy Solutions’ attempt to recover from the Universities higher PJM fees than what FirstEnergy Solutions had experienced in the immediate past.

The case is about whether the practice by FirstEnergy Solutions (“FES”) of collecting the RTO Expense Surcharge under its pass-through clause in a fixed-rate contract is an unfair, misleading, deceptive or unconscionable practice.

III. ARGUMENT

A. The Commission does have subject matter jurisdiction to hear this complaint.

In its Motion to Dismiss at pages 4-5, FES alleges that the Commission lacks subject matter jurisdiction citing its earlier filed motions to dismiss in Case Nos. 14-1182-EL-CSS, 14-1610-EL-CSS and 14-1944-EL-CSS filed on August 4, September 19, and November 24, 2014 respectively. These are three complaint cases against FirstEnergy Solutions which are similar to the case at bar. The Commission has not yet ruled upon these motions to dismiss. The Complainants hereby incorporate by reference the arguments raised by Power4Schools’ Memorandum Contra of August 19, 2014 in Case No. 14-1182-EL-CSS, the October 6, 2014 Complainants’ Memorandum Contra filed in Case No. 14-1610-EL-CSS and the February 25, 2015 Memorandum in Opposition of the City of Toledo filed in Case No. 14-1944-EL-CSS.

In addition, FES cites the case of New Bremen v. Pub. Util. Comm., 103 Ohio St. 23, 30, 132 N.E. 162, 1921 Ohio Lexis 204, 19 Ohio L. Rep. 153 (1921). But the New Bremen case is easily distinguished from the complaint pending before the Commission. In New Bremen, the village had a valid ordinance/contract with the gas company that gave the village the right to exercise its option to purchase the lines and equipment of the gas company in the event the gas company was relieved from performing the terms of said contract for furnishing of gas. The village filed a breach of contract action against the gas company in court. Subsequently, the gas company filed an abandonment application with the Commission under the recently passed Miller Act. In reversing the Commission's Order which approved the abandonment, the court stated:

Now, in this case there is a valid subsisting contract between the parties under the terms of which the gas company is under obligation to furnish gas at the rate stipulated in the contract for a period of three years, and it is under obligation to sell to the village the portion of its pipelines as above stated in the event that it should be released from furnishing gas by the acts of the parties or by judgment or decree of a court of competent jurisdiction. That is the expressed provision of the contract. The rights created under it are protected by the federal and state constitutions as shown above. Moreover, as shown by the record, there is pending in a court of competent jurisdiction the Court of Common Pleas of Auglaize county, a proceeding invoking the jurisdiction of the court for the judicial determination of the very question presented on the application to the Commission and the rights of the parties in connection with the facilities described in that application. That proceeding in the Court of Common Pleas was brought before the filing of the application in this case. The Court of Common Pleas had acquired full jurisdiction of the subject-matter of the parties and when this situation was shown by the answer of the villages, and the testimony in the proceeding before the public utilities commission, it was its duty under this state of facts to dismiss the petition.

Manifestly, the permission given by the commission to withdraw or abandon a particular service must be given to parties owning or controlling the facilities and if these parties have by contract bound themselves to a different use and a different disposition of the

facilities, and the rights and duties under that contract are involved in litigation in a court of competent jurisdiction, the parties are not entitled to the Order by the commission.

The Order will be reversed.

Unlike the New Bremen case, there is no municipal ordinance contract, no pending litigation in a county court of common pleas and no abandonment application pending before the Commission.

But another case cited by FES is applicable to this situation and affirms that the Commission does in fact have subject matter jurisdiction over this complaint. At page 4 of its Motion to Dismiss, FES cites the case of Saks v. East Ohio Gas Co., 2012-Ohio-2637 (8th Dist.), 971 N.E. 2d 498, 501 for the proposition that the dismissal of the complaint is appropriate when the complaining party “can prove no set of facts that would justify a court in granting relief.”

Mr. Saks filed a complaint against a public utility and a competitive retail natural gas supplier in Cuyahoga County Common Pleas Court. Mr. Saks sought to certify a class action on behalf of himself and other customers who had been allegedly “falsely and fraudulent double-billed” or “otherwise overcharged”. Mr. Saks also asserted a claim under the Ohio Consumer Sales Practices Act alleging that the defendants acts and practices were unfair, deceptive and unconscionable in connection with consumer transactions and in violation of R.C. 1345.02 and 1345.03.

The defendant public utility (Dominion East Ohio) moved to dismiss the complaint on the grounds that the trial court lacked subject matter jurisdiction to resolve the claims, arguing that the claims fell within the exclusive jurisdiction of the PUCO. The public utility also moved for dismissal arguing that the Consumers Sales Practices Act does not apply to the services provided in the case. The competitive retail natural gas service provider (Integritys) moved for judgment on the pleadings, also arguing that the billing dispute fell within the exclusive

jurisdiction of the PUCO. The trial court ultimately granted both motions and entered judgment for the defendants. Mr. Saks filed an appeal alleging that the trial court erred in granting the defendant's motions based on its wrong finding that the PUCO had exclusive subject-matter jurisdiction here.

The 8th Appellate District affirmed the trial court's finding that Mr. Saks' claims fell within the exclusive jurisdiction of the PUCO. The court stated:

Again, as stated above, disputes involving charges for service fall within the exclusive jurisdiction of PUCO. And to the extent that Saks broadly alleges that the charges were fraudulently made, we still find this claim falls within PUCO's jurisdiction, especially because the fraud allegations relate specifically to the billing. See Suleiman v. Ohio Edison Co., 146 Ohio App. 3d 41, 2001 Ohio Lexis 3414, 764 N.E. 2d 1098 (7th Dist. 2001) (applying Kazmaier and recognizing that a claim for fraudulent billing fell within the exclusive jurisdiction of PUCO).

Finally, we likewise find that the trial court properly dismissed Saks's alleged CSPA claim. Because the underlying conduct giving rise to the purported CSPA claim falls squarely within PUCO's jurisdiction, the trial court lacks jurisdiction to consider the claim. Furthermore, the CSPA generally excludes transactions between a utility (i.e. Dominion) or a company supplying natural gas (i.e. Integrys) and its customers from the scope of "consumer transactions" covered by the statute. R.C. 1345.01(A). Thus, Saks's CSPA claims fail as a matter of law.

This complaint case is not about a breach of contract, but rather a dispute relating to charges for service and the violation of statutes and Commission rules. Clearly, the Commission has subject matter jurisdiction over this complaint case; otherwise, it could not have initiated the investigation of the marketing practices in the CRES market in Case No. 14-568-EL-COI.

B. The complaint properly sets forth claims that FES violated several statutes.

At pages 5-6 of its motion to dismiss, FES alleges that none of the statutes cited in the complaint are susceptible to "violation" because none impose any duty, standard or directive on anyone other than the Commission. The Complainants disagree.

Sections 4905.26 and 4928.16, Revised Code permits the Commission to hear a complaint establishing reasonable grounds that a competitive retail electric service provider's rate is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential or in violation of law. That is precisely what the complainants are alleging here.

Section 4928.02, Revised Code is the state policy of which subsection (I) is to ensure retail electric service consumers' protection against unreasonable sales practices, market deficiencies, and market power. The Complainants allege that FES' practice of attempting to collect the "RTO Expense Surcharge" under a fixed rate contract is an unreasonable sales practice.

Section 4928.08(D), Revised Code authorizes the Commission to suspend, rescind or conditionally rescind the certification of any electric services company who has engaged in anticompetitive or unfair, deceptive or unconscionable acts or practices in this state.

Section 4928.10, Revised Code mandates that the Commission adopt rules for the protection of consumers in this state and among the rules adopted are to include a prohibition against unfair, deceptive, and unconscionable acts and practices in the marketing, solicitation and sale of such competitive retail electric service and in the administration of any contract for service. The Complainants allege that FES has violated these rules.

Clearly, the Commission has jurisdiction to entertain the Universities' claims that the charging of the RTO Expense Surcharge as set forth in the complaint is an unfair, deceptive, misleading and unconscionable practice in violation of several Ohio statutes.

C. The Complainant has set forth claims that FES has violated several Commission rules.

In its motion to dismiss, FES alleges that the complaint fails to state a claim that FES violated Commission rules.

Rule 4901:1-21-03(A) provides:

- (A) Competitive retail electric service (CRES) providers shall not engage in unfair, misleading, deceptive, or unconscionable acts or practices related to, without limitation, the following activities:
 - (1) Marketing, solicitation or sale of a CRES.
 - (2) Administration of Contracts for CRES.
 - (3) Provision of CRES, including interactions with consumers.

By attempting to recover from the Universities' higher PJM fees than what FES had experienced in the immediate past through the "RTO expense sir charge" FES has engaged in unfair, misleading, deceptive or unconscionable acts or practices relating to the marketing, solicitation or sale of a CRES, the administration of contracts for CRES, and the provision of CRES, including interactions with consumers such as the Universities.

Rule 4901:1-21-11(A) provides in part:

- (A) Competitive retail electric service (CRES) providers, except automatic governmental aggregation pursuant to Division (A) of section 4928.20 of the Revised Code, and percentage of income payment plan customers for whom the Ohio Development Services Agency procures electric services pursuant to section 4928.52 of the Revised Code, shall arrange for the provision of competitive retail electric service by contracting with their customers. In the administration of such contracts, CRES providers are prohibited from engaging in unfair, deceptive, misleading and unconscionable acts and practices.

Again, FES' attempt to recover from the Universities' higher PJM fees than what FES had experienced in the immediate past through an "RTO expense sir charge" violates this rule because FES is engaging in unfair, deceptive, misleading and unconscionable acts and practices.

FES alleges that Rule 4901:1-21-12(B)(7)(a)¹ does not apply to the Universities because the Universities are neither residential nor small commercial customers.

The Universities disagree. Rule 4901:1-21-01(K) of the Ohio Administrative Code defines a “customer” as meaning a person who contracts with or is solicited by a CRES provider for the provision of CRES. The Universities are clearly customers.

Rule 4901:1-21-01(GG) of the Ohio Administrative Code defines “Residential customer” as meaning a customer of a competitive retail electric service for residential purposes. This definition does not require a Residential customer to have a dwelling nor does it require the Residential customer to use competitive retail electric service exclusively for residential purposes. It only requires that one be a customer of a competitive retail electric service for residential purposes. The Universities are customers of FES and are institutions of higher learning; their students dwell in dormitories on their respective campuses. The competitive retail electric service that is provided by FES to the Universities is in part used for residential purposes. Thus, Rule 4901:1-21-12(A)(7)(a) is applicable to the Universities.

Thus, the complaint has stated claims that FES violated various Commission rules.

D. The Complainant seeks a finding from this Commission that FES has engaged in unfair, misleading, deceptive and unconscionable conduct, not that it has breached its contract with the Complainants.

Although FES cites the Ohio Consumer Sales Practices Act and the cases under Chapter 1345 of the Revised Code, the Commission need only look at the Complaint to determine that the Complainant has alleged facts to sustain a claim that FES has engaged in unfair, misleading, deceptive or unconscionable practices. The complaint alleges the following facts:

¹ The Complainants inadvertently cited Rule 4901:1-21-12(A)(7)(a) instead of Rule 4901:1-21-12(B)(7)(a) of the Ohio Administrative Code.

9. Each of the Universities entered into a uniform fixed-price Customer Supply Agreement (“Agreement”) with FES, copies of which are attached as Exhibit A of this complaint.
10. The Agreement was drafted and prepared by FES and little to no amendments or adjustments made to the uniform FES agreement outside of lines left blank on the form covering, the name of the customer, address, location, account number and similar identification information.
11. The Agreement indicates that all electric energy metered at the specified delivery points shall be billed at a fixed price per kilowatt-hour.
15. As a load-serving entity, FES pays the PJM Regional Transmission Organization (a quasi-governmental agency in charge of running the electric grid in 14 states including Ohio) a set list of fees (“PJM fees”).
16. The amount of these PJM fees changes every month based on the actual cost PJM incurs to operate the electric grid which it bills. All suppliers in the PJM, the quasi-governmental regional transmission organization servicing Ohio, are charged these PJM fees under the posted tariffs authorized by the Federal Energy Regulatory Commission.
17. These PJM fees include the cost of back-up power or added voltage to stabilize the grid.
19. In the June/July billing cycle to the universities FirstEnergy on the respective consolidated bills included a surcharge on invoice which was in addition to the fixed price. This itemized surcharge was entitled “RTO Expense Surcharge.” Ohio Power similarly placed on the consolidated bill for Ohio University and Central Ohio Technical College an “RTO Expense” surcharge from FES.
20. The RTO Expense Surcharge represented FES’ attempt to recover from the Universities higher PJM fees than what FES had experienced in the immediate past.
21. The RTO Expense Surcharge is not and was not the product of any change to either the terms of the Agreement; not the result of an imposition upon the Supplier of new or additional charges or requirements; and was not the result of any change in the method or procedure for determining charges or requirements relating to the electric supply under the Agreement.

The Complainants have stated sufficient facts to make a claim that FES has engaged in unfair, misleading, deceptive and unconscionable conduct.

IV. CONCLUSION

The Complainants are not seeking a breach of contract action, nor are they asking that the Commission re-write the contract. The Complainants ask that the Commission find that FES' assessment of the RTO Expense Surcharge is an unfair, misleading, deceptive and/or unconscionable practice in violation of Ohio law, that FES be ordered to discontinue such practices, that the Commission order any refund amounts paid by the Universities associated with the unlawful RTO Expense Surcharge along with any resultant late payment charge and to correct all past billings to the extent they reflect unpaid RTO Expense Surcharges as a utility expense owed to a utility. The motion to dismiss should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The PUCO's electronic filing system will electronically serve notice of the filing of this document on all parties of record who have agreed to receive electronic service. In addition, I certify that a copy of the foregoing document was served via email on the following persons this 10th day of April, 2015.



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Summary: Memorandum Complainants' Memorandum Contra FirstEnergy Solutions Corp.
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Technical College and Cleveland State University and Kent State University and Northwest
State Community College and Ohio University and University of Akron and University of
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