

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Central Ohio Technical College, et al.)	
)	
Complainants,)	
)	
v.)	Case No. 15-0455-EL-CSS
)	
FirstEnergy Solutions Corp., et al.,)	
)	
Respondents.)	

**REPLY MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS OF FIRSTENERGY SOLUTIONS CORP.**

In accordance with Rule 4901-1-12(B)(2), FirstEnergy Solutions Corp. (“FES”) submits this Reply in support of its Motion to Dismiss the Complaint.

I. INTRODUCTION

FES showed in its Motion to Dismiss that the only dispute in this case is a question of contract interpretation. Complainants are sophisticated entities, who with recourse to counsel negotiated and entered commercial contracts for competitive retail electric service with FES. FES sought to collect a particular charge under a certain provision of that contract; Complainants disagreed that the provision applied, and they filed this Complaint.

This is a question of contract interpretation—does the language of the contract permit these charges? It is the only question raised. To be sure, Complainants misleadingly *label* this interpretive dispute as a claim regarding an “unfair, misleading, deceptive, or unconscionable practice.” But they never *substantiate* that claim – nor could they. As FES showed, and Complainants’ Memorandum Contra confirms, every single one of their allegations boils down to disagreement over the meaning of a contract.

Thus, labels aside, this case presents a pure contract dispute, between sophisticated parties. If this case belongs anywhere, it belongs in court.

II. ARGUMENT

A. The Commission lacks subject matter jurisdiction.

FES demonstrated in its Motion to Dismiss that the Commission lacks jurisdiction to hear this Complaint because it “has no power to ascertain and determine legal rights and liabilities, or adjudicate controversies between parties as to contract rights.” *New Bremen v. Pub. Util Comm.*, 103 Ohio St. 23, 30 (1921). The Complainants do not avoid this conclusion.

First, they point to the Commission’s investigation of marketing practices in the competitive retail electric market, including fixed-rate contracts (Memo. Contra at 2), but this does not establish jurisdiction over the Complaint. To begin with, jurisdiction is the power to act—not the power to ask questions. *Cheap Escape Co. v. Haddox, LLC*, 120 Ohio St.3d 493, 2008-Ohio-6323, ¶ 6 (“Subject-matter jurisdiction . . . connotes the power to hear and decide a case upon its merits and defines the competency . . . to render a valid judgment in a particular action”). So the mere fact that the Commission sought comments related to a particular issue does not establish jurisdiction to adjudicate and decide any given case raising that issue. Moreover, jurisdictional issues were flagged in that case; as a number of commenters pointed out, that investigation brushed up against jurisdictional boundaries. (*See, e.g.*, 14-568 FES Reply Comments at 6 (noting parties “caution[ing] the Commission against exceeding the limits of its jurisdiction over the CRES market”); IGS Reply Comments at 2 n.3 (“nothing prevents the customer from contesting—as a matter of contract law—the scope and breadth of the pass-through clause in common pleas court”); RESA Init. Comments at 4–5 (discussing limitations on “Commission authority over CRES providers”).) The investigation neither asked nor answered

the question pertinent here: whether the Complaint sets forth a claim within the Commission's jurisdiction.

Complainants also attempt to distinguish the *New Bremen* case, noting that in this 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." (Memo. Contra at 5.) These "distinctions" are irrelevant here, and the Complainants offer no explanation. None of those factors affects the core finding of *New Bremen*, namely, that the Commission only has such powers as given to it by statute, and jurisdiction to resolve pure contract disputes is not among them. And even if Complainants had distinguished *New Bremen*, they have not distinguished the many cases following it. See e.g., *Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.*, 119 Ohio St.3d 301, 302 (2008); *State, ex rel. Dayton Power & Light Co., v. Riley*, 53 Ohio St.2d 168, 169 (1978).

Finally, the Complainants argue that jurisdiction is established by *Saks v. East Ohio Gas Co.* 2012-Ohio-2637 (8th Dist.). But unlike *New Bremen*, *Saks* is clearly distinguishable. First, *Saks* did not involve any question of contract interpretation, but concerned *billing practices* by a *regulated utility*. The plaintiff alleged that bills submitted by Dominion East Ohio on behalf of itself and a supplier "were done incorrectly," specifically, by miscalculating the charges due for service. *Id.* ¶ 16. The Court observed that "billing is a practice authorized *by the utility*," and that the billing dispute was specifically governed by various Commission rules. *Id.* (emphasis added). *Saks* involved an entirely different situation than this case, in which the only allegation of wrongdoing can only be resolved by interpreting provisions of a commercial CRES contract. Indeed, as *Saks* itself pointed out, whatever jurisdiction the Commission possesses "does not diminish the basic jurisdiction of the court of common pleas in other areas of possible claims

against utilities, including pure tort and contract claims.” *Id.* ¶ 10 (internal quotations and ellipses omitted).

In sum, Complainants fail to establish subject matter jurisdiction.

B. Complainants have failed to state a claim under R.C. 4905.26.

Jurisdiction is not the only obstacle. Even if the Commission had jurisdiction, Complainants fail to invoke it by stating reasonable grounds for a complaint. No statute cited by Complainants imposes any duties on FES, and the Complainants do not allege facts showing a violation of any rule.

1. The statutes cited by Complainants do not impose obligations on FES.

In its motion, FES explained that it could not have violated any of the statutes cited by Complainants “because none impose any duty, standard, or directive on anyone other than the Commission.” (*Id.* at 5.) In response, the Complainants describe the operation of all four statutes, and then assert that the Commission has jurisdiction under them. (Memo. Contra at 7.)

This misses the point. Even if the Commission has jurisdiction (and it does not), Complainants still must state a claim. That cause is not advanced by citing statutes that FES *in principle cannot violate*—because all speak solely to the Commission. (See FES Motion to Dismiss at 5–6.) Because these statutes cannot be violated by FES, it follows that a claim that FES violated them does *not* state reasonable grounds.

Complainants do not respond to, much less refute, this argument. Their statutory allegations fail to state a claim.

2. Under the rules, Complainants have not alleged facts showing “unfair, misleading, deceptive or unconscionable” conduct.

The Complainants fare no better with respect to the alleged rule violations. As FES explained in its motion, although the Complainants repeatedly employed the *labels* “unfair,”

“misleading,” “deceptive,” and “unconscionable,” they never alleged *facts* showing such conduct. (*Id.* at 7.) Yet again, the Complainants offer no legitimate response.¹

The Complainants list nine paragraphs from the Complaint that purportedly set forth “sufficient facts to make a claim.” (Memo. Contra at 10.) But the only “conduct” alleged against FES in these paragraphs is that FES entered a contract and “attempt[ed] to recover . . . higher PJM fees than what FES had experienced in the immediate past.” (*See id.*) It is not self evident that this conduct—entering a contract, and collecting a fee—is improper in any way, much less unfair and unconscionable. This is not conduct that shocks the conscience; the only thing that allegedly makes the conduct improper is that it was not permitted under a contract.

This is the salient point: whether or not the collection of the charge was permitted, it raises a question of contract interpretation, pure and simple. Complainants allege no facts that make this anything other than a breach-of-contract claim. They do not dispute that they entered a contract. They do not dispute that the contract was entered knowingly and voluntarily. They do not allege fraud, or forgery, or any other deliberate wrongdoing. They do not dispute what the terms of the contract are or whether the contract contained a “Pass-Through” provision. FES made all these points in its Motion to Dismiss (*see id.* at 8–10), and the Complainants rebut none of them.

The only issue, as Complainants’ memorandum contra confirms, is whether the Pass-Through provision means what FES says it means or what Complainants say it means. There is no way to reasonably characterize that issue as anything other than a question of contract

¹ The Complainants briefly argue that the universities qualify as “residential customers” under the rules because “students dwell in dormitories on their respective campuses.” (Memo. Contra at 9.) They cite no authority for this interpretation, which is incorrect on its face—although the universities arguably serve some “residents,” the residents are *not* the customers. Regardless, even if the Complainants *are* residential customers, they do not contest FES’s assertion that it complied with the rule in question.

interpretation. FES recognizes that Complainants repeatedly label this conduct “unfair, misleading, deceptive, and unconscionable.” (*See, e.g.*, Memo. Contra at 2, 3, 7, 8, 9, & 10.) But this is a legal conclusion, and legal conclusions are *not* presumed true. *See Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 193, 532 N.E.2d 753 (1998). Complainants must show that the alleged facts, if proven true, would support that conclusion; they have not.

If mere disagreement over the meaning of a contract constitutes an “unfair, misleading, deceptive, or unconscionable practice,” then there are *no limits* on the Commission’s jurisdiction over contracts. But this is clearly not the law. The Ohio Supreme Court recently reaffirmed that the Commission’s jurisdiction “over service-related matters does not affect the basic jurisdiction of the court of common pleas . . . in other areas of possible claims against utilities, *including pure . . . contract claims.*” *Corrigan v. Illuminating Co.*, 122 Ohio St. 3d 265, 2009-Ohio-2524, ¶ 9 (emphasis added; internal quotations omitted). At best, the facts alleged by Complainants state a pure contract claim. If their claim belongs anywhere, it is before a court, not the Commission.

III. CONCLUSION

For these reasons, and those stated in its Motion to Dismiss, FES requests that the Commission dismiss the Complaint with prejudice.

Dated: April 17, 2015

Respectfully submitted,

/s/ Mark A. Whitt

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CERTIFICATE OF SERVICE

On April 17, 2015, the foregoing document was filed on the Public Utilities Commission of Ohio's Docketing Information System. The PUCO's e-filing system will electronically serve notice of the filing of this document and the undersigned has served electronic copies to the following parties:

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Summary: Reply Memorandum in Support of Motion to Dismiss electronically filed by Ms. Rebekah J. Glover on behalf of FirstEnergy Solutions Corp.