

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Board of Commissioners of Lucas County,)	
)	
Complainant,)	
)	
v.)	
)	Case No. 15-0896-EL-CSS
FirstEnergy Solutions Corp.,)	
)	
Respondent.)	

**MOTION TO DISMISS OF
FIRSTENERGY SOLUTIONS CORP.**

Respondent FirstEnergy Solutions Corp. (FES) requests issuance of an Entry dismissing the Complaint, in accordance with Rule 4901-1-12, O.A.C. Dismissal is appropriate because the Complaint presents a pure contract dispute that the Commission lacks subject matter jurisdiction to decide. Additionally, to the extent the Complaint alleges violations of Commission rules prohibiting “unfair,” “deceptive,” “misleading” or “unconscionable” conduct, the claims do not state reasonable grounds for complaint, as required by R.C. 4905.26 and 4928.16. An alleged breach of contract is insufficient, as a matter of law, to support a customer’s claim that a supplier violated rules prohibiting unfair, deceptive, misleading or unconscionable practices.

The Commission should grant this motion and dismiss the Complaint.

MEMORANDUM IN SUPPORT

This is another “Polar Vortex” complaint arising from extreme and unprecedented weather events in January 2014. Complainant’s allegations are of the same general character as the allegations raised in four other Polar Vortex complaints previously filed with the Commission. Complainant executed an electric supply contract containing a “pass-through” provision allowing FES to bill certain expenses incurred in procuring generation service, including the “RTO Expense Surcharge” identified in the Complaint. Complainant disagrees that a pass-through event occurred. Thus, the crux of this Complaint, like the others, boils down to an issue of contract interpretation.

FES filed motions seeking dismissal of four Polar Vortex complaints filed before this one.¹ The motions explain two independent bases for dismissal. The first is jurisdictional. The complaints allege that no pass-through event occurred, and that FES, by attempting to charge the RTO Expense Surcharge without authorization under the pass-through clause, violated its contract as well as Commission rules. But the Commission cannot get to the issue of compliance with its rules without *first* interpreting the pass-through provision. There lies the jurisdictional problem: the Commission lacks subject matter jurisdiction to interpret, apply or enforce this provision because the Commission “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). Contract interpretation is a job for courts of general jurisdiction, not the Commission.

The second basis for dismissal addresses claims that FES’s alleged breach of contract also violates Commission rules governing CRES standards of conduct. As FES explained, the

¹ See Case Nos. 14-1182-EL-CSS (motion to dismiss filed Aug. 4, 2014), 14-1610-EL-CSS (motion to dismiss filed Sept. 19, 2014), 14-1944-EL-CSS (motion to dismiss filed Nov. 24, 2014), 15-0455-EL-CSS (motion to dismiss filed Mar. 26, 2015).

mere fact that FES interprets the pass-through provision differently than the entities who are suing it does not, as a matter of law, state sufficient grounds for a claim that FES violated rules prohibiting “unfair,” “misleading,” “deceptive” or “unconscionable” conduct. The quoted terms require some form of malfeasance above and beyond a mere breach of contract – like rolling back a car odometer, passing off used goods as new, or taking money from a buyer with no intent of delivering whatever the buyer thought it was paying for. *See, e.g.*, R.C. 1345.02(B)(3, 6, 7). So even if the Commission had jurisdiction to hear the complaints (and it does not), a finding that FES breached the supplier agreements would *not* establish that FES acted unfairly or deceptively.

The motions filed in the other Polar Vortex cases have been fully briefed and are awaiting decision. Because the grounds for dismissal of those cases apply with equal force here, FES incorporates the prior briefs and arguments by reference. To the extent Lucas County argues that something about its claims distinguishes them from the other Polar Vortex complainants, FES will address those arguments in its reply brief.

FES would again emphasize that dismissing the Complaint will not leave the Complainants without a remedy. They have remedies; they are just exercising them in the wrong forum. There is no inequity in holding the Complainants to their bargain by making them pursue their claims in the appropriate forum. This case, along with the others like it, belongs in common pleas court and should be dismissed.

Dated: May 29, 2015

Respectfully submitted,

/s/ Mark A. Whitt

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CERTIFICATE OF SERVICE

On May 29, 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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5/29/2015 3:47:08 PM

in

Case No(s). 15-0896-EL-CSS

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