

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Ohio Schools Council, )  
Ohio School Boards Association, Ohio )  
Association of School Business Officials, )  
and Buckeye Association of School )  
Administrators, dba Power4Schools, )  
Complainants, ) Case No. 14-1182-EL-CSS  
v. )  
FirstEnergy Solutions Corp., )  
Respondent. )

ENTRY

The Commission finds:

- (1) FirstEnergy Solutions (FES) is an electric services company as defined in R.C. 4928.01(A)(9), and, as such, is subject to the jurisdiction of this Commission.
- (2) Pursuant to R.C. 4905.26, the Commission has authority to consider written complaints filed against a public utility by any person or corporation regarding any rate, service, regulation, or practice furnished by the public utility that is in any respect unjust, unreasonable, insufficient, or unjustly discriminatory. Pursuant to R.C. 4928.16, the Commission has jurisdiction under R.C. 4905.26, upon complaint of any person, regarding the provision by an electric services company subject to certification under R.C. 4928.08 of any service for which it is subject to certification.
- (3) On July 3, 2014, pursuant to 4905.26, a complaint was filed against FES by Ohio Schools Council, Ohio School Boards Association, Ohio Association of School Business Officials, and Buckeye Association of School Administrators, dba Power4Schools (collectively, Power4Schools). Power4Schools alleges several counts relating to FES's pass-through of specific costs it received from PJM Interconnection LLC (PJM) to

Power4Schools. Power4Schools' complaint alleges that it contracted both fixed rates and discounted rates with FES and, in those contracts, FES failed to disclose the potential of additional charges from the pass-through event. Further, even if the contract did allow for the charges, imposing them was unlawful. In doing so, Power4Schools alleges FES engaged, among other things, in unfair, misleading, deceptive, or unconscionable acts or practices related to the administration of a CRES contract in violation of R.C. 4928.10, Ohio Adm.Code 4901:1-21-02(E), 4901:1-21-03(A)(1)-(3), 4901:1-21-11(A), 4901:1-21-12(A)(7)(a), and 4901:1-21-12(A)(7)(b). Additionally, according to the Power4Schools, the actions of FES were unjust, unreasonable, and unlawful pursuant to R.C. 4905.26.

- (4) On August 4, 2014, FES filed an answer to the complaint, denying all of the allegations made by Power4Schools.
- (5) Also on August 4, 2014, FES filed a motion to dismiss the complaint for lack of subject matter jurisdiction.

In its motion, FES avers that the Commission has limited jurisdiction over competitive retail electric services (CRES). According to FES, R.C. 4928.05(A)(1) and R.C. 4928.03 give the Commission very limited jurisdiction over CRES suppliers. FES notes the Commission determined this in the past in *In re Ohio Power Co.*, Case No. 10-1454-EL-RDR, Opinion and Order (January 11, 2012) at 16-17. Specifically, FES believes Power4Schools' complaint is asking the Commission to set CRES prices, which is not within the Commission's jurisdiction.

FES further argues that the issue in the complaint is a pure contract claim, which is the jurisdiction of Ohio courts. FES states the courts have long held that the Commission does not have the authority to hear breach of contract claims, citing *Corrigan v. Illuminating Co.*, 122 Ohio St. 3d 265, 2009-Ohio-2524, ¶ 9, and *New Breman v. Pub. Util. Comm.*, 103 Ohio St. 23 (1921). FES claims that any attempt by Power4Schools to claim it was deceived or misled is disingenuous. FES avers that Power4Schools is a sophisticated party, assisted by experienced counsel, that negotiated the contract and the specific clause at issue in the case. Because the issue in this case is the legal interpretation of a clause in the parties' contract, FES asserts the issue in this case is in the jurisdiction of the courts.

- (6) On August 19, 2014, Power4Schools filed a memorandum contra to FES's motion to dismiss. Power4Schools opines that it is not asking the Commission to regulate CRES prices, but instead it is asking the Commission to regulate unfair actions by a CRES provider, which the Commission has statutory authority to do. According to Power4Schools, R.C. 4928.16 gives the Commission jurisdiction over the services provided by a CRES provider and R.C. 4928.10 prohibits a CRES provider from engaging in unfair, deceptive, or unconscionable acts. Therefore, Power4Schools believes the Commission has the ability to regulate CRES providers and to review CRES contracts.

Power4Schools further asserts its complaint meets the Ohio Supreme Court's test to determine whether the Commission has jurisdiction over an issue. Under the test, set forth in *Allstate Insur. Co. v. Illum. Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917 (*Allstate*), the act complained of must be one typically authorized by the utility and, further, the Commission's expertise must be necessary to resolve the issue.

Power4Schools contends the first prong of the test is satisfied because FES is an authorized CRES provider and is subject to rules regarding CRES contracts, including rules governing disclosures. Power4Schools states that FES is a certified CRES provider and operates under the CRES rules outlined in Ohio Adm.Code 4901. Specifically, Power4Schools notes that Ohio Adm.Code 4901:1-21-12 requires CRES contracts to include the cost of generation, an explanation for any discounts, and the amount of any other charges. Power4Schools asserts FES violated these rules in seeking to pass-through specific costs. Regarding the second part of the test, Power4Schools asserts that the Commission's expertise is necessary for several reasons. According to Power4Schools, the Commission's expertise will be needed to apply rules that are specific to the Commission, to interpret tariffs filed in the Commission's docket, and to analyze utilities' electric security plans. Because these matters are unique and specific to the Commission, Power4Schools states the Commission's expertise is necessary. Believing that the Commission has the statutory authority to hear the case, and that the complaint meets the two-part test from *Allstate*, Power4Schools maintains FES's motion to dismiss should be denied.

- (7) FES filed its reply in support of the motion to dismiss on August 26, 2014. FES again argues that the issues are purely contractual and thus outside of the Commission's jurisdiction. FES avers contractual and tort claims have always been in the jurisdiction of the state courts. According to FES, R.C. 4928.05(A)(1) specifically states that competitive retail electric services are not subject to supervision and regulation by the Commission. FES further states that Power4Schools' reliance on *Allstate* is inapplicable because that case was strictly for tort claims, and this case is regarding contractual issues. Even if the *Allstate* test were applicable, FES claims, the Commission would still not have jurisdiction. According to FES, Power4Schools' assertion of Commission authority is overly broad and Ohio courts often deal with complex contracts. Therefore, the expertise of the Commission would not be necessary. For these reasons, FES believes jurisdiction for these claims remains with the Ohio courts and the complaint should be dismissed.
- (8) It is the responsibility of the Commission to ensure the state's policy of protecting consumers against unreasonable sales practices from retail electric services is effectuated. R.C. 4828.02(I) and 4928.06(A).

R.C. 4905.26 confers jurisdiction to the Commission to hear any complaint against a public utility regarding whether a charge is unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law. Further, R.C. 4928.16, extends the Commission's jurisdiction under R.C. 4905.26 to CRES providers. Under R.C. 4928.16(A)(2), the Commission has jurisdiction to hear complaints against a CRES provider, including, among other things, whether a competitive service is meeting the minimum service requirements for competitive services. The minimum service requirements are outlined in R.C. 4928.10, and further amplified in Ohio Adm.Code 4901:1-21. These rules give the Commission jurisdiction to ensure consumers are adequately protected. R.C. 4928.10 requires that rules shall include prohibitions against unfair, deceptive, and unconscionable acts and practices in the marketing, solicitation, sales of such a competitive retail electric services and in the administration of any contract for service. In addition, the law specifically provides the Commission with jurisdiction over rules for disclosure of terms in CRES contracts. Ohio

Adm.Code 4901:1-21-11 and 4901:1-21-12 discuss the standards of contract administration and contract disclosure required of competitive electric service providers.

As noted by the Complainants, the Supreme Court of Ohio sets forth the *Allstate* two-part test to determine when the Commission has exclusive jurisdiction over an action by a public utility. The Commission believes that *Allstate* applies to jurisdictional determinations regarding whether an issue is pure tort or contract. *Allstate* at ¶12. FES's argument that *Allstate* only applies to tort claims is unpersuasive, as the court applied the same test to a contract claim in *Corrigan*, 122 Ohio St.3d 265, 267, 2009-Ohio-2524, 910 N.E.2d 1009, 1012, ¶8-10 (2009). As noted above, the first part of the test is whether the act complained of is something that is typically authorized by the utility. The second part is whether the Commission's administrative expertise is necessary to settle the disputed issues. In order for the Commission to have jurisdiction, both parts of the test must be affirmatively satisfied.

- (9) Based on statutory authority, state policy, and precedent set by the Supreme Court of Ohio, the Commission finds that the issues raised in the complaint are within the Commission's jurisdiction, and the motion to dismiss should be denied. It is the state's policy to safeguard consumers against unreasonable sales practices from CRES providers, and it is the Commission's responsibility to ensure those protections are in place. R.C. 4928.02(I) and R.C. 4928.06. This is not a matter of the Commission setting CRES prices; rather, at issue is how the CRES provider is administering its contract and the CRES provider's practices related to contract disclosures. Further, the Commission has both extensive regulations regarding CRES contracts and the expertise necessary to interpret the law at issue in this case. See, e.g., Ohio Adm.Code 4901:1-21-02; 4901:1-21-03; 4901:1-21-11; and 4901:1-21-12.

R.C. 4905.26 gives the Commission exclusive jurisdiction over service-related issues regarding public utilities. *Corrigan*, 122 Ohio St.3d 265, 267, 2009-Ohio-2524, 910 N.E.2d 1009, 1012, ¶8-10 (2009). R.C. 4928.16 notes that jurisdiction also extends to service-related issues of CRES providers. While the *Allstate* test has only been applied to utilities in the past, because R.C. 4928.16 broadens the Commission's jurisdiction over service-

related issues to include CRES providers, the Commission will extend the *Allstate* test to CRES providers as well.

Therefore, for the Commission to have jurisdiction, the issues in the case must pass both parts of the test adopted by the Supreme Court in *Allstate*. Thus, it must first be determined if the issues alleged constitute a practice that FES is typically authorized to do. Second, the Commission's expertise must be necessary to resolve the issues alleged by Power4Schools.

The first prong of the *Allstate* test is met, as the issues alleged constitutes a practice that FES is typically authorized to do. Power4Schools' complaint alleges that it contracted both fixed rates and discounted rates with FES and, in those contracts, FES failed to disclose the additional charges that it later imposed. Pursuant to R.C. 4928 and Ohio Adm.Code 4901:1-21, FES is authorized to provide both fixed-rate and discounted-rate contracts. Power4Schools further alleges that, even if FES is capable of imposing the additional charges, the charges were enacted unlawfully. FES is a certified CRES provider under R.C. 4928, which authorizes it to contract with customers and administer those contracts. Thus, the acts complained of by Power4Schools are things that FES is normally authorized to do.

Second, the Commission's expertise is necessary to resolve the issues alleged in the complaint. Power4Schools alleges that FES is administering unfair and unforeseen charges to its customers. To ultimately answer these allegations, the expertise of the Commission is necessary to interpret the regulations and statutes governing the retail electric market in Ohio. Chapter 4928 of the Revised Code, and the regulations promulgated by the Commission under that Chapter, govern the acts at issue in this case. A purpose of the regulations, according to Ohio Adm.Code 4901:1-21-02(A)(2), is to protect consumers against misleading, deceptive, unfair, and unconscionable acts in the administration of any CRES contract. Ohio Adm.Code 4901:1-21-03(A)(2) requires that CRES providers administer contracts fairly. Pursuant to R.C. 4928.10, how CRES contracts are administered and what specifics need to be included in those contracts are outlined in Ohio Adm.Code 4901:1-21-11 and 4901:1-21-12, respectively. As noted above, the Commission has jurisdiction to hear any

complaint regarding a violation of R.C. 4928.10 and any rules under that section. R.C. 4928.16(A)(2) and R.C. 4905.26. Resolving the issues in this complaint requires interpretation of the statutes and regulations administered and enforced by the Commission, and thus the Commission's expertise is necessary. Because the Commission's expertise is necessary, this is not a pure contract or tort claim, and the second prong of the *Allstate* test is satisfied. Thus, the allegations in the complaint are within the Commission's statutory authority, and because the issues satisfy the Supreme Court's two-part test, the case is within the jurisdiction of the Commission.

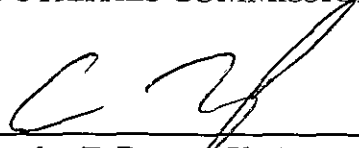
Therefore, for the reasons cited above, the Commission finds that the motion to dismiss filed by FES should be denied. The Commission further directs the attorney examiner to issue a procedural schedule in this case under which this matter should be set for hearing.

It is, therefore,

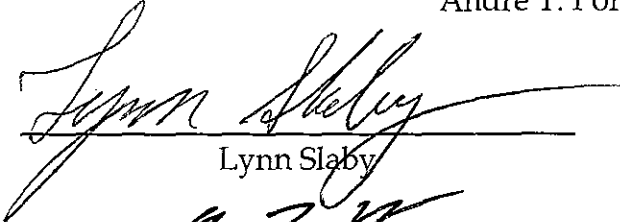
ORDERED, That the motion to dismiss for lack of subject matter jurisdiction be denied in accordance with Finding (9). It is further,

ORDERED, That a copy of this Entry be served upon each party of record.

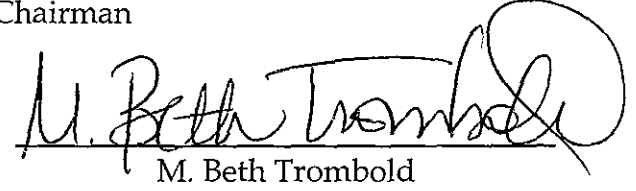
THE PUBLIC UTILITIES COMMISSION OF OHIO



Andre T. Porter, Chairman



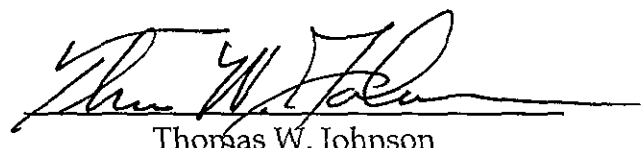
Lynn Slaby



M. Beth Trombold



Asim Z. Haque



Thomas W. Johnson

NW/vrm

Entered in the Journal

**NOV 18 2015**



Barcy F. McNeal  
Secretary