

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of City of Toledo,)	
)	
Complainant,)	
)	
v.)	Case No. 14-1944-EL-CSS
)	
FirstEnergy Solutions Corp.,)	
)	
Respondent.)	

ENTRY

The Commission finds:

- (1) FirstEnergy Solutions Corp. (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 November 4, 2014, pursuant to R.C. 4905.26, the city of Toledo (Toledo) filed a complaint against FES, as well as a request for relief from termination of electric service. Toledo alleges several counts relating to specific costs that FES incurred from PJM Interconnection LLC (PJM) in January 2014 and passed through to Toledo. Toledo's complaint states that its competitive retail electric service (CRES) contract with FES during the time in question was for fixed-price power and contained a provision designating ancillary services as FES' sole responsibility. Consequently, Toledo alleges that FES is required to cover the

charges in question and that the increased charges do not qualify as a regulatory pass-through event. Toledo further contends that FES' actions constitute unfair, misleading, deceptive, or unconscionable acts in violation of R.C. 4928.08 and Ohio Adm.Code Chapter 4901:1-21.

- (4) On November 6, 2014, FES filed an unopposed motion for a protective order regarding the Customer Supply Agreement and Pricing Attachment, which was attached to Toledo's complaint as Exhibit 1. In its motion, FES asserts that the contract specifically provides that the parties agree to keep the contract confidential, and that the contract's terms and conditions are the confidential business information of FES and should have been filed under seal. Further, FES notes that Toledo agrees that the contract should be removed from the public docket and filed under seal.
- (5) On November 24, 2014, FES filed an answer to the complaint, denying Toledo's allegations. Contemporaneously, FES filed a motion to dismiss the complaint for lack of subject matter jurisdiction.

In its motion, FES asserts that the Commission possesses limited jurisdiction over CRES. According to FES, R.C. 4928.05(A)(1) and 4928.03 provide the Commission with very limited jurisdiction over CRES suppliers. FES claims that the Commission has made this determination previously in *In re Ohio Power Co.*, Case No. 10-1454-EL-RDR, Opinion and Order (Jan. 11, 2012) at 16-17. Specifically, FES argues that Toledo's complaint requests that the Commission interpret Toledo's CRES contract, which is beyond the Commission's jurisdiction.

FES continues that the complaint lies in contract, which is the jurisdiction of the courts. FES asserts that the courts have long held that the Commission lacks authority to hear breach of contract claims, citing *Corrigan v. Illum. Co.*, 122 Ohio St.3d 265, 2009-Ohio-2524, 910 N.E.2d 1009, ¶ 9, and *New Bremen v. Pub. Util. Comm.*, 103 Ohio St. 23, 132 N.E. 162 (1921).

- (6) On February 25, 2015, Toledo filed a motion for leave to file a memorandum in opposition to FES' motion to dismiss out of time. In its motion for leave, Toledo asserts that, due to inadvertent email inbox errors, Toledo's counsel did not receive

FES' motion at the time it was filed. Contemporaneously, Toledo filed a memorandum in opposition to FES' motion to dismiss. In its memorandum in opposition, Toledo asserts that its allegations do not lie solely in contract, but meet the reasonable grounds standard set forth in R.C. 4905.26.

- (7) On March 4, 2015, FES filed its reply in support of its motion to dismiss. In its reply, FES asserts that Toledo failed to address any of the extensive authority cited in the motion demonstrating that the Commission lacks jurisdiction over questions of contract interpretation.
- (8) Initially, the Commission finds that Toledo's motion for leave to file a memorandum in opposition to FES' motion to dismiss out of time is reasonable and should be granted.
- (9) Additionally, the Commission finds that FES' unopposed motion for a protective order regarding the Customer Supply Agreement and Pricing Attachment, filed as Exhibit 1 to the complaint, should be granted. The Commission agrees that this exhibit contains confidential, trade secret information and should have been filed under seal, and grants FES' unopposed motion for a protective order. Consequently, the Commission directs that Docketing remove Exhibit 1 to the complaint from the public docket and place under seal in accordance with the Commission's procedures. Ohio Adm.Code 4901-1-24(F) provides that protective orders automatically expire after 24 months and requires a party wishing to extend a protective order to file an appropriate motion at least 45 days in advance of the expiration date. If FES wishes to extend this confidential treatment, it should file an appropriate motion at least 45 days in advance of the expiration date. If no such motion to extend confidential treatment is filed, the Commission may release this information without prior notice to FES.
- (10) Next, the Commission turns to the substance of FES' motion to dismiss. Recently, in *In re Ohio Schools Council d.b.a. Power4Schools v. FES*, Case No. 14-1182-EL-CSS, Entry (Nov. 18, 2015) (*Power4Schools Case*), the Commission examined a nearly identical issue. In *Power4Schools Case*, the Commission initially noted that "[i]t is the responsibility of the Commission to ensure the state's policy of protecting customers against unreasonable sales practices from retail electric services is effectuated[.]" citing

R.C. 4928.02(I) and 4928.06(A). *Power4Schools Case* at 4. R.C. 4905.26 confers upon the Commission jurisdiction to hear complaints against public utilities regarding whether a charge is unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law. Additionally, 4928.16 provides that the Commission's jurisdiction pursuant to R.C. 4905.26 extends to CRES providers. R.C. 4928.16(A)(2) bestows upon the Commission jurisdiction to hear complaints against CRES providers, including whether a CRES meets the minimum service requirements for competitive services, which are set forth in R.C. 4928.10 and Ohio Adm.Code Chapter 4901:1-21. The statutes and associated rules provide the Commission with jurisdiction to ensure that consumers are afforded adequate protection. R.C. 4928.10 specifically requires that the Commission rules include prohibitions against unfair, deceptive, and unconscionable acts and practices in the marketing, solicitation, and sales of CRES and in the administration of any contract for CRES. Further, the statute 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 set forth the standards of contract administration and contract disclosure required of CRES providers. *Power4Schools Case* at 4-5.

As discussed in *Power4Schools Case*, the Supreme Court of Ohio established a two-prong test to determine whether the Commission has exclusive jurisdiction over a public utility issue in *Allstate Ins. Co. v. Illum. Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, 893 N.E.2d 824 (*Allstate*). The first prong of the test inquires whether the act complained of is something typically authorized by the utility. The second prong queries whether the Commission's administrative expertise is necessary to settle the disputed issues. Only where both prongs are affirmatively satisfied does the Commission have exclusive jurisdiction over an issue.

- (11) Here, as in *Power4Schools Case*, the Commission finds that, based upon statutory authority, state policy, and Ohio Supreme Court precedent, the issues raised within the complaint are within the Commission's jurisdiction and, consequently, the motion to dismiss should be denied. As we stated in *Power4Schools Case*, "[i]t 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." *Power4Schools Case* at 5, citing R.C. 4928.02(I) and 4928.06. This is not a matter of the Commission deciding matters of contract interpretation regarding Toledo's CRES contract; 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 *Power4Schools Case* at 5, citing Ohio Adm.Code 4901:1-21-02; 4901:1-21-03; 4901:1-21-11; and 4901:1-21-12.

R.C. 4905.26 imparts with the Commission exclusive jurisdiction over service-related issues regarding public utilities. *Power4Schools Case* at 5, citing *Corrigan*, 122 Ohio St.3d 265, 2009-Ohio-2524, 910 N.E.2d 1009, at ¶ 8-10. Additionally, R.C. 4928.16 extends the Commission's jurisdiction to service-related issues involving CRES providers. In *Power4Schools Case*, the Commission held that, in light of these statutes, the *Allstate* test may be applied to CRES providers in addition to public utilities. *Id.* Consequently, the pertinent test will first inquire whether the issues alleged constitute a practice that FES is typically authorized to do; and, secondly, whether the Commission's expertise is necessary to resolve the issues alleged by Toledo.

The Commission finds that the first prong of the *Allstate* test is satisfied, as the issues alleged by Toledo constitute a practice that FES is typically authorized to do. Toledo has alleged that it contracted a fixed rate with FES and that FES has imposed charges in addition to the fixed rate. Pursuant to R.C. Chapter 4928 and Ohio Adm.Code Chapter 4901:1-21, FES is authorized to provide fixed-rate contracts. Further, FES is a certified CRES provider under R.C. Chapter 4928, authorizing it to contract with customers and administer resulting contracts. Consequently, Toledo's allegations involve matters that FES is normally authorized to do.

The Commission further finds that the second prong of the *Allstate* test is satisfied. Toledo alleges that FES has unfairly administered charges under its contract. In order to address these allegations, the Commission's expertise is necessary to interpret the regulations and statutes that govern Ohio's CRES market. As set forth in *Power4Schools Case*, a purpose of the

regulations set forth in R.C. Chapter 4928 and the rules promulgated thereunder "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." *Power4Schools Case* at 6. Further, the Commission has jurisdiction to hear any complaint regarding an alleged violation of R.C. 4928.10 and any rules promulgated under that code section. R.C. 4928.16(A)(2) and 4905.26. Consequently, as resolving the issues in this complaint requires interpretation of the statutes and regulations administered and enforced by the Commission, the Commission's expertise is necessary – preventing the complaint at issue from lying purely in contract. In conclusion, as the allegations set forth in the complaint fall within the Commission's statutory authority and the two-prong *Allstate* test is satisfied, the Commission finds that this complaint is within its jurisdiction.

For the reasons set forth above, the Commission finds that FES' motion to dismiss should be denied. Additionally, the Commission directs the attorney examiner assigned to the case to issue a procedural schedule setting this matter for hearing.

- (12) Next, the Commission will address Toledo's motion to stay termination of service. Toledo has requested that the Commission issue an order staying FES from terminating power to Toledo's accounts pursuant to Ohio Adm.Code 4901-9-01(E).
- (13) The Commission finds that Toledo's motion to stay termination of service is reasonable and should be granted until otherwise ordered. Consequently, the Commission finds that FES shall not terminate service to Toledo on the basis of the amounts disputed in this case until otherwise ordered by the Commission, the legal director, or an attorney examiner.

It is, therefore,

ORDERED, That Toledo's motion for leave to file a memorandum in opposition to FES' motion to dismiss out of time be granted as set forth in Finding (8). It is, further,

ORDERED, That FES' motion for a protective order be granted as set forth in Finding (9). It is, further,

ORDERED, That Docketing remove from the public docket and treat as confidential Exhibit 1 to the complaint as set forth in Finding (9). It is, further,

ORDERED, That FES' motion to dismiss for lack of subject matter jurisdiction be denied as set forth in Finding (11). It is, further,

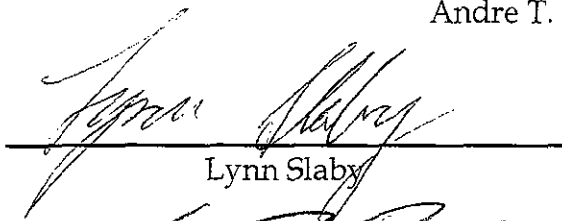
ORDERED, That Toledo's motion to stay termination of service should be granted as set forth in Finding (13). It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO



Andre T. Porter, Chairman



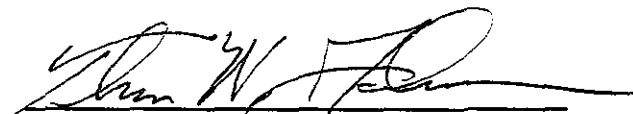
Lynn Slaby



Asim Z. Haque



M. Beth Trombold

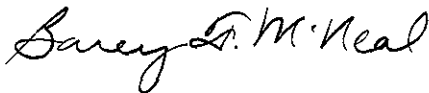


Thomas W. Johnson

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Entered in the Journal

JAN 06 2016



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Secretary