

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Board of)	
Commissioners of Lucas County,)	
)	
Complainants,)	
)	
v.)	Case No. 15-896-EL-CSS
)	
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 May 8, 2015, pursuant to R.C. 4905 and 4928, the Board of Commissioners of Lucas County (Lucas County) filed a complaint against FES. Lucas County alleges several counts relating to specific costs that FES incurred from PJM Interconnection LLC (PJM) in January 2014 and passed through to Lucas County. Lucas County'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's sole responsibility. Consequently, Lucas County 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. Lucas County further contends that FES's 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 May 29, 2015, FES filed an answer to the complaint, denying all of the allegations made by Lucas County.
- (5) Also on May 29, 2015, FES filed a motion to dismiss the complaint for lack of subject matter jurisdiction.

FES notes that it fully briefed the same arguments in four pending Commission cases that concern the same issues and similar contracts, and rather than subject the Commission to another round of briefing, FES incorporates the prior briefs and arguments by reference.¹ In those briefs, FES avers that R.C. 4928.05(A)(1) and R.C. 4928.03 limits the Commission's jurisdiction over CRES providers. FES notes the Commission determined this previously in *In re Ohio Power Co.*, Case No. 10-1454-EL-RDR, Opinion and Order (January 11, 2012) at 16-17. Specifically, FES argues that the Commission does not have jurisdiction to set CRES prices.

FES further argues in its incorporated briefs 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 Bremen v. Pub. Util. Comm.*, 103 Ohio St. 23 (1921). FES asserts that the Complainant is a sophisticated party, assisted by experienced counsel, that negotiated its contract, including the specific clause at issue in this case. Because the issue in this case is a legal interpretation of a contract clause, FES states that the issue in this case falls within the jurisdiction of the courts.

- (6) On June 8, 2015, Lucas County filed a memorandum contra to FES's motion to dismiss. Lucas County states it agrees with FES that the four other cases pending before the Commission

¹ See *In re Ohio Schools Council d.b.a. Power4Schools v. FES*, Case No. 14-1182-EL-CSS, Entry (Nov. 18, 2015); *Carbo Forge, et al. v. FirstEnergy Solutions Corp.*, Case No. 14-1610-EL-CSS; *City of Toledo v. FirstEnergy Solutions Corp.*, Case No. 14-1944-EL-CSS; *Central Ohio Technical College, et al. v. FirstEnergy Solutions Corp.*, Case No. 15-0455-EL-CSS.

are substantially similar to this proceeding. Lucas County asserts there are not any major factors that differentiate its case from the other proceedings and that it adopts the arguments against dismissal made by the Complainants in those cases. In doing so, Lucas County avers its complaint meets the two-part test set by the Supreme Court to determine whether the Commission has jurisdiction over an issue in *Allstate Insur. Co. v. Ilium. Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917 (*Allstate*). Under the test, 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. As argued in the other cases, the first prong of the test is satisfied because FES is an authorized CRES provider and is subject to Commission rules regarding CRES contracts. Further, 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.

- (7) As noted by the parties, there are several other cases pending before the Commission with nearly identical issues, which were addressed by the Commission in *In re Ohio Schools Council d.b.a. Power4Schools v. FES*, Case No. 14-1182-EL-CSS, Entry (Nov. 18, 2015) (*Power4Schools Case*). In that 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, R.C. 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 the *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 asks 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.

- (8) Here, as in the *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 Complainants' CRES contracts; rather, at issue is how the CRES provider is administering its contracts and the CRES provider's practices related to the 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 the *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 Complainants.

The Commission finds that the first prong of the *Allstate* test is satisfied, as the issues alleged by Complainants constitute a practice that FES is typically authorized to do. Complainants have alleged that they contracted for fixed rates with FES and that FES has imposed charges in addition to the fixed rates. 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, Complainants' allegations involve matters that FES is normally authorized to do.

The Commission further finds that the second prong of the *Allstate* test is satisfied. Complainants allege that FES has unfairly administered charges under their contracts. 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 the *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, thus 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.

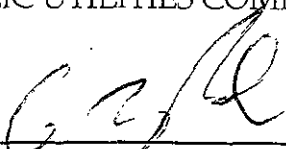
For the reasons set forth above, the Commission finds that FES's motion to dismiss should be denied. Additionally, the Commission directs the attorney examiner assigned to the case to issue a procedural schedule setting this matter for hearing.

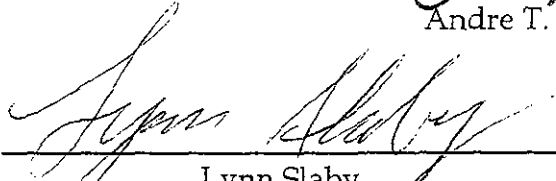
It is, therefore,

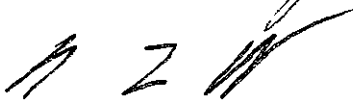
ORDERED, That the motion to dismiss for lack of subject matter jurisdiction be denied in accordance with Finding (8). It is further,

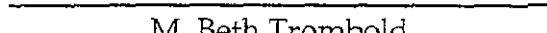
ORDERED, That a copy of this Entry be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



Andre T. Porter, Chairman

Lynn Slaby

Asim Z. Haque

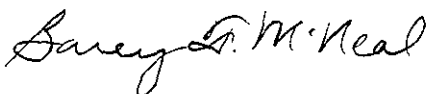
M. Beth Trombold

Thomas W. Johnson

NW/vrm

Entered in the Journal

FEB 03 2016



Barcy F. McNeal

Barcy F. McNeal
Secretary