

IN THE SUPREME COURT OF OHIO

CARL DIFRANCO, et al.

11-2025

Appellees,

CASE NO. _____

v.

On Appeal from the Geauga County
Court of Appeals, Eleventh Appellate
District

FIRSTENERGY CORP., THE
CLEVELAND ELECTRIC
ILLUMINATING COMPANY & OHIO
EDISON COMPANY

Court of Appeals
Case No. 2010-G-2990

Appellants.

APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION

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SUPREME COURT OF OHIO

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Proposition of Law: No matter how they are labeled, claims challenging the propriety of rates to be charged to utility customers are subject to the exclusive jurisdiction of the Public Utilities Commission of Ohio.

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DiFranco v. First Energy, No. 10 M 000164, C.P., Geauga County (Order Sep. 7, 2010).25

I. EXPLANATION OF WHY THIS IS A CASE OF GREAT GENERAL INTEREST AND RAISES A SIGNIFICANT CONSTITUTIONAL QUESTION.

The decision below undoes settled law that requires disputes involving the “rates” charged by a public utility to be heard only by the Public Utilities Commission of Ohio (the “Commission”). Before today, a case that “in any respect” involved “unjust, unreasonable or unlawful [rates]” was exclusively “designated [to] the [C]ommission.” *Kazmaier Supermarket, Inc. v. Toledo Edison Co.* (1991), 61 Ohio St. 3d 147. The contrary holding below required certain rate-based claims proceed before the Commission but allowed one related claim to proceed in Common Pleas court. The decision thus is not only at odds with settled precedent, but it also: (a) creates the risk of duplicative litigation; and (b) raises the specter of inconsistent results in the competing fora. These issues of great general interest deserve the Court’s attention.

This case involves a challenge by residential electric utility customers asserting they were promised “discounted rate[s].” *DiFranco v. First Energy*, Geauga App. No. 2010-G-2990, 2011 Ohio 5434, at ¶4, Appx. 3 (“DiFranco”) (quoting Plaintiffs’ Compl.). In May 2009, Plaintiffs filed suit in common pleas court, alleging that “the discounted rate . . . was terminated.” Plaintiffs sought to bring, among other claims, actions for breach of contract and fraud on the part of defendants FirstEnergy Corp., The Cleveland Electric Illuminating Company (“CEI”) and Ohio Edison Company (“Ohio Edison”) (collectively the “Companies”). *Id.* at ¶3. The Companies moved to dismiss these rate-based claims on the grounds that they were subject to the Commission’s exclusive jurisdiction. The trial court granted the motion as to all claims.

On appeal, the Eleventh District, reasoning that Plaintiffs’ contract claim was at bottom based on the “promise that [defendants] would permanently be charged the discounted rate,” properly affirmed the dismissal of the contract claim. *Id.* at ¶¶56, 59, Appx. 18, 19-20. Yet, the appellate court *reversed* the dismissal of the fraud claim, even though that was based on the very

same alleged promises regarding and change in the “discounted rate.” Id. This decision is not only at odds with the Court’s precedent addressing challenges to utility rates – an issue which the Court had recognized is addressed exclusively by the Commission – but it also creates the undesirable situation where claims based upon the same subject matter (indeed, the same “rate”) are litigated in separate fora. The decision below thus authorizes future litigants to split their claims, taking two bites at the utility-litigation apple while driving up the legal expenses for these actions. It also improperly rewards creative pleading. Employing the roadmap set out by the decision below, a plaintiff, utilizing the same set of facts, can craft multiple (yet related) legal theories, and invoke the jurisdiction of multiple tribunals. Ohioans would be well served by this Court adding clarity to an area that has become deeply clouded by the decision below.

The decision below also raises a constitutional question worthy of this Court’s attention. Quoting *New Bremen v. Pub. Util. Comm.* (1921), 103 Ohio St. 23, 30-31, the court below invoked Article VI of the Ohio Constitution as a ground to justify its decision that Plaintiffs’ fraud claim should proceed in state court. Id. at ¶¶27, 42, Appx. 9, 14. Despite the comprehensive statutory regime set out in Title 49 of the Revised Code, the court below held that Article VI permitted Plaintiffs’ fraud claim be resolved in common pleas court. The appeals court’s analysis of Article VI (and the case law interpreting it) undercuts the comprehensive statutory regime put in place by the General Assembly; one that, until now, was held to govern exclusively cases involving challenges to electric utility rates. Indeed, the decision below overstates the force of Article VI while ignoring the fundamental interpretative rule that policy decisions are properly made in the legislature, not the courts. See *State v. Smorgala* (1990), 50 Ohio St. 3d 222, 223 (“the General Assembly should be the final arbiter of public policy”).

This appeal presents a matter of public or great general interest along with a substantial constitutional question: whether a claim alleging a false promise about the continued availability of electric utility rates falls under the exclusive jurisdiction of the Commission. Long-standing precedent holds that the General Assembly conferred exclusive jurisdiction on the Commission for all claims involving the propriety of rates.¹ The appeals court correctly held that a breach of contract claim based on allegedly false promises made by defendants regarding the duration of an electric rate was properly dismissed because such a claim is subject to the Commission's exclusive jurisdiction. Remarkably, the court held that a related fraud claim based on the very same allegedly false promise regarding the very same electric rate was a "pure tort" that belonged before the court of common pleas. Because the Commission has exclusive jurisdiction to hear rate disputes, this Court should grant jurisdiction to review the decision below.

II. STATEMENT OF THE CASE AND FACTS

A. Background Facts

The facts of this case center upon a series of special rates for electric heating customers, many who lived in so-called "all electric homes." These special rates were rates approved by the Commission and instituted by CEI and Ohio Edison.² Those rates provided discounts from standard residential rates. The special rates were eliminated and replaced with different discounts, which, in turn, will be phased out over the next eight years. The termination of the

¹ *State ex rel. Northern Ohio Tel. Co. v. Winter* (1970), 23 Ohio St. 2d 6, 9; *Kazmaier Supermarket v. Toledo Edison Co.* (1991), 61 Ohio St. 3d 147, 152; *Hull v. Columbia Gas of Ohio*, 110 Ohio St. 3d 96, 2006-Ohio-3666, at ¶21.

² While FirstEnergy Corp. is a named defendant, it is not an electric utility. Nor does it charge rates for electric services to any customers. It is a holding company. CEI and Ohio Edison are wholly owned subsidiaries of FirstEnergy Corp.

special rates and the phase out of the discounts were all done pursuant to orders of the Commission.

In their complaint before the Court of Common Pleas for Geauga County, Plaintiffs allege that the Companies breached various “oral agreements” and fraudulently induced them to accept the special discounted rates with the alleged false promise that this rate structure would be available to them in perpetuity. (Compl. ¶¶ 1, 2, 15, 16, 17, 19, 49.)

CEI and Ohio Edison, with the approval of the Commission, began offering “all electric” rates to electric heating customers, among others. One of the justifications for these rates was to address the perceived natural gas energy crisis in the 1970s. Customers who chose the all electric rate received a lower rate during the winter period for using electricity (as opposed to other fuels) as their main source of energy for space heating or water heating and for load management. In November 1973, the Commission approved CEI’s first all electric rate tariff, and CEI began offering it to its customers the following year. In subsequent years, the Commission approved similar rates for CEI and Ohio Edison.

Under these tariffs, eligible customers received lower rates for electricity used for given levels of usage. Although the amounts and certain terms of these rates changed over time, the rate schedules remained in effect for CEI through April 2009 for distribution service and through May 2009 for generation service. While the underlying rate structure changed on those dates, electric heating customers, including Plaintiffs, continued to receive without interruption all of the discounts for distribution service and a reduced discount for generation service. Throughout the four decades that the all electric rates were in effect, they were at all times rates charged pursuant to and in accordance with filed tariffs approved by the Commission. See *In re Application of Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo*

Edison Co. for Approval of a New Rider and Revision of an Existing Rider, PUCO No. 10-176-EL-ATA (Commission's Finding and Order, Mar. 3, 2010 ("Mar. 2010 Order"), p. 1).

Two legislative events precipitated the discontinuation of the special rates and the gradual elimination of the discounts enjoyed by these customers. In 1999, the General Assembly passed amended Senate Bill No. 3, which restructured Ohio's retail electric industry and required a five-year freeze of rates for electricity. *Id.* After the rate freeze expired, in January 2006, the Commission ordered that, as of January 1, 2007, the all electric rates would no longer be available to new customers or new premises. *Id.* In 2008, the General Assembly passed additional major legislation affecting Ohio's electric industry. In Senate Bill 221, the General Assembly established a state policy to encourage energy efficiency and conservation and set aggressive alternative energy and energy efficiency benchmarks for Ohio's electric utilities.

Because the all electric rates promoted higher electricity consumption at below cost, these rates ran counter to state policies established in Senate Bill 221, especially policies to promote conservation and energy efficiency. As a result, as part of the Companies' 2008 Electric Security Plan ("ESP"), filed pursuant to Senate Bill 221, the Commission authorized the discontinuation of the then-current rate structure, while retaining discounts for all electric customers. Numerous residential rate schedules, including the all electric rates, were consolidated into a single residential rate schedule for CEI and for Ohio Edison. See Mar. 2010 Order, pp. 1-2. To ease the transition away from the special rates, the Companies established, with Commission approval, credits for certain customers who previously had been receiving service under the all electric rates. *Id.* at p. 2.

During the winter heating season of 2009-2010, notwithstanding that they continued receiving discounts on their electricity, customers who had previously received service under all

electric rates began to complain about increases in their bills. In response, on March 3, 2010, a proceeding was initiated at the Commission, referred to as Case No. 10-176-EL-ATA. In that case, the Commission issued an order directing the Companies to file tariffs that implemented an additional credit for these customers to provide “interim rate relief for all electric residential customers of FirstEnergy.” *In re Application of Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co. for Approval of a New Rider and Revision of an Existing Rider*, PUCO No. 10-176-EL-ATA (Commission’s Opinion and Order, May 25, 2011 (“May 2011 Order”), p. 4). As a result, most electric heating customers received bill credits so that the discount they received relative to other residential customers’ rates was the same as or greater than the discount that existed in 2008.

In Case No. 10-176-EL-ATA, the Commission also held numerous public hearings. In announcing these hearings, the Commission specifically requested customers appear and present any evidence or testimony that the Companies made promises or entered into contracts regarding the special discounted rates, the same issue raised in Plaintiffs’ complaint.

Further, in February 2011, the Commission conducted a five-day evidentiary hearing. At that hearing, several parties, including the Ohio Office of Consumers’ Counsel (“OCC”), alleged that CEI and Ohio Edison had breached contracts with customers for discounted rates or otherwise made misrepresentations in marketing materials.

On May 25, 2011, the Commission issued its opinion in Case No. 10-176-EL-ATA. The Commission ordered that the phase-out of the previously ordered discount extend over an eight-year period for most customers who previously had received service under an all electric rate. *See* May 2011 Order, at pp. 8; 20. However, the Commission also ordered that the two other discounts being provided to electric heating customers be continued without change.

Notably, in its May 25, 2011 Order, the Commission addressed the allegations that the Companies had made false promises and engaged in improper marketing to customers – the same allegations in Plaintiffs’ Complaint. The Commission determined that CEI and Ohio Edison had not acted improperly. The Commission held that, with regard to “claims that the Companies unfairly and deceptively enticed residential customers and housing developers to commit to electric heating before the Companies abandoned support for favorable rate treatment, . . . the evidence demonstrates that discounts for electric heating customers have never been eliminated and that electric heating customers have always received a minimum of two discounts.” *Id.* at p. 23. Indeed, the Commission observed that the evidence “does not demonstrate how electric heating customers have been misled by FirstEnergy³ when these customers have always received a significant discount on the rates paid by standard service offer customers.” *Id.*

B. Procedural History

1. The Court of Common Pleas Decision

On February 16, 2010, Plaintiffs filed suit in the Court of Common Pleas for Geauga County. As noted, Plaintiffs’ Complaint alleged, among other things, breach of contract and fraudulent inducement against the Companies regarding the elimination of the special rates.⁴ Plaintiffs’ contract claim alleges that the Companies entered into an oral contract because the Plaintiffs received an “unlimited promise” that they would receive the discounted rates indefinitely. (Compl. ¶ 4.) Plaintiffs’ fraud claim similarly alleges that the Companies misled them by promising that they would receive the discounted rates indefinitely. (See *id.* ¶ 49.)

³ The reference to “FirstEnergy” was to FirstEnergy Corp.’s Ohio electric utilities, *i.e.*, CEI, Ohio Edison and Toledo Edison.

⁴ The Complaint also included claims for declaratory and injunctive relief.

Pursuant to Rule 12(B)(1) of the Ohio Rules of Civil Procedure, the Companies moved to dismiss for lack of subject matter jurisdiction because Plaintiffs' claims all involved the question of the rate to which they claimed they were entitled, and a court of common pleas does not have jurisdiction to hear a rate dispute.

The trial court properly granted the Companies' motion to dismiss, holding that under Ohio law a court of common pleas does not have jurisdiction to hear a rate dispute initiated by customers against utility companies. (See Order of Geauga Cty. C.P. (Sept. 7, 2010) ("9/7/2010 Order") at p. 3; Appx. 27.) The court held that "the Plaintiffs' claims are not pure contract or pure tort" and that Plaintiffs' arguments, "while thorough, creative and imaginative, cannot survive application" of the test established in *Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.*, 119 Ohio St. 3d 301, 2008-Ohio-3917 – *e.g.*, whether the expertise of the Commission was required – because "[t]he dispute between the Companies and the plaintiffs is over the rate increases." *Id.* at pp. 5-6; Appx. 29-30. The trial court further held that, pursuant to Revised Code Section 4905.26, the Commission is the proper forum for such disputes: "Courts should not be dissuaded from finding a claim to be within the exclusive jurisdiction of the Commission simply because it is cloaked in terms of breach of contract or tort." *Id.* at 5; Appx. 29.

On November 10, 2010, the Commission, in Case No. 10-176-EL-ATA, subsequently agreed with the trial court's decision:

[T]he Geauga County Court of Common Pleas has issued a decision holding that it lacks jurisdiction over allegations pertaining to the Companies' rate and marketing practices. The Commission agrees with the Court [t]he Commission will exercise our jurisdiction over FirstEnergy's rate and marketing practices ...

See In re Application of Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co. for Approval of a New Rider and Revision of an Existing Rider, PUCO No. 10-176-EL-ATA (Fifth Entry on Rehearing, Nov. 10, 2010, p. 5).

2. The Court of Appeals Decision

The Court of Appeals addressed Plaintiffs' breach of contract claim, which allegedly occurred as "as a result of the companies' termination of the discount program," and Plaintiffs' fraud claim for allegedly "inducing appellants to purchase electrical heating systems by misrepresenting that they would permanently be provided with discounted rates." *DiFranco* at ¶4, Appx. 3-4. The Court of Appeals upheld the trial court's dismissal of Plaintiffs' contract claim. The Court of Appeals observed that "[w]hile appellants argue their contract claims ... are based on the companies' alleged breach of a promise to charge a discounted rate, the essence of these claims is that the rate approved by the Commission and imposed by the companies after the all-electric program was eliminated was unjust, unreasonable or unlawful." *DiFranco* at ¶54; Appx. 17. Therefore, "the trial did not err in finding such claims are within the PUCO's exclusive jurisdiction." *Id.* Further, "in order for a claim to be properly considered as a pure contract claim, the contract at issue must be completely unrelated to the utility's service or rates." *Id.* at ¶56; Appx. 18. But, "the subject matter of the alleged promise is *the rate to be charged the customers.*" *Id.* (emphasis original). The Court of Appeals thus agreed with the trial court that only the Commission, and not a court of common pleas, had jurisdiction to hear Plaintiffs' contract claim.

In contrast, the Court of Appeals reversed the dismissal of Plaintiffs' fraud claim, providing minimal reasoning for this decision. The Court of Appeals simply stated, "[B]ecause fraud is a civil action that existed at common law in Ohio and [Plaintiffs] alleged a fraud claim in their complaint," a court of common pleas had jurisdiction to hear it. *Id.* at ¶55; Appx. 17-18. The Court of Appeals believed that this was so even though "the trial court did not err in dismissing appellants' claim for injunction as it relates to the fraud claim since this would

require a determination of the proper rate to be charged.” Id. (emphasis added). The Court of Appeals stated the Commission’s expertise would not be necessary to address Plaintiff’s fraud claim. Id. at ¶58; Appx. 19-20. The Court of Appeals never stated, however, why this was true. Further, the Court of Appeals cursorily found that “since [the fraud] claim will require appellants to prove that, when they made the alleged promise, the companies misrepresented their present state of mind in that they had no intention of performing the promise.” Id. at ¶59; Appx. 19-20. Thus, the Court of Appeals reasoned, Plaintiffs’ fraud claim somehow fell outside of a practice normally authorized by a utility. Id. Based on the foregoing, the Court of Appeals held that the trial court had jurisdiction to hear the fraud claim and reversed and remanded it accordingly.

III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: No matter how they are labeled, claims challenging the propriety of rates to be charged to utility customers are subject to the exclusive jurisdiction of the Public Utilities Commission of Ohio.

Pursuant to settled law, the Commission has exclusive jurisdiction with regard to any issue involving the rates utilities charge their customers. As this Court explained in *Kazmaier*:

The General Assembly has created a broad and comprehensive statutory scheme for regulating the business activities of public utilities. R.C. Title 49 sets forth a detailed statutory framework for the regulation of utility service and the fixation of rates charged by public utilities to their customers. The General Assembly has provided a rather specific procedure by which customers may challenge rates or charges of a public utility that are “in any respect” unjust, unreasonable, or unlawful, and has designated the commission as the appropriate forum before which such claims are to be heard.

61 Ohio St. 3d at 150-151. This Court further held that “the commission has been granted exclusive jurisdiction to hear and determine matters which are in essence rate and service oriented.” Id. at 153-154. Disputes between a utility and its customers involving rates thus unquestionably fall within the exclusive jurisdiction of the Commission.

To be sure, Ohio jurisprudence permits a plaintiff to prosecute a “pure tort” claim against a utility in a court of common pleas. See, e.g., *Milligan v. Ohio Bell Tel. Co.* (1978), 56 Ohio St. 2d 191, 195. Nonetheless, “the mere fact” that a litigant “cast its allegations in the underlying case to sound in tort is insufficient to confer jurisdiction upon the common pleas court.” *State ex rel. Columbia Gas of Ohio, Inc. v. Henson*, 102 Ohio St. 3d 349, 2004-Ohio-3208, at ¶19. The *Henson* court subsequently held that plaintiff’s tortious interference claim against a utility was service-related and could not be heard by a court of common pleas. *Id.* at ¶20.

Recently, in *Hull v. Columbia Gas of Ohio*, 110 Ohio St. 3d 96, 2006-Ohio-3666, at ¶39, this Court, reversing a Court of Appeals decision holding that a customer’s breach of contract claim against a natural gas utility could be brought in a court of common pleas, stated, “A pure contract case is one having nothing to do with the utility’s service or rates,” and held that the claim related to the rate he was to be charged and thus was subject to the Commission’s jurisdiction. *Id.* at ¶34.

A “pure tort” case is likewise “one having nothing to do with service or rates.” Indeed, in *State ex rel The Illuminating Co. v. Cuyahoga Court of Common Pleas*, 97 Ohio St. 3d 69, 2002-Ohio-5312, at ¶¶24-26, a case decided prior to *Hull*, this Court held that plaintiff predicated its fraud allegations on violations of Section 4905.22 of the Ohio Revised Code involving unjust service and billing. Therefore, those claims were within the exclusive jurisdiction of the Commission. See, e.g., *Suleiman v. Ohio Edison* (Mahoning Cty. 2001), 146 Ohio App. 3d 41, 46-47 (a fraudulent billing claim held to be within the exclusive jurisdiction of the Commission because a claim about “[a] customer being charged a higher rate than authorized by the rate schedule is within the exclusive jurisdiction of PUCO”).

More recently, in *Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.*, 119 Ohio St. 3d 301, 2008-Ohio-3917, at ¶12, this Court established a two-pronged test to determine whether a trial court has jurisdiction over a tort allegedly committed by a utility. “First, is PUCO’s administrative expertise required to resolve the issue in the dispute? Second, does the act complained of constitute a practice normally authorized by a utility? . . . If the answer to either question is in the negative, the claim is not within the PUCO’s exclusive jurisdiction.” *Id.*

The appellate court’s analysis of the fraud claim ignored these authorities. Indeed, that court’s reliance on authority under Ohio Constitution Article IV and its citation to general common pleas jurisdiction under Revised Code Section 2305.01 and its observation that the fraud claim must be heard because it existed at common law miss the point completely. Here, following *Hull*, Plaintiffs’ fraud claim cannot be said to have “nothing to do with rates or service.” Plaintiffs expressly allege that “Defendants agreed to provide an all electric home discount in consideration of Plaintiffs equipping their homes with all electric heating systems and appliances.” (Compl. ¶ 15.) The “discount” referred to is a discount in the rate for electric service. “Defendants placed no time limitations on their agreements, covenants, promises and inducements as to the all electric homes program.” (*Id.* ¶ 17.) The agreements and promises referenced here refer to alleged agreements and promises related to a discounted rate for electricity. Plaintiffs claim that they “justifiably relied” on the Companies’ statements. (*Id.* ¶ 18.) “Defendants, by and through their agents, distributors, representatives, or employees represented that the ‘all electric home’ program would be ‘permanent’ or unlimited as to time or would be perpetual as long as the homeowners maintained their electric usage.” (*Id.* ¶ 19.) Defendants “induced” plaintiffs to buy all electric homes and/or to continue using electric appliances by “maintain[ing] and provid[ing] to Plaintiffs and others similarly situated discounts

until May, 2009.” (Id. ¶ 21.) These allegations, which form the basis for the contract and fraud claims alike, are that the Plaintiffs were promised a certain rate. The Court of Appeals correctly held that the contract claim was subject to the Commission’s exclusive jurisdiction. It wrongly held that the fraud claim was not, and provided little rationale why the two claims could be treated differently since they were both based upon the same alleged facts.

Demonstrating that the promises upon which the contract and fraud claims are based are identical, the Complaint repeatedly refers to “agreements, misrepresentations and fraudulent inducements” together. (See, e.g., id. ¶¶ 10, 16, 17, 18, 29, 30, 31.) The fraud count alleges that the Companies “falsely represented to Plaintiffs . . . that if they maintained all electric homes . . . Defendants would permanently include them as all electric home . . . at a reduced rate.” (Id. ¶ 49). Both claims are based upon the same promise, *i.e.*, that Plaintiffs would receive discounted rates for electric service indefinitely.

Plaintiffs have alleged that the Companies misled them about the rates the Companies would charge. (See Compl. ¶ 49.) Plaintiffs’ damages ostensibly would require calculating the difference between the rates that Plaintiffs paid and the rates that Plaintiffs believe that they were promised. Thus, Plaintiffs’ fraud claim is inescapably a claim about rates. Pursuant to this Court’s precedents, Plaintiffs’ fraud claim falls under the exclusive jurisdiction of the Commission. *See Kazmaier*, 61 Ohio St. 3d at 151; *State ex rel The Illuminating Co. v. Cuyahoga Court of Common Pleas*, 97 Ohio St. 3d 69, 2002-Ohio-5312, at ¶¶24-26; *Suleiman*, 146 Ohio App. 3d at 46-47. In fact, the Commission, in Case No. 10-176-EL-ATA, heard testimony and ruled upon the same claims as those raised in Plaintiffs’ complaint.

The decision below also fails to apply the *Allstate* test properly to Plaintiffs’ fraud claim. In analyzing the first prong of the *Allstate* test, the Court held that, for all claims but the fraud

claim, the Commission's administrative expertise would be required to determine "whether appellants were promised rates that were in violation of the PUCO-approved tariffs or were not authorized by the PUCO," and the amount of the overcharge. *DiFranco* at ¶ 58, Appx. 19. The Court further held, without explanation, that "[s]uch would not be the case, however, with respect to appellants' fraud claim." *Id.* Because the same promise is the basis for all claims, if the Commission's expertise is required for the contract claims, it is necessary to address the fraud claim as well. Further, Plaintiffs allege that the Companies misled them regarding the availability of all electric rates or discounts. The Commission also has expertise of the accuracy and propriety of the marketing materials or statements that may have been made to customers. *See, e.g.*, OAC 4901:1-20-24(D). In fact, in Case No. 10-176-EL-ATA, the Companies' marketing of the all electric rates was specifically investigated. *See* May 2011 Order at 22-23.

The Court of Appeals also drew an incorrect distinction regarding the second *Allstate* factor, whether the acts complained of constitute a practice normally authorized by the utility:

[T]he act that is actually being challenged by appellants with respect to their contract claims is the imposition of the higher rate following the elimination of the all-electric program. It should be obvious that charging a customer based on rates approved by the PUCO is a practice normally authorized by the utility. However, such is not the case with respect to appellants' fraud claim since such claim will require appellants to prove that, when they made the alleged promise, the companies misrepresented their present state of mind in that they had no intention of performing the promise. [*DiFranco* at ¶ 59, Appx. 19-20.]

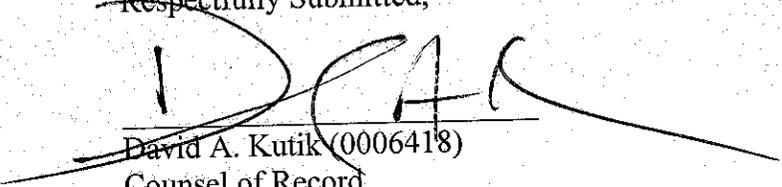
The Court of Appeals' distinction is incorrect. There is no difference between the alleged promise that forms the basis of Plaintiffs' contract claim and the promise or representation upon which the fraud claim is based. Both relate to an alleged promise that Plaintiffs would receive a discounted rate and would have such a rate indefinitely. The Court of Appeals appeared to recognize this in affirming dismissal of the claim for injunctive relief: "With regard to the request for injunctive relief, the trial court did not err in dismissing appellants' claim for

injunction as it relates to their fraud claim since this would require a determination of the proper rate to be charged." *DiFranco* at ¶ 55, Appx. 18. The same logic must apply to the fraud claim itself. It is based upon an alleged promise that Plaintiffs would be charged all electric rates; the same basis as the contract claim. Here, the *Allstate* test establishes that Plaintiffs' tort claim falls under the exclusive jurisdiction of the Commission and cannot be heard in a court of common pleas.

IV. CONCLUSION

For the foregoing reasons, this Court should grant jurisdiction to review the decision of the Eleventh District Court of Appeals, Geauga County.

Respectfully Submitted,



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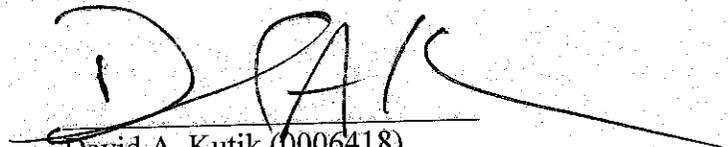
*Attorneys for Defendants-Appellants
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellants' Memorandum in Support of Jurisdiction was served by First-Class U.S. Mail, this 5th day of December, 2011 upon the following parties:

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APPENDIX

FILED
IN COURT OF APPEALS

OCT 21 2011

DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

STATE OF OHIO

COUNTY OF GEAUGA

CARL DIFRANCO, et al.,

Plaintiffs-Appellants,

- vs -

FIRST ENERGY, et al.,

Defendants-Appellees.

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

JUDGMENT ENTRY

CASE NO. 2010-G-2990

For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Geauga County Court of Common Pleas is affirmed in part and reversed in part; and this case is remanded for further proceedings consistent with the opinion.

Costs to be taxed against the parties equally.

On September 20, 2011, co-counsel for appellants, Timothy J. Grendell, moved to withdraw as counsel instantior and requested 30 days for appellants to secure additional co-counsel. The motion to withdraw is hereby granted. The request for 30 days to secure additional co-counsel is denied as moot.


PRESIDING JUDGE TIMOTHY P. CANNON

FOR THE COURT

131374

FILED

IN COURT OF APPEALS

OCT 21 2011

DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO

CARL DIFRANCO, et al.,

:

OPINION

Plaintiffs-Appellants,

:

CASE NO. 2010-G-2990

- vs -

:

FIRST ENERGY, et al.,

:

Defendants-Appellees.

:

Civil Appeal from the Court of Common Pleas, Case No. 10 M 000164.

Judgment: Affirmed in part, reversed in part, and remanded.

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TIMOTHY P. CANNON, P.J.

{1} Appellants, Carl DiFranco and other named residents of northeast Ohio, appeal the judgment of the Geauga County Court of Common Pleas dismissing their complaint for declaratory and other relief against appellees, First Energy, Cleveland Electric Illuminating Company, and Ohio Edison Company ("the companies"), for lack of subject matter jurisdiction. At issue is whether appellants' complaint represents a

challenge to the rate they were charged by the companies for electrical service and is therefore within the exclusive jurisdiction of the Public Utilities Commission of Ohio ("PUCO"). For the reasons that follow, we affirm in part, reverse in part, and remand.

{¶2} Appellants filed this action against the companies, which are public utilities providing electricity in Ohio. Appellants alleged they represent a class of similarly-situated individuals and requested class action status for their lawsuit.

{¶3} In their complaint, appellants, who are residential customers of the companies, alleged that, during the last 40 years, the companies established the "all-electric program" with the approval of the PUCO. Pursuant to this program, the companies offered to charge them a discounted rate for electricity if they purchased all-electric homes or equipped their homes with all-electric heating systems and appliances. Appellants alleged the companies promised to provide this discounted rate to them permanently as long as they continued to maintain all-electric appliances in their homes, even if the PUCO eliminated the discounted rate. Appellants alleged that, in exchange for this promise, they purchased all-electric homes or electric heating systems and other appliances, instead of natural gas or oil-operated appliances. Appellants alleged the companies provided this discounted rate to them until May 2009, when the discount was terminated. Appellants alleged that, due to the discontinuation of the reduced rate, they have been damaged in that they are now required to pay a higher rate for electricity charged to other customers.

{¶4} In their four-count complaint, appellants asserted claims for (1) declaratory judgment, based on the parties' alleged contract, to require the companies to continue to charge appellants the discounted rate for electrical service they paid prior to May

2009 and to require the companies to refund all excess charges appellants paid; (2) breach of contract, as a result of the companies' termination of the discount program; (3) fraud, for inducing appellants to purchase electrical heating systems by misrepresenting they would permanently be provided with discounted rates; and (4) an injunction, based on appellees' alleged breach of contract and fraud, to prevent the companies from charging appellants more than the discounted rate.

{¶5} In response, the companies filed a motion to dismiss the complaint for lack of subject matter jurisdiction, pursuant to Civ.R. 12(B)(1). They argued that this case is within the exclusive jurisdiction of the PUCO because, in effect, it represents a challenge to the rate charged by utilities, which the PUCO has exclusive jurisdiction to address.

{¶6} In their brief in opposition, appellants argued that the PUCO does not have jurisdiction of their claims. They argued that this case does not represent a challenge to the rate charged by the companies, but rather presents a "pure contract" claim and a "pure tort" claim, which are not within the PUCO's jurisdiction. In support of their contract claim, appellants argued the companies breached their promise to charge appellants the discounted rate. In support of their tort claim, they maintained that the companies fraudulently induced them to enter the all-electric program by misrepresenting the rate appellants would be charged.

{¶7} The factual history that follows is derived from the evidentiary materials submitted by the parties in their filings concerning the companies' motion to dismiss, including various rate schedules approved by the PUCO and orders entered by that agency. Beginning in the early 1970s, the PUCO approved discounted rates for

electricity for residential customers using electricity as their sole source of energy. These rates remained in effect until the end of 2008.

{18} In 2008, the General Assembly enacted Senate Bill 221, which established a statewide policy encouraging energy efficiency and conservation. Because the discount to all-electric users in effect for some 40 years encouraged increased usage by charging a lower rate for electricity, the companies determined the discount conflicted with this change in state policy. As a result, in January 2009, the companies filed, and the PUCO approved, a tariff that consolidated the different residential rates then in effect, including the all-electric rate, into one residential rate, beginning in May 2009. The effect of such request was to terminate the discounted rate for all-electric users and to require those users to pay the same rate charged to the companies' other customers. At the same time, the companies requested, and the PUCO approved, credits to the all-electric customers in order to mitigate the impact on these customers of this consolidation. Thus, while the PUCO approved the rate structure that eliminated the all-electric discount, these customers continued to receive discounts.

{19} However, despite the continued discounts provided to the all-electric users, during the winter of 2009-2010, several of these customers complained about increases in their bills. In response to these complaints, on February 12, 2010, the companies filed an application for approval of new tariffs with the PUCO, being case No. 10-176-EL-ATA ("the PUCO case"), aimed at limiting the amount of bill increases for their all-electric customers. Four days later, on February 16, 2010, appellants filed their complaint in the trial court.

{¶10} On March 3, 2010, the PUCO entered a finding and order in the PUCO case, in which it found that, "until such time as the [PUCO] determines the best long-term solution to this issue, rate relief should be given to the all-electric residential customers." To that end, the PUCO ordered the companies to file tariffs for these customers that would provide bill impacts commensurate with the companies' December 31, 2008 charges for them prior to the elimination of the discount. The companies responded to the PUCO's order on March 17, 2010, by filing new tariffs designed to restore the discounts. It is undisputed that the all-electric customers are now receiving a discount that is the same as or greater than the discount that existed in December 2008, before the discount was terminated.

{¶11} On September 7, 2010, the trial court in a detailed, seven-page judgment entry granted the companies' motion to dismiss. The court noted that, pursuant to R.C. 4905.28, the PUCO has exclusive jurisdiction to determine cases against public utilities, such as the companies, claiming that any rate or charge "is in any respect, unjust, unreasonable, *** or in violation of law." The court further noted that, while the PUCO's jurisdiction is broad and extensive, claims characterized as pure contract or pure tort, which have nothing to do with rates or service, are excluded from the PUCO's jurisdiction. After describing the tests adopted by the Supreme Court of Ohio to determine whether a claim is a pure contract or a pure tort claim, the trial court found:

{¶12} "The dispute between the Companies and the plaintiffs is over the rate increases. There is no separate rate 'contract' between the utility and the plaintiffs. The contract is set *by the tariff*, not by agreement. The rate of a public utility is determined by PUCO, not by bargaining between the utility and customers."

{¶13} Finally, the court noted that, by its ruling, appellants were not left without a remedy because their claims can be determined by the PUCO and the Supreme Court of Ohio, which has jurisdiction to review decisions of the PUCO.

{¶14} Subsequent to the trial court's ruling, the PUCO, in its November 10, 2010 Fifth Order on Rehearing entered in the PUCO case, stated it agreed with the trial court's finding that the PUCO has jurisdiction over appellants' claims that they were promised rates that are in violation of PUCO-approved tariffs or that were not authorized by the PUCO. The PUCO stated it will exercise jurisdiction over the companies' rates and marketing practices and that the parties may conduct discovery regarding these issues and present evidence at upcoming hearings. In October and November 2010, the PUCO held six public hearings regarding the all-electric rates.

{¶15} Appellants appeal the trial court's judgment, asserting four assignments of error. Because appellants' first and fourth assigned errors are related, we shall consider them together. They allege:

{¶16} "[1.] The common pleas court erred when it ruled that it lacked jurisdiction to adjudicate homeowners' breach of contract and tort claims against First Energy based on First Energy's unilateral breach of First Energy's promises, covenants and representations that in consideration of homeowners' agreement to purchase or maintain all-electric homes, homeowners would be included in First Energy's all-electric home discount program.

{¶17} "[4.] The lower court erred by ruling that homeowners' claims based on First Energy's breach of its pre-delivery promises and reliance or promissory estoppel are not pure contract or tort."

{¶18} Appellants argue the trial court erred in finding their claims were not pure contract and pure tort claims and that it consequently lacked subject matter jurisdiction to address them.

{¶19} Subject matter jurisdiction is the power conferred upon a court, either by constitutional provisions or by statute, to decide a particular matter or issue on its merits. *State ex rel. Jones v. Suster* (1998), 84 Ohio St.3d 70, 75. A motion to dismiss for lack of subject matter jurisdiction is made pursuant to Civ.R. 12(B)(1), and "[t]he standard of review for a dismissal pursuant to Civ.R. 12(B)(1) is whether any cause of action cognizable by the forum has been raised in the complaint." *State ex rel. Bush v. Spurlock* (1989), 42 Ohio St.3d 77, 80. (Citations omitted.) This court has held:

{¶20} "[I]n determining whether the plaintiff has alleged a cause of action sufficient to withstand a Civ.R. 12(B)(1) motion to dismiss, the trial court is not confined to the allegations of the complaint and it may consider material pertinent to such inquiry without converting the motion into one for summary judgment." *Kinder v. Zuzak*, 11th Dist. No. 2008-L-167, 2009-Ohio-3793, at ¶10, quoting *McHenry v. Indus. Comm. of Ohio* (1990), 68 Ohio App.3d 56, 62, citing *Southgate Dev. Corp. v. Columbia Gas Transm. Corp.* (1976), 48 Ohio St.2d 211, paragraph one of the syllabus.

{¶21} Further, in ruling on a Civ.R. 12(B)(1) motion, the court is not required to take the allegations in the complaint at face value. *N. Central Local Edn. Assn. v. N. Central Local School Dist. Bd. of Edn.* (Oct. 2, 1996), 9th Dist. No. 96CA0011, 1996 Ohio App. LEXIS 4349, *3. "[N]o presumptive truthfulness attaches to plaintiff's allegations[.] *****" *Id.*, quoting *Mortensen v. First Fed. S. & L. Assn.*, 549 F.2d 884, 891 (C.A.3, 1977). Further, we review an appeal of a dismissal for lack of subject matter

jurisdiction under Civ.R. 12(B)(1) de novo. *Washington Mut. Bank v. Beatley*, 10th Dist. No. 06AP-1189, 2008-Ohio-1679, at ¶8.

{¶22} The Supreme Court of Ohio has on numerous occasions considered whether the PUCO, as opposed to Ohio courts, has jurisdiction over claims of customers against Ohio's public utilities.

{¶23} In *Milligan v. Ohio Bell Tel. Co.* (1978), 56 Ohio St.2d 191, the Supreme Court of Ohio held:

{¶24} "A Court of Common Pleas is without jurisdiction to hear a claim alleging that a utility has violated R.C. 4905.22 by charging an unjust and unreasonable rate *** since such matters are within the exclusive jurisdiction of the Public Utilities Commission. ***"

{¶25} "A Court of Common Pleas has jurisdiction pursuant to R.C. 2305.01 to hear a properly stated claim alleging an invasion of privacy brought against a utility." *Id.* at paragraphs two and three of the syllabus.

{¶26} In explaining paragraph three of its syllabus, the *Milligan* Court stated:

{¶27} "In *New Bremen v. Pub. Util. Comm.* (1921), 103 Ohio St. 23, at pages 30-31, this court noted that the commission has no power to judicially ascertain and determine legal rights and liabilities, since such power has been vested in the courts by the General Assembly pursuant to Article IV of the Ohio Constitution. Thus, claims sounding in contract or tort have been regarded as reviewable in the Court of Common Pleas, although brought against corporations subject to the authority of the commission. See *State ex rel. Dayton Power & Light Co. v. Riley* (1978), 53 Ohio St.2d 168, 169-170; *Richard A. Berjani, D.O. Inc., v. Ohio Bell Tel. Co.* (1978), 54 Ohio St.2d 147.

{¶28} "Whereas the right of privacy has been recognized as a legal right existing at common law in this state, see *Housh v. Peth* (1956), 165 Ohio St. 35, it follows that the Court of Common Pleas has subject-matter jurisdiction pursuant to R.C. 2305.01 to hear a complaint alleging a violation of this right by a utility. The claim of invasion of privacy confers power upon the court to hear the claim, and it is incumbent for it to do so unless the claim is alleged solely for the purpose of obtaining jurisdiction or is wholly insubstantial or frivolous. See *Binderup v. Pathe Exchange* (1923), 283 U.S. 291, at pages 305-308; *Ouzts v. Maryland Nat. Ins. Co.* (C.A.9, 1972), 470 F.2d 790, 791." *Milligan*, supra, at 195.

{¶29} In *Kazmaier Supermarket, Inc. v. Toledo Edison Co.* (1991), 61 Ohio St.3d 147, the Court considered a claim that the utility charged the customer an excessive rate. Before addressing this issue, the Court provided a pertinent analysis of the PUCO's jurisdiction, as follows:

{¶30} "The General Assembly has created a broad and comprehensive statutory scheme for regulating the business activities of public utilities. R.C. Title 49 sets forth a detailed statutory framework for the regulation of utility service and the fixation of rates charged by public utilities to their customers. As part of that scheme, the legislature created the Public Utilities Commission and empowered it with broad authority to administer and enforce the provisions of Title 49. *The commission may fix, amend, alter or suspend rates charged by public utilities to their customers.* R.C. 4909.15 and 4909.16. Every public utility in Ohio is required to file, for commission review and approval, tariff schedules that detail rates, charges and classifications for every service

offered. R.C. 4905.30. And a utility must charge rates that are in accordance with tariffs approved by, and on file with, the commission. R.C. 4905.22.

{¶31} "The General Assembly has by statute pronounced the public policy of the state that the broad and complete control of public utilities shall be within the administrative agency, the Public Utilities Commission. This court has recognized this legislative mandate.

{¶32} "There is perhaps no field of business subject to greater statutory and governmental control than that of the public utility. This is particularly true of the rates of a public utility. Such rates are set and regulated by a general statutory plan in which the Public Utilities Commission is vested with the authority to determine rates in the first instance, and in which the authority to review such rates is vested exclusively in the Supreme Court by Section 4903.12, Revised Code ***' ***

{¶33} "The General Assembly has provided a rather specific procedure by which customers may challenge rates or charges of a public utility that are 'in any respect' unjust, unreasonable, or unlawful, and has designated the commission as the appropriate forum before which such claims are to be heard. R.C. 4905.26, in this regard, provides as follows:

{¶34} "Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, *** charge, *** or service *** is in any respect unjust, unreasonable, *** or in violation of law, *** if it appears that reasonable grounds for [the] complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public

utility thereof, and shall publish notice thereof in a newspaper of general circulation in each county in which complaint has arisen. ***

{¶35} "Accordingly, it is readily apparent that the General Assembly has provided for commission oversight of filed tariffs, *including the right to adjudicate complaints involving customer rates and services*. This court has previously had occasion to discuss such authority of the commission. In *State, ex rel. Northern Ohio Tel. Co. v. Winter* (1970), 23 Ohio St.2d 6, 9, it was stated:

{¶36} ***** The General Assembly has enacted an entire chapter of the Revised Code dealing with public utilities, requiring, *inter alia*, adequate service, and providing for permissible rates and review procedure. E.g., R.C. 4905.04, 4905.08, 4905.22, 4905.231 and 4905.381. Further, R.C. 4905.26 provides a detailed procedure for filing service complaints. *This comprehensive scheme expresses the intention of the General Assembly that such powers were to be vested solely in the Commission.* [Emphasis added by the *Kazmaier* Court.] As this court said in *State, ex rel. Ohio Bell Telephone Co. v. Court of Common Pleas* (1934), 128 Ohio St. 553 at 557:

{¶37} ""The jurisdiction specifically conferred by statute upon the Public Utilities Commission over public utilities of the state, *including the regulation of rates and the enforcement of repayment of money collected* *** *during the pendency of the proceeding* *** *is so complete, comprehensive and adequate as to warrant the conclusion that it is* *** *exclusive.* ***** (Internal citations omitted; original emphasis removed; and emphasis added.) *Kazmaier, supra*, at 150-152.

{¶38} In *Kazmaier*, the customer alleged it was billed under the wrong rate schedule; that the utility wrongfully charged a higher rate than that which was

authorized under its tariff; and that it was consequently charged an excessive fee. As a result, it demanded reimbursement for any excess amount it paid plus interest. The customer argued its claims were for breach of contract and tort and therefore were within the trial court's jurisdiction. The Supreme Court disagreed, holding:

{¶39} "This type of claim is one which by way of complaint may be properly raised before the commission pursuant to R.C. 4905.26. The root of the complaint is that the rate imposed by Toledo Edison was unreasonable and in violation of law. Although the allegations of the complaint seem to sound in tort and contract law, it must not be forgotten that the contract involved is the utility rate schedule. A dollar determination of the amount of the rate overcharge, if any, would require an analysis of the rate structure and various charges that were in effect under each of the tariff schedules during the period. This process of review and determination of any overcharges, and of the duty of the utility, under the circumstances, to disclose any lower rates available to the customer, is best accomplished by the commission with its expert staff technicians familiar with the utility commission provisions." *Id.* at 153.

{¶40} In *State ex rel. Ohio Power Co. v. Harnishfeger* (1980), 64 Ohio St.2d 9, the Supreme Court of Ohio recognized an exception to the general rule of exclusivity of PUCO jurisdiction based on a contract or tort claim. The Court stated:

{¶41} "Admittedly, the power of the Public Utilities Commission under the legislative scheme of R.C. Title 49 is comprehensive and plenary. (See, especially, R.C. 4905.26 and 4905.61.) However, *this does not mean that exclusive original jurisdiction over all complaints of individuals against public utilities is lodged in the commission.*

{¶42} ***** [C]ourts of this state are available to supplicants who have claims sounding in contract against a corporation coming under the authority of the Public Utilities Commission. *New Bremen v. Pub. Util. Comm.* (1921), 103 Ohio St. 23 ***. As noted in *New Bremen*, supra, at pages 30-31, '[t]he public utilities commission is in no sense a court. It has no power to judicially ascertain and determine legal rights and liabilities, or adjudicate controversies between parties as to contract rights or property rights.' This court, also stated in *Milligan v. Ohio Bell Tel. Co.* (1978), 56 Ohio St.2d 191, at page 195, that 'claims sounding in contract or tort have been regarded as reviewable in the Court of Common Pleas, although brought against corporations subject to the authority of the commission. *** ***' (Internal citations omitted and emphasis added.) *Harnishfeger*, supra, at 10.

{¶43} In *Hull v. Columbia Gas of Ohio*, 110 Ohio St.3d 98, 2006-Ohio-3666, the Supreme Court of Ohio addressed facts similar to those presented here. Columbia Gas, a public utility and natural gas provider, established a program pursuant to which its customers could purchase gas from other natural gas suppliers, while Columbia remained responsible for the delivery of the gas. The PUCO approved the tariff filed by Columbia that included the specifics of the program, including the rate to be charged. After the supplier selected by the customer, Energy Max, defaulted, pursuant to the program, Columbia terminated the contract and applied the default rate included in the tariff. The customer sued Columbia for the difference between Columbia's tariff rate and the lower contract rate based on his contract with Energy Max. The customer argued his claim was a pure contract claim and so not subject to the PUCO's exclusive jurisdiction. The Court disagreed, stating:

{¶44} **** “[C]asting the allegations in the complaint to sound in tort or contract is not sufficient to confer jurisdiction upon a trial court” when the basic claim is one that the commission has exclusive jurisdiction to resolve.’ *** [T]he dispute in this case is the antithesis of the pure contract case envisioned by the exception to the PUCO’s jurisdiction. A pure contract case is one *having nothing to do with the utility’s service or rates* -- such as perhaps a dispute between a public utility and one of its employees or a dispute between a public utility and its uniform supplier. This case involves only the rates charged by Columbia for natural gas.

{¶45} ****

{¶46} “Despite Hull’s attempts to characterize it otherwise, his claim against Columbia was that Columbia should have charged for the natural gas supplied to Hull at the Energy Max contract rate, which was lower than the Columbia tariff rate that Columbia in fact charged. *** Columbia is a public utility ***. As such, Columbia was and is subject to the regulatory jurisdiction of the PUCO. That regulation required Columbia to file PUCO-approved tariffs containing rate schedules, obtain approval of its Customer Choice program, and abide by the terms and conditions of its tariffs and the Customer Choice program, all of which Columbia did. It could not legally have provided service to Hull or charged for that service other than it did.

{¶47} “While Hull characterizes his complaint against Columbia as a pure contract claim, it is not. His complaint against Columbia is that the rate he was charged exceeded the Energy Max contract rate and, thus, that he was overcharged. A dispute so founded is squarely within the exclusive jurisdiction of the PUCO.” (Internal citations omitted.) *Hull*, supra, at ¶34, ¶40-41.

{¶48} In *Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, the insurer filed a subrogation claim against CEI, alleging it was negligent in responding to an emergency of Allstate's insured. Allstate argued it was obligated to pay the claim of its insured when a fire and property damage occurred. The electric company filed a motion to dismiss, asserting the PUCO had exclusive jurisdiction. The Supreme Court held that the PUCO did not have jurisdiction. *Id.* at ¶14. In arriving at its decision, the Court adopted the following two-step test to determine when a trial court, rather than the PUCO, has jurisdiction over a case involving a public utility alleged to have committed a tort:

{¶49} "First, is PUCO's administrative expertise required to resolve the issue in dispute? Second, does the act complained of constitute a practice normally authorized by the utility?"

{¶50} "If the answer to either question is in the negative, the claim is not within PUCO's exclusive jurisdiction." (Internal citation omitted.) *Allstate, supra*, at ¶12-13.

{¶51} In finding that the PUCO did not have exclusive jurisdiction over Allstate's claim, the Supreme Court stated:

{¶52} "We now apply this test to the case before us. The substance of Allstate's claim is that CEI was negligent in failing to respond to emergency calls from the Harris residence. This claim is no different from those brought against a business that negligently fails to correct a known dangerous condition on its property. *** The ultimate question in this case is whether the delay between CEI's receipt of the emergency calls and arrival at the Harris residence was reasonable. That issue is

particularly appropriate for resolution by a jury. The expertise of PUCO is not necessary to the resolution of this case." *Id.*

{¶53} Turning our attention to the instant case, appellants do not challenge any specific rate and concede that at all times, they were charged according to rates that were on file with and approved by the PUCO. Instead, they maintain that the companies breached their promises and fraudulently induced them to enter the all-electric program by misrepresenting that a discounted rate would be permanently provided to them in exchange for appellants' equipping their homes with all-electric appliances. Consequently, they argue their claims are pure contract and pure tort claims and are, therefore, excluded from the PUCO's exclusive jurisdiction.

{¶54} First, pursuant to *Milligan*, *supra*, the common pleas court has no jurisdiction to consider a claim alleging that a utility has been charging an unjust, unreasonable, or unlawful rate since such matter is within the exclusive jurisdiction of the PUCO. While appellants argue their contract claims, i.e., their breach of contract claim, their claim for declaratory relief, and their claim for injunction as it relates to contract, are based on the companies' alleged breach of a promise to charge a discounted rate, the essence of these claims is that the rate approved by the PUCO and imposed by the companies after the all-electric program was eliminated was unjust, unreasonable, or unlawful. Pursuant to *Milligan*, *supra*, the trial court did not err in finding such claims are within the PUCO's exclusive jurisdiction.

{¶55} However, pursuant to *Milligan*, because fraud is a civil action that existed at common law in Ohio and appellants alleged a fraud claim in their complaint, the court of common pleas has subject matter jurisdiction pursuant to R.C. 2305.01 to adjudicate

that claim. In so holding, we do not, of course, address the merits of such claim, which will have to be determined based on the evidence presented at trial or on summary judgment. With regard to the request for injunctive relief, the trial court did not err in dismissing appellants' claim for injunction as it relates to their fraud claim since this would require a determination of the proper rate to be charged. In addition, based on the claim presented related to the fraud, appellants have an adequate remedy at law.

{¶156} Further, according to the standard announced in *Hull*, supra, a pure contract claim is one *having nothing to do with the utility's service or rates*—such as a dispute between a public utility and one of its employees or a dispute between a public utility and its uniform supplier. By noting these examples, the Supreme Court obviously meant to convey that in order for a claim to be properly considered as a pure contract claim, the contract at issue must be completely unrelated to the utility's service or rates. Here, the subject matter of the alleged promise is *the rate to be charged the customers*. Appellants argue that the companies are liable in contract because they breached their promise that appellants would permanently be charged *the discounted rate*. We therefore cannot say that appellants' contract claim has nothing to do with the utilities' rates. *Hull*, supra. Thus, pursuant to *Hull*, the trial court did not err in finding it did not have jurisdiction of appellants' contract claims.

{¶157} We next apply the two-step test announced by the Court in *Allstate*, supra. As noted above, if the answer to either prong is in the negative, the claim is not within the PUCO's exclusive jurisdiction. As a preliminary matter, we note that, while the Supreme Court of Ohio applied this test in the context of a tort claim, we see no reason why it would not also apply to contract claims. The same considerations apply to both

types of claims. Moreover, the Supreme Court has referenced the same considerations incorporated in the *Allstate* test in the past in connection with contract claims. See, e.g., *Kazmaier*. Finally, appellants do not dispute that the *Allstate* test applies when the claims asserted sound in contract or tort.

(¶58) According to the *Allstate* test, we first consider whether the PUCO's administrative expertise would be required to resolve the issue in dispute. Here, with respect to appellants' contract claims, decisions would have to be made concerning: (1) whether appellants were promised rates that were in violation of the PUCO-approved tariffs or were not authorized by the PUCO; and (2) the amount of the rate overcharge, if any, based on an analysis of the difference between the charges imposed using the former discounted rates and the amounts charged based on the rates, discounts, and credits subsequently imposed after the discount program was eliminated. This process of review and determination would therefore require the expertise of the PUCO's staff technicians familiar with the statutes and regulations the PUCO administers and enforces. See *Kazmaier*. Such would not be the case, however, with respect to appellants' fraud claim.

(¶59) Second, under the *Allstate* test, we must consider whether the acts complained of constitute a practice normally authorized by the utility. While appellants argue that the "all-electric promise" was not a normal practice authorized by the PUCO, the act that is actually being challenged by appellants with respect to their contract claims is the imposition of the higher rate following the elimination of the all-electric program. It should be obvious that charging a customer based on rates approved by the PUCO is a practice normally authorized by the utility. However, such is not the case

with respect to appellants' fraud claim since such claim will require appellants to prove that, when they made the alleged promise, the companies misrepresented their present state of mind in that they had no intention of performing the promise. *Link v. Leadworks* (1992), 79 Ohio App.3d 735, 742.

{¶60} Thus, because the answer to both prongs of the *Allstate* test is in the affirmative with respect to appellants' contract claims, such claims are within the PUCO's exclusive jurisdiction. However, because the answer to both questions under the *Allstate* test is in the negative with respect to appellant's fraud claim, that claim is within the trial court's subject matter jurisdiction.

{¶61} Appellants' first and fourth assignments of error are overruled.

{¶62} For their second assigned error, appellants allege:

{¶63} "The common pleas court erred in ruling that the PUCO has exclusive jurisdiction over homeowners' all-electric home breach of contract and tort claims against First Energy when the PUCO has no legal authority to award monetary damages, equitable relief, or retroactive relief to homeowners for First Energy's contractual breach and tortious misconduct."

{¶64} Appellants argue that because the PUCO has no authority to award damages, declaratory relief, an injunction, or retroactive relief, the trial court's dismissal of their contract claims constitutes a denial of the right to redress in Ohio's courts. We do not agree. While the plight of the homeowners is significant and real, we are bound by the clear constraints of the statutory scheme that requires these claims to be addressed by the PUCO.

{¶65} First, we note that appellants have not cited clear pertinent authority in support of this argument. Specifically, there is no reference to any pertinent authority for the proposition that the inability of the PUCO to issue certain *remedies* means that it lacks jurisdiction to address related *claims*.

{¶66} The Supreme Court of Ohio held in *Kazmaier*, *supra*, that, although the customer sought reimbursement for any excess amount it paid, the claim was in the PUCO's exclusive jurisdiction. Further, pursuant to R.C. 4909.15, the PUCO has the authority to amend, alter, or suspend rates charged by public utilities to their customers. While not referring to its orders as declaratory judgments or injunctions, an order of the PUCO amending, altering, or suspending an approved rate would be the functional equivalent of ordering the companies to charge appellants pursuant to the former discounted rates, and/or to issue an appropriate credit due to the affected customer for overpayment.

{¶67} Further, contrary to appellants' contention that there is no meaningful avenue of obtaining their full complement of damages, R.C. 4905.61 provides:

{¶68} "If any public utility *** does, or causes to be done, any act or thing prohibited by Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4927. of the Revised Code, or declared to be unlawful, or omits to do any act or thing required by the provisions of those chapters, or by order of the public utilities commission, the public utility *** is liable to the person, firm, or corporation injured thereby in treble the amount of damages sustained in consequence of the violation, failure, or omission. Any recovery under this section does not affect a recovery by the state for any penalty provided for in the chapters."

{¶69} Thus, if appellants are able to establish their claims before the PUCO and the PUCO determines the companies' conduct is prohibited by R.C. 4905.61, appellants can then seek an award of treble damages against them in court. *Milligan, supra*, at paragraph one of the syllabus. R.C. 4905.61 therefore provides for enhanced damages that would not otherwise be available to claimants damaged by a public utility. However, because the PUCO has not yet made this determination, appellants' claim for such damages is simply premature.

{¶70} We also note that, in addition to the remedies available to consumers from the PUCO, final orders of the PUCO are subject to review by the Supreme Court of Ohio. R.C. 4903.13. Thus, contrary to appellants' argument, the fact that they must challenge the applicable rate before the PUCO does not imply that the trial court's dismissal amounted to a violation of any right to redress. Further, because we hold that appellants may pursue their fraud claim in the trial court, their argument as to such claim is moot.

{¶71} Appellants' second assignment of error is overruled.

{¶72} For their third assignment of error, appellants allege:

{¶73} "The common pleas court erred when it totally ignored the PUCO's determination and ruling that the PUCO has no legal authority or jurisdiction to decide homeowners' breach of contract and tort claims against First Energy raised in this action, leaving homeowners with no means of redress."

{¶74} Appellants argue that the trial court erred in not following the PUCO's Second Entry on Rehearing, dated April 15, 2010, that "the adjudication of [appellants']

alleged agreements, promises, or inducements made by the Companies is best suited for a court of general jurisdiction rather than the Commission."

{¶75} Once again, appellants have failed to draw our attention to any pertinent authority in support of this argument. For this reason alone, the argument lacks merit. App.R. 16(A)(7).

{¶76} In any event, while appellants also referenced in their brief the PUCO's subsequent Fifth Entry on Rehearing, dated November 10, 2010, they failed to mention that in this later order, the PUCO revised its April 15, 2010 order regarding its jurisdiction over appellants' claims, as follows:

{¶77} *** [T]he Geauga County Court of Common Pleas has issued a decision holding that it lacks jurisdiction over allegations pertaining to the Companies' rates and marketing practices. The Commission agrees with the Court that *claims that customers were to receive rates that are in violation of Commission-approved tariffs or which were not authorized by the Commission are issues that the Commission is empowered to decide.* *** The Commission will exercise [its] jurisdiction over FirstEnergy's rates and marketing practices ***, and the parties are not precluded from conducting discovery regarding these issues nor from presenting evidence during the hearing ***." (Emphasis added.)

{¶78} Further, in addition to finding that it has jurisdiction over appellants' claims, the PUCO has actually asserted jurisdiction over them. In the PUCO case, the PUCO has entered orders and held at least six public hearings concerning the same issues raised by appellants in the trial court.

{¶79} Thus, contrary to appellants' argument, the PUCO in its last entry on the subject of its jurisdiction and in its conduct has made it clear that, in its view, it has exclusive jurisdiction to address appellants' claims.

{¶80} Appellants' third assignment of error is overruled.

{¶81} We therefore affirm all aspects of the trial court's dismissal of appellants' claims, except with respect to their claim for common law fraud. Despite the difficulties inherent in proving the companies' alleged representations concerning future events were fraudulently made, we believe such claim should be resolved based on the evidence.

{¶82} For the reasons stated in this opinion, it is the judgment and order of this court that the judgment of the Geauga County Court of Common Pleas is affirmed in part and reversed in part; and this case is remanded for further proceedings consistent with the opinion.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.

FILED
IN COMMON PLEAS COURT
2010 SEP -7 AM 9:50
LENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO

CARL L. DIFRANCO, et al.,

: CASE NO: 10 M 000164

Plaintiffs

:

JUDGE DAVID L. FUHRY

-vs-

:

FIRST ENERGY CORP. et al.,

: ORDER OF THE COURT

Defendants

:

CLAIMS

This matter comes on for consideration on First Energy Corp., The Cleveland Electric Illuminating Co. and Ohio Edison Company ("Companies") Motion to Dismiss for Lack of Jurisdiction. Plaintiffs claim they, and all other similarly situated customers ("class") of the Companies, have been harmed because they were promised discounted electric rates in exchange for the customers equipping their homes with all electric heating systems and appliances ("all electric homes"), or otherwise equipping their homes with specific types of electrical systems. First, they seek a declaratory judgment on their own behalf and on behalf of the class. The judgment they seek is one which orders the Companies to essentially rescind rate increases imposed in April, 2009 and to declare plaintiffs and the class as contractually entitled to "all electric" rates. Plaintiffs maintain a second, separate claim for breach of contract with respect to the charges imposed after the Companies terminated "all electric" rates. A third claim alleges that the Companies fraudulently induced the class members to go "all electric" by promising them permanently discounted rates. Last, the plaintiffs seek an injunction enjoining the Companies from charging or collecting amounts in excess of the original, discounted all electric rate.

The Plaintiffs have responded and, on April 16 and April 19, 2010 further supplemented their response. The supplemented responses point out to the Court the Public Utility Commission of Ohio ("PUCO") finding #9 set forth in its Second

Entry on Rehearing. That finding provides that a court of general jurisdiction should adjudicate any alleged agreements or inducements made by the Companies outside the express terms of PUCO's tariffs. In response to the Court's order of May 25, 2010 the parties then further addressed the "Pure Contract" exceptions to the PUCO's exclusive jurisdiction over utility related matters.

ISSUE

At issue is whether the Plaintiffs have brought this case in the wrong forum. Ordinarily this would not be an issue because the Court of Common Pleas is a court of general jurisdiction. As such it is generally empowered to hear all types of disputes including declaratory judgments, breach of contract, as well as fraud and injunctive actions. The instant case would ordinarily be heard by the Common Pleas Court. It is in fact essentially a breach of contract action. It is brought by "all electric" and similar users against the Companies because the Companies are alleged to be in breach of their promise to provide deeply discounted rates to all electric homes.

JURISDICTION

While the Court of Common Pleas is a Court of a general jurisdiction the Ohio legislature has in certain areas limited that jurisdiction. Some jurisdiction has been delegated to other entities who then have exclusive authority to decide the types of disputes delegated to them. Such is the grant of authority to the PUCO. Ohio Revised Code Title 49 grants PUCO jurisdiction over a multitude of matters concerning the provision of public utilities. In many types of disputes concerning those matters the Courts of Common Pleas are prohibited from exercising their jurisdiction because the power over such matters is vested exclusively in the PUCO.

One matter involving public utilities over which the PUCO has jurisdiction to the exclusion of the Common Pleas courts concerns disputes over rates. Ohio Revised Code §4905.26 grants PUCO authority to hear and determine cases wherein the complaint is against a public utility (such as electric providers) and claims that "any rate, fare, change [or] toll is in any respect unjust, unreasonable, unjustly discriminatory [or] preferential, or in violation of law . . .". The Ohio Supreme Court has expressly provided that such disputes are exclusively within the jurisdiction of the PUCO, meaning the Common Pleas Court is without any authority whatsoever to determine such disputes: "The commission has exclusive jurisdiction over various

matters involving utilities, such as rates and charges, classifications, and service, effectively denying to all Ohio courts [except the Ohio Supreme Court] any jurisdiction over such matters." (Emphasis added), *State ex rel. Cleveland Elec. Illum. Co. v Cuyahoga Cty. Court of Common Pleas* (2000), 88 Ohio St. 3d 447. Therefore, "[t]he jurisdiction specifically conferred by statute upon the Public Utilities Commission over public utilities of the state *** is so complete, comprehensive and adequate, as to warrant the conclusion that it is likewise exclusive." *State ex rel. N. Ohio Tel. Co v. Winters* (1970), 23 Ohio St. 2d 6, 9, quoting *State ex rel. Ohio Bell Tel Co. v. Cuyahoga Cty. Court of Common Pleas* (1934), 128 Ohio St. 553 557; see, also *Kazmaier Supermarket, Inc. v. Toledo Edison Co.* (1991), 61 Ohio St. 3d 147, 152.

"PURE" CONTRACT OR TORT

Not within the jurisdiction of PUCO are disputes that do not concern rates or service. These are disputes whose subject matter is so far removed from rates or service issues as to be labeled "pure" contract or tort disputes. Such disputes involve a claim that the defendant broke a duty imposed by agreement or one created by law, and which duty is not related to rates or service issues over which PUCO has exclusive jurisdiction. The vexing question that has repeatedly challenged the courts is: where is the dividing line between "pure" contract or tort versus the exclusive jurisdiction of PUCO because rates or utility service is involved?

The Courts have had to decide the issue in a variety of settings. Some examples, in no particular order, include the following:

1. A dispute over the contracting utilities' delay in providing foreign exchange lines requiring the customer to use more expensive WATS lines. *Marketing Research Services, Inc. v. Public Utilities Commission of Ohio*, 34 Ohio St. 3d 52 (1997). The court found that the case involved a contract not subject to the exclusive jurisdiction of PUCO.
2. A dispute over contracting utilities' provision of "3 phase" service to a church being constructed. The church was promised there would be no cost but then it was billed \$13,193 by the utility. The court found that the case was a contract not subject to the exclusive jurisdiction of the PUCO. *State ex rel. Ohio Power Co. v. Harnishseger*, 64 Ohio St. 2nd 9 (1980).
3. A claim against the public utility for trespass and damage to property which alleges acts relating to a service furnished by the utility. The court held the

matter is exclusively vested in the PUCO's jurisdiction since it is service related. *Farra v. Dayton*, 62 Ohio App. 3d 487 (1989).

4. A dispute between a utility and a guarantor of one of the utility customer's accounts. The issue with respect to the guarantee was held to be outside the jurisdiction of the PUCO. The State *ex rel. The Illuminating Co. v. Cuyahoga County Court of Common Pleas* 97 Ohio St. 3d 69 (2002).
5. A dispute between an individual and a public utility with respect to the existence or non-existence of long distance telephone calls, and the billing therefor. The court determined that rates for such calls were not an issue because the dispute was over the existence or non-existence of long distance calls, not the amount of charges for each. *Senchisin v. Ameritech*, 1997 Ohio App. Lexus 3788 (8/22/97), 11th Dist. Court of Appeals.
6. A claim by a customer who had ordered a second line installed in his barn which went dead a short time after its installation. For eight years thereafter the utility charged for the non-functioning second line. The customer sued for negligence and fraudulent conduct. The appeals court affirmed the trial court's dismissal for lack of subject matter jurisdiction since this was a service complaint that should have been brought before the PUCO. *Weiler v. Ohio Bell Telephone Co.* (1997) Ohio App. Lexus 819, Montgomery County Court of Appeals.
7. The negligent placement upon a residence of temporary power lines after a storm. The public utility performed this work which then led to a power surge damaging the customer's property. The court found the matter was a "pure tort" outside of the PUCO's jurisdiction. *Pacific Indemnity Insurance Co. v. The Illuminating Company*, 2003 WL 21710787 (2003) Ohio App. 8th Dist.
8. An act of Common Pleas Court in enjoining the construction and operations of a transmission line adjudged to be a public utility matter within the exclusive jurisdiction of the Ohio Power Siting Board (similar to PUCO). The State *ex rel. Ohio Edison Company v. Parrott*, *Judge* 73 Ohio St. 3d 705 (1995).

The cases go on. With respect to torts and related service related claims and the PUCO's exclusive jurisdiction, the *Pacific Indemnity* case, *supra*, has provided a test for determining whether or not the PUCO has exclusive jurisdiction. The case of *Hull v.*

Columbia Gas of Ohio 11 Ohio St. 3d 96 (2006) similarly provides a test for "pure" contract disputes.

In *Pacific Indemnity*, at page 3 of the decision, the court provides a litany of examples of what kinds of cases courts may hear. At paragraph 16 of the decision it provides a two step test for determining whether an action is service related thereby bringing it within the ambit of PUCO's exclusive jurisdiction. The first question is whether PUCO's administrative expertise is required to resolve the issue in dispute. Second, does the act complained of constitute a "practice" normally authorized by the utility? If the answer to either question is in the negative, courts routinely find that those claims fall outside PUCO's exclusive jurisdiction.

With respect to "pure" contract, the *Hull* case recites: "a pure contract case is one having nothing to do with the utility's service or rates – such as perhaps a dispute between a public utility and one of its employees or a dispute between a public utility and its uniform supplier." *Id.* at 101.

ANALYSIS

In applying the foregoing tests the Ohio Supreme Court has made one principle very clear. That is that the courts should not be dissuaded from finding a claim to be within the exclusive jurisdiction of PUCO simply because it is cloaked in terms of breach of contract or tort.

The Ohio Supreme Court has ruled that, "... despite the nature of the allegation, [if] the substance of the claim involved is a dispute over the rate charged [it is] a matter patently within the jurisdiction of the PUCO." *Allstate Insurance Company v. Cleveland Electric Illuminating Company* 119 Ohio St. 3d 301, 303, citing the *Kazmaier* case, *supra*. And restated: "This court recently confirmed its earlier holding that "[c]asting the allegations in the complaint to sound in tort or contract is not sufficient to confer jurisdiction upon a trial court when the basic claim is one that the commission has exclusive jurisdiction to resolve." *Hull*, *Id.* at 102 citing *State ex rel. Illuminating Company vs. Cuyahoga County Court of Common Pleas* *Id.* quote of *Higgins v. Columbia Gas of Ohio, Inc.* (2000), 136 Ohio App. 3d 198.

FINDINGS

THE COURT FINDS THAT the Plaintiffs' claims are not pure contract or tort. Plaintiffs' arguments, while thorough, creative and imaginative, cannot survive

application of the foregoing tests. The dispute between the Companies and the all electric homeowners are not like a dispute between "a public utility and one of its employees or a dispute between a public utility and its uniform supplier." The dispute between the Companies and the plaintiffs is over the rate increases. There is no separate rate "contract" between the utility and the plaintiffs. The contract is set by the tariff, not by agreement. The rate of a public utility is determined by PUCO, not by bargaining between the utility and customers. "It has been said that the tariff constitutes the service contract between a [utility] company and a member of the general public who applies for [utility] service." (Emphasis added). *Sanchisin v. Ameritech*, Lexis 3788 (1997) 11th District Court of Appeals, citing *Sonstegard v. General Telephone Co.* (C.P. 1969), 27 Ohio Misc. 112. The cases in "pure" contract or tort (including *Senchisin, supra.*) wherein the Common Pleas Courts maintain jurisdiction are those cases which are not "claims which are in essence rate or service oriented . . ." *Kazmaier, Id.*, at 12, 573 N.E. 2d 655. The General Assembly has in fact specifically authorized the Commissions' complaint jurisdiction to include contract disputes involving retail electric service. See R.C. §4928.16.

Plaintiffs further claim that the PUCO's expertise is not involved in resolving the instant claims. The Court finds this argument unconvincing. The establishment of rates necessarily involves expertise in weighing the effect of increases upon different classes of users and providing for a fair rate of return to the utility. The very establishment of PUCO as the exclusive entity to set rates was premised upon its ability to set fair rates because it has the benefit of the expertise of economists and others at its disposal.

The Plaintiffs have also cited the language of the Commission in its Second Entry on Rehearing that suggests that the Common Pleas Court has jurisdiction. This Court regards that language as no more than a suggestion on the part of the Commission. The Court finds such suggestion is inaccurate for the reasons aforesated.

THE COURT FURTHER FINDS THAT because the Commission did not authorize the alleged improper conduct set forth in the Complaint that does not mean the Commission has no jurisdiction over the conduct. Claims that customers were to receive rates that are in violation of Commission tariffs or which were not authorized by the Commission are issues that the Commission is expressly empowered to decide pursuant to R.C. Chapter 4905.

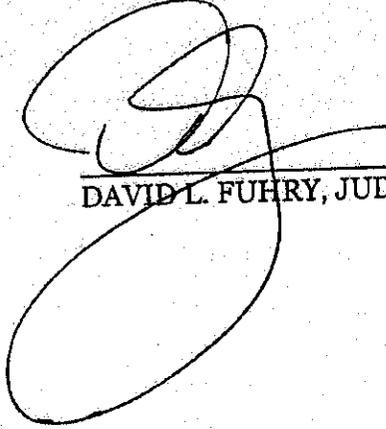
Last, this Court finds that while the Common Pleas Court lacks jurisdiction to hear and decide this case, the Plaintiffs are not denied a forum to seek redress of their claims. The matter may proceed before the PUCO, and the Ohio Supreme Court has original jurisdiction as well. The Commissions' rules authorize it to regulate a utility's marketing activities and to punish unfair or deceptive sales practices. R.C. §4928.16 and 4928.02(I); O.A.C. 4901:1-10-24(C) & (D).

CONCLUSION

The Court of Common Pleas lacks jurisdiction to hear and decide this case. The case is one which the General Assembly has determined is exclusively within the jurisdiction of the Public Utilities Commission of Ohio.

RULING

The motion to dismiss Plaintiffs' Complaint is hereby granted. Costs to Plaintiff.
IT IS SO ORDERED.



DAVID L. FUHR, JUDGE

cc: Michael E. Gilb, Esq.
Timothy Grendell, Esq.
Christina F. Londrigo, Esq.
Jeffrey Saks, Esq.
Grant Garber, Esq.

sb

TO THE CLERK:

Serve upon all parties, not in default for failure to appear (per Civil Rule 5-(B)), notice of this Judgment and its date of journalization.