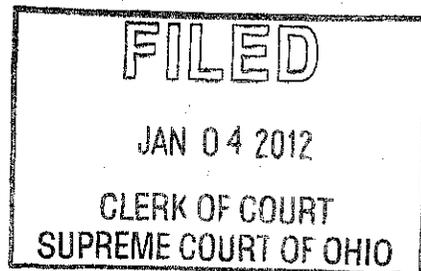


IN THE SUPREME COURT OF OHIO

CARL DIFRANCO, et al., )  
 )  
 )  
 Plaintiffs-Appellants, )  
 )  
 )  
 vs. )  
 )  
 )  
 FIRST ENERGY CORP., )  
 THE CLEVELAND ELECTRIC )  
 ILLUMINATING COMPANY & )  
 OHIO EDISON COMPANY )  
 )  
 Defendants-Appellees )  
 )  
 )

Case No. 11-2025

On Appeal from the Geauga County  
Court of Appeals, Eleventh  
Appellate District  
Case No. 2010-G-2990



APPELLEES' MEMORANDUM IN RESPONSE

Michael E. Gilb, Esq.(0029868)  
 Counsel of Record  
[michaelgilb@yahoo.com](mailto:michaelgilb@yahoo.com)  
 7547 Cental Parke Blvd.  
 P.O. Box 773  
 Mason, OH 45040  
 Telephone: (513)204-6703  
 Fax: (513)770-3301

David A. Kutik, Esq. (0006418)  
 Counsel of Record  
[dakutik@jonesday.com](mailto:dakutik@jonesday.com)  
 Jeffrey Saks, Esq. (0071571)  
 Jones Day  
 North Point, 901 Lakeside Ave.  
 Cleveland, OH 44114  
 Telephone: (216)586-3939  
 Fax: 216-579-0212

James E. Grendell, Esq.(0088098)  
[jgrendell07@jcu.edu](mailto:jgrendell07@jcu.edu)  
 904 Bellwood Dr.  
 Highland Heights, OH 44143  
 Telephone: (440)785-7279

Chad A. Readler, Esq. (0068394)  
[careadler@jonesday.com](mailto:careadler@jonesday.com)  
 Jones Day  
 P.O. Box 165017  
 Columbus, OH 43216-50-17  
 Telephone: (614)469-3939  
 Fax: (614)461-4198

Attorneys for Plaintiffs-Appellees

Attorneys for Defendants-Appellants

**TABLE OF CONTENTS**

	<b>Page</b>
<b>WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES NO SUBSTANTIAL CONSTITUTIONAL QUESTION.....</b>	<b>1</b>
<b>STATEMENT OF THE CASE AND FACTS.....</b>	<b>3</b>
<b>CONCLUSION.....</b>	<b>4</b>
<b>CERTIFICATE OF SERVICE.....</b>	<b>6</b>

WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES NO SUBSTANTIAL CONSTITUTIONAL QUESTION.

The decision below properly recognizes the subject matter jurisdiction of the Court of Common Pleas, pursuant to R.C. 2305.01, to adjudicate the fraud claims raised in Plaintiffs-Appellees Complaint.

The four part Complaint filed by Plaintiffs-Appellees below in the Court of Common Pleas, asserted claims for (1) declaratory judgment, based on the parties alleged contract, to require the companies to continue to charge plaintiffs the discounted rate for electrical service they paid prior to May 2009 and to require the companies to refund all excess charges plaintiffs-appellees paid; (2) breach of contract, as a result of the companies' termination of the discount program; (3) fraud, for inducing plaintiffs-appellees to purchase electrical heating systems by misrepresenting they would permanently be provided with discounted rates; and (4) an injunction, based on the companies' alleged breach of contract and fraud, to prevent the companies from charging plaintiffs-appellees more than the discounted rate.

The Court below correctly applied *Milligan v. Ohio Bell Tel. Co.* (1978), 56 Ohio St.2d 191, to determine that because fraud is a civil action that existed at common law in Ohio the court of common pleas has subject matter jurisdiction pursuant to R.C. 2305.01 to adjudicate that claim.

Furthermore, the Court below correctly applied *Allstate Ins. Co. v. Cleveland Electric Illuminating Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, to find that with respect to Plaintiffs-Appellees fraud claims, because the answer to both questions under the *Allstate* test was in the negative, that claim is within the trial courts subject matter jurisdiction.

This case is not of public or great general interest as it merely involves a determination of common law fraud; a matter squarely within the subject matter jurisdiction of the common pleas court pursuant to R.C. 2305.01.

Further, this case does not involve any substantial constitutional question; again, it merely involves a determination of common law fraud.

## STATEMENT OF THE CASE AND FACTS

The action is brought by Plaintiffs-Appellees, Carl DiFranco, et al. (“Homeowners”) and more than three hundred thousand similarly situated property owners in Northern Ohio to redress their fraud claims against Appellees, First Energy Corp., et al. (“First Energy”). Homeowners’ fraud claims are predicated on First Energy’s breach of its longstanding promises, covenants, and representations that Homeowners would benefit from participation in an all electric discount program in exchange for the Homeowners purchase and maintenance of all electric homes and forbearance of alternate energy sources such as natural gas or fuel oil. First Energy breached its promises, covenants, and representations by unilaterally terminating the all electric discount program in 2009. As a result of First Energy’s tortious misconduct, Homeowners have suffered monetary damages such as the devaluation of the value of their homes and the increased cost to convert to alternate energy sources.

The PUCO is not a court of general jurisdiction and has no legal authority to grant damages based on fraud for First Energy’s failure to extend the Homeowners’ participation in the all electric discount program for the 2009-2010 winter. The PUCO has no retroactive rulemaking power. The PUCO also cannot order First Energy to reimburse the Homeowners from general corporate funds. If treated solely as a rate case, the PUCO can only pass the cost of First Energy’s tortious misconduct on to its customers.

Homeowners do not challenge any specific, or actual, rate in this action. Rather, Homeowners are asking the court to determine whether First Energy made enforceable promises or representations to Homeowners that in exchange for buying or owning an all electric home, they would be part of the all electric discount program. Only a court can adjudicate these issues.

It would be in error to deprive Homeowners of access to the courts to redress their fraud claims, which access is guaranteed by Article I, Section 5 of the Ohio Constitution.

## CONCLUSION

This action on behalf of Homeowners and more than 300,000 homeowners in Northern Ohio seeks to enforce fraud claims held by Homeowners, and others similarly situated, against First Energy which only a Court of Common Pleas can award.

First Energy promised, covenanted and represented to Homeowners that Homeowners would be included in an all electric home discount program if Homeowners purchased or maintained all electric homes. In reliance on First Energy's promises, covenants, and representations, Homeowners, and more than 300,000 similarly situated consumers in Northern Ohio, went "all electric". During the 2009-2010 winter, First Energy unilaterally terminated the all electric home discount program. The electric bills for Homeowners, and those similarly situated, skyrocketed.

Homeowners filed this action seeking damages against First Energy for the devaluation of their all electric homes and reduction in their marketability, declaratory judgment as to Homeowners' contractual rights, and equitable relief based on breach of contract and tort. These claims involve no regulatory expertise of the PUCO.

The PUCO has no jurisdiction to adjudicate Homeowners' fraud claims. The PUCO has recognized its lack of jurisdiction to adjudicate Homeowners' claims, including "claims based on reliance or promissory estoppel, or claims seeking equitable remedies."

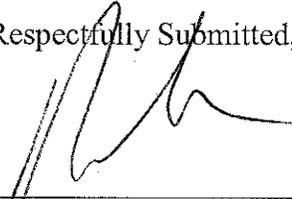
This is not a rate case. Homeowners are entitled to damages totally outside of the PUCO's rate determination authority for devaluation and reduced marketability of their homes

and other damages based on First Energy's fraud in breach of its promises, covenants, and representations to Homeowners.

Homeowners are entitled to their day in court with respect to their fraud claims against First Energy. Homeowners simply ask that this Honorable Court give them that day.

For all these reasons, the decision of the Eleventh District Court of Appeals is correct; this case is not of any public or great general interest and does not involve any substantial constitutional question; it is merely involves a determination of common law fraud. For all these reasons, this Court should not grant jurisdiction.

Respectfully Submitted,



---

Michael E. Gilb, Esq. (0029868)  
7547 Central Park Blvd.  
P.O. Box 773  
Mason, OH 45040  
(P) 513-204-6703  
(F) 513-770-3301  
E-mail: [michaelgilb@yahoo.com](mailto:michaelgilb@yahoo.com)

James E. Grendell, Esq. (0088098)  
904 Bellwood Dr.  
Highland Heights, OH 44143  
(P) 440-785-7279  
E-mail: [jgrendell07@jcu.edu](mailto:jgrendell07@jcu.edu)

Attorneys for Plaintiffs-Appellees

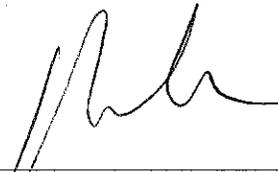
## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Appellees' Memorandum in Response** was served this 4<sup>th</sup> day of January, 2012, by Ordinary First Class U.S. Mail, postage pre-paid upon:

David A. Kutik, Esq.  
Jeffrey Saks, Esq.  
Jones Day  
North Point, 901 Lakeside Ave.  
Cleveland, OH 44114

Chad A. Readler, Esq.  
Jones Day  
P.O. Box 165017  
Columbus, OH 43216-5017

Attorneys for Defendants-Appellants



---

Michael E. Gilb, Esq. (0029868)  
An Attorney for Appellees