

IN THE SUPREME COURT OF OHIO

CARL DIFRANCO, et al.,

Plaintiffs-Appellants,

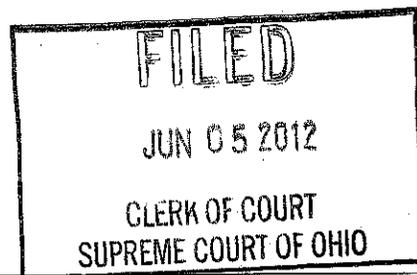
vs.

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



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## STATEMENT OF THE CASE AND FACTS<sup>1</sup>

Appellants' Brief lays out a comprehensive statement of the case and facts, albeit, in an expected self-serving manner. Much of Appellant's statement is irrelevant since the only issue before this Court is the common law fraud claim of Homeowners (defined below). While Homeowners will not repeat that exercise in irrelevance here, Homeowners respectfully ask this Court to take note of the following:

This is **NOT** a case about the appropriateness of rates charged by Appellants, First Energy Corp., et al. ("First Energy" or "Appellants"), as argued in Appellants' Brief. It is about whether Appellants can be held accountable by a court of common pleas for misleading and misrepresenting to over 300,000 all-electric homeowners in Northern Ohio, including Appellees, Carl DiFranco, et al. ("Homeowners"). (Complaint, Counts II & III). The appropriate place to resolve these preservice fraud claims, issues not dependent on any knowledge of the intricacies of the PUCO's tariff structure, is the common pleas court. In this case, the Geauga County Common Pleas Court erred by failing to allow Homeowners their day in that court. The Ohio Eleventh District Court of Appeals was correct in their holding permitting Homeowners the right to proceed on their common law fraud claims in court pursuant to R.C. 2305.01.

No matter how many times First Energy tries to miscast the nature of this action, especially the fraud claim (Complaint, Count III) which is the sole surviving claim, this is NOT a rate case. Homeowners do not assert that any rate is "unjust, unreasonable or discriminatory" as provided in R.C. Chapter 49.

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<sup>1</sup> All of the facts are based on the Complaint initiating this action. (Complaint). The lower court ruled on a motion to dismiss on the pleadings. There is no evidentiary record.

This is a simple common law fraud case. (Complaint, Count III). As admitted by Appellants, First Energy made representations to all-electric homeowners to induce the over 300,000 homeowners into buying or converting to all-electric homes by using all-electric heating and appliances, instead of using natural gas or other heating sources. First Energy also previously admitted that First Energy unilaterally acted contrary to its prior all-electric home representations. (T.D. 10; Appellants' Merit Brief in the Appellate Court below, commonly referred to as 'Merit Brief of Appellee's First Energy, et. al.', at pp. 7 & 8).

The PUCO, in its Fifth Entry (heralded by First Energy in Appellants' Brief), correctly recognized the difference between the PUCO's jurisdiction over rates and marketing and the PUCO's "lack" of jurisdiction to adjudicate claims "based on reliance." PUCO Case No. 10-176-EL ATA, Fifth Entry on Rehearing, at ¶ 13, (see, Appellants' Merit Brief at App. p. 77) (the "Fifth Entry").

As discussed below, First Energy's and Appellants' double speak, misleading and conveniently edited quotes, and outright erroneous arguments do not change the simple facts that:

1. Fraud is a civil action that existed at common law.
2. Fraud is a pure tort action.
3. Homeowners have alleged a fraud claim (Count III) in their Complaint. (Complaint, Count III).
4. The Geauga County Common Pleas Court had subject matter jurisdiction over Homeowners' fraud claim pursuant to R.C. 2305.01.
5. The Eleventh District Court of Appeals correctly ruled that Homeowners' claim for common law fraud "should be resolved based on the evidence" by the Geauga County Common Pleas Court. (DiFranco v. First Energy, 2011 Ohio 5434 at ¶¶ 55 & 81).

The well-reasoned decision by the Eleventh District Court of Appeals should be affirmed.

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

### Proposition of Law No. 1:

**A Claim for common law fraud against a Public Utility does not require any special PUCO expertise and should be adjudicated by a common pleas court. Milligan v. Ohio Bell Tel. Co. (1978), 56 Ohio St.2d 191 at Syllabus 2 and 3.**

The sole issue on appeal before this Court is whether Appellees' common law fraud claim, based upon Appellants' multiple misrepresentations that induced homeowners to purchase or convert to all-electric homes and forgo other less expensive utility services should be adjudicated by the courts. The Eleventh District Court of Appeals correctly held that Homeowners' "claim for common law fraud" should "be resolved based on the evidence." DiFranco v. First Energy, 2011 Ohio 5434 at ¶81. Specifically, the Eleventh District Court of Appeals correctly ruled:

[P]ursuant to Milligan, because fraud is a civil action that existed at common law in Ohio Appellants [Homeowners] alleged a fraud claim in their complaint, the court of common pleas has subject matter jurisdiction pursuant to RC 2305.01 to adjudicate that claim.

Id., at ¶ 55 (emphasis added.)

Contrary to Appellants' erroneous assertion, Homeowners' fraud claim (Complaint, Count III ) does NOT challenge the propriety of any electric rate<sup>2</sup>. Homeowners' fraud claim is based solely on Appellants' prior misrepresentations and fraudulent inducements seeking to capture Homeowners as customers. (Complaint). Homeowners justifiably relied on Appellants' false misrepresentations and fraudulent inducements. No specific rate schedule or rate is at issue; rather, the sole question now remaining in this action is whether Appellants are liable in tort for damages to Homeowners for the devaluation of their homes, and for the cost to convert to alternate energy sources. The question is whether Homeowners would have bought or converted

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<sup>2</sup> Neither Appellants' nor Homeowners have appealed the issues relating to breach of contract or contract rate related issues, which the appellate court held were rate related. Homeowners are now only pursuing their fraud based tort claim, as correctly recognized by the court of appeals below.

to an all-electric home if Appellants had not fraudulently induced them into going all-electric? Resolution of this question is not best accomplished by an expert staff of technician's familiar with the utility commission regulatory provisions, but by a common pleas court knowledgeable in basic tort law.

As the Eleventh District Appellate correctly ruled, the sole claim remaining to be adjudicated in this case is a "fraud claim," DiFranco, at 55, which is a civil action at common law for which the common pleas court has jurisdiction pursuant to R.C. 2305.01. Milligan v. Ohio Bell Tel. Co. (1978), 56 Ohio St.2d 191 at paragraph 2 and 3 of the syllabus.

Appellants' reliance on Kazmair Supermarket Inc. v. Toledo Edison (1991), 61 Ohio St.3d 147, 573 N.E.2d 655, is misplaced. The remaining issue to be adjudicated in this case does not involve consumer complaints about rates or services and therefore does not invoke the PUCO's plenary jurisdiction. The fraud in this case concerns Appellants' pre-service and pre-rate conduct. The Appellate Court below correctly recognized this distinction, which Appellants now attempt to confuse by filing a plethora of irrelevant PUCO orders and by rehashing the appellate court's breach of contract and rate issues rulings which are not before this Court because neither Appellants nor Homeowners have appealed those rulings.

As discussed further below, Homeowners' fraud action is a pure tort action. Homeowners only claim involves Appellants' fraudulent misrepresentations and inducements to lock Homeowners in as customers. Pursuant to the Ohio Constitution, Article I, Section 5, Homeowners are entitled to their day in Court on their common law fraud claim.

The decision of the Appellate Court should be affirmed.

**Proposition of Law No. 2:**

**Homeowner's action, based on Appellants' misrepresentations and fraudulent inducements, constitutes a claim for common law fraud, for which the common pleas court has subject matter jurisdiction to adjudicate pursuant to R.C. 2305.01 Milligan v. Ohio Bell Tel. Co. (1978), 56 Ohio St.2d 191 at Syllabus at 2 and 3.**

No matter how many times Appellants attempt to misstate the nature of the sole cause of action remaining in this case, this is **NOT** a rate case. Rather, this is simple civil action for common law fraud. The PUCO's exclusive jurisdiction relates to rates and services not common law torts. Marketing Research v. Ohio Bell Co. (1987), 24 Ohio St.3d 52; Milligan v. Ohio Bell Tel. Co. (1978), 56 Ohio St.2d 191; Higgins v. Columbia Gas of Ohio, Inc. (2000), 136 Ohio App.3d 198.

The Eleventh District Court of Appeals correctly held that Homeowners' cause of action is based on Appellants' misrepresentations, a "claim for common law fraud," that "should be resolved based on the evidence." DiFranco v. First Energy, 2011 Ohio 5434 at ¶81. The PUCO also correctly recognized that it lacked jurisdiction to determine Homeowners' claim "based on reliance." PUCO Case No. 10-176-EL ATA, Fifth Entry Rehearing, at ¶ 13 (See, Appellant's Merit Brief Appendix at App. p. 77). "Reliance" is another way of saying "fraud", as reasonable reliance on a misrepresentation of a party constitutes fraud. Gaines v. Preterm Cleveland (1987), 33 Ohio St.3d 54, 55, 514 N.E. 2d 709.

Indeed, the PUCO cannot hear or adjudicate Homeowners' fraud or "reliance" cause of action because, "[t]he commission has no power to judicially ascertain and determine legal rights and liabilities." Milligan v. Ohio Bell Tel. Co. (1978), 56 Ohio St.2d 191, 195, 383 N.E.2d 575, 578. Additionally, the PUCO has no jurisdiction to award monetary damages to Homeowners on their fraud or tortious reliance claim. State ex rel Ohio Power co. v. Harnisferger (1980), 64 Ohio St.2d 9, 10.

Simply stated, the PUCO has no jurisdiction to hear Homeowners' fraud claim and no power to award relief to Homeowners for the damages caused by Appellants' forty years of fraudulent conduct. The Appellate Court understood this prescient point.

1. Fraud is a pure tort.

Under Ohio Law, fraud or fraudulent misrepresentation is:

(A) A material false misrepresentation; (B) knowingly made; (c) with intent of misleading another into relying on it; (d) with reasonable reliance on the misrepresentation; and (e) injury resulting from that reliance.

Gaines v. PreTerm Cleveland (1987), 33 Ohio St.3d. 54, 55, 514 N. E. 2d 709.

It is universally accepted that fraud, fraudulent misrepresentation, and fraudulent inducement are pure tort actions. See, Restatement (Second) of Torts, Sect. 550; and, Prosser and Keeton on Torts (5<sup>th</sup> Ed. 1984), Sect. 108, pp. 749-753.

2. Homeowners' sole surviving claim in this action is a claim for common law fraud.

As spelled out in the Complaint<sup>3</sup>, Homeowners' fraud claim is based on Appellants' pre-service and pre-rate fraudulent misrepresentations and false and fraudulent inducements to Homeowner. (Complaint, Count III). This surviving fraud claim arises before and separate from any rate issue that could subsequently, independently come before the PUCO.

During the last approximately forty (40) years, Appellants at various times, intentionally and knowingly misrepresented to and induced Homeowners to maintain or to convert to all-electric homes in consideration of misrepresentations made by Appellants. (Complaint, ¶. 15).

Appellants placed no time limitations on their misrepresentations and inducements as to the all-electric homes. (Complaint, ¶. 16).

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<sup>3</sup> This appeal comes before the Court on a Motion to Dismiss. As such, the facts as pled and the reasonable inferences therefrom must be accepted as true for the purposes of this appeal. See, Peterson v. Teodosio (1973), 34 Ohio St.2d 161.

Homeowners, and others similarly situated, reasonably and justifiably relied on Appellants' knowingly false misrepresentations and inducements and equipped their homes with all-electric heating equipment, appliances, geothermal heating systems and other electric uses, in lieu of natural gas or oil operated heating systems and appliances. (Complaint ¶. 17).

Numerous Homeowners, and others similarly situated, purchased their homes in reliance on Appellants' "all-electric home" misrepresentations and inducements, which were not limited or conditional as to duration. (Complaint ¶. 18).

Appellants, by and through its agents, distributors, representatives, or employees knowingly, intentionally, and falsely misrepresented 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 all-electric usage. (Complaint ¶. 19).

Appellants knowingly and falsely represented to Homeowners residing in Geauga County and Northeast Ohio [including Thomas M. Logan, and others similarly situated], as far back as 1988, that the all-electric home status would not be affected or forfeited by the elimination of the program and that this would be "guaranteed" as long as they wished to use it. (Complaint ¶ 20).

To induce Homeowners, and others similarly situated, to purchase or convert to all-electric homes or to continue to use electric appliances and heating systems in their homes in lieu of natural gas or other appliances or utilities, Appellants maintained and provided the all-electric program to Homeowners and others similarly situated until May, 2009. (Complaint ¶ 23).

Until May, 2009, Appellants admitted and agreed that owners of all-electric homes were "grandfathered" or permanently entitled to the all-electric home status. (Complaint ¶ 21).

Appellants also induced the named subclass Homeowners, and others similarly situated, in the electric water heating subclass, into installing and/or maintaining electric water heating system at those homeowners' cost. (Complaint ¶ 25).

Appellants unilaterally terminated its electric water heating commitment on or about May, 2009. (Complaint ¶ 26).

In reasonable reliance on Appellants' misrepresentations and inducements, Homeowners, and others similarly situated, (a) purchased all-electric homes; (b) installed, maintained, and replaced, electric appliances and heating systems in their homes; and, (c) refrained from using natural gas, heating oil or other non-electric utility services or appliances in their homes, even though such alternatives may have been less costly. (Complaint ¶ 30).

Appellants benefited by Homeowners' actions by selling off-peak electricity in Geauga County and Northeast Ohio, and by now having a captive electric usage reliant group of homeowners in Geauga County and Northeast Ohio. (Complaint ¶ 32).

Homeowners have been monetarily damaged as a result of their reasonable reliance on Appellants' misrepresentations in the form of devaluation of their all-electric homes and increased costs to transfer to another energy source to make their homes marketable. (Complaint, ¶ prayer). Homeowners are entitled to present their evidence as to the amounts of these damages at trial.

The 11<sup>th</sup> District Court of Appeals correctly held that Homeowners have asserted a claim for common law fraud. DiFranco v. First Energy, 2011 Ohio 5434 at ¶ 55. Appellants intentionally, knowingly, and falsely promised and misrepresented to Homeowners that they would be included in an all-electric home program in exchange for Homeowners' commitment to use all-electric heat and appliances in their home and Homeowners' forbearance of less costly

alternate energy sources such as natural gas. (Complaint ¶¶ 17-23). Homeowners reasonably relied on the misrepresentations made by Appellants. (Complaint ¶ 28). This quid pro quo and reasonable and justifiable reliance are the basis for common law fraud which is a pure tort action. No specific scheduled rate is at issue. Rather, the question is whether Appellants are liable for damages to Homeowners for the devaluation of their homes, reduction in the marketability of Homeowners' homes, and the cost to convert to a less expensive energy source (e.g. natural gas). Appellants' tort liability arises from Appellants' prior fraudulent representation that induced Homeowners into buying or converting to an all-electric home. Resolution of this pure tort issue transcends any specific scheduled rate. The threshold issue in this case is whether Homeowners would have bought an all-electric home or gone "all-electric" if Appellants had not fraudulently induced them to do so with the misrepresentation of the all-electric program? Resolution of this issue requires no special administrative expertise of the PUCO, as correctly found by the appellate court. Such resolution requires a trial. R.C. 2305.01

As the Eleventh District correctly held, Homeowners' fraud claim (Count III) is governed by this Court's ruling in Milligan v. Ohio Bell Tel. Co. (1978), 56 Ohio St.2d 191 at syllabus 2 and 3.

This Court has recognized that the PUCO does not have exclusive jurisdiction over every action filed against a utility. AllState Insurance v. CEI (2008), 119 Ohio St. 3d 301, 303, 2008 Ohio 3917, 893 N.E.2d 824 ("As a preliminary matter we reject CEI's implicit argument that everything it does is service related.")

Pure common law tort claims, such as Homeowners' common law tort claims, may be brought in common pleas court. Milligan v. Ohio Bell Tel. Co.(1978), 56 Ohio St.2d 191, 3983 N.E.2d 575; Kazmaier Supermarket, Inc v. Toledo Edison Co. (1991), 61 Ohio St.3d. 147, 154,

573 N.E.2d 655, 660 (pure common-law tort claims may be brought in common pleas court); Kohli v. Pub. Util. Comm. (1985), 18 Ohio St.3d 12, 14 479 N.E.2d 840.

The Eleventh District Court of Appeals correctly held that Homeowners' "claim for common law fraud...should be resolved [by the common pleas court] based on the evidence."  
DiFranco v. First Energy, 2011 Ohio 5434 at ¶81. This Court should affirm that ruling.

3. Resolution of the Homeowners' common law fraud claim does NOT require any special administrative or regulatory expertise of the PUCO or its staff.

Determining whether Appellants knowingly and intentionally, made false misrepresentations to Homeowners to induce them into going "all-electric" at Homeowners' peril does NOT require any special regulatory or administrative expertise within the exclusive domain of the PUCO. Homeowners' common law fraud claim is predicated on Appellants' misconduct at the onset of the utilities relationship with Homeowners and Homeowners' reliance thereon. This is no different than any other tort action for fraud. As this Court is well aware courts adjudicate these common law tort cases on a daily basis without the aid of any other governmental agency. These common law fraud cases are resolved by triers of fact, not regulators or bureaucrats, based on the evidence as to the nature of the misrepresentations and the reasonableness of the injured party's reliance on those misrepresentations.

As the Appellate Court below so aptly found in Gayheart v. Dayton Power and Light Co. (1994), 98 Ohio App.3d 220, 229, 648 N.E. 172:

The expertise of the PUCO is not necessary to the resolution of this case. Rather, this is a case that is particularly appropriate for resolution by a jury.

Gayheart v. Dayton Power and Light Co. (1994), 98 Ohio App.3d 220, 229, 648 N.E. 172.

As the 11<sup>th</sup> District Court of Appeals correctly ruled with respect to the Homeowners' common law fraud claim, the same is absolutely true in this case. NO PUCO expertise in

interpreting regulations or with respect to rates is necessary to resolve whether Appellants knowingly made false misrepresentations to individual Homeowners to induce them into buying or converting to all-electric homes. The single issue remaining in this case, common law fraud, is particularly appropriate for resolution by a jury.

4. Appellants' arguments, if followed by this Court, would essentially eliminate tort claims against utility companies except invasion of privacy.

The PUCO is not a court of general jurisdiction and has no power to judicially ascertain and determine legal rights and liabilities. State ex rel. Dayton Power & Light Co. v. Riley (1978), 53 Ohio St.2d 168, 170, 7 O.O.3d 317, 373 N.E.2d 385. See, New Bremen v. Pub. Utils. Comm. (1921), 103 Ohio St. 23, 30-31, 132 N.E. 162, 19 Ohio L. Rep. 153 (PUCO "has no power to judicially ascertain and determine legal rights and liabilities"). Because the PUCO lacks jurisdiction over tort claims such as common law fraud, any decision it issues on Homeowners' claims would be void ab initio.

"As a preliminary matter, we categorically reject CEI's implicit argument that everything it does is service related" (emphasis added). So held this Court in Allstate Insurance v. CEI (2008), 119 Ohio St.3d 301, 303, 2008 Ohio 3917, 893 N.E.2d 824, a case which is dispositive of the issue presented herein.

Contrary to this Court's ruling in Allstate, Appellants once again seek to use its assertion of service and rates as a shield to the pure tort common law fraud claim of Homeowners. Under Appellants' argument, just a utility's mere assertion that a rate could be discussed in a tort action automatically transforms that tort action into a rate case. This argument is both self-serving and contrary to this Court's prior holdings that common pleas courts retain limited jurisdiction over tort actions. E.g. Milligan, 56 Ohio St. 2d 191, Syllabus 2 and 3.

For example, this Court has ruled that in Ohio, an at-will employee may assert a claim for fraud in the inducement against an employer, despite the employee's at-will status. Wing v. Anchor Media, Ltd. of Texas (1991), 59 Ohio St.3d 108, 110, 570 N.E.2d 1095. What happens if the fraud used to induce that employee to work for a utility involves a representation of a reduced utility rate, which was later unilaterally terminated by the utility employer?

Applying Appellants' argument, the aggrieved utility company employee could not pursue her Ohio Supreme Court recognized tort claim in a court of law because the employee's claim "involved" a rate issue. Under Appellants' argument, the aggrieved utility employee would have to pursue her fraud claim by filing with the PUCO.

The fallacy of Appellants' argument is clear. The defrauded utility company employee, just like the defrauded Homeowners in the present case, has a right to redress a fraud claim in the common pleas court. R.C. 2305.01.

To hold otherwise, would simply give Appellants and other utilities free reign to defraud Ohioans, cloak that fraud with a misrepresentation that tangentially "involves" a rate, and then totally circumvent accountability for such a fraudulent misrepresentation by claiming that the PUCO has exclusive jurisdiction, even though the PUCO cannot order money damages or other necessary relief. Such a result would directly contravene this Court's own rulings and lead to an unconscionable result for all Ohioans.

5. The Geauga County Court of Common Pleas has subject matter jurisdiction to adjudicate Homeowners' common law fraud claim against Appellants, pursuant to R.C. 2305.01.

Fraud is a civil action that existed at common law. DiFranco v. First Energy, 2011 Ohio 5434 at ¶ 81. Fraud is a pure tort action. See, Restatement (Second) of Torts, Sect. 550; and, Prosser and Keeton on Torts (5<sup>th</sup> Ed. 1984), Sect. 108, pp. 749-753.

As correctly held by the Appellate Court below, Homeowners have alleged a common law fraud claim (Complaint, Count III) in their Complaint in this action.

Pursuant to Milligan, the PUCO does not have jurisdiction to adjudicate fraud claims.

According to the PUCO, the PUCO does not have jurisdiction to adjudicate fraud claims. PUCO Case No. 10-176-EL ATA, Fifth Entry on Rehearing, at ¶ 13, (see, Appellants' Merit Brief at App. p. 77).

Pursuant to R.C. 2305.01, the common pleas court has subject matter jurisdiction to adjudicate Homeowners' fraud claims against Appellants.

The Appellate Court was correct on this issue, which is the ONLY issue before this Court. The decision of the Eleventh District Court of Appeals should be affirmed.

6. Appellants cite to and rely on numerous PUCO rate cases and lower court issues that simply are not relevant to the sole surviving issue before this Court. The only issue before this Court is Homeowners right to pursue their common law tort action in court pursuant to R.C. 2305.01.

Appellants expended more than twenty-five pages in their brief discussing issues adjudicated by the lower courts in this action that are NOT before this Court. The sole surviving issue before this Court is the Homeowners' right to pursue their common law claim in court pursuant to R.C. 2305.01. Appellants' voluminous discussion of such irrelevant material can only be intended for the purpose of confusing the issue before this Court by trying to disguise the Homeowners' common law claim as a rate case. Homeowners' are confident that this Court will not be fooled.

Moreover, Appellants expend considerable energy citing to and discussing case authority from this Court where utility rates are the direct issue in dispute. Those cases do not involve common law fraud claims, such as the fraud claim being pursued by the Homeowners in this

case. Therefore, while Homeowners take no issue with those cases in their specific factual context, those cases have no relevance to this action or the common law fraud claim being pursued by Homeowners in this case.

**Proposition of Law No. 3:**

**When a claim does not seek (a) a determination of utility rates, (b) damages based on a difference between utility rates, and (c) a review of utility marketing practices, but rather seeks solely to recover damages based on a utility's fraudulent misrepresentations, the PUCO lacks jurisdiction to adjudicate that claim because no PUCO expertise is required. Milligan v. Ohio Bell Tel. Co.(1978), 56 Ohio St.2d 191.**

Appellants' third proposition of law is based on numerous factual misstatements and erroneous conclusions of law. First, as discussed above, Homeowners' claim is based on common law fraud involving Appellants' fraudulent misrepresentations, NOT the propriety of a specific rate. Second, Homeowners' damages are based on the diminution of their property values, reduction in marketability, and costs to connect to an alternative, less expensive energy source. None of these damages are based on a rate differential, as incorrectly argued by Appellants. Rather, they are all predicated on the damages incurred by Homeowners caused by their reasonable reliance on the Appellants' fraudulent misrepresentations.

Finally, as discussed above, no PUCO regulatory expertise is involved in determining that the Appellants lied and made fraudulent misrepresentations to Homeowners to induce them to buy or to convert to an all-electric home. In fact, the PUCO has no such legal expertise. Resolution of these factual based claims fall squarely into the jurisdiction of the court of common pleas. R.C. 2305.01.

The Eleventh District Court of Appeals correctly ruled that Homeowners have a right to pursue their common law fraud claim in court. This legally and constitutionally correct ruling should be affirmed.

### CONCLUSION

The sole issue before this Court is whether the Eleventh District Court of Appeals correctly ruled that, “pursuant to Milligan, because fraud is a civil action that existed at common law in Ohio and because Homeowners alleged a fraud claim in their complaint (Count III), the court of common pleas has subject matter jurisdiction pursuant to R.C. 2305.01 to adjudicate that fraud claim.” DiFranco v. First Energy, 2011 Ohio 5434 at ¶ 55.

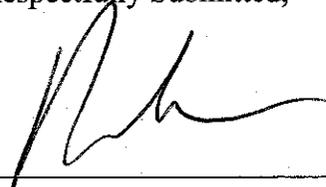
The Appellate Court below ruled correctly. Fraud and fraudulent misrepresentation are pure torts. Homeowners have asserted a claim against Appellants for fraud and fraudulent misrepresentation. Appellants’ prior misrepresentations, not their rates, form the gravamen of Homeowners’ fraud claim.

Homeowners’ damages include reduced home value, loss of home marketability, and the cost to convert to alternate less expensive energy sources. None of these require any special regulatory expertise of the PUCO.

Determining whether Appellant made fraudulent misrepresentations to Homeowners does NOT require any regulatory expertise of, or interpretations by, the PUCO.

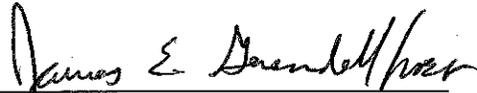
Before this Court is the common law tort claim of fraud brought by Homeowners. The Eleventh District Court of Appeals correctly ruled that the Homeowners’ fraud claim should be heard by the common pleas court. This ruling should be affirmed.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellees' Merit Brief was served this 5<sup>th</sup> day of June, 2012, by Ordinary First Class U.S. Mail, postage pre-paid upon:

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# Article I, Ohio Constitution

Article I of the Ohio Constitution is entitled **Bill of Rights** and consists of 23 sections.

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## Section 5

### **Text of Section 5:**

#### **Trial by Jury**

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

*(1851, am. 1912)*

## **Chapter 2305: JURISDICTION; LIMITATION OF ACTIONS**

### **2305.01 Jurisdiction in civil cases - trial transfer.**

Except as otherwise provided by this section or section 2305.03 of the Revised Code, the court of common pleas has original jurisdiction in all civil cases in which the sum or matter in dispute exceeds the exclusive original jurisdiction of county courts and appellate jurisdiction from the decisions of boards of county commissioners. The court of common pleas shall not have jurisdiction, in any tort action to which the amounts apply, to award punitive or exemplary damages that exceed the amounts set forth in section 2315.21 of the Revised Code. The court of common pleas shall not have jurisdiction in any tort action to which the limits apply to enter judgment on an award of compensatory damages for noneconomic loss in excess of the limits set forth in section 2315.18 of the Revised Code.

The court of common pleas may on its own motion transfer for trial any action in the court to any municipal court in the county having concurrent jurisdiction of the subject matter of, and the parties to, the action, if the amount sought by the plaintiff does not exceed one thousand dollars and if the judge or presiding judge of the municipal court concurs in the proposed transfer. Upon the issuance of an order of transfer, the clerk of courts shall remove to the designated municipal court the entire case file. Any untaxed portion of the common pleas deposit for court costs shall be remitted to the municipal court by the clerk of courts to be applied in accordance with section 1901.26 of the Revised Code, and the costs taxed by the municipal court shall be added to any costs taxed in the common pleas court.

The court of common pleas has jurisdiction in any action brought pursuant to division (I) of section 3733.11 of the Revised Code if the residential premises that are the subject of the action are located within the territorial jurisdiction of the court.

The courts of common pleas of Adams, Athens, Belmont, Brown, Clermont, Columbiana, Gallia, Hamilton, Jefferson, Lawrence, Meigs, Monroe, Scioto, and Washington counties have jurisdiction beyond the north or northwest shore of the Ohio river extending to the opposite shore line, between the extended boundary lines of any adjacent counties or adjacent state. Each of those courts of common pleas has concurrent jurisdiction on the Ohio river with any adjacent court of common pleas that borders on that river and with any court of Kentucky or of West Virginia that borders on the Ohio river and that has jurisdiction on the Ohio river under the law of Kentucky or the law of West Virginia, whichever is applicable, or under federal law.

Effective Date: 07-06-2001; 04-07-2005