[Cite as *DiFranco v. First Energy*, 2011-Ohio-5434.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

CARL DiFRANCO, et al.,	:	**O P I N I O N**
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.

Timothy J. Grendell, Grendell & Simon Co., L.P.A., 6640 Harris Road, Broadview Heights, OH 44147 and *Michael E. Gilb*, 7547 Central Parke Boulevard, P.O. Box 773, Mason, OH 45050 (For Plaintiffs-Appellants).

David A. Kutik and *Jeffrey W. Saks*, Jones Day, North Point, 901 Lakeside Avenue, Cleveland, OH 44114; and *Douglas R. Cole* and *Grant W. Garber*, Jones Day, 325 John H. McConnell Boulevard, Suite 600, Columbus, OH 43215-2673 (For Defendants-Appellees).

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.

{¶8} 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.

{¶9} 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. 4905.26, 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. Berjian, 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), 263 U.S. 291, at pages 305-306; *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, 4905.06, 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 96, 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.

{¶56} 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.

{¶57} 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 t*o 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 tortuous 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.