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Court of Common Pleas

NOTICE OF APPEAL
January 30, 2019 15:21

By: JACK LANDSKRONER 0059227

Confirmation Nbr. 1612721

CLINT YOBY

CV 15 852708

vs.

Judge: DEBORAH M. TURNER

CITY OF CLEVELAND, ET AL

Pages Filed: 30

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CLINT YOBY, ET AL.	)	CASE NO. CV-15-852708
	)	
Plaintiff,	)	JUDGE JANET R. BURNSIDE
	)	
v.	)	<u>NOTICE OF APPEAL</u>
	)	
CITY OF CLEVELAND	)	
	)	
Defendant.	)	

Pursuant to Appellate Rule 3(A), Plaintiffs Clint Yoby, Tremont Scoops, LLC, 2362 Professor Avenue LLC, and Tymex Plastics, Inc., on behalf of themselves and a certified Class, hereby give notice of appeal from the Summary Judgment entered by the trial court on January 7, 2019, which is attached as **Exhibit A** to this Notice, and which is a final order under R.C. 2505.02(B)(1).

Respectfully submitted,

s/Jack Landskroner

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PROOF OF SERVICE

A copy of this document was served by the Court's electronic filing system to all counsel of record on January 30, 2019, pursuant to Civil Rule 5(B)(2)(f).

Signed by,

s/Jack Landskroner

Jack Landskroner (0059227)

EXHIBIT A



106923993

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

CLINT YOBY
Plaintiff

Case No: CV-15-852708

Judge: JANET R BURNSIDE

CITY OF CLEVELAND, ET AL
Defendant

JOURNAL ENTRY

85 DSP.PRE-TRL - FINAL

01/16/2019: PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT PURSUANT TO CIVIL RULE 56(A), FILED 01/15/2018, IS DENIED FOR THE REASONS SET FORTH IN THE FINAL JUDGMENT ENTRY ANNEXED HERETO AND MADE A PART THEREOF.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, FILED 01/11/2018, IS GRANTED. JUDGMENT IS ENTERED IN FAVOR OF THE DEFENDANT CITY OF CLEVELAND AS MORE FULLY EXPLAINED IN THE FINAL JUDGMENT ENTRY ANNEXED HERETO AND MADE A PART THEREOF.

THIS IS A FINAL JUDGMENT UNDER R.C. 2505.02. FINAL.

COURT COST ASSESSED TO THE PLAINTIFF(S).

PURSUANT TO CIV.R. 58(B), THE CLERK OF COURTS IS DIRECTED TO SERVE THIS JUDGMENT IN A MANNER PRESCRIBED BY CIV.R. 5(B). THE CLERK MUST INDICATE ON THE DOCKET THE NAMES AND ADDRESSES OF ALL PARTIES, THE METHOD OF SERVICE, AND THE COSTS ASSOCIATED WITH THIS SERVICE.

Judge Signature

Date

FILED

2019 JAN - 7 2:54

CLERK OF COURTS
CUYAHOGA COUNTY

STATE OF OHIO)
) SS:
CUYAHOGA COUNTY)

IN THE COURT OF COMMON PLEAS

CASE NO. CV-15-852708

JUDGE JANET R. BURNSIDE

CLINT YOBY, et al,)
) PLAINTIFFS)
)

v.)
)

CITY OF CLEVELAND, et al,)
) DEFENDANTS)
)

FINAL JUDGMENT ENTRY

Plaintiff Clint Yoby and added parties, Tremont Scoops LLC, 2362 Professor Avenue LLC, and Tymex Plastics, Inc., are the certified class representatives of this class action ("Plaintiffs"). The class members are residential and commercial customers of Defendant City of Cleveland's division, Cleveland Public Power ("CPP"). See Stipulated Class Certification Order of 8/2/17.

Under their Fourth Consolidated Amended Complaint filed 6/30/17, Plaintiffs assert claims for (1) breach of contract; (2) fraud; (3) declaratory judgment; (4) restitution and (5) injunctive relief. In its Amended Answer, remaining Defendant City of Cleveland generally denied the allegations of the complaint and asserted certain affirmative defenses. For simplicity, Defendant is referred to as CPP below.

This matter comes on for decision upon two summary judgment motions. CPP filed a motion seeking summary judgment on each of Plaintiffs' claims with evidentiary materials; Plaintiffs opposed CPP's motion with evidentiary materials; and CPP filed a reply. Plaintiffs filed a motion for partial summary judgment on the issue of breach of contract only with evidentiary materials; CPP filed its opposition with evidence and

Plaintiffs filed a reply. The Court held an oral argument on the parties' motions on 4/17/18, and the parties filed factual stipulations on 5/16/18.

The Court has now reviewed and considered all the arguments and the evidence qualifying for consideration under Civ.R. 56(C). For the reasons that follow, the Court grants CPP's motion for summary judgment, denies Plaintiffs' motion for partial summary judgment, and enters final judgment on all claims of the complaint.

BACKGROUND

The City of Cleveland is a municipal corporation and political subdivision under R.C. 2744.01(F). The City's municipally-owned utility CPP sells electric power to customers in Cleveland, including residential and commercial customers such as Plaintiffs.

Under the class definition Plaintiffs are all CPP customers who at any time paid a bill for electricity that included the line item "Energy Adjustment Charge" (EAC) during a time when CPP included in that charge an additional amount known as the "Environmental and Ecological Adjustment" (EEA). The "Energy Adjustment Charge" provided in Cleveland ordinances adjusts customer rates based on the cost of electricity and it is not itself at issue here. At issue is the propriety of adding an "Environmental and Ecological Adjustment" amount to customer billings and doing so by imbedding the amount inside the Energy Adjustment Charge on billings.

I. PLAINTIFFS' BREACH OF CONTRACT CLAIM

CPP moves for summary judgment in its favor upon Plaintiffs' breach of contract claim.

Cleveland Codified Ordinance Chapter 523 governs the rules and rates for electricity sales to CPP customers. It includes an electric sales agreement by which customers are charged monthly for receipt of electric services.

The parties agree that a binding contract exists between Plaintiffs and CPP and that contract is an electric services agreement established by Cleveland Codified Ordinance 523.19(a) having the general terms provided in CCO 523.19(b) including this provision labelled Article 3:

For the electric service furnished under this contract, the Consumer agrees to pay the City in accordance with the terms, conditions and applicable rate schedule established by or as may be amended from time to time by the City and approved by City Council, and said rates, terms and conditions are hereby made a part of this contract the same as if incorporated herein.

The ordinance on its terms incorporates into the parties' electric service agreement other ordinances containing the "the terms, conditions and applicable rate schedule... approved by City Council."

Plaintiffs claim CPP violated its contract (the electric services agreement) with customers in the following ways:

- A. by charging an EEA rate adjustment that was not authorized by CCO 523.17 (see paragraphs 73-77 of the complaint)
- B. by charging the EEA adjustment amount on customer billings as an undisclosed part of the EAC amount
- C. by failing to prorate the EEA on a cents per kilowatt-hour basis as required by CCO 523.17(a) equally across all rate schedules
- D. by certain other failures.

The Court will address each allegation of breach of contract in this order.

I.A. *EEA charges not authorized by CCO 523.17*

Plaintiffs allege CPP charged amounts as environmental and ecological adjustments to recover costs that were not environmental and ecological costs as required by city ordinances. CPP denies that EEA adjustments to customer billings are limited to those recovering environmental and ecological costs and claims city ordinances authorize the EEA adjustments in its rate calculation.

The broad language of Article 3 of the electric services agreement for residential customers, quoted above, is the basis for Plaintiffs' argument that CPP is required to strictly follow the terms of enacted ordinances governing rate calculations. (Similarly, CCO 523.196 governs agreements with commercial customers and all Plaintiffs' contentions are made with equal force there.) That said, the essential dispute between the parties here is one of interpretation of a specific ordinance, CCO 523.17, about EEA rate adjustments to CPP customers.

The title of CCO 523.17 is "Environmental and Ecological Adjustment". Plaintiffs argue that any adjustment to customer billing under this ordinance must necessarily be one for environmental and ecological costs as spelled out in that section. Accordingly, Plaintiffs argue, no other costs can support an adjustment to customer billing under this section. CPP points out Cleveland's ordinances do not permit themselves to be read in this way. CCO 101.01 provides that section headings do not constitute part of the law but are present for convenience only. So, in truth, in this litigation the parties should not—and in this decision, the Court should not—be speaking of an "Environmental and Ecological Adjustment" because that is only the title of the ordinance. The parties' dispute here is different; it is "what costs are properly the subject of adjustments to

customer billing under the ordinance so titled, *i.e.*, CCO 523.17". The Court will use the term "Environmental and Ecological Adjustment" or "EEA" neutrally, as an adjustment made under CCO 523.17. At least use of the term EEA distinguishes it from the other adjustment clearly permitted by a separate ordinance for energy costs known as "EAC".

CPP uses three revenue streams to operate as an electrical supplier: base rates, EAC and EEA. Base rates are set by separate ordinances. The parties agree that rates for residential customers are typically lower than those for commercial customers and Cleveland ordinances have long maintained a host of different rate classifications.

The rate adjustment ordinance at issue is CCO 523.17:

- (a) The costs of special apparatus and equipment required for compliance with Federal, State or City environmental protection laws and directives as have been or may be installed and operated from time to time or on a continuing basis shall be prorated on a ¢/KW-hr. basis and assessed against the appropriate rate schedule. The provisions of this section may be applied to rate schedules described in Sections 523.02 to 523.06 or any other rate schedules as may later be enacted and approved.
- (b) The costs for which an adjustment can be incurred shall include but are not limited to voluntary or involuntary research and development charges, purchase and installation of emission control equipment for Sulphur, nitrogen and particulate emissions, purchase and installation of control equipment for protection of the natural water supply, purchase and installation of power supply apparatus and power from remote sources and any other charges levied on the Division of Light and Power in lieu of precise compliance with statutes and directives.

The parties in substance agree to the following. CCO 523.17, the ordinance titled "Environmental and Ecological Adjustment", became effective in 1974, but CPP did not begin to bill customers EEA amounts until 1984. By 1984, CPP no longer generated electricity except for a very small amount; rather, CPP bought electricity elsewhere and distributed it to its customers. In so doing, it competes door-to-door with

Cleveland Electric Illuminating Company. This switch from production to distribution meant fewer environmental protection laws applied to CPP's operations. From among the items listed in CCO 523.17, all EEA adjustment amounts charged by CPP over the years were for "purchase and installation of power supply apparatus". The latter is text found only in 523.17(b). As a result, the parties' arguments focus on that particular justification for EEA amounts on customer bills.

Plaintiffs argue CCO 523.17 limits EEA adjustments to only those required to comply with environmental protection laws. CPP argues that the ordinance permits adjustments set forth in subdivision (b) without regard to the contents of subdivision (a). In other words, Plaintiffs argue the term "costs" of 523.17(b) refers to costs as defined in 523.17(a). CPP argues that the term "costs" of 523.17(b) is not limited to the costs described by 523.17(a).

From January 1, 1984 to May 31, 2013, CPP billed its customers EEA amounts totaling \$188,076,337.00. It is undisputed that EEA amounts totaling \$188,076,337.00 were not limited to those required by environmental protection laws, *i.e.*, were not costs defined in 523.17(a). It is undisputed that all EEA adjustments were justified by CPP under the "power supply apparatus" language of 523.17(b).

CPP argues the two paragraphs of CCO 523.17 are to be read independently of each other. Therefore, the argument proceeds, any costs listed in CCO 523.17(b) justify an EEA rate adjustment without regard to the description of costs in CCO 523.17(a).

The chief disagreement here is one of statutory interpretation. The Court rejects Plaintiffs' reading of CCO 523.17 as no language in the ordinance supports it. The

ordinance's language is not ambiguous and therefore Ohio law requires that it be enforced as written. The ordinance clearly permits adjustments beyond those required for environmental protection compliance. CCO 523.17(b) allows recovery of costs that are not described in CCO 523.17(a). For example, CCO 523.17(b) allows adjustments which are not "special apparatus and equipment" or which are not environmentally related.

The second sentence of CCO 523.17(a) clearly permits CPP to choose whether it will apply any adjustments to any of the rate schedules. This is the apparent structure created by Cleveland's legislative authority and it invests CPP with considerable discretion in its application and use of rate adjustments under CCO 523.17. CCO 523.17 governing EAC adjustments also permits CPP to choose whether to apply EAC adjustments to any of the rate schedules.

The Court concludes that the adjustments made by CPP justified solely under CCO 523.17(b) did not violate the ordinances and therefore did not violate the electric services agreement with its customers.

I.B. *EEA adjustments were not separately identified on billings*

Plaintiffs also argue CPP was in violation of its contractual duties by not listing separately the amount for the EEA adjustment from the Energy Adjustment Charge (EAC) on customer bills. When CPP charged an EEA amount, it was simply included as part of the EAC amount. The consumer has no way of knowing that an item other than EAC was involved.

There is no requirement in any ordinance to separately list and describe in different line items amounts on customer bills. No ordinance required a separate line

for EEA charges from EAC charges. Sound government policy and transparency might be served by doing so, but it is not required by current ordinances.

As will be discussed below, under Ohio law this Court has no power to impose such changes. More significantly, no city ordinance requires use of separate line items on billing statements.

I.C. *Proration*

Plaintiffs also claim that CPP was in breach of its contract with customers by applying the EEA adjustment unequally among rate classes. The Court rejects this contention. This argument assumes that the cents-per kilowatt-hour proration spelled out in CCO 523.17(a) applies to all adjustments authorized by the ordinance. As discussed above, the only tenable interpretation of CCO 523.17 is that 523.17(b) authorizes adjustments independently of those authorized by 523.17(a). As a result, the cents-per kilowatt-hour proration applies only to adjustments made under the first sentence of 523.17(a) and not to adjustments made under the first sentence of 523.17(b). CPP's failure to prorate its EEA adjustments equally among all rate classes is not a violation of the electric services agreement because under the literal terms of 523.17(b) no such proration was required.

Plaintiffs question the legality of giving different rate classes different EEA rate adjustments. CPP admits that for any billing period the amount of the EEA adjustment and indeed, the cents-per kilowatt-hour proration was not necessarily equal among all customer rate classes. However, the rate adjustment was equal for all customers within a given rate class. Plaintiffs offer no evidence to the contrary.

Plaintiffs argue that the proration should have been equal among all customer rate classes, but the ordinance does not require this equality. CPP argues the plain language of CCO 523.17 gives them the discretion to charge different adjustments (i.e., different cents-per kilowatt-hour prorations) for different rate classes. This follows from the section's language: "The provisions of this section may be applied to rate schedules described in Sections 523.02 to 523.06 or any other rate schedules as may later be enacted and approved." CCO 523.17(a) (emphasis added). Use of the term "section" in this statutory language is a reference to section 523.17 and not to its paragraph 523.17(a) alone. This is an express grant of discretion to CPP for adjustments it makes whether authorized under 523.17(a) or under 523.17(b).

I.D. Other failures alleged to be in breach of contract

Plaintiffs' complaint also describes other conduct as constituting a breach of contract by CPP with its customers. CPP's summary judgment motion seeks judgment in its favor on all theories that CPP acted in violation of its contractual duties.

I.D.1. Double Recovery

It is undisputed that CPP based its EEA charges on costs incurred for "power supply apparatus", a cost listed in CCO 523.17(b). Plaintiffs contend that CPP is obligated to recover its cost for power supply apparatus through its base rates and therefore, its use of EEA amounts to recover for such expenses amounts to a double recovery. No evidence supports the existence of any actual double recovery for any expense. No evidence or legal authority supports the contention that CPP is obligated to recover its cost for power supply apparatus through its base rates alone.

This contention is unworkable and unrealistic. Since City Council sets the base rates, CPP is powerless to determine the base rates or enact an ordinance adjusting base rates. The undisputed evidence before the Court indicated that City Council has not increased the base rates for a great number of years. CPP must operate the utility using the three revenue streams provided to it. Viewed in this light, use of CCO 523.17(b) to impose an upward consumer billing adjustment makes sense. It places the director of CPP in the same position as other business operators. When costs increase, CPP may pass some of that cost on to the consumer to insure continuation and improvement of service. The record evidence showed CPP did just that but limited the adjustment amount to insure its total electricity charges remained competitive with the rates charged by Cleveland Electric Illuminating Company. It should also be noted that CCO 523.17 imposes no amortization schedule; this leaves discretion in CPP to recoup costs over a long or short time period as business and competition circumstances dictate.

The Plaintiffs' argument is based on a good government motive or policy for transparency with consumers. As laudable as those goals are, no ordinance or legal principle supports it. In addition, as discussed below, Ohio law does not permit Courts to interfere with municipal utility ratemaking. Plaintiffs' arguments thrust this Court into exactly that form of interference.

I.D.2. Accounting of EEA funds

Plaintiffs also argue that any amounts recovered under the EEA adjustment must be placed in specially segregated funds and use of the funds for the permitted 523.17

purpose strictly accounted for. Again, such a practice would be sound government policy and transparent, but no ordinance or statute requires any such reconciliation.

II. LAW & ANALYSIS ON BREACH OF CONTRACT CLAIM

The above analysis focuses on the parties' statutory interpretation dispute and the Court agrees with CPP's interpretation of the subject ordinance because basic legal principles of statutory interpretation require it. The Court finds no breach of contract by CPP in implementing the EEA rate adjustment. That could be the end of the inquiry, but the Court is obligated to consider whether, if any technical violation of the ordinances involved in CPP ratemaking was found, the Court would be compelled to conclude an actionable breach of contract was established. This obligation arises because the parties disagree about the legal standard under which this Court must review CPP's conduct in implementing the EEA. Plaintiffs argue in favor of a traditional breach of contract standard, requiring CPP to comply strictly with city ordinances:

"[A] breach of contract occurs when a party demonstrates the existence of a binding contract or agreement; the non-breaching party performed its contractual obligations; the other party failed to fulfill its contractual obligations without legal excuse; and the non-breaching party suffered damages as a result of the breach. Upon demonstration of breach of contract, damages should place the injured party in as good a position as it would have been absent the breach."

Garofalo v. Chicago Title Ins. Co., 104 Ohio App. 3d 95, 108 (8th Dist. 1995) (citations omitted).

Conversely, CPP argues that this Court must apply the Ohio Supreme Court's holdings when considering the contractual relationship between a municipality's utility company and its customers. That Supreme Court precedent is summarized by this quote,

"The only restraint imposed by law upon a municipality's proprietary undertaking of providing electrical energy is 'that the rates charged be reasonable and that there be no unjust discrimination among the customers served, taking into account their situation and classification.'"

Orr Felt Co. v. Piqua, 2 Ohio St. 3d 166, 170-71 (1983) (citation omitted).

This difference of opinion between the parties compels the Court to address the legal principle of long-standing Ohio law that generally courts will not involve themselves in utility ratemaking but will instead defer to the municipal actors. Even if it could be said that CPP did not strictly follow the requirements of CCO 523.17 or related ordinances, Ohio law holds that this Court may not step in and require strict adherence to the ordinances but instead must re-focus the inquiry to what the law considers the bottom line: whether the rates are reasonable and whether customers suffer any unjust discrimination in those rates.

The Ohio Constitution authorizes municipal corporations "to establish, maintain and operate municipal lighting, power, and heating plants, for the generation, transmission and supplying of electricity to the municipal corporation and its inhabitants." *Orr Felt Co.*, *supra*. "[T]he General Assembly is without authority to impose restrictions or limitations upon that power." *Swank v. Shiloh*, 166 Ohio St. 415 (1957), paragraph one of the syllabus. In the *Orr Felt* decision, the Ohio Supreme Court extended the *Swank v Shiloh* concept, holding that Ohio courts were without authority to subject municipal utilities to a "common law" of ratemaking.

Orr Felt's summary reference "to a common law of ratemaking" was possible because the appellate decision it was affirming dealt in detail with the permissible limits of court oversight when utility customers complain of overcharging for fuel adjustments by the municipal utility. *The Orr Felt Co. v. Piqua*, 1981 Ohio App. LEXIS 13097 (2nd

Dist. 1981). The appellate decision in *Orr Felt* explicitly addressed the fact that Piqua's municipal utility passed along certain costs to consumers in a fuel adjustment in a manner not expressly authorized by the governing ordinance. Notwithstanding this fact, the appellate court ruled in favor of the City of Piqua and against the utility customers. In doing this, the appellate court relied upon *Consumers' Counsel v. Pub. Util. Comm.*, 56 Ohio St. 2d 319 (1978), which upheld a fuel adjustment to Ohio Edison customers that was not expressly authorized by statute. The *Consumers' Counsel* decision pointed out the statute at issue did not on its terms expressly prohibit or limit adjustments and therefore other adjustments were apparently permitted. The Supreme Court in *Orr Felt* affirmed the Second District Court of Appeals in all respects.

The Supreme Court's approach to oversight of municipal utilities had its beginning in *Butler v. Karb*, 96 Ohio St. 472 (1917). *Butler v. Karb* considered whether the municipality engaged in unjust discrimination among its customers when no ordinances or systems were in place setting rate schedules and instead, rates were arbitrarily set by municipal officers and rates differed among users. The failure of the city council to establish any rate schedule was an abuse of power subject to correction by the court but otherwise,

"[t]he manner in which the authority conferred by statute is to be exercised is left to the discretion of the officials of the municipality. * * * Surely the Court cannot be called upon to determine the extent to which current should be used for street lighting and what portion of the current generated may properly be furnished private consumers, nor to ascertain and fix by judicial decree the precise burden that may be placed upon the plant. A mere departure from the exercise of sound judgment does not warrant the interposition of the Court and the control and guidance of its mandate."

Butler v. Karb, 96 Ohio St. 472, 480-481. The Supreme Court's approach to oversight of municipal utilities in *Butler v. Karb* continued in *State ex rel Mt. Sinai Hospital v.*

Hickey, 137 Ohio St. 474 (1940) (refusing to interfere with Cleveland ordinance directing its water utility to provide free water to hospitals and like institutions against a challenge that the ordinance improperly gave away municipal property).

Plaintiffs argue that the *Orr Felt* holding is not dispositive of this case because the Supreme Court decided that case under a theory of rates set by law, and not contract. The Court cannot agree because the present dispute involves similar issues to those present in *Orr Felt Co. v. Piqua*, that is, complaints of overcharging consumers for electrical service by a municipal utility. It brings into question this Court's authority to interfere with CPP rate making. *Orr Felt* evolved from a line of cases requiring judicial deference to the operators of municipal utilities. This deference is built into the Ohio Constitution Article XVIII's grant of authority to municipalities to operate public utilities. *Swank v. Shiloh*, *supra*.

The cases relied on by Plaintiffs involve non-residents with specifically negotiated rate contracts and are distinguishable. In *Rispo Inv. Co. v. City of Cleveland*, 2009-Ohio-2250, ¶ 15-16 (8th Dist. 2009), plaintiff owned an apartment building in Parma. Parma had entered into a Water Service Agreement with the City of Cleveland that granted Cleveland the exclusive authority to set the rates Parma water users would pay for the Cleveland-supplied water. Plaintiff argued the rates were unreasonable, unrelated to costs of service, and discriminated against apartment building owners. The Court of Appeals applied the Supreme Court of Ohio's holding in *Fairway Manor, Inc. v. Board of Comm'rs*, 36 Ohio St. 3d 85, 90 (1988), that when rates are the result of a negotiated contract, courts are without authority to review the reasonableness of the bargain. *Fairway Manor* also held that when rates from a municipal utility are set forth

in such a contract, the rates will not be struck down as discriminatory even where no factor exists justifying the rate discrimination between customers. In other words, the parties are left to live with their bargain. *Fairway Manor Inc.*, *supra* (paragraph two of syllabus).

In the *Fairway Manor* decision as in the *Rispo* decision, the Ohio Supreme Court considered rates charged by a municipal utility to an extraterritorial purchaser after usage rates were established by a negotiated contract between the parties. In each of the cases, there was evidence of a specific negotiated contract between the municipal utility and a non-resident of that municipality. In the present action, Plaintiffs are residents of the City of Cleveland. Their contract is established by operation of law and Plaintiffs did not present any evidence to this Court that any of the rates in the present action were the result of a bargained-for or negotiated contract.

As a result, the Court reviews Plaintiffs' claims that CPP overcharged its customers and violated their electrical service agreements under the *Orr Felt v. Piqua* standard. *Orr Felt* dealt with a dispute between city residents and their municipal utility, as does the dispute between our present parties; it applies to this action.

Under the *Orr Felt* analysis, the Court must now address the parties' arguments about reasonableness of rates and whether customers were unjustly discriminated against in rates.

II.A. Reasonableness of CPP's Rates

In obedience to *Orr Felt*'s holding, the Court is required to consider the reasonableness of CPP's rates and whether those rates unjustly discriminated against customers. The Court does not evaluate specific application of individual adjustments, such as the EAC or EEA, but rather evaluates CPP's rates in totality.

A municipality engaged in the operation of a public utility acts within its proprietary capacity, and is entitled to a fair profit. *Niles v. Union Ice Corp.*, 133 Ohio St. 169 (1938). "So long as the rate is reasonable, the Courts cannot prohibit a municipality from making a profit on the operation of its electric light and power system, in the absence of any restriction in the statute which enables it to operate such system." *Id.* at 182.

CPP relies on evidence that generally its rates are at or below those charged by its competitor Cleveland Electric Illuminating Company to show their reasonableness. While CPP produced evidence that it did not establish unreasonable rates and that it has expanded its customer basis and modernized its distribution system, Plaintiffs failed to produce evidence establishing that CPP's rates in totality were unreasonable. Plaintiffs did not produce evidence that CPP's aggregate revenues exceeded what CPP could lawfully collect under all the ordinances.

CPP points out the same rates could have been charged by the simple expediency of increasing the base rates and not using any EEA adjustment. That the rates were determined using EEA adjustments supports the argument that City Council intended in its ordinances to use stabilized base rates and to permit CPP administrators to apply rate adjustments from time to time to fund operations and remain profitable as well as competitive.

The Court has reviewed all of the Civ.R. 56(C) evidence submitted by the parties, and determines that (a) CPP met its burden to affirmatively demonstrate that Plaintiffs do not have evidence to support their claims that CPP's rates were unreasonable or that it generated unreasonable profits, and (b) Plaintiffs failed to contradict that evidence by

its evidentiary submissions. Based on the undisputed evidence and even though construing it most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion and that is that CPP is entitled to summary judgment on the issue of reasonableness of rates.

II.B. *Unjust Discrimination*

The evidence established that Cleveland City Ordinances have long maintained multiple rate classes based on customer situations and electricity consumption. Multiple rate classes means different base rates are established by ordinance for differently situated customers. The evidence established that city ordinances' base rates have generally been lower for residential consumers than commercial users. No argument was made and no evidence established that such rate structures were unjustly discriminatory. Industry-wide it is customary for utilities to charge different rates among different customer classes and rate variances are built into the rate schedules.

No argument was made here that any customers within a given customer rate classification suffered different rates or adjustment charges. Plaintiffs' argument of unjust discrimination was limited to the fact that in a given time period EEA adjustments were different for customers in one rate classification than for customers in a different rate classification. No evidence supported the conclusion that practice was unjustly discriminatory. Such discretion was expressly placed in CPP's hands by City Council's ordinance language that adjustments "may be applied to rate schedules", CCO 523.17(a). Uniformity in applying adjustments was not mandated by the ordinances. As a result, this Court is left with enforcing the existing ordinance language.

The Court has reviewed all of the admissible Civ.R. 56(C) evidence submitted by the parties, and determines that (a) CPP met its burden to affirmatively demonstrate that Plaintiffs do not have evidence to support their claims that CPP's rates were unjustly discriminatory and (b) Plaintiffs failed to contradict that evidence by its evidentiary submissions. Based on the undisputed evidence and even though construing it most strongly in favor of the non-moving party, reasonable minds could to but one conclusion and that is that CPP is entitled to summary judgment on the issue of unjust discrimination in rates.

III. CPP'S DEFENSES TO THE BREACH OF CONTRACT CLAIM

CPP raises two defenses on Plaintiffs' breach of contract claim and urges they serve as an independent basis to grant summary judgment.

III.A. *Plaintiffs suffered no damages*

CPP claims the evidence is undisputed that Plaintiffs have suffered no damages and Plaintiffs can produce no evidence of damages. The Court agrees. CPP's use of EEA increases to customer billings did not cause damage to Plaintiffs. Plaintiffs paid the amounts properly determined and imposed by CPP under CCO 523.17 in keeping with their electric services agreement. CPP presented evidence of its use of income from customer billing and the necessary dollars that EEA charges supplied. Plaintiffs presented no evidence of any large cash surplus or other fund that would represent CPP hoarding dollars beyond their need for operating funds. CPP could have raised the same income dollars by increasing base rates and Plaintiffs agree to that fact. That admission shows CPP customers have suffered no damages. Business income to CPP was used for business expenses of CPP.

III.B. Statute of Limitations on Contract Claim

Whether the statute of limitations has expired on a given claim is generally a question of fact for the trier of fact. Here the material facts are undisputed and Ohio law permits of several contradictory conclusions. Having reviewed the parties' arguments and legal authority, the Court concludes electricity in the context of this action is a "good" under Ohio law and subject to a four-year period of limitations under R.C. 1302.98.

IV. CONCLUSION AS TO BREACH OF CONTRACT CLAIM

The Court has reviewed all of the admissible Civ.R. 56(C) evidence submitted by the parties and determines that CPP met its burden to affirmatively demonstrate that Plaintiffs do not have evidence to support their claim that CPP acted in breach of its contract with its customers and Plaintiffs failed to contradict that conclusion by producing evidence of acts in violation of the electric services agreement. Based upon the undisputed material facts and after construing the evidence most strongly in favor of Plaintiffs, the Court concludes that reasonable minds could come to but one conclusion and that is that CPP is entitled to judgment as a matter of law on Plaintiffs' claim for breach of contract. Defendant's motion for summary judgment is granted on this claim and Plaintiffs' motion for partial summary judgment is denied.

V. PLAINTIFFS' FRAUD CLAIM

CPP moves for summary judgment upon Plaintiff's fraud claim. A claim of common law fraud requires proof of the following factual elements:

"(a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another

into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance.”

Cohen v. Lamko, Inc., 10 Ohio St. 3d 167, 169 (1984) (quoting from *Friedland v. Lipman*, 68 Ohio App. 2d 255 (8th Dist. 1980)).

In briefs opposing summary judgment, Plaintiffs state they do not seek money damages under their fraud claim. No language of their Fourth Consolidated Amended Complaint makes that clear, so the Court analyzes the fraud count with and without money damages.

The Court has reviewed all of the Civ.R. 56(C) evidence submitted by the parties, and determines that CPP met its burden to demonstrate affirmatively that Plaintiffs do not have evidence to support their fraud claim, and that Plaintiffs failed to contradict that evidence with proof of the contrary as required to avoid summary judgment. Separate analyses produce the same conclusion.

To the extent money damages are sought here, CPP is entitled to sovereign immunity under R.C. Chapter 2744 and Plaintiffs produced no evidence to negate the presumption of immunity and permit a fraud claim against the defendant municipality and its utility. Immunity would not protect CPP under claims for other recovery based on fraud, as discussed below.

In addition, Plaintiffs did not produce evidence that there is an independent basis for their fraud claim.

“Generally, the existence of a contract action * * * excludes the opportunity to present the same case as a tort claim. A tort claim based upon the same actions as those upon which a claim of contract breach is based will exist independently of the contract action only if the breaching party also breaches a duty owed separately from that created by the contract, that is, a duty owed even if no contract existed.”

Textron Fin. Corp. v. Nationwide Mut. Ins. Co., 115 Ohio App. 3d 137, 151 (8th Dist. 1995); see also, *Mohan Jain v. Omni Publishing, Inc.*, 8th Dist. Cuyahoga No. 92121, 2009-Ohio-5221, ¶ 27. The Court concludes that Plaintiffs' fraud claim is based upon the same actions as those alleged in the breach of contract.

Based on the foregoing the Court grants CPP's summary judgment motion as a matter of law on Plaintiffs' claim for money damages based on fraud. Based upon the undisputed material facts and after construing the evidence most strongly in favor of Plaintiffs, the Court concludes that reasonable minds could come to but one conclusion and that is that CPP is entitled to judgment as a matter of law on Plaintiffs' fraud claim seeking money damages.

Next, the Court addresses Plaintiffs' claim that CPP's fraudulent billings warrant remedies including restitution, injunctive relief and declaratory judgment. The fraudulent billings Plaintiffs describe include imbedding EEA amounts inside a billing's line item for EAC charges as well as what Plaintiffs term unorthodox and unsupported practices in arriving at EEA charges and failing to reconcile them with costs. CPP produced evidence that it does not have a duty to provide to its customers line-item billing statements that separate EEA charges from EAC charges or from charges based on base rates. CPP produced evidence of its authority under the ordinances to implement EEA charges and the Court has determined that CPP did not violate ordinance provisions with EEA charges. Plaintiffs' only evidence suggests there may be a best practice that CPP should follow; however, best practices do not create an affirmative duty. Moreover, CPP produced evidence that Plaintiffs have not been injured by relying

on CPPs billing statements that do not separate EAC and EEA adjustment charges, and Plaintiffs' evidence did not contradict this conclusion.

Based on the foregoing the Court grants CPP's summary judgment motion as a matter of law on Plaintiffs' claim for fraud as a justification for equitable and other relief as discussed below. Based upon the undisputed material facts and after construing the evidence most strongly in favor of Plaintiffs, the Court concludes that reasonable minds could come to but one conclusion and that is that CPP is entitled to judgment as a matter of law on Plaintiffs' fraud claim.

IV. RESTITUTION, INJUNCTIVE RELIEF, AND DECLARATORY JUDGMENT

CLAIMS

CPP moves for summary judgment in its favor upon the Plaintiffs' three remaining causes of action. The conclusions under the summary judgment proceedings for the breach of contract claim apply here with equal force. Those conclusions preclude Plaintiffs from pursuing these three causes of action.

The parties have litigated this action under the claim of breach of contract and agreed to the existence of a contract between the plaintiff consumers and defendant utility. If viewed as one based on unjust enrichment, Plaintiffs' claim for restitution must fail. No such claim can arise given the existence of the parties' undisputed contractual relationship. If viewed as a claim for equitable relief, CPP argues that recovery of such amounts from CPP would be money coming from the Plaintiff class and other customers. CPP is not a private corporation with retained earnings. Based on the undisputed evidence, CPP has no claim on the City's General Fund and the City has no legal obligation to disgorge a judgment against CPP from the General Fund. Such a

recovery would require CPP to raise money to pay the restitution from their customers, that is, the Plaintiff class.

In addition, such a claim must fail because the undisputed evidence that shows that CPP's implementation and use of EEA increases to customer billings was lawful and permitted by ordinance and in any event, did not cause damage to Plaintiffs. CPP's conduct was not fraudulent. Plaintiffs paid the amounts properly determined and imposed by CPP under CCO 523.17 in keeping with their electric services agreement. Based on the undisputed evidence, judgment must be granted to CPP upon Plaintiffs' request for restitution because after construing the evidence most strongly in favor of Plaintiffs, the Court concludes that reasonable minds could come to but one conclusion and that is that CPP is entitled to judgment as a matter of law on Plaintiffs' restitution claim.

The Plaintiffs' request for declaratory judgment at paragraph 52 of the complaint seeks a declaration that

"Plaintiffs' ...bills were improperly calculated because they included improper Environmental Adjustments, or were based upon unaccounted-for costs fabricated by CPP as unrecovered Environmental Adjustment costs, and that all accounts must be re-calculated."

In the above analysis, the Court found that Plaintiffs' bills were not charged improperly due to improper Environmental Adjustments. Customer accounts need not be re-calculated. Based on the undisputed evidence, judgment must be granted to CPP upon Plaintiffs' request for this declaratory judgment.

The Plaintiffs' claim for injunctive relief seeks a permanent injunction

"to prevent CPP from from billing customers for an Environmental Adjustment without expressly disclosing the charge on customer's bills and without correlating the amounts charged to qualified expenses incurred."

As above analyzed, Plaintiffs are not entitled to prevail on the merits of their contract claim and therefore Plaintiffs have not demonstrated irreparable harm or lack of a remedy at law. They are not entitled to injunctive relief and judgment must be entered in summary fashion in favor of CPP.

CPP is entitled to summary judgment on Plaintiffs' restitution, injunctive relief and declaratory judgment claims based on the undisputed material facts and the Court's analysis that although construing the evidence most strongly in favor of Plaintiffs, reasonable minds could come to but one conclusion and that is that CPP is entitled to judgment as a matter of law on these of Plaintiffs' claims.

VI. CONCLUSION

For all the forgoing reasons, the Court grants Defendant City of Cleveland's motion for summary judgment in all respects. Judgment is entered in the City's favor and against Plaintiffs on all counts of Plaintiffs' Fourth Consolidated Amended Complaint. Accordingly, the Court denies Plaintiffs' request for restitution, declaratory, and injunctive relief. Plaintiffs' partial summary judgment motion is denied. While the material facts are not in dispute, the Court cannot conclude that on those facts reasonable minds would come to the conclusion that plaintiffs are entitled to judgment as a matter of law on their breach of contract claim, even though the undisputed facts were most strongly construed in favor of Plaintiffs. Costs are assessed to Plaintiffs. This is a final judgment under R.C. 2505.02.

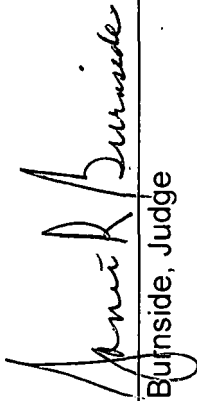
As required by Civ.R.23, the Court finds class members bound by this judgment to be those class members described by this Court's 8/2/17 order but excluding therefrom the 590 persons identified in the Trammel affidavit filed 5/25/18 who timely

opted-out of the class after receiving the class notice and also excluding therefrom the Court and its staff, all counsel of record, and employees of the City of Cleveland and the immediate family members of the latter three (3) groups.

IT IS SO ORDERED.

PURSUANT TO CIV.R. 58(B) THE CLERK OF COURT SHALL SERVE A COPY OF THE FOREGOING JOURNAL ENTRY AND OPINION ON ALL COUNSEL OF RECORD AT THE ADDRESS LISTED ON THE COURT DOCKET.

DATED: 1/7/2019



Janet R. Burnside, Judge

A copy of this Judgment Entry was sent by email to counsel this 7 day of January, 2019.