BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Ohio Schools Council, Ohio School Boards Association, Ohio Association of School Business Officials, and Buckeye Association of School Administrators, dba Power4Schools	)	
Complainants,	)	
v.	)	**Case No. 14-1182-EL-CSS**
FirstEnergy Solutions Corp.	)	
Respondent.	)	

FIRSTENERGY SOLUTIONS CORP.'S MEMORANDUM CONTRA MOTIONS TO INTERVENE AND FOR INTERIM AND PRELIMINARY ORDERS BY THE TIMKEN COMPANY, ET AL., AND NAVCO ENTERPRISES, ET AL.

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I. INTRODUCTION

On July 17 and July 21, 2014, two groups of large commercial or industrial customers (the Movants) asked this Commission both to grant intervention *and* to issue so-called "interim and preliminary orders." Both motions should be rejected.

The Movants do not meet the standards for intervention. The underlying complaint arises from energy supply agreements between the complainants' members and FirstEnergy Solutions Corp. (FES). The Movants are not parties to those contracts and have no relationship with the complainants. Whether this proceeding ultimately results in "precedent" is of no consequence, as the Commission has long rejected the potential precedential effect of a case as a basis for intervention. *See, e.g.*, *In re Self-Complaint of Columbus S. Power Co.*, Case No. 06-222-EL-SLF, 2007 Ohio PUC LEXIS 221, Entry at *3 (Mar. 21, 2007).

The motion for "interim and preliminary orders" must also be rejected. The Movants fail to articulate *any* basis for granting the motion: they do not address jurisdiction; they do not cite any authorizing statute or rule; and they do not even explain why such extraordinary relief is necessary. To gain extraordinary relief, one must make an extraordinary showing. Far from extraordinary, the Movants' showing is non-existent.

As explained in FES's motion to dismiss (also filed today), the Commission lacks subject matter jurisdiction over the underlying complaint. That being the case, there is no matter properly before the Commission in which the Movants may participate. But in the unlikely event the Commission allows the complaint to proceed, it must proceed without the Movants. Both of their motions, to intervene and for extraordinary relief, must be denied. But before addressing the numerous specific errors presented by their motions, FES would begin by pointing out the irredeemable substantive flaw in what the Movants are asking the Commission to do.

II. THE MOVANTS IMPROPERLY SEEK TO REVISE VALID CONTRACTUAL OBLIGATIONS

If everything else were proper about the Movants' filings, it would not change the fact that what they are seeking is forbidden. The Movants are trying to get the Commission to revise the terms of a valid, existing contract, thereby unilaterally imposing on FES a new contract with new terms. Many of the terms the Movants request, if granted by the Commission, would substantially and one-sidedly revise the contracts they signed with FES. The Movants are looking to add new obligations to FES, remove agreed-upon obligations from themselves, and eliminate remedies available to FES. Not even the courts have the authority to dictate new terms to an existing agreement, and the Commission should not allow itself to be led down this path.

A "court will not rewrite [a] contract to achieve a more equitable result." *Dugan & Meyers Constr. Co. v. Ohio Dept. of Admin. Servs.*, 113 Ohio St.3d 226, 2007-Ohio-1687, ¶ 39. Even if "unforeseen" events cause a contract to become uneconomic for one of the parties, "[i]t is not the responsibility or function of [a] court to rewrite the parties' contract to provide for such circumstances." *Aultman Hospital Assoc. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 54–55 (1989) (internal quotations omitted). The Supreme Court of Ohio has recognized the consequences if tribunals do not respect the language of contracts: "Any rule of law which would sanction the renunciation of an otherwise valid, voluntary agreement would lead to instability in all of our personal and business contractual relationships and assure multifarious litigation." *Jarvis v. Ashland Oil, Inc.*, 17 Ohio St.3d 189, 192 (1985).

The Movants are not victims. The agreements at issue are commercial contracts. They were bargains reached at arm's length with experienced negotiators on both sides. Both sides had the advice of counsel and access to experts in the markets. The Movants knew exactly what they

were getting; they knew that pass-through charges were possible; and they knew that both parties possessed remedies if they could not come to agreement on what charges were covered.

The Commission should note well that the same parties who complain about their contracts *also* take care to ensure that they may continue to receive service under the very same contracts. They wish to be kept off of the SSO, and they wish to eliminate any possibility of early termination. (*See, e.g.*, Timken Mot. for Int. Orders at 2 (Items 2 and 3)[1].) The Movants clearly wish to preserve service under the contract. In reality, the complaining parties are not concerned about violations of the rules, none of which actually occurred; they are asking the Commission to hand them a better deal than they were able to negotiate.

III. THE COMMISSION SHOULD DENY INTERVENTION

A. The Movants do not satisfy the standards for intervention.

Under Ohio Adm. Code 4901-1-11(A)(2), intervention is permitted if the movant shows that it (*1*) "has a real and substantial interest in the proceeding" and (*2*) "is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest, unless the person's interest is adequately represented by existing parties." The Movants satisfy neither factor.

1. The Movants have no cognizable interest in this case.

A ruling on the complainants' contracts will not affect the Movants' contracts or their right to pursue any remedies they may have. None of the Movants alleges that it is a party to any contract between FES and the entities involved in the underlying complaint. Nor do the Movants allege any relationship between any of their members and complainants. The Movants make

[1] Throughout this memorandum contra, FES refers only to the Timken Motion; the Navco Motion, filed a few days later, is in all material respects identical, was prepared by the same counsel, and expressly supports the Timken Motion.

several statements regarding their interests in *their* contracts (Timken Mot. to Intervene at 4–5), but *their* contracts are not at issue in the complaint.

The only other "interests" they offer do not justify intervention. They allege an interest in defending FES's CRES certification, but that interest is already adequately represented by FES. (*See id*. at 5.) And if this interest were acceptable, it would permit intervention by any of FES's thousands of customers.

Movants' belief that intervention is justified because they have grievances similar to the complainants is also unavailing. (*See id*. at 3–5.) "It is the policy of the Commission not to grant intervention to entities whose only real interest in the proceeding is that legal precedent may be established which may affect that entity's interest in a subsequent case." *In re Complaint of XO Ohio*, Case No. 03-870-AU-PWC, 2003 Ohio PUC LEXIS 200, Entry at *14 (May 14, 2003); *see also In re Self-Complaint of Columbus S. Power Co.*, Case No. 06-222-EL-SLF, 2007 Ohio PUC LEXIS 221, Entry at *3 (Mar. 21, 2007) (same; rejecting intervention); *In re Complaint of Dominion Retail, Inc.*, Case No. 00-2526-EL-CSS, Entry at *2 (Apr. 19, 2001) ("Although [an entity] has an interest in the proceeding and the precedent that might be set in [the] case, . . . that interest is not a sufficient basis for intervention."). Interest in precedent does not justify intervention.

If intervention were allowed based on the mere fact that the would-be intervenor and complainant received service under similar terms and conditions, then every residential customer (for example) could intervene and participate in every residential complaint case—all receive service under similar, in fact identical, terms and conditions. To say that similarity of service qualifies as a "real and substantial interest" is to say that the Commission may grant intervention

as a matter of right, which is plainly contrary to the statutory requirements of R.C. 4903.221, as well as Ohio Adm. Code 4901-1-11.

2. Denying intervention will not deprive Movants of a remedy; any Movant may pursue its claim through its own complaint.

Because the Movants lack any cognizable interest in this case, it follows that they cannot satisfy the second factor, namely, that "the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest." Ohio Adm. Code 4901-1-11(A)(2). Moreover, if any of the Movants *do* have an interest protectable by the Commission that interest may be protected through the filing of an appropriate complaint.

a. A complaint, not a motion to intervene, is the proper pleading to submit a dispute for Commission resolution.

What the Movants seek to accomplish is plain: "the resolution of [a] dispute" with FES. (Timken Mot. to Intervene at 4.) In their words, each Movant has "pursuant to the controlling [contract], disputed FES's right to bill and collect the RTO Expense Surcharge." (*Id*.) They apparently desire the Commission to resolve this dispute. If the Movants believe that they have a dispute with FES that requires Commission resolution—and FES does not concede that they do—then each Movant must file its own complaint.

The Commission's rules directly address what pleading is necessary for "any customer or consumer" who wishes to resolve an alleged "service or billing problem"—the filing of "a formal complaint." Ohio Adm. Code 4901-9-01(A). To be clear, FES does not acknowledge that Movants have a claim that properly belongs before the Commission. As FES explains today in its motion to dismiss, the Commission lacks subject matter jurisdiction over the underlying complaint. But if any of the Movants believe that it has a dispute that belongs before the Commission, it must present that dispute in a complaint.

b. A motion to intervene is no substitute for a complaint.

A motion to intervene is no substitute for a complaint. Both to ensure orderly proceedings and to satisfy due process, it is essential that each entity file its own complaint.

The complaint sets the scope of relevance for all proceedings that follow. *See, e.g.*, *In re the Complaint of OHIOTELNET.COM, INC.*, Case No. 09-515-TP-CSS, 2010 Ohio PUC LEXIS 1314, Entry at *8 (Dec. 1, 2010) (striking testimony relating to issues that were not raised in the complaint and explaining that "[t]he complaint does not raise these issues . . . these claims fall outside the scope of the complaint . . . . [t]o be heard, this claim should have been pleaded"); *In re Complaint of Cleveland Elec. Illum. Co.*, Case No. 95-458-EL-UNC, 2004 Ohio PUC LEXIS 627, Order on Remand at *9 (Dec. 21, 2004) ("It would be inappropriate to consider additional allegations not raised in this original complaint"). Without a complaint, FES must speculate as to what precisely is even being disputed.

The requirement of a written complaint is also critical for the satisfaction of due process. The purpose of a complaint is "to notify the defendant of the legal claim against him." *Wilson v. Riverside Hospital*, 18 Ohio St.3d 8, 10 (1985). A complaint must "give the defendant fair notice of the plaintiff's claim and the grounds upon which it is based." *Slife v. Kundtz Properties, Inc.*, 40 Ohio App.2d 179, 182 (8th Dist. 1974). Without clear, written notice both of the complainant's factual allegations and of its legal theories and claims, a respondent can neither investigate the facts for itself nor address the propriety or merit of the legal claims.

These requirements also benefit the Commission. The answer narrows the scope of the dispute, *see* Ohio Adm. Code 4901-9-01(D) (requiring admission or denial of factual allegations), and a motion to dismiss may show that the dispute does not even belong before the Commission, *see id*. 4901-9-01(C). None of these steps, essential to orderly and fair proceedings, are satisfied when a dispute is kicked off by a motion to intervene.

c. Any complaint must be filed in its own docket; "second" complaints are not permitted.

Finally, if the Movants do wish to file complaints, each Movant must individually file its own complaint, and each in its own docket.

"The Commission's rules of practice do not provide for class action complaints." *In re the Complaint of S.G. Foods, Inc.*, Case No. 04-28-EL-CSS, Entry at *2 (Aug. 12, 2004). By the same token, its "rules do not allow for the filing of a second complaint in an ongoing proceeding, by unrelated entities." *In re the Complaint of S.G. Foods Inc.*, Case No. 04-28-EL-CSS, 2006 Ohio PUC LEXIS 172, Entry at *25–26 (March 7, 2006). Indeed, *S.G. Foods* further confirms that the motions to intervene must be denied. If a properly prepared complaint is not permissible as a follow-up to an unrelated party's complaint, how much less should an improper pleading be permitted to initiate a new dispute in an unrelated party's docket.

This is not to say that the Commission is the proper forum. FES believes that the preparation and filing of such complaints before the Commission would likely be a futile effort. While their pleadings are irreparably defective, it appears that the Movants' intent was to present pure breach-of-contract claims, over which the Commission lacks jurisdiction. The salient point is that the Movants' attempt at submitting their dispute through a motion to intervene must be rejected.

IV. THE COMMISSION SHOULD NOT ISSUE THE REQUESTED "INTERIM AND PRELIMINARY ORDERS"

Just as the Movants' request for intervention must be denied, so too must their request for "interim and preliminary orders."

Their request for preliminary relief is improper. Backed only by a few unsupported factual assertions that they are "similarly situated" to parties whose complaint has not even been answered, the Movants present the Commission with a nine-item wish list. Every item on the list

would either require FES to take potentially unwanted actions or prohibit FES's exercise of contractually negotiated rights. The Movants *also* ask the Commission to generically prohibit FES from taking *any* action that would "adversely affect the business relationship between FES, *third parties*, and the Movants." (Timken Mot. for Int. Orders at 10 (emphasis added).) And even though these requests would override existing commercial contracts, they ask the Commission to do all this without any hearing or other due process.

This cannot be done. As FES explains today in its motion to dismiss the underlying complaint, the Commission lacks jurisdiction to hear pure contract claims. The Movants take this jurisdictional transgression one step further and ask the Commission to do something that even a court cannot do—disregard the agreed terms of an existing agreed-upon contract and replace it with an altogether new bargain. The Commission lacks this authority and should not allow itself to be led down this path.

A. The movants have the burden of justifying their request, but they have failed to provide any support.

Even a cursory review of Movants' request shows that it cannot be granted. Any party seeking relief from the Commission must first establish that the Commission has jurisdiction to act; that some statute or rule permits the action; and that the action is reasonable and necessary. And the more extraordinary the relief, the stronger the requisite showing. *See State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, ¶ 56 ("Parties seeking extraordinary relief bear a more substantial burden in establishing their entitlement to this relief").

The relief requested by Movants is truly extraordinary. They have not only failed to support their request; they have scarcely attempted it and, as such, their request must be rejected.

1. The Movants bear the burden of supporting their request.

First, the Movants plainly bear the burden of justifying their request for relief. "[I]n any . . . proceeding, the party asserting his right to affirmative relief has the burden of proof." *Yarbrough v. Maxwell*, 174 Ohio St. 287, 288 (1963). Consistent with this common-sense rule, the Commission has explained that "once a party raises an issue the burden of proof then falls upon the party who raised that issue." *In re Purchased Gas Adjustments Clause of The E. Ohio Gas Co.*, Case No. 82-87-GA-GCR, 1983 Ohio PUC LEXIS 73, Opin. & Order, at *20 (Apr. 13, 1983); *In re Application of Columbia Gas*, 89-616-GA-AIR, 1990 Ohio PUC LEXIS 376, Opin. & Order at *137 (Apr. 5, 1990) ("staff bears the burden of proof as to the reasonableness of its proposal"); *see also, e.g.*, *Lincoln Properties, Inc. v. Goldslager*, 18 Ohio St.2d 154, 159 (1969) ("The party interested in obtaining relief has the burden of proof . . . .").

"It is a truism that 'he who alleges must prove.'" *Cupps v. Toledo*, 172 Ohio St. 536, 539 (1961). The Movants ask much, but have proven nothing and have not carried their burden of proof.

2. The Movants have not offered any support for their request.

At least three major questions are left unanswered by the motion for preliminary relief: (*1*) whether each request pertains to a matter within the Commission's jurisdiction; (*2*) whether any statute or rule supports the exercise of the power necessary to grant each request; and (*3*) whether it is reasonable and necessary to grant each request.

a. The Movants have not addressed whether the Commission has subject matter jurisdiction over the dispute.

To begin, the Movants have not addressed the question of jurisdiction. They offer no explanation of what source of jurisdiction or power would enable the Commission to make such sweeping orders. "The Public Utilities Commission has only those powers expressly granted by

the General Assembly." *Radio Relay Corp. v. Pub. Util. Comm.*, 45 Ohio St.2d 121, 127 (1976). The motions for preliminary relief present two serious jurisdictional obstacles that Movants have not even acknowledged, much less cleared.

First, subject matter jurisdiction: before the Commission may act, it must first determine that the dispute falls within its power to resolve. FES explains today in its motion to dismiss that the Commission lacks subject matter jurisdiction over the underlying complaint, which alleges a pure breach-of-contract claim. While the Movants have not even filed a complaint (making it impossible to evaluate the precise contours of their claim), even more significant is the Movants' total failure to address the question of the Commission's power to hear their dispute.

b. The Movants have not shown that the Commission has authority to grant "interim and preliminary" relief.

The Movants also disregard the question of whether and to what extent the Commission has power to grant "interim and preliminary" relief. What the Movants essentially want is an injunction and temporary restraining order, but they fail to address the serious, foundational questions about whether the Commission has the authority and to what extent it may grant such relief.

The Commission has held that it "lacks jurisdiction to grant injunctive and declaratory relief [and] to grant a temporary restraining order." *In re the Complaint of Harry G. Dworkin*, Case No. 88-1716-GA-CSS, 1989 Ohio PUC LEXIS 230, Entry at *1 (March 23, 1989). It had good reason for saying so. The Supreme Court of Ohio has held, "The General Assembly has granted the power of injunctive relief solely to the courts of Ohio. It has conferred no such right upon the Public Utilities Commission, and the commission, in exercising such power, has exceeded its statutory jurisdiction." *Penn. Cent. Transp. Co. v. Pub. Util. Comm.*, 35 Ohio St.2d 97, 101 (1973); *see also Sylvania Home Tel. Co. v. Pub. Util. Comm.*, 97 Ohio St. 202 (1918).

And it goes without saying that, even if the Commission had power to grant injunctive relief, the exercise of this power must still be supported. Courts may be empowered to grant injunctions, but they do not just hand them out on request. "[A] party requesting a preliminary injunction must show that (*1*) there is a substantial likelihood that the plaintiff will prevail on the merits, (*2*) the plaintiff will suffer irreparable injury if the injunction is not granted, (*3*) no third parties will be unjustifiably harmed if the injunction is granted, and (*4*) the public interest will be served by the injunction." *P&G v. Stoneham*, 140 Ohio App.3d 260, 267 (1st Dist. 2000). The Movants do not even address—much less establish—any of these factors.

c. The statute and rules cited by the Movants are irrelevant here.

The Movants have not cited any statute or rule that authorizes the requested relief. The sole statute cited by the Movants is R.C. 4928.10. This statute does not authorize anything other than the promulgation of rules, and does not speak in any way to the granting of extraordinary injunctive relief without a complaint, hearing, or any other process.

As for the rules created under that statute, the Movants admit that "the Commission's rules do not address" many of the issues in this case regarding the "ongoing relationships between the Movants and FES." (Timken Mot. for Int. Orders at 4.) Even this is too generous; none of the rules cited by the Movants is even relevant here.

For example, the Movants cite Rule 4901:1-10-15. (*Id*. at 8.) They do not explain how this rule supports their request for preliminary relief, and it is not self evident. This rule, which governs disconnection of service, does not even apply to CRES providers. It applies to an "electric utility," which means an EDU providing non-competitive services. *See* Ohio Adm. Code. 4901:1-10-01(P) (incorporating definition of "electric utility" in R.C. 4928.01(A)(11); R.C. 4928.01(A)(11) (defining "electric utility" as one "supplying a noncompetitive retail electric service").

The Movants also cite Rule 4901:1-10-31, which governs environmental disclosures; it appears that they mean Rule 4901:1-10-33. (Timken Mot. for Int. Orders at 9.) But again, they do not explain how a rule governing consolidated billing supports their requests for extraordinary relief. They only describe what the rule requires in general terms, not how it authorizes the issuance of the extraordinary orders that they request. This rule does not apply under the facts at hand and is also irrelevant to their request.

Finally, the Movants cite the fact that the Commission "asserted authority" by instituting a "Commission-ordered investigation" regarding cold weather events. (*Id*. at 8.) The fact that the Commission called for general industry comments on a particular issue hardly supports the issuance of injunctive relief against FES, and the Movants again offer no explanation. Far from showing that this investigation supports their request, the Movants admit that the investigation "did *not* address" the "issues that may need to be addressed" in resolving their alleged disputes. (*Id*. (emphasis added).)

d. The movants have not explained why their requests are reasonable or should be granted—nor can they.

As FES has shown, the failure of the Movants to marshal any legal support in favor of their requests is sufficient grounds to reject them. But FES would finally note that the Movants *also* fail even to explain—as a matter of fact—why any of their requests is reasonable or lawful. Besides their bare-bones claim to be in a similar position as the underlying complainants, the Movants offer no explanation of how or why any of their requests for relief are necessary or appropriate. "[T]he least that can be required of the movant is to enlighten the court as to why relief should be granted" and "[a] mere allegation . . . without any elucidation, cannot be expected to warrant relief." *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 21 (1988). The latter quotation fairly describes the motion for interim relief, and the same result should obtain.

In sum, the Movants have failed to support their extraordinary request. The support for their request, far from rising to the extraordinary levels necessary, cannot even be called minimal. They bear the burden of proving their entitlement for relief and they clearly have not met their burden.

V. CONCLUSION

For the foregoing reasons, FES respectfully requests that the Commission deny the motions to intervene and the motions for interim and preliminary orders.

Dated: August 4, 2014

Respectfully submitted,

/s/ Mark A. Hayden

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Summary: Memorandum Contra Motions to Intervene and for Interim and Preliminary Orders by the Timken Company, et al., and Navco Enterprises, et al. electronically filed by Mr. Gregory L. Williams on behalf of FirstEnergy Solutions Corp.