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 MOTION TO INTERVENE BY THE OHIO MANUFACTURERS' ASSOCIATION

I. INTRODUCTION

On July 29, 2014, the Ohio Manufacturers' Association (OMA) asked this Commission to allow it to intervene in this case. OMA's motion should be denied.

OMA does not meet the standards for intervention. The underlying complaint arises from energy supply agreements between the complainants' members and FirstEnergy Solutions Corp. (FES). Neither OMA nor any of its members are parties to those contracts. Moreover, neither OMA nor any of its members allege a relationship with the complainants. And OMA's only possible interest in this case—establishing precedent—is of no consequence; 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).

As explained in FES's August 4, 2014 motion to dismiss, the Commission lacks subject matter jurisdiction over the underlying complaint. That being the case, there is no matter

properly before the Commission in which OMA may participate. But in the unlikely event the Commission allows the complaint to proceed, it must do so without OMA. Its motion to intervene must be denied.

II. THE COMMISSION SHOULD DENY INTERVENTION

Under Ohio Adm. Code 4901-1-11(A)(2), intervention is permitted if the movant shows that it *both* (*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." OMA satisfies neither factor, and as a result, its motion to intervene should be denied.

A. OMA does not have a "real and substantial" interest in this case.

1. No contract involving OMA or any of its members is at issue in this case.

A ruling on the complainants' contracts will not affect any contracts involving OMA or its members or their right to pursue any remedies they may have. OMA does not allege that it or any of its members are parties to any contract at issue between FES and the complainants. Nor does OMA allege that it or any of its members have any relationship with the complainants. Rather, the only statement OMA makes regarding it or its members' interests concerns its *members'* contracts with FES, which are not at issue in this complaint. (*See* OMA Mot. to Intervene at 4 ("Numerous OMA members are also customers who purchase electric generation services from FES, have been improperly assessed (or noticed that they will be assessed for) charges for ancillary services based upon their usage during the month of January 2014 . . . .").)

2. OMA's apparent interest in potential precedent is not a "real and substantial interest" that justifies intervention.

OMA's only apparent interest in this case is the potential precedent that may be set. (*See id.* (suggesting that its members' contracts "will be affected by the Commission's determination

in this matter").) But this has long been held an insufficient basis for intervention since it is not a real and substantial interest.

"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").

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 because 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 in effect that the Commission may grant intervention as a *matter of right* to any similarly situated party irrespective of their interest. This is plainly contrary to the text and intent of Ohio Adm. Code 4901-1-11(A)(2), which only allows intervention to those parties who have a "real and substantial interest in the proceeding."

In short, OMA failed to establish a real and substantial interest in this case and does not satisfy the first factor of the rule governing intervention.

B. Denying intervention will not deprive OMA or its members of a remedy; they may pursue any alleged claim through an individual complaint.

Although OMA's failure to satisfy the first of two required factors for intervention is reason enough to deny intervention in this case, OMA also fails to satisfy the second factor for intervention, 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). If any of OMA's members *do* have an interest protectable by the Commission, that interest may be protected through the filing of an appropriate complaint.

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

OMA seems to anticipate a potential dispute between some of its members and FES. (*See* Mot. to Intervene at 4.) But to the extent OMA believes that these disputes might require Commission resolution—and FES does not concede that they do—then any of these members must file its own complaint.

The Commission's rules directly provide that the filing of a "formal complaint" is necessary for "any customer or consumer" who wishes to resolve an alleged "service or billing problem." Ohio Adm. Code 4901-9-01(A). To be clear, FES does not acknowledge that either OMA or any of its members have a claim that properly belongs before the Commission. As FES explained in its August 4 motion to dismiss, the Commission lacks subject matter jurisdiction over the underlying complaint. But if any of OMA's members believe that they have a dispute that belongs before the Commission, it must present that dispute by filing a formal complaint.

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

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

The complaint sets the scope of relevance for all proceedings that follow. *See, e.g.*, *In re 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). These steps are essential to orderly and fair proceedings, and none of them are satisfied when a dispute is kicked off by a motion to intervene.

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

Finally, if any of OMA's members wish to file a complaint, each 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 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 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 it is improper to file a second complaint in a proceeding initiated by an unrelated party, surely it also is improper to initiate a new dispute in an unrelated party's docket by means of intervention.

2. OMA does not possess standing to file a complaint on behalf of other parties.

There is another barrier to hearing OMA's alleged claims: OMA lacks standing to file a complaint on behalf of any of its individual members.

OMA does not raise issues with respect to any contract it has with FES, but asserts only that "[n]umerous OMA members are . . . customers who purchase electric generation services from FES." (OMA Mot. to Intervene at 4.) In its reply in support of intervention, OMA makes plain that its grounds for intervention are not based on "a contract with FES" but that it seeks to "participat[e] in this proceeding on behalf of its affected members." (OMA Reply in Support of Intervention at 4.) This confirms that OMA is not a proper party to these or any other proceedings regarding the underlying contract dispute.

a. OMA alleges no direct interest in any energy supply agreement with FES.

"A party must have standing to be entitled to have a court decide the merits of a dispute." *Util. Serv. Partners v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, ¶ 49 (internal quotations omitted). If a party has "no personal stake in the outcome of [a] litigation," it may not submit the dispute. *ProgressOhio.org, Inc. v. JobsOhio*, Slip Op. 2014-Ohio-2382, ¶ 26 (June 10, 2014); *see generally Moore v. City of Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, ¶ 22 ("plaintiffs must show that they suffered (*1*) an injury that is (*2*) fairly traceable to the defendant's allegedly unlawful conduct, and (*3*) likely to be redressed by the requested relief").

Consistent with these overarching requirements, the Commission has required, at a minimum, that a would-be complainant must be "directly affected by the alleged unreasonable activity." *In re Complaint of Lawrence A. Boros*, Case No. 05-1281-EL-CSS, 2007 Ohio PUC LEXIS 327, Entry at *5 (Apr. 25, 2007); *see, e.g.*, *In re Complaint of Jack Vasi*, Case No. 06-575-GA-CSS, 2006 Ohio PUC LEXIS 590 (Oct. 11, 2006) ("allegations of improper disconnection of service, refusal to reconnect service, improper billing and collection" establish standing). Among other things, the standing requirement means that coalition groups (such as OMA) cannot file complaints under R.C. 4905.26 unless "such groups are the real parties in interest." *S.G. Foods*, 2006 Ohio PUC LEXIS 172, Entry at *38. If such groups are not the real parties in interest, the complaint must be filed "by . . . their members," with "such members . . . specifically named as complainants." *Id*.

OMA fails to satisfy the requirement that it "assert its own rights, not the claims of third parties." *Util. Serv. Partners*, 124 Ohio St.3d 284, ¶ 49. It does not allege that it possesses any interest that would be directly affected by a ruling in this case. Nor does it allege that it is the real party in interest in any of its members' contracts. On the contrary, the only interests OMA speaks

of belong to *other* parties, namely, its members. As discussed above, if any of its members wish to file a complaint, they may seek to do so. But unless OMA can articulate a direct interest that is subject to injury, it is not the proper party to file a dispute about other parties' contracts, whether before a court or the Commission.

b. OMA cannot satisfy the conditions for third-party standing.

Although disfavored, courts have recognized a limited exception for "third-party standing," but the exception is clearly inapplicable here. "Third-party standing is not looked favorably upon, . . . but it may be granted when a claimant (*i*) suffers its own injury in fact, (*ii*) possesses a sufficiently close relationship with the person who possesses the right, and (*iii*) shows some hindrance that stands in the way of the claimant seeking relief." *Util. Serv. Partners*, 124 Ohio St. 3d 284, ¶ 49 (internal quotations and citations omitted).

All three of these factors must be satisfied. But assuming for sake of argument that OMA has a "sufficiently close relationship" with the possessor of contract rights, *id*., it cannot satisfy the first or third requirements. As just discussed, OMA has not alleged that it has suffered any injury in fact. And OMA cannot show any "hindrance that stands in the way of the claimant seeking relief." *Id*. Per OMA, its members are "Ohio manufacturers" (OMA Mot. to Intervene at 4), and if large commercial entities cannot be expected to seek relief on their own behalf, then no one can.

To reiterate, none of this is to suggest that the Commission is the proper forum for any complaint by OMA's members. On the contrary, FES believes that the preparation and filing of such complaints before the Commission would likely be a futile effort. The salient point is that OMA's attempt at submitting its members' dispute through a motion to intervene must be rejected.

III. CONCLUSION

For the foregoing reasons, FES respectfully requests that the Commission deny OMA's motion to intervene.

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Respectfully submitted,

/s/ Mark A. Hayden

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CERTIFICATE OF SERVICE

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Summary: Memorandum Contra the Ohio Manufacturers' Association's Motion to Intervene electronically filed by Mr. Andrew J Campbell on behalf of FirstEnergy Solutions Corp.