

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of 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.)

ENTRY

The attorney examiner finds:

- (1) On July 3, 2014, a complaint was filed against FirstEnergy Solutions Corp. (FES) by Ohio Schools Council, Ohio School Boards Association, Ohio Association of School Business Officials, and Buckeye Association of School Administrators, dba Power4Schools (collectively, Power4Schools). In its complaint, Power4Schools alleges that actions by FES violated R.C. 4928.10, violated Ohio Adm.Code 4901:1-21-02(E), 4901:1-21-03(A)(1)-(3), 4901:1-21-11(A), 4901:1-21-12(A)(7)(a), 4901:1-21-12(A)(7)(b), and were unjust, unreasonable, and unlawful pursuant to R.C. 4905.26. Power4Schools alleges FES subjected it to unjust charges when FES claimed it is entitled to pass-through specific costs billed by PJM Interconnection LLC (PJM) to Power4Schools.
- (2) On July 17, 2014, a collective motion to intervene was filed by The Timken Company, Marathon Petroleum Company, Wausau Paper Towel and Tissue LLC, ASHTA Chemicals Inc., Columbus Castings, The Lincoln Electric Company, Delphi Corporation, and Landmark Plastic Corporation (collectively, Industrial Customers). Simultaneously, the Industrial Customers filed a motion for interim and preliminary orders. They claim that, like Power4Schools, FES similarly unjustly charged them and that, without intervention, their interests

could be negatively affected by the outcome of this case. The Industrial Customers also declare that their experience with PJM demonstrates their ability to contribute to the full development and equitable resolution of the issues.

- (3) On July 21, 2014, a collective motion to intervene was filed by Navco Enterprises.com, Inc., Navco Enterprises of P.V., Inc., Navco Enterprises, Inc., Foodlife International, Inc., and Navco of York Road, Inc. (collectively, Navco). Navco, represented by the same counsel as the Industrial Customers, makes the exact same claims as the Industrial Customers.
- (4) On July 29, 2014, a motion to intervene was filed by the Ohio Manufacturers' Association (OMA). OMA claims that some of its members were similarly overcharged by FES and that the outcome of this case may affect its interests. It contends that the Complainants do not adequately represent its interest and that its intervention will not unduly delay the proceedings.
- (5) Memoranda contra to the intervention requests were filed by both FES and Power4Schools.

FES argues that the Industrial Customers, Navco, and OMA (collectively, Movants) do not have an interest in the case, as their contracts are separate from Power4Schools' contracts. Further, FES alleges the Movants' interests in the precedent this case may set is not a credible interest. FES also says the Movants have other, more appropriate remedies they can pursue with separate complaints.

Power4Schools maintains that the Movants should be denied intervention in the case because they are unable to show that their contracts are substantially similar to Power4Schools' contracts. Also, because this is a specific contract dispute between the Complainants and FES, Power4Schools argues that the Movants will not be harmed by the disposition of this case.

- (6) The Industrial Customers, Navco, and OMA filed reply memoranda to the memoranda contra.

The Industrial Customers and Navco argue that intervention is proper because their contracts are similar or the same as Powers4Schools.' They also assert that their requests for

additional orders demonstrates that Power4Schools is not representing their interests.

OMA contends that some of its members' contracts are the same or similar to Power4Schools' contracts, and it was able to discern those similarities by viewing the contracts attached to Power4Schools' complaint. Because the contracts are the same or similar to Powers4Schools' contracts, OMA argues, it has an interest in this case and should be allowed to intervene.

- (7) In accordance with Ohio Adm.Code 4901-1-11(B), in deciding whether to grant intervention, the Commission shall consider:
 - (a) The nature and extent of the prospective intervenor's interest.
 - (b) The legal position advanced by the prospective intervenor and its relation to the merits of the case.
 - (c) Whether said intervention will unduly prolong or delay the proceedings.
 - (d) Whether the prospective intervenor will significantly contribute to the full development and equitable resolution of the factual issues.
 - (e) The extent to which the person's interest is represented by existing parties.
- (8) After balancing the interests of the parties and all of the Movants, and considering the factors noted above, the motions to intervene by the Industrial Customers, Navco, and OMA should be denied. By initiating the filing, Power4Schools has the burden of prosecuting its complaint, pursuant to R.C. 4905.26. After accounting for the alleged facts that were presented through the pleadings, Power4Schools should be able to steer that prosecution as it sees fit. At issue in this case is a specific billing dispute between Power4Schools and FES. The particulars of the Movants' contracts with FES are largely unknown, as they were not set forth in the motions to intervene or otherwise filed in the docket. While the Movants may have similar contractual issues with FES, the disposition of this case will not impair their rights to file their own complaints and

prosecute them in the manner that they so choose. The Movants may have a legitimate interest in the precedent that this case sets, but the Commission has long held that such an interest is not a sufficient reason for intervention. *In re Complaint of the City of Cleveland & WPS Energy Service, Inc., v. The Cleveland Electric Illuminating Company & FirstEnergy Corp.*, Case No. 01-174-EL-CSS, Entry (March 29, 2001) at 4. In balancing Power4Schools' right to litigate its own complaint with the Movants' similar interests, it is important that the Movants' rights are not hindered by the results of this case. Although their motions are denied, the Industrial Customers, Navco, and OMA maintain the ability to file their own complaints against FES to settle their own billing disputes and protect their interests.

- (9) On July 3, 2014, Power4Schools also filed a motion for protective order and memorandum in support to designate as confidential portions of Exhibits A, B, C, G, and H attached to its complaint. Specifically, information in Exhibits B and G discuss pricing structures and other services provided by FES to Power4Schools' members. Information in Exhibits C and H describe, among other things, specific pricing for members. Exhibit A contains communication about the list of customers shopping under the affinity program. No memoranda contra were filed in response to the motion for protective order.
- (10) R.C. 4905.07 provides that all facts and information in the possession of the Commission shall be public, except as provided in R.C. 149.43, and as consistent with the purposes of R.C. Title 49. R.C. 149.43 specifies that the term "public records" excludes information which, under state or federal law, may not be released. The Ohio Supreme Court has clarified that the "state or federal law" exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State*, 89 Ohio St. 3d 396, 399, 732 N.E. 2d 373 (2000).
- (11) Similarly, Ohio Adm.Code 4901-1-24 allows for the issuance of an order to protect the confidentiality of information contained in a filed document, "to the extent that state or federal law prohibits release of the information, including where the information is deemed * * * to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code."

- (12) Ohio law defines a trade secret as “information * * * that satisfies both of the following: (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” R.C. 1333.61(D).
- (13) The attorney examiner has reviewed the redacted information covered by the motion for protective order for Exhibits A, B, C, G, and H of Power4Schools’ complaint. Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to R.C. 1333.61(D), as well as the six-factor test set forth by the Ohio Supreme Court,¹ the examiner finds that the noted information contained in the exhibits attached to the complaint constitutes trade secret information. Release of the redacted portions of this document is, therefore, prohibited under state law. The examiner also finds that nondisclosure of this information is not inconsistent with the purposes of R.C. Title 49. Therefore, the examiner finds that Power4Schools’ motion for protective order for Exhibits A, B, C, G, and H of its complaint is reasonable and should be granted.
- (14) Ohio Adm.Code 4901-1-24(F) provides for protective orders to automatically expire 24 months after the date of their issuance, and such information may then be included in the public record of the proceeding. A party wishing to extend a protective order beyond 24 months shall file an appropriate motion at least 45 days in advance of the expiration date of the existing order. The motion shall include a detailed discussion of the need for continued protection from disclosure.

It is, therefore,

ORDERED, That the motions to intervene filed by the Industrial Customers, Navco, and OMA are denied in accordance with Finding (8). It is, further,

¹ See *State ex-rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997).

ORDERED, That Power4Schools' motion for protective order for Exhibits A, B, C, G, and H of its complaint is granted in accordance with Finding (13). It is, further,

ORDERED, That a copy of this Entry be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/ Nicholas Walstra

By: Nicholas Walstra
Attorney Examiner

jrj/vrm

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

9/4/2014 4:09:42 PM

in

Case No(s). 14-1182-EL-CSS

Summary: Attorney Examiner Entry denying the motions to intervene and granting Power4Schools' motion for protective order; electronically filed by Vesta R Miller on behalf of Nicholas Walstra, Attorney Examiner, Public Utilities Commission of Ohio