

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Complaint of Martin)	
Painting,)	
)	
Complainant,)	Case No. 14-1270-EL-CSS
)	
v.)	
)	
FirstEnergy Solutions Corp.,)	
)	
Respondent.)	

RESPONDENT FIRSTENERGY SOLUTIONS CORP.'S MOTION TO DISMISS

Respondent FirstEnergy Solutions Corp. respectfully moves the Commission to dismiss the Complaint of Martin Painting for the following reasons:

1. The Complaint was filed on behalf of a corporate entity that is not properly represented by an attorney-at-law as is required by O.A.C. 4901-1-08(A).
2. The Complaint asks the Commission to find that a competitive provider of retail electric service (FirstEnergy Solutions Corp.) charged its commercial customer (Martin Painting) more than provided in their retail contract. However, R.C. §§ 4928.03 and 4928.05 make it clear that the Commission does not have jurisdiction over such issues of contract interpretation. Instead, issues of general contract interpretation such as that presented in the Complaint are left solely to Ohio courts. Therefore, the Commission does not have jurisdiction over this claim and the Complaint should be dismissed for lack of subject matter jurisdiction.

Respectfully Submitted,

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**MEMORANDUM IN SUPPORT OF RESPONDENT FIRSTENERGY SOLUTIONS
CORP.’S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

I. INTRODUCTION

Commission rules require that, in practice before the Commission, “[c]orporations must be represented by an attorney at law.” O.A.C. 4901-1-08(A). Complainant Martin Painting is a corporate entity attempting to proceed *pro se* in this matter. Thus, Martin Painting is proceeding improperly, and its Complaint should be dismissed.

Even if Martin Painting were represented by an attorney, the only claim in this case is Complainant’s allegation that, under the parties’ contract, FES has charged too much for a one-time RTO Expense Surcharge, which was related to and necessitated by additional ancillary services charges imposed on FES by PJM Interconnection, LLC (“PJM”). Martin Painting’s sole complaint is that the RTO Expense Surcharge is “too high” under its contract with FES. This is a question of pure contract interpretation, and R.C. §§ 4928.03 and 4928.05 make clear that the Commission does not have jurisdiction over questions of contract interpretation. Instead, such questions are the exclusive province of Ohio courts. As the Commission does not have jurisdiction over this claim, the Complaint should be dismissed for lack of subject matter jurisdiction.

II. ARGUMENT

A. A Corporation Must Be Represented By An Attorney-At-Law.

Pursuant to O.A.C. 4901-1-08(A), corporate entities must be represented by an attorney-at-law in proceedings before the Commission. The Complaint and attached invoices identify the complainant as “Martin Painting” and “Martin Painting & Coating.” According to the Ohio Secretary of State’s public database, “Martin Painting” is a registered trade name of “Martin Painting and Coating Company”, which is an Ohio corporation in good standing located at 2040 Longwood Avenue, Grove City, Ohio 43223.¹ Martin Painting is a corporation that is impermissibly attempting to proceed *pro se*.

Ohio law is clear that a corporate entity cannot act, even through its corporate officers, to pursue litigation on the corporation’s behalf.² The Supreme Court of Ohio has “consistently held that a corporation may not maintain an action through an officer who is not a licensed attorney” and has also held that “a corporation may not appear in court through its officer.”³ Preparing, signing, and filing documents instituting formal complaints before the Commission constitutes the practice of law,⁴ and thus, must be undertaken by an attorney-at-law. Because Complainant has failed to comply with this fundamental requirement, the Complaint should be dismissed.

¹ See http://www2.sos.state.oh.us/pls/bsqry/f?p=100:7:0::NO:7:P7_CHARTER_NUM:306502, for the Ohio Secretary of State’s records for Martin Painting and Coating Company. The Commission may take administrative notice of Ohio Secretary of State records. *In re Application of Water and Sewer LLC for an Increase in Rates and Charges*, PUCO Case No. 03-318-WS-AIR, Opinion & Order, p. 5 (Oct. 6, 2004).

² *Union Savings Assn. v. Home Owners Aid, Inc.*, 23 Ohio St. 2d 60 (1970) (affirming lower court’s decision to strike corporate defendant’s petition, which was signed and filed by corporate officer “in propria persona” and not by attorney-at-law).

³ *Cincinnati Bar Assn. v. Clapp & Affiliates Fin. Serv., Inc.*, 94 Ohio St.3d 509, 510 (2002) (internal citations omitted).

⁴ *Cleveland Bar Assn. v. Woodman*, 98 Ohio St. 3d 436, 2003-Ohio-1634, ¶4; *Metzenbaum v. AT&T Corp.*, Case No. 03-142-TP-CSS, Entry, May 22, 2003, pp. 3-4.

B. The Commission Does Not Have Jurisdiction Over CRES Charges.

The Complaint challenges FES's interpretation of a contract, asserting that the one time charge was "too high."⁵

Ohio has, for years, recognized that general contract and tort claims are within the jurisdiction of state courts.⁶ Since at least 1921, Ohio courts have acknowledged that the Commission "is in no sense a court. It has no power to judicially ascertain and determine legal rights and liabilities, or adjudicate controversies between parties as to contract rights or property rights."⁷ The Ohio Supreme Court has recognized that generation is no longer under the exclusive jurisdiction of the Commission.⁸ R.C. § 4928.05(A)(1) provides that:

On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric utility or electric services company shall not be subject to supervision and regulation by . . . the public utilities commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except sections 4905.10 and 4905.31, division (B) of section 4905.33, and sections 4905.35 and 4933.81 to 4933.90; except sections 4905.06, 4935.03, 4963.40, and 4963.41 of the Revised Code only to the extent related to service reliability and public safety; and except as otherwise provided in this chapter. The commission's authority to enforce those excepted provisions with respect to a competitive retail electric service shall be such authority as is provided for their enforcement under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter.

Id. (emphasis added).

⁵ Complaint, p. 1.

⁶ *See, e.g., Kohli v. Pub. Util. Comm.*, 18 Ohio St. 3d 12 (1985) (court had jurisdiction over tort claim for failure to warn of dangers); *McComb v. Suburban Natural Gas Co.*, 85 Ohio App. 3d 397 (1993) (court had jurisdiction over breach of contract claim in lease dispute between gas company and village).

⁷ *New Breman v. Pub. Util. Comm.*, 103 Ohio St. 23 (1921).

⁸ *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St. 3d 486, 487 (2008) ("Pursuant to R.C. 4928.03 and 4928.05, electric generation is an unregulated, competitive retail electric service, while electric distribution remains a regulated, noncompetitive service pursuant to R.C. 4928.15(A).").

This language clearly demonstrates that the Commission’s authority over competitive retail electric service (“CRES”) providers is limited. Competitive retail electric service is not subject to supervision by the Commission outside of certain specifically defined areas. This conclusion is also supported by R.C. § 4928.03, which defines and guarantees customers’ access to competitive retail electric service.⁹ As charges are not one of the specifically defined areas of retail electric service still subject to Commission jurisdiction, the Commission has no jurisdiction to regulate charges by FES – a certified CRES provider in Ohio – under its contract with Complainant.

The Commission has previously recognized the limits of its jurisdiction in similar situations: “Pursuant to Sections 4928.03 and 4928.05(A)(1), Revised Code, retail electric generation service is a competitive retail electric service and, therefore, not subject to Commission regulation, except as otherwise provided in Chapter 4928, Revised Code.”¹⁰

Here, the Complainant is asking the Commission to exceed its statutory authority. Revised Code § 4928.05(A)(1) does not grant the Commission authority over CRES charges, and no statutory exception applies. Therefore, the Commission does not have subject matter jurisdiction and the Complaint should be dismissed.

C. Ohio Courts Have Jurisdiction Over Contracts.

Dismissing the Complaint will not deny Plaintiff a forum for this dispute. Ohio courts have long acknowledged their authority over breach of contract claims.¹¹ Courts have

⁹ R.C. § 4928.03 (“Beginning on the starting date of competitive retail electric service, retail electric generation, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers.”).

¹⁰ 2012 Ohio PUC LEXIS 36; Case No. 10-1454-EL-RDR, Opinion and Order dated January 11, 2012, pp. 16-17 (emphasis added).

¹¹ See, e.g., *State ex rel. Ohio Power Co. v. Harnishfeger*, 64 Ohio St. 2d 9, 10 (1980) (courts of this state are available to supplicants who have claims sounding in contract against a corporation coming under the authority of

recognized the essential difference between service complaints, which are subject to the jurisdiction of the Commission, and contract claims, which fall outside the Commission's jurisdiction:

The broad jurisdiction of PUCO over service-related matters does not affect “the basic jurisdiction of the court of common pleas . . . in other areas of possible claims against utilities, including pure tort and contract claims.”¹²

The jurisdiction of courts over certain types of contracts has been extensively litigated, and courts have recognized that they have a role in interpreting contracts.¹³

As shown through this extensive authority from the Ohio Supreme Court, the law is clear.¹⁴ Ohio courts have jurisdiction over contract claims and, conversely, such claims are beyond the jurisdiction of the Commission. The Complaint here puts at issue a clause in a contract between a CRES provider and its customer. This contract interpretation question is beyond the jurisdiction of the Commission. The Commission “has no power to judicially ascertain and determine legal rights and liabilities, or adjudicate controversies between parties as to contract rights.”¹⁵ The Complaint should therefore be dismissed for lack of subject matter jurisdiction.

the [Commission]); *Milligan v. Ohio Bell Tel. Co.*, 56 Ohio St. 2d 191, 195 (1978); *McComb v. Suburban Natural Gas Co.*, 85 Ohio App. 3d 397 (1993) (court has jurisdiction over breach-of-contract claim in lease dispute between gas company and village).

¹² *Corrigan v. Illuminating Co.*, 122 Ohio St. 3d 265, 2009-Ohio-2524, ¶ 9 (quoting *State ex rel. Ohio Edison Co. v. Shaker*, 68 Ohio St. 3d 209, 211 (1994)).

¹³ See *Cleveland v. Cleveland Elec. Illuminating Co.*, 115 Ohio App. 3d 1 (8th Dist. 1996) (finding that lower court should have retained jurisdiction in complaint over FERC contract).

¹⁴ See, e.g., *New Bremen v. Pub. Util. Comm.*, 103 Ohio St. 23 (1921); *State ex rel. Ohio Power Co. v. Harnishfeger*, 64 Ohio St. 2d 9, 10 (1980); *Milligan v. Ohio Bell Tel. Co.*, 56 Ohio St. 2d 191, 195 (1978); *Corrigan v. Illuminating Co.*, 122 Ohio St. 3d 265, 2009-Ohio-2524, ¶ 9 (quoting *State ex rel. Ohio Edison Co. v. Shaker*, 68 Ohio St. 3d 209, 211 (1994)).

¹⁵ *New Bremen v. Pub. Util. Comm.*, 103 Ohio St. 23 (1921).

III. CONCLUSION

The Complaint should be dismissed for two independent reasons. First, corporate entities such as Complainant must be represented by an attorney-at-law in proceedings before the Commission. Second, the Commission does not have jurisdiction to interpret the terms of the CRES contract at issue here. Therefore, the Complaint should be dismissed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Respondent FirstEnergy Solutions Corp.'s Motion to Dismiss for Lack of Subject Matter Jurisdiction and Memorandum in Support were served by U.S. mail to the following person on this 16th day of September, 2014:

Martin Painting
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One of the Attorneys for
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