

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Carbo Forge, Inc., et al.,)	
)	
Complainants,)	
)	
v.)	CASE NO. 14-1610-EL-CSS
)	
FirstEnergy Solutions Corp.)	
)	
Respondent.)	

**RESPONDENT FIRSTENERGY SOLUTIONS CORP.’S MEMORANDUM IN
OPPOSITION TO COMPLAINANTS’ MOTION FOR ASSISTANCE**

I. INTRODUCTION

Complainants’ Motion for Assistance to Prevent Termination Of Service, Request For Relief, and Request For Expedited Ruling (the “Motion”) asks the Commission to interpret the contracts between Complainants and FirstEnergy Solutions Corp. (“FES”). Interpreting contracts in this manner is beyond the Commission’s authority, and is instead within the exclusive jurisdiction of Ohio courts. Therefore the Complaint should be dismissed.

In addition to lacking jurisdiction, the Motion is also completely unsupported. Ohio law requires parties seeking preliminary injunctive relief to meet certain minimum standards. Among other things, parties seeking preliminary relief are required to support their claims with clear and convincing proof of the right to an injunction. Here, Complainants have completely failed to support their claims. Complainants fail to support their motion with an affidavit or any documentation. Complainants also fail to explain why they are entitled to the requested relief, how the Commission has authority to grant the requested relief, or why it would be appropriate to grant injunctive relief relating to Ohio distribution utilities when those utilities are not party to

this proceeding. In short, the Motion makes a series of unsupported and incorrect factual assertions and fails to provide any legal analysis whatsoever. Therefore, Complainants have failed to meet their burden under Ohio law, and the Motion should be denied.

II. ARGUMENT

A. The Commission Does Not Have Jurisdiction Over CRES Prices.

As explained in the FES Motion to Dismiss, which FES hereby incorporates by reference in the interests of efficiency, generation service is no longer within the exclusive jurisdiction of the Commission.¹ Instead, contractual disputes relating to generation service are within the exclusive jurisdiction of Ohio courts.

As the Commission does not have jurisdiction over the prices charged by CRES providers for generation service, the Commission also does not have jurisdiction to grant the Motion. Instead, the power to grant relief to Complainants is within the sole jurisdiction of Ohio courts. Therefore, the Motion should be denied.

B. Complainants Have Failed To Meet Their Burden For Injunctive Relief.

The Motion requests a variety of preliminary injunctive relief. The Motion asks the Commission to “prevent the termination of service by FES or Complainants’ respective electric distribution utilities.”² The Motion also asks the Commission to issue a preliminary order “directing FES and the Ohio EDUs to not assess or attempt to collect late fees associated with the disputed charges.”³

¹ *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).”)

² Motion, p. 2.

³ *Id.*, p. 5.

Despite this request for preliminary relief, the very brief motion filed by Complainants fails to meet, or even discuss, the legal standard for preliminary injunctive relief. The Supreme Court of Ohio has characterized an injunction as “an extraordinary remedy in equity where there is no adequate remedy available at law.”⁴ Because of the extraordinary nature of injunctive relief, a movant is required to provide clear and convincing proof of its right to an injunction.⁵

Therefore, to demonstrate entitlement to relief, the movant must establish *by clear and convincing evidence* that:

1. It is likely to succeed on the merits of its underlying claims;
2. It will suffer irreparable injury in the absence of an injunction;
3. The harm which other interested individuals will suffer if the injunction is granted is outweighed by the harm it will suffer if the injunction is denied; and
4. The public interest will be furthered or, at least, will not be impaired by the issuance of the injunction.⁶

Applying this high standard, it is clear that Complainants are not entitled to temporary or preliminary injunctive relief.

1. Complainants Have Failed To Provide Any Evidence In Support Of The Motion.

The Motion includes only two pages of discussion, and offers no explanation showing why Complainants will succeed on the merits.⁷ Instead, the Motion quotes (but does not attach

⁴ *Garono v. State of Ohio*, 37 Ohio St. 3d 171, 173 (1988) (emphasis added).

⁵ See *Rite Aid of Ohio, Inc. v. Marc's Variety Store, Inc.*, 93 Ohio App. 3d 407, 412, 638 N.E.2d 1056 (8th Dist. 1994) (“It is well established that ‘[t]he right to an injunction must be clear and the proof thereof clear and convincing’”); *Ormsby v. Transcontinental Oil & Gas, Inc.*, 9th Dist. No. 18063, 1997 Ohio App. LEXIS 4254, *4 (Sept. 17, 1997) (“The right to an injunction exists only where the movant has proved by clear and convincing evidence that such relief is necessary . . .”).

⁶ *Cleveland v. Cleveland Electric Illuminating Co.*, 115 Ohio App. 3d 1, 12 (8th Dist. 1996).

⁷ See Motion, pp. 4-5.

as an exhibit or support with an affidavit) a letter from FES questioning whether Complainants' allegations have merit.⁸ The Motion also discusses purported letters from an unidentified EDU which has purportedly provided additional unidentified letters to unidentified Complainants regarding the dispute with FES (again these letters are not attached as exhibits or supported with affidavits).⁹ That is the entirety of the "evidence" contained in the Motion.

As opposed to establishing a claim, the few unsupported factual assertions in the Motion show that Complainants are not entitled to extraordinary relief. Complainants admit that they have been in communication with electric distribution utilities.¹⁰ Complainants also admit that at least one of those distribution utilities has told Complainants that it will reimburse the charge at issue or eliminate it from consolidated bills.¹¹ Complainants accordingly do not allege that any distribution utility has threatened disconnection, or that they face a threat of immediate harm requiring equitable relief. There is good reason for Complainants' silence on this issue, because the Ohio Administrative Code does not permit disconnection if there is a bona fide dispute regarding CRES payments.¹² Complainants also fail to identify any specific contractual provision which would prevent FES from terminating the contracts with Complainants. Therefore, Complainants have not established that they are entitled to injunctive relief.

As discussed above, an injunction is "an extraordinary remedy in equity where there is no adequate remedy available at law."¹³ To receive this extraordinary remedy, Complainants must

⁸ Motion, p. 4.

⁹ *Id.*, pp. 4-5.

¹⁰ *Id.*, p. 5.

¹¹ *Id.*, p. 5.

¹² See OAC 4901:1-10-33(H)(2)(a)(creating exception to general payment priority rules).

¹³ *Garono v. State of Ohio*, 37 Ohio St. 3d 171, 173 (1988)(emphasis added).

show its right to this relief by clear and convincing evidence. Not only have Complainants failed to meet their burden, they have failed to even attempt to provide evidence in support of the Motion. Complainants have offered no affidavits, documents, or other evidence supporting their assertions. In light of this complete lack of evidence, the Motion should be summarily rejected.

2. The Complainants Have Failed To Establish Any Of The Elements For Injunctive Relief.

The Motion fails to address any of the four elements for injunctive relief. Instead, Complainants merely reference the fact that they dispute FES's rightful charges under their contracts, and ask the Commission to prevent FES from pursuing its rights under those contracts. The Motion should be denied due to Complainants' lack of analysis and failure to establish their claim by clear and convincing evidence.

Even if the Commission were to reach the merits of Complainants' arguments, Complainants do not satisfy the four-part test for injunctive relief. For example, Complainants have failed to explain why they are likely to succeed on the merits of the underlying claim. There is a good reason for this silence. The Complainants are not likely to succeed on their claims due to the plain language of the contracts at issue. The RTO Expense Surcharge relates to extraordinary weather conditions which caused severe strain on the grid. PJM Interconnection ("PJM") declared eight Maximum Emergency Generation Alerts during January 2014, compared with zero alerts during the prior three winters. PJM's emergency actions caused ancillary charges to significantly exceed historical levels. For example, the total PJM charges for Operating Reserves, Synchronous Reserves, Day Ahead Scheduling Reserves and Regulation for January 2014 exceeded the total level of these PJM charges for all of 2013.

Paragraphs 6, 31 & 32 of the contracts specifically allow FES to pass through the extraordinary charges at issue. PJM charges are properly classified as a Pass-Through Event

because they are “new or additional charges or requirements” imposed by PJM that are directly applicable by load ratio to Complainants’ electric usage. The extraordinary and unforeseeable PJM costs related to the unprecedented actions it took to maintain reliability in the face of extreme cold clearly fit the criteria of a Pass-Through Event under the Agreement, and Complainants contractually agreed that FES may pass through the additional costs of such Pass-Through Events. In light of this clear contractual language, Complainants are unlikely to succeed on the merits.

Complainants have also failed to discuss the other three factors for injunctive relief. Complainants have not even alleged that they will suffer irreparable injury in the absence of injunctive relief. Indeed, even if FES were to immediately terminate the contracts at issue, there is no evidence that Complainants would face interruptions in their electric service. Similarly, Complainants have failed to address the harm to other entities if the injunction is granted. In this case, that is significant because an injunction would significantly harm FES by prohibiting FES from pursuing collection activities and exercising its contractual rights. Finally, Complainants have failed to identify any way in which the public interest would be furthered by granting injunctive relief.

In light of Complainants’ complete failure to provide any analysis or argument in support of the Motion, Complainants have failed to establish an entitlement to injunctive relief through clear and convincing evidence. The Motion should accordingly be denied.

C. Injunctive Relief Cannot Be Granted Against Distribution Utilities Not Party To This Proceeding.

The Motion demands that the Commission “order FES and the Ohio EDU’s not to terminate the existing service to Complainants or assess late fees for reasons associated with

their dispute of the RTO Expense Surcharge during the course of this proceeding.”¹⁴ Once again, the Complainants have failed to explain or justify this request. In addition to the issues raised above when applying this argument to FES, there are additional complications with applying this injunction to the undefined “Ohio EDU’s.” The unidentified Ohio distribution utilities are not party to this proceeding. Ohio R. Civ. P. 65 requires that at minimum parties seeking injunctive relief against a party provide notice to affected parties.¹⁵ In light of Complainants’ failure to name the distribution utilities which it seeks to bind through preliminary injunctive relief, the injunction may not be granted.

D. Complainants Have Failed To Provide Security For The Injunction.

Ohio law recognizes that parties are required to provide security for injunctive relief of this type. Ohio R. Civ. P. 65(C) provides that injunctive relief is not appropriate unless security is provided in an amount sufficient “to secure to the party enjoined the damages he may sustain, if it is finally decided that the order or injunction should not have been granted.” Here, Complainants ask the Commission to enjoin FES from exercising its contractual rights to collect under the contracts with Complainants, but fail to offer any security that the disputed amounts would be paid in the event judgment is issued for FES. Though no injunction is appropriate in this case, if an injunction is ordered then at minimum Complainants should be ordered to deposit the entire disputed amount of the RTO Expense Surcharge with the clerk’s office until the Commission resolves the Complaint.

¹⁴ Motion, p. 6.

¹⁵ Ohio R. Civ. P. 65(B)(1).

III. CONCLUSION

Ohio law is clear. The Commission is not a court. It does not have jurisdiction to interpret the pricing or terms of a CRES contract. Even if the Commission had jurisdiction over this dispute, Complainants have failed to provide any evidence or legal analysis in support of the Motion, and have failed to show an entitlement to injunctive relief through clear and convincing evidence. Finally, even if an injunction were warranted, it should not be granted until Complainants deposit the entire amount in controversy with the clerk's office.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *FirstEnergy Solutions Corp. 's Memorandum In Opposition to Motion For Assistance* was served this 19th day of September, 2014, via e-mail upon the parties below.

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This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

9/19/2014 8:57:45 AM

in

Case No(s). 14-1610-EL-CSS

Summary: Memorandum In Opposition To Motion For Assistance electronically filed by Mr. Nathaniel Trevor Alexander on behalf of FirstEnergy Solutions Corp.