



June 4, 2014

**VIA E-FILE**

**David P. Zambito**

Direct Phone 717-703-5892  
Direct Fax 215-989-4216  
dzambito@cozen.com

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor North  
P.O. Box 3265  
Harrisburg, PA 17105-3265

**Re: John R. Evans v. FirstEnergy Solutions Corp.; ANSWER AND NEW MATTER OF FIRSTENERGY SOLUTIONS CORP. IN OPPOSITION TO THE PETITION OF THE SMALL BUSINESS ADVOCATE FOR DECLARATORY ORDER; Docket No. P-2014-2421556**

Dear Secretary Chiavetta:

Enclosed for filing with the Commission is FirstEnergy Solutions Corp.'s Answer and New Matter in the above-referenced proceeding. A copy of this document has been served in accordance with the attached Certificate of Service.

If you have any questions regarding this filing, please direct them to me. Thank you for your attention to this matter.

Sincerely,

COZEN O'CONNOR

A handwritten signature in blue ink, appearing to read "David P. Zambito", written over the printed name and firm name.

By: David P. Zambito  
Counsel for *FirstEnergy Solutions Corp.*

DPZ/kmg  
Enclosure

cc: Per Certificate of Service

**CERTIFICATE OF SERVICE**  
**John R. Evans, Small Business Advocate, Petitioner v.**  
**FirstEnergy Solutions Corp., Respondent**  
**Docket No. P-2014-2421556**

I hereby certify that I have this day served a true copy of the Answer and New Matter of FirstEnergy Solutions Corp. In Opposition to the Petition of the Small Business Advocate for Declaratory Order, upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

**VIA E-MAIL and FIRST CLASS MAIL:**

Daniel G. Asmus, Esquire  
Office of Small Business Advocate  
Suite 1102, Commerce Tower  
300 North Second Street  
Harrisburg, PA 17101-1303  
[dasmus@pa.gov](mailto:dasmus@pa.gov)

Charles E. Thomas, III, Esquire  
Thomas, Niesen & Thomas, LLC  
212 Locust Street, Suite 600  
P.O. Box 9500  
Harrisburg, PA 17108-9500  
[cet3@tntlawfirm.com](mailto:cet3@tntlawfirm.com)

Candis A. Tunilo, Esquire  
Brandon J. Pierce, Esquire  
Office of Consumer Advocate  
555 Walnut Street  
Forum Place, 5th Floor  
Harrisburg, PA 17101-1923  
[ctunilo@paoca.org](mailto:ctunilo@paoca.org)  
[bpierce@paoca.org](mailto:bpierce@paoca.org)

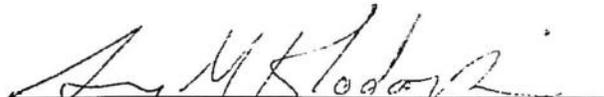
DATED: June 4, 2014

  
\_\_\_\_\_  
David P. Zambito, Esquire  
Counsel for *FirstEnergy Solutions Corp.*

**VERIFICATION**

I, Amy M. Klodowski, Attorney for FirstEnergy Solutions Corp., hereby state that the facts set forth above are true and correct to the best of my knowledge, information and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

Date: June 4, 2014

  
Amy M. Klodowski





generic declaratory order action. Further, even assuming for the sake of argument that the Commission has the jurisdiction to grant the requested relief, the Petition utterly fails to demonstrate that FES violated any provision of the Public Utility Code or the Commission's regulations thereunder. Therefore, as a matter of law, OSBA is not entitled to the relief requested.

In support of its Answer and New Matter, FES avers and represents as follows:

**ANSWER**

1. Admitted, except that FirstEnergy Corp. is not a public utility but rather a public utility holding company.
2. Paragraph 2 is a statement of law requiring no response.
3. Admitted.
4. It is admitted that Pass-Through Event language was included in the Small Commercial Disclosure Statement attached to the Petition as Exhibit A, which is a written document the contents of which speak for themselves.
5. It is admitted that FES sent customers a notice in the form of the Petition's Exhibit B, which is a written document the contents of which speak for themselves.
6. Admitted.
7. It is admitted that FES seeks to recover from small business customers ancillary services costs billed by PJM (hereafter referred to as the "Surcharge"). It is also admitted that ancillary services are required of all suppliers. The remainder of Paragraph 7 is denied. There are more than two types of ancillary services in PJM; the document attached to the Petition as Exhibit C describes only two of the markets PJM operates for ancillary services. Also, the

implication that the only ancillary service included in the Surcharge is Synchronized Reserve Service is denied. The Surcharge includes Operating Reserves, Regulation Service and Day-Ahead Scheduling Reserves, as well as Synchronized Reserve Service. Of these charges, Operating Reserves were the largest single component of the PJM ancillary services charges to FES.

8. It is admitted that Petitioner is quoting from Petition Exhibit C, which is a written document that speaks for itself.

9. The allegations that FES had viable alternatives to meet its obligation for ancillary services in January 2014, by using its own generation or entering into a bilateral contract with a third party, are denied. Purchasing ancillaries from the PJM market is the lowest cost solution and standard industry practice. Reducing generation output to self-schedule reserve or regulation is not an economically or operationally reasonable alternative. Purchasing ancillaries from a third party is not a viable alternative because there are significant liquidity challenges in the bilateral ancillary market.

10. The allegations that FES could have avoided being billed by PJM for ancillary service costs are denied for the reasons set forth in Paragraph 9 of this Answer. Also, the assertion that in January, FES planned its operations throughout unprecedented weather, extraordinary events and PJM's actions, in a way designed to enable FES to invoke its contractual pass-through rights after being charged by PJM for ancillary services in April, is denied. Self-scheduling generation and bilateral contracting would have had no impact on the largest components of PJM's ancillary service charges to load serving entities. Further, to the extent the Petition contains legal interpretations of FES's contract, these allegations are conclusions of law to which no response is required. To the extent a response may be deemed to

be required, they are denied. The ancillary charges at issue are precisely the types of charges contemplated in the Pass-Through Event provision in the contract. The extraordinary and unforeseeable PJM charges related to the unprecedented actions it took to maintain reliability in the face of extreme cold weather clearly fit the criteria of a Pass-Through Event under the contract.

11. Denied. Answering Paragraphs 9 and 10 are incorporated by reference.

12. The allegations that FES had multiple avenues open to it for meeting its ancillary service obligation are denied for the reasons set forth in Paragraph 9 of this Answer. Also, the allegations that the unprecedented events of January 2014, including but not limited to extraordinary weather conditions, natural gas transmission constraints and forced outages which caused severe strain on the grid, PJM's declaration of eight Maximum Emergency Generation Alerts (compared with zero alerts during the prior three winters), PJM's making of unit and natural gas scheduling requests outside of its traditional Day-Ahead Energy Market commitment mechanism and the resulting make-whole payments, PJM's requests to FERC for waivers of PJM's tariff rules, among other events, "could not have been an unexpected event," are denied. The unexpected nature of January's events are described in PJM reports concerning the events of January and how it was required to deviate from its normal practices.<sup>1</sup> The resulting extraordinary level of ancillary service charges was also unexpected. PJM's ancillary charges for January significantly exceeded 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. Total synchronized

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<sup>1</sup> See, e.g., PJM's May 8, 2014 "Analysis of Operational Events and Market Impacts During the January 2014 Cold Weather Events."

reserve credits paid to generators in January were two times higher than the 2013 yearly total and three times higher than the 2012 yearly total.

13. Paragraph 13 contains conclusions of law to which no response is required. By way of further answer, the Commission stated that its Order was not intended to impact current contracts.<sup>2</sup>

14. Paragraph 14 contains conclusions of law to which no response is required. By way of further answer, the Commission stated that its Order was not intended to impact current contracts.<sup>3</sup> FES's relevant contracts are consistent with the law applicable at the time they became effective.

#### **NEW MATTER**

15. FES incorporates paragraphs 1 through 14 of this Answer as if they were fully stated herein.

16. The Commission does not have subject matter jurisdiction to decide disputes concerning private contractual matters between licensed EGSs and their customers. These matters are properly heard by the civil courts of common pleas. *See* FES Preliminary Objection, Paragraphs 9-18, which are incorporated herein by reference.

17. Until November 2013, FES's small commercial customer supply contract contained a provision stating that in addition to the customer's basic service price, if an RTO "imposes" upon FES "new or additional charges" relating to the customer's retail electric supply under the agreement (defined as a "Pass-Through Event"), which are not otherwise reimbursed to

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<sup>2</sup> *Guidelines for Use of Fixed Price Labels for Products With a Pass-Through Clause*, Docket No. M-2013-2362961 (Order entered Nov. 14, 2013) at 24. Notably, the Petition acknowledges that the guidelines are effective "going forward," *i.e.* after the November, 2013 entry date. FES is not collecting the Surcharge from customers who entered into contracts after the guidelines' effective date.

<sup>3</sup> *Id.*

FES, the customer agrees that FES may pass through any additional cost of such Pass-Through Event to the customer.

18. In January 2014, due to extreme weather conditions, PJM declared eight Maximum Emergency Generation Alerts (compared with zero alerts during the prior three winters), made unit and natural gas scheduling requests outside of its traditional Day-Ahead Energy Market commitment mechanism and requested that FERC grant waivers of PJM's tariff rules. The unexpected nature of January's events are described in PJM reports concerning the events of January and how it was required to deviate from its normal practices.<sup>4</sup> The resulting extraordinary level of ancillary service charges was also unexpected. PJM's ancillary charges for January significantly exceeded 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. Total synchronized reserve credits paid to generators in January were two times higher than the 2013 yearly total and three times higher than the 2012 yearly total.

19. The ancillary charges at issue are precisely the types of charges contemplated in the Pass-Through Event provision in the contract. The extraordinary and unforeseeable PJM charges related to the unprecedented actions it took to maintain reliability in the face of extreme cold weather clearly fit the criteria of a Pass-Through Event under the contract.

20. The Petition makes several serious and material factual errors in describing both the nature of the PJM charges and the alternatives FES supposedly had that OSBA alleges would have resulted in its avoiding the Surcharge.

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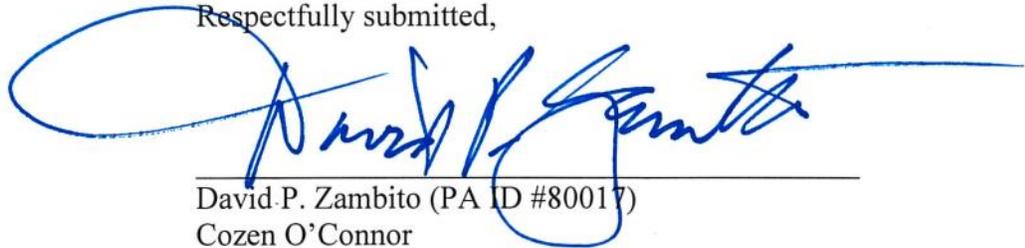
<sup>4</sup> See, e.g., PJM's "Analysis of Operational Events and Market Impacts During the January 2014 Cold Weather Events" (May 8, 2014).

21. The Commission should not grant declaratory relief where the dispute is bound up in facts. *See City Council of Phila. v. Cmwltth.*, 806 A.2d 975 (Pa. Cmwltth. 2002). The disputes between FES and its customers involving the pass-through event surcharge are clearly bound up in facts, and declaratory relief is therefore not appropriate. A fair and impartial examination of the disputes, which comports with the basic tenets of due process, would require inquiries into factual issues associated with each individual contract. A petition for declaratory order may only terminate a controversy or remove uncertainty, not create a controversy and explore complex contractual issues involving numerous and substantial issues of fact.

**REQUEST FOR RELIEF**

WHEREFORE, for all of the foregoing reasons, the Small Business Advocate's request for an Order declaring that FirstEnergy Solutions Corp. is not permitted to recover the costs billed to it by PJM for ancillary services costs as a "pass-through event" under the terms of its fixed price contracts with its customers should be denied and the docket marked closed.

Respectfully submitted,



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David P. Zambito (PA ID #80017)  
Cozen O'Connor  
305 North Front Street, Suite 400  
Harrisburg, PA 17101-1236  
Telephone: (717) 703-5892  
Facsimile: (215) 989-4216  
E-mail: dzambito@cozen.com

Amy M. Klodowski, Esquire (PA ID #28068)  
FirstEnergy Solutions Corp.  
800 Cabin Hill Drive  
Greensburg, PA 15601  
Telephone: (724) 838-6765  
Facsimile: (234) 678-2370  
E-mail: [aklodow@firstenergycorp.com](mailto:aklodow@firstenergycorp.com)

Counsel for *FirstEnergy Solutions Corp.*

Dated: June 4, 2014