



June 4, 2014

VIA E-FILE

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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.; Docket No. P-2014-2421556;
PRELIMINARY OBJECTION OF FIRSTENERGY SOLUTIONS CORP.**

Dear Secretary Chiavetta:

Enclosed for filing with the Commission is FirstEnergy Solutions Corp.'s Preliminary Objection 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

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 FirstEnergy Solutions Corp.'s Preliminary Objection, 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:

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DATED: June 4, 2014



David P. Zambito Esquire
Counsel for *FirstEnergy Solutions Corp.*

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**John R. Evans,
Small Business Advocate,**

Petitioner

v.

FirstEnergy Solutions Corp.,

Respondent

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Docket No. P-2014-2421556

NOTICE TO PLEAD

TO: John R. Evans, Small Business Advocate

Pursuant to 52 Pa. Code § 5.61(a)(2), you are hereby notified that you are required to file an Answer to the enclosed Preliminary Objection of FirstEnergy Solutions Corp. within **ten (10) days** from the date of service of the Preliminary Objection. All pleadings must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served to counsel for FirstEnergy Solutions Corp., and where applicable, the Administrative Law Judge presiding over the case.

File with:

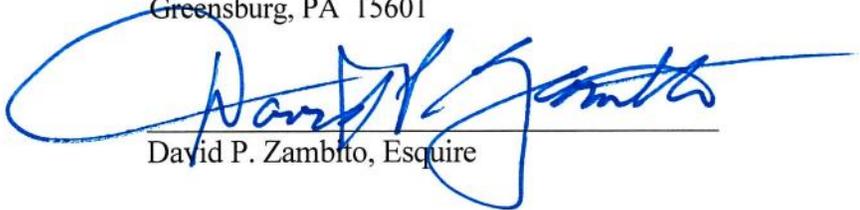
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
P.O. Box 3265
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With copies to:

David P. Zambito, Esquire (PA ID #80017)
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Amy M. Klodowski, Esquire (PA ID #28068)
FirstEnergy Solutions Corp.
800 Cabin Hill Drive
Greensburg, PA 15601

Dated: June 4, 2014



David P. Zambito, Esquire

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

PRELIMINARY OBJECTION OF FIRSTENERGY SOLUTIONS CORP.

FirstEnergy Solutions Corp. (“FES”), by and through counsel, hereby submits this Preliminary Objection pursuant to Section 5.101 of the Rules and Regulations of the Pennsylvania Public Utility Commission (“Commission”), 52 Pa. Code § 5.101, to the above-captioned Petition for Declaratory Order (“Petition”) of John R. Evans, Small Business Advocate (“Petitioner”). FES submits that the Commission lacks subject matter jurisdiction to decide the issues raised in the Petition. In support of its Preliminary Objection, FES states the following:

- 1. The Petition alleges that FES is a licensed electric generation supplier (“EGS”) in the Commonwealth of Pennsylvania. (Petition, ¶ 1)
- 2. The Petition alleges that FES serves small business customers in Pennsylvania. (Petition, ¶ 2)
- 3. The Petition alleges that FES’s small commercial customer supply contract contains 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 FES, the customer agrees that FES may pass through any additional cost of such Pass-Through Event, which may be variable, to the customer. (Petition, ¶ 4)

4. The Petition alleges that FES is seeking to recover certain ancillary service costs that were billed to FES by PJM from small business customers, pursuant to fixed-price contracts entered into prior to November 14, 2013. (Petition, ¶¶ 7, 14)

5. The Petition alleges that the PJM RTO did not “impose” on FES “new or additional charges.” (Petition, ¶¶ 10-12, 14)

6. The Petition alleges that the ancillary service costs FES is seeking to recover from small business customers do not qualify as a “Pass-Through Event” under FES’s fixed price contracts with its small business customers. (Petition, ¶ 14)

7. The Petition requests that the Commission issue an order declaring that FES is not permitted to recover the costs billed to it by PJM for ancillary service costs as a “Pass-Through Event” under the terms of its fixed price contract with its small business customers. (Petition, Prayer for Relief).

8. The Petition does not request any declaration of any parties’ rights or obligations under the Public Utility Code or any Commission regulation, only a declaration of rights and obligations under FES’s contract. (Petition, *passim*)

I. Preliminary Objection Based upon Lack of Commission Jurisdiction

9. It is well-settled that administrative agencies, such as the Commission, are creatures of legislation and can only exercise the powers that are specifically conferred upon them by statute.¹

10. With respect to EGSs, the Commission's powers and duties are explicitly limited by Section 2802(14) of the Electricity Generation Customer Choice and Competition Act ("Competition Act"), which provides that the "generation of electricity will no longer be regulated as a public utility function except as otherwise provided for in this chapter."²

11. FES is a licensed EGS, not a public utility.

12. FES's contracts with its customers are private contracts.

13. The OSBA is asking the Commission to interpret the meaning of terms and conditions in FES's private contracts with its customers, to determine whether the charges PJM imposed on FES for January 2014 qualify as a "Pass-Through Event" under FES's contracts.

14. The Commission lacks subject matter jurisdiction to decide private contractual disputes between EGSs and their customers, or interpret the terms and conditions of private contracts. Rather, these are matters for civil courts of common pleas.³

¹ See *Small v. Horn*, 554 Pa. 600, 609, 772 A.2d 664, 669 (1998); *Grimaud v. Pa. Ins. Dep't*, 995 A.2d 391, 405 (Pa. Cmwlth. Ct. 2010); see *Feingold v. Bell*, 477 Pa. 1, 8, 383 A.2d 791, 795 (1977) ("Since the PUC is a creature of statute, it has only those powers which are expressly conferred upon it by the Legislature and those powers which arise by necessary implication.").

² 66 Pa. C.S. § 2802(14).

³ See *Allport Water Auth. v. Winburne Water Co.*, 258 Pa. Super. 555, 393 A.2d 673 (Pa. Super. 1978); *Adams et al. v. Pa. Pub. Util. Comm'n*, 819 A.2d. 631 (Pa. Cmwlth. 2003). The Commission has consistently ruled that Section 2809(e) of the Pennsylvania Public Utility Code, 66 Pa. C.S. § 2809(e), provides the Commission with the limited authority to impose requirements necessary to maintain quality of service, including assuring that Chapter 56 billing regulations are followed. See *Bracken v. Champion Energy Services, LLC*, Docket No. C-2011-2256514 (Opinion and Order entered Jun. 12, 2012); see also *Bosche v. Direct Energy Services, LLC*, Docket No. C-2013-2361740 (ALJ E. Barnes Initial Decision dated Nov. 21, 2013; Secretarial Letter issued Feb. 12, 2014). The Commission has demonstrated similar restraint with regard to interpretation of easement agreements and resolution of property right controversies, recognizing that such controversies are matters for a court of general jurisdiction. See generally

15. The Commission has no jurisdiction to decide disputes arising from contracts between a licensed EGS and non-jurisdictional third parties.

16. The Commission has previously declined requests to exercise jurisdiction over and interpret private contracts and decide private contractual disputes.⁴

17. Given the statutory limitation in the Public Utility Code on the Commission's authority to interpret contracts between EGSs and third parties, it is apparent that the Petition requests relief that the Commission is not legislatively empowered to grant.⁵

18. Accordingly, the Petition should be dismissed for lack of Commission jurisdiction.

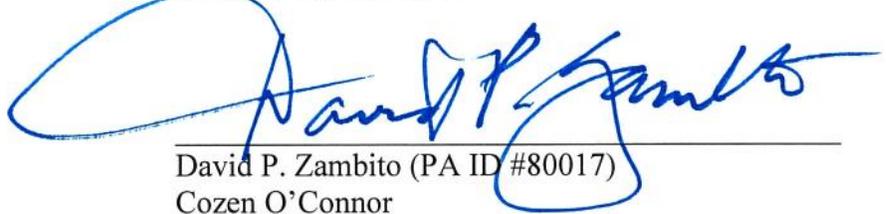
Perrige v. Metropolitan Edison Co., Docket No. C-00004110 (Order entered Jul. 3, 2003); *Fiorillo v. PECO Energy Co.*, Docket No. C-00971088 (Order entered Sept. 15, 1999).

⁴ See *Bracken and Bosche, supra* (recognizing Commission's limited authority under Competition Act to regulate the quality of EGS service); see also *Perrige and Fiorillo, supra* (explaining that Commission lacks legislative authority to resolve disputes regarding property right controversies); see also *Petition of PECO Energy for Approval of its Default Service Plan*, Docket No. P-2012-2283641 (Order entered Mar. 12, 2014)(recognizing, in the context of Customer Assistance Program, that Commission lacks statutory authority to regulate EGS contracted prices, early termination and cancellation fees, and contract terms) (Order currently on appeal to Commonwealth Court of Pennsylvania, *CAUSE-PA v. Pa. Pub. Util. Comm'n*, 445 C.D. 2014 and *McCloskey v. Pa. Pub. Util. Comm'n*, 596 C.D. 2014).

⁵ *Id.* § 2804(5).

WHEREFORE, FirstEnergy Solutions Corp. respectfully requests that its Preliminary Objection be granted, the above-captioned matter be dismissed with prejudice, and the docket marked closed.

Respectfully submitted,



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Dated June 4, 2014