



June 23, 2014

VIA E-FILE

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

Re: John R. Evans v. FirstEnergy Solutions Corp.; ANSWER OF FIRSTENERGY SOLUTIONS CORP. IN OPPOSITION TO THE PETITION TO INTERVENE OF NOBLE AMERICAS ENERGY SOLUTIONS LLC; Docket No. P-2014-2421556

Dear Secretary Chiavetta:

Enclosed for filing with the Commission is FirstEnergy Solutions Corp.'s Answer in Opposition to the Petition to Intervene of Noble Americas Energy Solutions LLC 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

VERIFICATION

I, Amy M. Klodowski, Attorney of 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 23, 2014


Amy M. Klodowski

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 of FirstEnergy Solutions Corp. In Opposition to the Petition to Intervene of Noble Americas Energy Solutions LLC, upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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DATED: June 23, 2014



David P. Zambita, Esquire
Counsel for *FirstEnergy Solutions Corp.*

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

JOHN R. EVANS,
SMALL BUSINESS ADVOCATE,
Petitioner

v.

FIRSTENERGY SOLUTIONS CORP.,
Respondent

Docket No. P-2014-2421556

**ANSWER OF FIRSTENERGY SOLUTIONS CORP.
IN OPPOSITION TO PETITION TO INTERVENE OF
NOBLE AMERICAS ENERGY SOLUTIONS LLC**

AND NOW, comes FirstEnergy Solutions Corp. ("FES"), by and through counsel, and hereby files an answer, pursuant to 52 Pa. Code § 5.66, in opposition to the "Petition to Intervene of Noble Americas Energy Solutions LLC" (the "Petition to Intervene") filed on June 2, 2014, by Noble Americas Energy Solutions LLC ("Noble"). Through the Petition to Intervene, Noble seeks the ability to participate in the above-captioned proceeding as "a full and active party." Noble claims that it has "a direct and immediate interest" in this proceeding and that its interest in this proceeding "is not adequately represented by any other participant." Petition to Intervene at pp. 3-4.

The Commission should deny the Petition to Intervene. For the reasons explained in greater detail herein, Noble does not satisfy the standard for intervention in this action by the Pennsylvania Small Business Advocate (hereinafter, the "Office of Small Business Advocate" or "OSBA") for a declaratory order. *See* 52 Pa. Code § 5.72. In addition, the OSBA petition

involves an issue of interpretation of private contracts over which the Commission lacks subject matter jurisdiction. Even if the Commission had jurisdiction, Noble certainly lacks standing to insert itself into disputes involving contracts to which it is not a party. In the event that the Commission allows Noble to intervene in this proceeding (which it should not), FES asks that the Commission explicitly limit Noble's participation, in accordance with 52 Pa. Code §5.75(b), to the issues presented in OSBA's petition for a declaratory order.

In support of this Answer, FES states as follows:

I. BACKGROUND

On May 15, 2014, OSBA petitioned the Commission for an order declaring that FES cannot, under the terms of its private agreements with its small commercial customers, charge an "RTO Expense Surcharge" related to extraordinary and unprecedented charges by PJM Interconnection, LLC ("PJM") during the polar vortex events of January 2014. On June 2, 2014 Noble filed the Petition to Intervene seeking leave from the Commission to intervene in the OSBA proceeding. Petition to Intervene at p. 5. Noble claimed, *inter alia*, that (1) it has "a direct and immediate interest in the issue raised and to be addressed in this proceeding;" and (2) "Noble's interest in this proceeding is not adequately represented by any other participant," and that its interest "may be directly affected by the outcome of this proceeding" Petition to Intervene at p. 4.

II. STANDARD OF REVIEW FOR INTERVENTION

In order to intervene in a proceeding, a party must show that it has: (1) "[a] right conferred by statute of the United States or of the Commonwealth"; (2) "[a]n interest which may

be directly affected and which is not adequately represented by existing participants, and as to which the Petitioner may be bound by the action of the Commission in the proceeding”); or, (3) “[a]nother interest of such nature that participation of the petitioner may be in the public interest.” See 52 Pa. Code § 5.72(a). The Commission has also held that, in order to have standing, in any proceeding before the Commission, the person or entity seeking standing must have “a direct, immediate and substantial interest in the subject matter of [the] proceeding.” *In re Consumers Pennsylvania Water Company – Shenango Valley Divisions*, 95 Pa. P.U.C. 5 (2001) (citing *Joint Application of Pennsylvania American Water Co. and Evansburg Water Co. for Approval of the Transfer, by Sale, of the Water Works Property and Rights of Evansburg Water Co. to Pennsylvania-American Water Co.*, A-212285F0046/47 and A-210870F01 (Opinion and Order entered Jul. 9, 1998)).

III. ARGUMENT IN OPPOSITION TO NOBLE INTERVENTION

Noble’s eligibility to intervene in this proceeding is predicated on a showing that its interest in this proceeding is direct, immediate, and substantial. Noble must further show that its interests are not adequately represented by existing participants and that it will be bound by the action of the Commission in this proceeding, or that its participation is otherwise in the public interest.¹ For the reasons more fully explained below, Noble has failed to satisfy this burden.

In addition, this proceeding improperly seeks a declaratory order from the Commission regarding interpretation of private contracts. Noble cannot reasonably be deemed to have a direct, immediate, and substantial interest in a matter over which the Commission itself lacks subject matter jurisdiction.

¹ Noble has made no assertion, nor could it make a colorable assertion, that it has a right conferred by a statute to intervene. Cf. 52 Pa. Code § 5.72(a)(3).

The scope of a declaratory order action is extremely limited. The Commission may properly consider only the issues and facts presented in the petition for declaratory order. Noble however, through its Petition to Intervene, is seeking to expand the scope of the instant proceeding with the ulterior motive of using these proceedings in order to disadvantage a competitor. This is not a proper purpose of intervention. The Commission should not allow these proceedings to become a vehicle for FES's competitors to attack FES's business practices in an attempt to gain a competitive advantage in the Commonwealth's competitive electricity markets. Accordingly, Noble's Petition to Intervene should be denied.

A. Noble's Interest in This Matter is Neither Direct, Nor Immediate, Nor Substantial.

Noble's Petition to Intervene fails to show that Noble's interest in this proceeding is direct, immediate, and substantial. Accordingly, Noble lacks standing to intervene. Generally, the Commission has held that, in order to have standing in a proceeding before the Commission, the person or entity seeking standing must have "a direct, immediate and substantial interest in the subject matter of [the] proceeding." See *In re Consumers Pennsylvania Water Company – Shenango Valley Divisions*, *supra*. This threshold discourages frivolous and costly judicial actions that delay proceedings. *Pa. Pub. Util. Comm'n v. Nat'l Fuel Gas Distrib. Corp.*, 73 Pa. P.U.C. 552, 121 P.U.R.4th 434 (1990).

A party's interest in a proceeding is deemed direct "if the protestant's interest is adversely affected by the actions challenged in the protest," is deemed immediate "if there is a close causal nexus between the protestant's asserted injury and the action challenged in the protest," and is deemed substantial "if the Protestant has a discernible interest other than the general interest of all citizens in seeking compliance with the law." *In re Consumers*

Pennsylvania Water Company – Shenango Valley Divisions, supra (citing *Ken R. ex rel. C.R. v. Arthur Z.*, 682 A.2d 1267 (Pa. 1996)); *In El Rancho Grande, Inc.*, 437 A.2d 1150 (Pa. 1981); *William Penn Parking Garage Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975); *Empire Coal Mining & Development, Inc. v. Pa. Dep’t of Natural Resources*, 623 A.2d 897 (Pa. Cmwlth. 1993).

Noble is not adversely affected by the contractual provisions contested in the OSBA petition for declaratory order. This proceeding centers around the RTO Expense Surcharge, which may be billed by FES to some of its customers pursuant to a pass through clause in its private contracts with such customers. Noble is not a customer of FES, nor is it affected by FES’s private contractual matters. In fact, the closest Noble comes to alleging any harm at all is a purely conjectural assertion that the actions in this proceeding “could negatively impact consumers, other EGSs, the Pennsylvania retail market, and the industry as a whole if these EGSs [*i.e.*, FES] engaged in misleading or deceptive marketing practices.” Petition to Intervene at p. 4. Although Noble may desire to enter this proceeding and play the speculation game, “[m]ere conjecture about possible future harm does not confer a direct interest in the subject matter of a proceeding.” *See In re Consumers Pennsylvania Water Company – Shenango Valley Divisions, supra* at 4. Thus, Noble does not have a direct interest in this proceeding.

Additionally, there is no close causal nexus between the injury asserted in the Petition to Intervene and the action challenged in this proceeding. Noble not only has no contracts with FES, as discussed above; Noble, by its own description, does not utilize contract terms similar to those at issue with its own customers. Noble does nothing to hide the fact that it considers its customer contract terms as distinct from FES’s contract terms. *See* Petition to Intervene at pp. 3-

4. Thus, no matter how the Commission concludes in this proceeding, there will be no direct effect upon Noble and Noble accordingly lacks an immediate interest in this proceeding.²

Further, Noble does not have a greater or more discernible interest in this proceeding. While Noble states that it is concerned about the potential implications that this proceeding and the imposition of pass-through charges could have on the competitive supply industry, Noble's concerns are speculative in nature and, ultimately, Noble's purported interests are the same as those of OSBA – *i.e.*, ensuring compliance with the Commonwealth's legal requirements. Thus, Noble does not have a substantial interest in this proceeding that is discernible from that of OSBA or the general public.

Since Noble does not have a direct, immediate, or substantial interest in this proceeding, it lacks the necessary standing to participate in this proceeding. Accordingly, the Commission should deny Noble's Petition to Intervene.

B. Noble's Interest in This Proceeding Is Adequately Represented by Existing Participants.

Even if the Commission determines that Noble does have a direct, immediate, and substantial interest in this proceeding (which it should not), Noble's interests are more than adequately represented by the participation of OSBA. Noble points out in the Petition to Intervene that it "agrees with the statements made by the OSBA" regarding the RTO Expense Surcharge. Petition to Intervene at p. 4. The OSBA's filing solely addresses the interpretation of FES's contracts with its small commercial customers and not the expanded issues Noble seeks to introduce through its Petition to Intervene. A petition to intervene cannot be used to expand the

² Declaratory relief has never been appropriate to determine rights in anticipation of events which may never occur. See *Chester Upland Sch. Dist. v. Cmwlth. of Pa.*, 495 A.2d 981 (Pa. Cmwlth. 1985); see also *South Whitehall Twp. v. Pa. Dep't of Transp.*, 473 A.2d 166 (Pa. Cmwlth. 1984).

issues in a proceeding that are not addressed in the initiating filing. *See Metropolitan Edison Co. Energy Efficiency and Conservation Plan, et al.*, Docket No. M-2009-2092222 *et al.* (ALJ Salapa Order Granting Intervention entered Jul. 31, 2009)(recognizing that “a grant of intervention does not equal an open invitation to discovery.” and limiting the scope of intervention to the plans at issue before the Commission); *Metropolitan Edison Co. Energy Efficiency and Conservation Plan, et al.*, Docket No. M-2009-2092222, *et al.* (ALJ Salapa Order entered Aug. 2, 2009)(reiterating that the scope of intervention is limited to the original scope of plans before the Commission); *see also Thompson v. Deal*, 49 F.Supp. 366 (D.D.C.1943) (explaining that an intervener may not introduce issues outside the scope of the issues in the main suit); *Nat’l Ass’n of Regulatory Utility Cm’rs v. Interstate Commerce Comm’n*, 41 F.3d 721, 729 (D.C.Cir.1994)(opining that interveners may only argue issues raised by the principal parties); *Marvel Entertainment Group, Inc. v. Hawaiian Triathlon Corp.*, 132 F.R.D. 143, 146 (S.D.N.Y.1990)(explaining that intervention is not proper if it expands the scope and costs of litigation); *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944)(recognizing that an intervening party is admitted to a proceeding where it stands, in respect to pending issues, and is not permitted to enlarge those issues). Thus, Noble’s alleged interest is already adequately represented and the Commission should deny Noble’s Petition to Intervene.

C. By Its Own Admission, Noble Will Not Be Bound by the Action of the Commission in This Proceeding.

Although Noble states that it “may be directly affected by the outcome of this proceeding, as Noble could be bound by any Commission decision regarding the ability of FES . . . to recover from its customers ancillary services costs under the terms of fixed price contracts,” Noble is not a party to any contracts with FES and Noble is – by its own admission – dealing

with PJM ancillary service charges in a different manner than FES. Petition to Intervene at pp. 2-4.

Accordingly, there is no risk that Noble “may be bound by the action of the Commission in the proceeding.” *See* 52 Pa. Code § 5.72(a)(2). The OSBA petition seeks a declaration on the limited issue of interpretation of FES’s private contracts with its small commercial customers and Noble, accordingly, lacks standing to intervene.

Additionally, “[C]ompetitors only have standing where the alleged competition is prohibited by a regulatory scheme in which both parties participate” *Interstate Gas Marketing, Inc. v. Pa. Pub. Util. Comm’n*, 679 A.2d (1349)(Pa. Cmwlth. 1996)(citing *Pa. Petroleum Ass’n, infra*); *see Pa. Petroleum Ass’n v. Pa. Power & Light Co.*, 377 A.2d 1270 (Pa. Cmwlth. 1997)(finding that a trade association comprised of competitors of Pennsylvania Power & Light Company (“PPL”) lacked standing to challenge PPL’s rates based upon a competitive disadvantage since competition was not prohibited in that marketplace), *aff’d*, 412 A.2d 522 (Pa. 1980); *see also Municipal Auth. of the Borough of West View v. Pa. American Water Co.*, Docket No. C-2010-2153062 (Initial Decision of ALJ Weismandel issued Apr. 15, 2010). Competition in the Commonwealth’s retail electric supply market is not prohibited. In fact, it is encouraged pursuant to the goals of the Electricity Generation Customer Choice and Competition Act of 1996, 66 Pa. C.S. § 2807. Since Noble will not be bound by the Commission’s decision in this proceeding and it only wishes to intervene in this proceeding in order to inflict competitive harm upon FES, the Commission should deny Noble’s Petition to Intervene.

D. The Scope of a Petition for Declaratory Order is Very Limited.

The purpose of a petition for declaratory order is to allow a party to seek a declaration regarding existing rights as presented in the facts for a petition for a declaratory order. The Pennsylvania Public Utility Code authorizes the Commission to issue a declaratory order to terminate an actual controversy or remove uncertainty. 66 Pa. C.S. § 331(f); *Re Duquesne Light Co.*, 61 Pa. P.U.C. 507 (1986). The Commission should not to allow Noble, a competitor of FES, to disrupt and divert these proceedings in an attempt to seek information by which it can attempt to gain a competitive advantage.

The issuance of a declaratory order is limited to instances where the controversy is based on existing rights, status, or legal relations. *See Pa. Ind. Petroleum Producers v. Pa. Dep't of Environl. Resources*, 525 A.2d 829 (Pa. Cmwlth. 1988), *aff'd*, 550 A.2d 195 (Pa. 1989), *cert. denied*, 489 U.S. 1096 (1989). Declaratory relief has never been appropriate to determine rights in anticipation of events which may never occur. *Chester Upland Sch. Dist.*, *supra*; *South Whitehall Twp.*, *supra*.

The instant petition for declaratory order involves a request for interpretation of an FES contractual provision – nothing more. Noble's asserted interest in ensuring that any Commission action does not affect "Noble's operations, business activities, and the Pennsylvania competitive retail market which it participates" is misplaced. Petition to Intervene at p. 3, ¶ 7. The Commission's scope of review is limited to review of the existing rights, status, and legal relations of FES and its small business customers (noting however that the Commission lacks subject matter jurisdiction over private contractual disputes). Noble's apparent attempt to expand the Commission's scope of review to include a review of EGS marketing practices, *see*

Petition to Intervene at p. 4, ¶ 9, is improper and Noble's request for intervention should be denied.

If the Commission permits Noble to intervene in this proceeding (which it should not), FES respectfully asks that the Commission explicitly limit Noble's participation in accordance with 52 Pa. Code §5.75(b). A petition to intervene cannot be used to expand the issues in a proceeding that are not addressed in the initiating filing. *See Metropolitan Edison Co. Energy Efficiency and Conservation Plan* (ALJ Orders issued Jul. 31, 2009 and Aug. 2, 2009), *supra*. The scope of the OSBA filing is limited to FES's contracts with small commercial customers. Noble should not be permitted to expand this proceeding beyond the limited scope of this declaratory order action.

E. The Commission Lacks Jurisdiction to Decide This Matter.

As explained in FES's Preliminary Objection filed on June 4, 2014, the Commission lacks subject matter to decide private contractual disputes between EGSs and their customers, or to interpret the terms and conditions of private contracts. These are matters for the Commonwealth's civil courts of common pleas. *See Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673 (Pa. Super. 1978); *Adams v. Pa. Pub. Util. Comm'n*, 819 A.2d 631 (Pa. Cmwlth. 2003); *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); *see generally 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); *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).

Noble is not a party to the private contracts at issue and Noble's interest in the proceeding is tenuous at best given that its strongest motive for participation is based upon a conjecture of future harm. Combined with the fact that the Commission does not have jurisdiction over private contractual disputes, the Commission should decline to grant Noble's Petition to Intervene. Noble cannot reasonably be deemed to have a direct, immediate, and substantial interest in a matter over which the Commission itself lacks jurisdiction.

IV. RESPONSES TO SPECIFIC PARAGRAPHS OF PETITION TO INTERVENE

FES hereby responds to the specific paragraphs of the Petition to Intervene as follows:

1. ADMITTED in part and DENIED in part. FES admits the basic facts surrounding its intent to charge certain customers an "RTO Expense Surcharge." FES however denies Noble's characterization of the facts insofar as Noble attempts to insinuate that actions of FES caused the instant dispute. The instant dispute is the result of a filing by OSBA which attempts to shield small commercial customers from their contractual obligations to FES.

2. ADMITTED in part and DENIED in part. FES admits that OSBA filed the petition for declaratory order that initiated this proceeding on May 15, 2014 and that the Utility Workers Union of America filed a similar petition for declaratory order on April 8, 2014. FES denies that the ancillary service charges were "purportedly" imposed upon FES by PJM. The

charges were actually imposed upon FES by PJM, were the result of extraordinary and unprecedented events related to the polar vortex of January 2014, and were substantial.

3. ADMITTED in part and DENIED in part. FES admits that OSBA made such arguments in its petition for declaratory order. FES denies that the OSBA arguments have merit. The "RTO Expense Surcharge" is permitted under FES's contracts with its customers. Further, FES denies that its contracts were not precise, transparent, and in plain language.

4. ADMITTED upon representation by Noble.

5. ADMITTED upon representation by Noble.

6. ADMITTED upon representation by Noble.

7. DENIED. For the reasons stated above, FES denies that Noble has a "direct and immediate" or "vested" interest in the issue raised and to be addressed in this proceeding. FES lacks sufficient knowledge regarding whether "Noble and other EGSs have performed on the obligations made to their customer who purchased a fixed price product regardless of the events of this past winter" and the assertion, which is irrelevant to this proceeding, is therefore denied.

8. DENIED. FES denies that the issue involved in this proceeding is whether there was a change in law or regulation. The issue involves the interpretation of FES's contracts with its small commercial customers. The "RTO Expense Surcharge" represents a "new or additional charge" that is properly passed through to customers under the terms of such customers' agreements with FES. Noble, a competitor of FES, does not have an electric generation supply contract with FES and therefore does not have standing to intervene in this proceeding.

9. DENIED. The OSBA petition for declaratory order involves an issue of interpretation of private contracts. FES denies that the pass-through of extraordinary PJM ancillary service charges to customers who have agreed to such pass-through charges presents "a

problem” that could “negatively impact consumers, other EGSs, and the Pennsylvania retail market” Further, Noble’s insinuation that FES engaged in “misleading or deceptive marketing practices” is utterly without foundation and is therefore denied.

10. DENIED. FES denies that Noble’s interest in this proceeding is not adequately represented by any other participant. For the reasons stated above, Noble’s interests are not discernible from those of the general public and such interests are being adequately represented by OSBA in this proceeding.

The final paragraph of the Petition to Intervene is a request for relief to which no response is required.

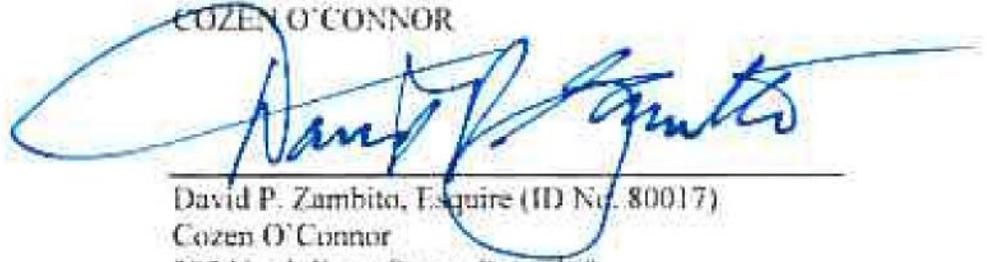
V. CONCLUSION

Noble’s interest in this proceeding is not direct, immediate, or substantial and Noble is motivated by mere conjecture about possible future harm. Thus, Noble lacks necessary standing to intervene in this proceeding. Noble’s interest in the proceeding is already adequately represented by the participation of OSBA. Since Noble is not a party to a contract with FES and Noble does not utilize similar contract terms with its own customers, Noble will not be bound by the Commission’s decision in this proceeding. Additionally, Noble should not be permitted to intervene in this proceeding involving an issue over which the Commission lacks subject matter jurisdiction (*i.e.*, the interpretation of private contracts). The Commission should deny Noble’s Petition to Intervene. Intervention by Noble would result in the improper expansion of the scope of review of the OSBA petition for declaratory order.

WHEREFORE, for the foregoing reasons, FirstEnergy Solutions Corp. respectfully requests that the Commission deny the Petition to Intervene of Noble Americas Energy Solutions LLC.

Respectfully submitted,

COZEN O'CONNOR



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Counsel for *FirstEnergy Solutions Corp.*

DATED: June 23, 2014