



June 26, 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.; ANSWER OF FIRSTENERGY SOLUTIONS CORP. IN OPPOSITION TO THE PETITION TO INTERVENE OF FES INDUSTRIAL & COMMERCIAL CUSTOMER COALITION; 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 FES Industrial & Commercial Customer Coalition 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 26, 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 FES Industrial & Commercial Customer Coalition, 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 26, 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
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**ANSWER OF FIRSTENERGY SOLUTIONS CORP.
IN OPPOSITION TO PETITION TO INTERVENE OF
THE FES INDUSTRIAL AND COMMERCIAL CUSTOMER COALITION**

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 the FES Industrial and Commercial Customer Coalition” (the “Petition to Intervene”) filed on June 6, 2014, by the FES Industrial & Commercial Customer Coalition (“ICCC”). Through the Petition to Intervene, ICCC seeks the ability to participate in the above-captioned proceeding as an intervening party with “full-party status.” Petition to Intervene at p. 3. ICCC claims that it has “a significant interest” in this proceeding and that its interest in this proceeding “is not represented by any other party of record.” *Id.*

The Commission should deny the Petition to Intervene. For the reasons explained in greater detail herein, ICCC 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 (which it does not), ICCC certainly

lacks standing to insert itself into disputes involving contracts to which it is not a party. In the event that the Commission allows ICCC to intervene in this proceeding (which it should not), FES asks that the Commission explicitly limit ICCC'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 6, 2014 ICCC filed the Petition to Intervene seeking leave from the Commission to intervene in the OSBA proceeding. Petition to Intervene at p. 3. ICCC claimed, *inter alia*, that (1) it has "a significant interest in this proceeding;" and (2) that its interest in this proceeding "is not represented by any other party of record;" and (3) that it will be "directly impacted by the outcome of this proceeding." Petition to Intervene at pp. 2-3.

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)). 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).

III. ARGUMENT IN OPPOSITION TO ICCC INTERVENTION

ICCC’s eligibility to intervene in this proceeding is predicated on a showing that its interest in this proceeding is direct, immediate, and substantial. ICCC 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, ICCC has failed to satisfy this burden. The proceeding will not result in a direct, immediate, and substantial effect upon ICCC.

A. ICCC’s Interest in this Proceeding is not Direct or Immediate.

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” and is deemed immediate “if there is a close causal nexus between the protestant’s asserted injury and the action challenged in the protest.” See *In re Consumers Pennsylvania Water Company – Shenango Valley Divisions*,

¹ ICCC has not alleged that it has statutory right to intervene in this proceeding.

supra. ICCC lacks a direct and immediate interest in this proceeding. The instant proceeding will cause no direct or immediate injury to ICCC, as it involves the interpretation of FES contracts with small commercial customers. ICCC has made no allegation that any of its members fall within the class of customers being represented by OSBA. In fact, ICCC members are not small commercial customers and their contracts are different from the small commercial customer contracts at issue in the instant proceeding. ICCC has initiated a separate complaint proceeding to address the matters relevant to its members' contracts and ICCC will have full due process rights in that separate proceeding. *See FES Industrial & Commercial Customer Coalition v. FirstEnergy Solutions Corp.*, Docket No. C-2014-2425989 (Complaint filed Jun. 9, 2014). Since ICCC has no interest in the interpretation of the small commercial contracts at issue in this proceeding, and its interests will be fully protected in the separate complaint proceeding it has initiated with regard to its members' contracts, it has no direct or immediate interest in being a party to this proceeding and its intervention request should be denied.

B. ICCC's Interest in this Proceeding is not Substantial.

A party's interest is deemed substantial "if the Protestant has a discernible interest other than the general interest of all citizens in seeking compliance with the law." *See 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 269 (Pa. 1975); *Empire Coal Mining & Development, Inc. v. Pa. Dep't of Natural Resources*, 623 A.2d 897 (Pa. Cmwlth. 1993). Although ICCC members are concerned about the imposition of pass-through charges under their contracts with FES, ICCC's interests are essentially the same as those of OSBA – *i.e.*, ensuring compliance with the Commonwealth's legal requirements – and these interests are already represented in this proceeding by OSBA. Thus, ICCC does not have a

substantial interest in this proceeding that is discernible from that of OSBA and its request to intervene should be denied.

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

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 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 Envmtl. 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. *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.*, 475 A.2d 166 (Pa. Cmwlth. 1984).

The instant petition for declaratory order involves a request for interpretation of an FES contractual provision with small commercial customers – nothing more. If the Commission permits ICCC to intervene in this proceeding (which it should not), FES asks that the Commission limit ICCC's participation in accordance with 52 Pa. Code §5.75.

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, 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). If permitted to intervene (which it should not be), ICCC should not be permitted to expand the scope of this declaratory order proceeding to address contracts that its members may have with FES. The scope of the OSBA filing is limited to FES's contracts with small commercial customers. ICCC should not be permitted to expand the limited scope of this declaratory order action.

D. 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 jurisdiction 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).

Since the Commission does not have jurisdiction over private contractual disputes, the Commission should decline to grant ICCC's Petition to Intervene. ICCC cannot reasonably be deemed to have a standing 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 upon representation by ICCC.
2. ADMITTED upon representation by ICCC.
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.

4. ADMITTED upon representation by ICCC.
5. ADMITTED in part and DENIED in part. FES admits that ICCC members entered into fixed-price contracts with FES who were given notice from FES that FES would be billing ICCC members for ancillary service charges imposed on FES by PJM, referred to as the RTO Expense Surcharge. FES denies that these charges were already included in ICCC

members' fixed-price generation service. The RTO Expense Surcharge is intended to recover only those new or additional costs imposed by PJM on FES that were not included in contract pricing.

6. DENIED. For the reasons stated above, FES denies that ICCC has a substantial interest in the issue raised and to be addressed in this proceeding. Further, FES denies that ICCC's interest in this proceeding is not adequately represented by any other participant. For the reasons stated above, ICCC's interests are not discernible from those of the general public and such interests are being adequately represented by OSBA in this proceeding.

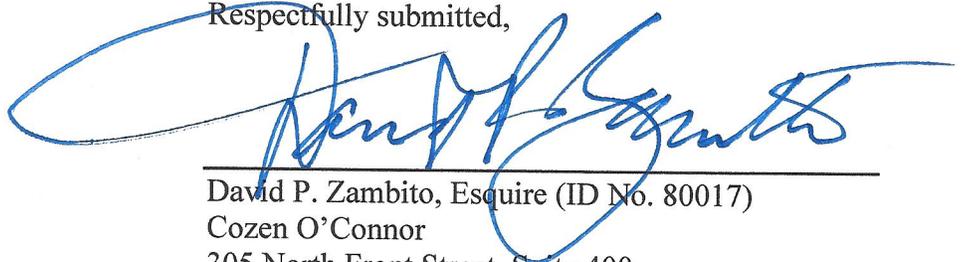
The final paragraph of the Petition to Intervene is a request for relief to which no response is required.

V. CONCLUSION

ICCC's interest in this proceeding is not direct, immediate, or substantial. Thus, ICCC lacks necessary standing to intervene in this proceeding. ICCC's interest in the proceeding is already adequately represented by the participation of OSBA, and FES's contracts with ICCC's members will be directly addressed in a separate complaint proceeding that is currently pending. Additionally, ICCC 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 ICCC's Petition to Intervene. However, in the event that ICCC is granted leave to intervene, ICCC's participation should be strictly limited to the issues raised in OSBA's Petition for a Declaratory Order.

WHEREFORE, for the foregoing reasons, FirstEnergy Solutions Corp. respectfully requests that the Commission deny the Petition to Intervene of the FES Industrial & Commercial Customer Coalition.

Respectfully submitted,



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DATED: June 26, 2014