



July 1, 2014

VIA E-FILE

David P. Zambito

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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: FES Industrial & Commercial Customer Coalition v. FirstEnergy Solutions Corp.;
Docket No. C-2014-2425989; PRELIMINARY OBJECTIONS OF FIRSTENERGY
SOLUTIONS CORP. TO THE COMPLAINT OF FES INDUSTRIAL & COMMERCIAL
CUSTOMER COALITION

Dear Secretary Chiavetta:

Enclosed for filing with the Commission are the Preliminary Objections of FirstEnergy Solutions Corp. to the Complaint 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.*

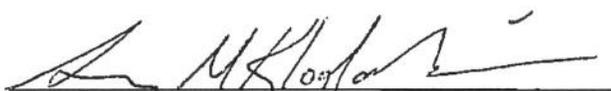
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Enclosure

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: July 1, 2014



Amy M. Klodowski

CERTIFICATE OF SERVICE
FES Industrial & Commercial Customer Coalition v.
FirstEnergy Solutions Corp.
Docket No. C-2014-2425989

I hereby certify that I have this day served a true copy of the Preliminary Objections of FirstEnergy Solutions Corp. to the Complaint 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).

VIA E-MAIL and FIRST CLASS MAIL:

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DATED: July 1, 2014



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

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**FES INDUSTRIAL & COMMERCIAL
CUSTOMER COALITION,**

Complainant

v.

FIRSTENERGY SOLUTIONS CORP.,

Respondent

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Docket No. C-2014-2425989

NOTICE TO PLEAD

TO: FES Industrial & Commercial Customer Coalition

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 Objections 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
Harrisburg, PA 17105-3265

With a copy to:

David P. Zambito, Esquire (PA ID #80017)
D. Troy Sellars, Esquire (PA ID #210302)
Cozen O'Connor
305 North Front Street, Suite 400
Harrisburg, PA 17101-1236

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

Dated: July 1, 2014



David P. Zambito, Esquire

2. The Complaint avers that the members of FES-ICCC are large commercial & industrial (“Large C&I”) customers of FES. (Complaint, ¶ 10)

3. The Complaint alleges that FES’s supply contracts with FES-ICCC members contain a provision stating that, in addition to the customer’s basic service price, the customer agrees that FES may pass through any additional cost of a Pass-Through Event (as defined in the contract). (Complaint, ¶ 12)

4. The Complaint alleges that FES sent notice to FES-ICCC members in March 2014 informing them that FES would bill them “a charge [“RTO Expense Surcharge”] that will appear as a separate line item on fixed-price customers’ bills” for costs invoiced to FES by PJM Interconnection, LLC (“PJM”) for “extremely high ancillary costs to purchase additional reserve generation needed to keep the bulk energy system reliable” throughout extremely cold weather during January 2014. (Complaint, ¶¶ 6-9)

5. The Complaint alleges that the PJM did not “impose” on FES “new or additional charges.” (Complaint, ¶¶ 12-15)

6. The Complaint alleges that the ancillary service costs FES is seeking to recover from Large C&I customers do not qualify as a “Pass-Through Event” under FES’s fixed price contracts with Large C&I customers. (Complaint, ¶¶ 12-15)

7. The Complaint alleges that FES engaged in deceptive billing practices by attempting to collect the RTO Expense Surcharge from Large C&I customers. (Complaint, ¶¶ 34, 35, 39, 40)

8. The Complaint requests that the Commission (a) issue an order staying FES ICCC members’ liability for FES’s proposed charges, (b) prohibit FES from attempting to recover from FES ICCC members the costs billed to it by PJM for ancillary costs during January 2014 via the

Pass-Through Event clause under the terms of members' contracts with FES, and (c) provide any additional or necessary relief as appropriate. (Petition, Request for Relief).

I. Preliminary Objection Based upon Lack of Commission Jurisdiction over Contracts

9. A preliminary objection is appropriate where the Commission lacks jurisdiction.¹

10. 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.²

11. 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."³

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

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

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

¹ 52 Pa. Code § 5.101(a)(1).

² 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.").

³ 66 Pa. C.S. § 2802(14).

15. 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.⁴

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

17. The Commission has previously declined requests to exercise jurisdiction over and interpret private contracts and decide private contractual disputes.⁵

18. 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 Complaint requests relief that the Commission is not legislatively empowered to grant.⁶

19. Accordingly, the Complaint should be dismissed with prejudice for lack of Commission jurisdiction.

⁴ 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 *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).

⁵ 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).

⁶ 66 Pa. C.S. §§ 2802(14), 2809.

II. Preliminary Objection Based upon Lack of Commission Primary Jurisdiction

20. A preliminary objection is appropriate where the Commission lacks jurisdiction.⁷

21. The primary jurisdiction doctrine counsels courts and administrative agencies to refrain from exercising jurisdiction over a claim where an issue is within the jurisdiction of another court or administrative agency and involves complex subject matter beyond the knowledge of the fact finder.⁸

22. In the instant proceeding, FES-ICCC alleges that FES engaged in deceptive billing practices because it is allegedly not entitled to collect the RTO Expense Surcharge from FES-ICCC members under the terms of their private contracts with FES.⁹ (Complaint, ¶¶ 34, 35, 39, 40)

23. FES-ICCC's claims of deceptive billing practices by FES are contingent upon a final finding by civil courts of competent jurisdiction that FES violated the terms of the contracts. If there were no violations of the contracts, FES could not have engaged in a deceptive billing practice because it was legally entitled to issue the invoices that included the RTO Expense Surcharge.

24. For the foregoing reasons, the Complaint, if it is not dismissed in its entirety for other reasons, should be stayed until such time that civil courts of competent jurisdiction have made a final determination that FES violated the contracts. In other words, the Commission should defer to the primary jurisdiction of the civil courts to interpret the contracts before taking any action with regard to FES-ICCC's allegations of deceptive billing practices.

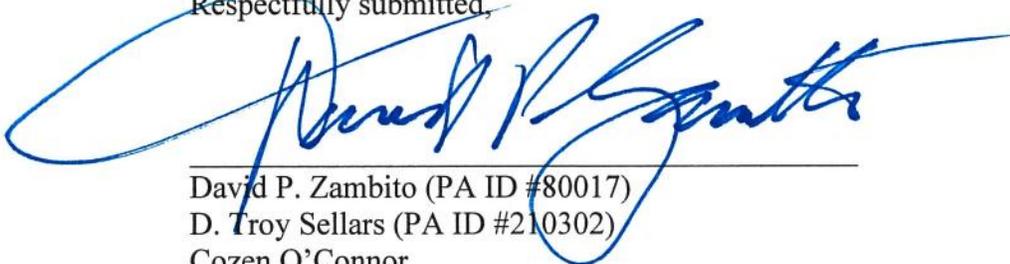
⁷ 52 Pa. Code § 5.101(a)(1).

⁸ See, e.g., *In re Insurance Stacking Litigation*, 754 A.2d 702 (Pa. Super. Ct. 2002); *Pettko v. Pa. American Water Co.*, 39 A.3d 473 (Pa. Cmwlth. 2012), *allocatur denied*, 51 A.3d 839 (Pa. 2012).

⁹ It is important to note that FES-ICCC has not alleged any type of deceptive marketing activities by FES to induce the members of FES-ICCC to execute their agreements with FES. The only allegation of deceptive behavior relates to billing practices associated with the RTO Expense Surcharge.

WHEREFORE, FirstEnergy Solutions Corp. respectfully requests that its Preliminary Objections be granted, the above-captioned Complaint be dismissed with prejudice, and the docket marked closed. Alternatively, if the Complaint is not dismissed in its entirety for other reasons, the Complaint should be stayed until such time that civil courts of competent jurisdiction have finally determined the issues of contractual interpretation.

Respectfully submitted,



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Counsel for *FirstEnergy Solutions Corp.*

Dated: July 1, 2014