



100 Pine Street • PO Box 1166 • Harrisburg, PA 17108-1166
Tel: 717.232.8000 • Fax: 717.237.5300

Susan E. Bruce
Direct Dial: 717.237.5254
Direct Fax: 717.260.1666
sbruce@mwn.com

July 7, 2014

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

VIA ELECTRONIC FILING

**RE: John R. Evans, Small Business Advocate v. FirstEnergy Solutions Corporation;
Docket No. P-2014-2421556**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission ("PUC" or "Commission") is the FES Industrial and Commercial Customer Coalition's ("FES ICC") Response to FirstEnergy Solutions Corp.'s Answer in Opposition to Petition to Intervene of the FES ICC, in the above-referenced proceeding.

As evidenced by the attached Certificate of Service, all parties to the proceeding are being served with a copy of this document. Thank you.

Sincerely,

McNEES WALLACE & NURICK LLC

By 
Susan E. Bruce

Counsel to the FES Industrial and Commercial Customer Coalition

Enclosures

c: Chief Administrative Law Judge Charles E. Rainey, Jr. (via E-Mail and First-Class Mail)
Certificate of Service

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the participants listed below in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

VIA EMAIL AND FIRST-CLASS MAIL

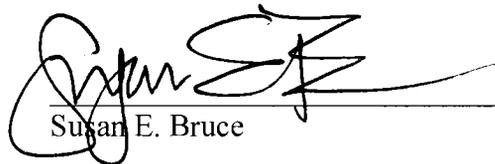
Amy M. Klodowski, Esq.
FirstEnergy Corp.
800 Cabin Hill Dr.
Greensburg, PA 15601
aklodow@firstenergycorp.com

David P. Zambito, Esq.
Cozen O'Connor
305 North Front Street
Suite 400
Harrisburg, PA 17101-1236
dzambito@cozen.com

John R. Evans
Daniel G. Asmus, Esq.
Office of Small Business Advocate
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, PA 17101
jorevan@pa.gov
dasmus@pa.gov

Candis A. Tunilo, Esq.
Brandon J. Pierce, Esq.
Office of Consumer Advocate
555 Walnut Street
Forum Place - 5th Floor
Harrisburg, PA 17101-1921
ctunilo@paoca.org
bpierce@paoca.org

Charles E. Thomas III, Esq.
Thomas Niesen & Thomas LLC
212 Locust Street, Suite 600
Harrisburg, PA 17101
cet3@tntlawfirm.com


Susan E. Bruce

Counsel to the FES Industrial and Commercial
Customer Coalition

Dated this 7th day of July, 2014 at Harrisburg, Pennsylvania.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**THE FES INDUSTRIAL AND COMMERCIAL CUSTOMER COALITION'S ("FES ICC")
RESPONSE TO FIRSTENERGY SOLUTIONS CORP.'S
ANSWER IN OPPOSITION TO FES ICC'S PETITION TO INTERVENE**

The FES Industrial and Commercial Customer Coalition ("FES ICC") files this Response to FirstEnergy Solutions Corp.'s ("FES") Answer in Opposition ("Answer") to the Petition to Intervene ("Petition") of the FES ICC requesting that the Pennsylvania Public Utility Commission ("PUC" or "Commission") deny FES ICC's Petition.¹ See 52 Pa. Code §§ 5.61(a)(2) and 5.101(f). For the reasons stated herein, FES ICC respectfully requests that the Commission reject FES's position and grant FES ICC's Petition in the above-captioned proceeding.

I. INTRODUCTION

1. On May 15, 2014, the Office of Small Business Advocate ("OSBA") filed a Petition for Declaratory Order with the Commission. The OSBA's Petition for Declaratory Order seeks a Commission determination that FES is prohibited from billing small business

¹ Procedural precedent indicates that the Commission accepts responses to Answers in Opposition. See, e.g., *PPL Elec. Util. Corp. Universal Serv. and Energy Conservation Plan for 2011 through 2013*, 2011 WL 2530226 (Pa. P.U.C.) at *1 (May 5, 2011) (noting the Office of Consumer Advocate's Response to PPL Electric's Answer in Opposition to the Amended Petition to Intervene); *Petition of UGI Central Penn Gas, Inc. for Accelerated Refund of Overcollected Purchased Gas Costs*, 104 Pa. P.U.C. 490, 2009 WL 4087049 (Pa. P.U.C.) at *4 (Nov. 19, 2009) (discussing UGI Central Penn Gas, Inc.'s Response to the Office of Small Business Advocate's Answer in Opposition). Based on this precedent, FES ICC submits this Response to FES's Answer in Opposition. Alternatively, FES ICC contends that FES's Answer in Opposition should be treated as Preliminary Objections to FES ICC's Petition to Intervene to which FES ICC has a right to respond pursuant to 52 Pa. Code §§ 5.61(a)(2) and 5.101(f).

customers for certain "ancillary service costs" that FES claims were imposed upon it by PJM Interconnection, L.L.C. ("PJM"), stemming from the extreme winter weather in January 2014 (*i.e.*, "RTO Expense Surcharge"). OSBA asserted that FES incurred such "ancillary service costs" in the normal course of business and that these costs were not imposed upon FES by PJM. Therefore, the OSBA asserts there was no pass-through event. In addition, OSBA requested that the Commission direct FES to refund any "ancillary services costs" that it has recovered from customers to date with interest.

2. On June 6, 2014, FES ICCC sought intervener status through the above-referenced Petition. FES ICCC is an *ad hoc* group of energy-intensive, Large Commercial and Industrial ("C&I") customers receiving electric distribution service from Electric Distribution Companies ("EDCs") throughout Pennsylvania. The members of the FES ICCC receive generation supply from FES, an Electric Generation Supplier ("EGS") licensed in Pennsylvania by the Commission.

3. On June 26, 2014, FES filed an Answer in Opposition ("Answer") to FES ICCC's Petition.

4. FES's Answer argues that the Commission should deny FES ICCC's Petition because, among other reasons, its members purportedly do not have an interest in this proceeding, any interests are allegedly already represented by the OSBA, and the Commission lacks jurisdiction over the subject matter of this proceeding.

5. For the reasons stated herein, FES's position should be rejected, and FES ICCC's Petition should be granted.

II. RESPONSE

A. **Contrary to FES's Claims, FES ICCC Has A Direct, Immediate, and Substantial Interest in This Proceeding.**

6. FES erroneously claims that FES ICCC does not have a direct or immediate interest in this proceeding because it involves the interpretation of FES contracts with small commercial customers. *See Answer*, at pp. 3-4. Therefore, FES argues that FES ICCC does not meet the Commission's standard for interventions. *Id.*

7. Contrary to FES's claims, FES ICCC has an "interest which may be directly affected" by the outcome of this proceeding and that interest is direct, immediate, and substantial. 52 Pa. Code § 5.72(a). Similar to the OSBA's small commercial customer clients, FES ICCC members take generation supply service from FES and also received invoices from FES seeking to impose the "RTO Expense Surcharge" to collect costs related to the January 2014 winter weather events. Commission action in this proceeding regarding the purported RTO Expense Surcharge and/or FES's compliance with the Commonwealth's rules and regulations governing EGSs would likely have a direct, substantial, and immediate impact FES ICCC members. FES ICCC supports the OSBA's position that FES's fixed-price contracts do not permit it to recover the RTO Expense Surcharge from any fixed-price contract customer. In the event that FES were, either on its own or by Commission direction, to waive the RTO Expense Surcharge for small commercial customers (as it did for its residential customers), however, FES ICCC members would realize a direct, substantial, and immediate *negative* impact because such an outcome would leave FES ICCC members as the sole targets for FES's cost recovery efforts. Furthermore, if that were to be the case, it is unclear whether FES would seek to recover the "ancillary service costs" associated with all customer classes from just its Large C&I customers on fixed-price contracts. As a result of such a decision, FES ICCC members "would be bound

by the action of the Commission" in this proceeding because the resulting precedent would control any other potential efforts for relief sought by FES ICCC.

8. For these reasons, FES ICCC respectfully submits it satisfies the Commission's requirements for intervention, and FES's arguments to the contrary should be dismissed. Accordingly, FES ICCC's Petition should be granted.

B. FES Erroneously Claims That FES ICCC's Interests Are Being Adequately Represented by the OSBA.

9. FES erroneously claims that "ICCC's interests are essentially the same as those of OSBA" and, therefore, "ICCC does not have a substantial interest in this proceeding that is discernible from that of OSBA." Answer, at pp. 4-5.² As discussed herein, however, the interests represented by the OSBA and by FES ICCC are not identical, nor does the OSBA's enabling statute permit the OSBA to represent Large C&I customers. Therefore, FES ICCC has "[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." 52 Pa. Code § 5.72(a) (emphasis added).

10. The OSBA is a creature of statute that is tasked with representing the interests of small business customers – *i.e.*, an entity which employs fewer than 250 employees and which receives public utility service under a small commercial, small industrial or small business rate classification – before the Commission. *See* 73 P.S. § 399.42. By contrast, FES ICCC represents the interests of Large C&I customers who have fixed-price supply agreements with FES. FES ICCC members do not meet the definition of small business customer, because they

² Ironically, elsewhere in the Answer, FES appears to contradict itself, recognizing that no FES ICCC members fall within the class of customers represented by the OSBA. *See* Answer, at pp. 3-4.

have more than 250 employees and/or receive service under a large customer rate classification.³ Thus, the Large C&I customers comprising FES ICCC do not fall within the definition of small business customer and cannot be represented by the OSBA.

11. FES ICCC acknowledges that its interests and those of the OSBA focus on FES's pass-through of the RTO Expense Surcharge to customers with fixed-price contracts, but the OSBA and FES ICCC represent two discrete customer classes. Moreover, the OSBA's mandate is to protect the interests of small business customers. *See* 73 P.S. § 399.43. In doing so, the OSBA could potentially seek FES to waive the RTO Expense Surcharge confronting its clients without considering the interests of FES ICCC members. Consequently, the Commission's disposition of the OSBA's Petition for Declaratory Order will likely have a direct, substantial, and immediate impact on similarly-situated FES ICCC members. Therefore, FES ICCC's participation in this proceeding is necessary to protect the interests of its Large C&I customer members.

C. FES's Jurisdictional Argument Is Irrelevant for Purposes of Considering FES ICCC's Petition.

12. In its Answer, FES repeats the jurisdictional argument set forth in its Preliminary Objection filed on June 4, 2014, which is currently pending before the Commission. In short, FES characterizes this proceeding as involving a "interpretation of private contracts over which the Commission lacks subject matter jurisdiction." Answer, at pp. 1; *see also id.* at 6-7.⁴ Accordingly, FES argues that, since the Commission lacks jurisdiction over this purported

³ While certain FES ICCC members may have secondary accounts that are treated as small business customers, members' primary accounts are treated as Large C&I customers taking service under rate schedules such as Pennsylvania Electric Company's Rate Schedules LP or GP; West Penn Power Company's Rate Schedules 30, 40, 41, 44 or 46; and Metropolitan Edison Company's Rate Schedules TP or GP.

⁴ As noted above, the OSBA's Petition for Declaratory Order is still pending and, therefore, the Commission has not determined that the Petition for Declaratory Order raises issues solely regarding private contractual disputes and does not raise issues within the Commission's jurisdiction over the retail electric market and its functioning.

"private contractual dispute," the Commission should decline to grant FES ICCC's Petition. *Id.* at 7.

13. As a threshold matter, FES ICCC assumes that the Commission may exercise jurisdiction over this matter and, based on the assumption that this proceeding will move forward, FES ICCC filed the Petition.

14. Moreover, FES's jurisdictional argument is not relevant for purposes of evaluating FES ICCC's Petition. In evaluating a petition to intervene, the Commission focuses, in relevant part, on whether the party seeking intervention has "[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 "[a]nother interest of such nature that participation of the petitioner may be in the public interest." 52 Pa. Code § 5.72(a). As demonstrated in its Petition, and in this Response, FES ICCC satisfies the applicable standard of review for intervention in this proceeding. Therefore, FES ICCC respectfully requests that the Commission grant this Petition.

D. Contrary to FES's Assertion, FES ICCC Does Not Seek To Expand the Scope of This Proceeding.

15. FES argues, if FES ICCC's Petition is granted, it "should not be permitted to expand the scope of this declaratory order proceeding to address contracts that its members may have with FES." Answer, at p. 6. FES also notes that declaratory relief is not appropriate to "determine rights in anticipation of events which may never occur." *Id.* at 5. As stated in its Petition, like the small commercial customers with fixed-price supply agreements with FES represented by the OSBA, FES ICCC members received notices from FES stating that FES would be billing FES ICCC members for "ancillary service costs," even though these costs were already included in FES ICCC members' fixed-price generation service. As such, like these

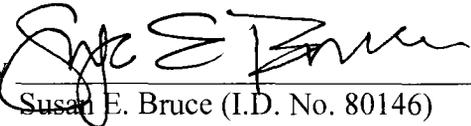
small commercial customers, FES ICCC members are part of the present controversy and face the same uncertainty surrounding FES's efforts to recover the RTO Expense Surcharge. Moreover, FES ICCC supports the OSBA's position (*i.e.*, FES's fixed-price contracts do not permit such charges to be billed to any customers on such fixed-price agreements). Contrary to FES's assertion, FES ICCC does not seek to expand the scope of this proceeding, and nowhere in its Petition does FES ICCC suggest otherwise. Thus, FES's argument is without merit and should be dismissed.

III. CONCLUSION

WHEREFORE, the FES ICCC respectfully submits that FES's Answer should be rejected with respect to its arguments in opposition to any aspect of FES ICCC's Petition to Intervene, and that FES ICCC's Petition to Intervene should be granted.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By 

Susan E. Bruce (I.D. No. 80146)
Charis Mincavage (I.D. No. 82039)
Vasiliki Karandrikas (I.D. No. 89711)
Andrew S. Ziegler (I.D. No. 314859)
McNEES WALLACE & NURICK LLC
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
Phone: (717) 232-8000
Fax: (717) 237-5300
sbruce@mwn.com
cmincavage@mwn.com
vkandrikas@mwn.com
aziegler@mwn.com

Counsel to the FES Industrial and Commercial
Customer Coalition

Dated: July 7, 2014