

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

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July 11, 2014

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

RE: FES Industrial & Commercial Customer
Coalition v. FirstEnergy Solutions Corp.
Docket No. C-2014-2425989

Secretary Chiavetta:

Enclosed please find the Office of Consumer Advocate's Answer to the Preliminary Objections of FirstEnergy Solutions Corp. in the above-referenced proceeding.

Copies have been served as indicated on the enclosed Certificate of Service.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Brandon J. Pierce".

Brandon J. Pierce
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Enclosures

cc: Certificate of Service
*184999

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

ANSWER OF THE
OFFICE OF CONSUMER ADVOCATE
TO THE PRELIMINARY OBJECTIONS OF
FIRSTENERGY SOLUTIONS CORP.

Pursuant to Section 309-4 of the Administrative Code of 1929, 71 P.S. § 309-4, and Section 5.61 and 5.101 of the Pennsylvania Public Utility Commission’s (Commission) regulations regarding Answers to Preliminary Objections, 52 Pa. Code §§ 5.61 and 5.101, the Office of Consumer Advocate (OCA) provides the following Answer to the Preliminary Objections of FirstEnergy Solutions Corp. (Answer), in the above-captioned proceeding.

I. INTRODUCTION

On June 9, 2014, the FirstEnergy Solutions Corp. (FES) Industrial & Commercial Customer Coalition (FES ICCC) filed a Complaint asking the Commission to stay the FES ICCC members’ responsibility for paying certain charges, deny FES’s ability to implement such charges, review the appropriateness of FES’s licensure, and take other actions the Commission deems as necessary and appropriate.

In March 2014, FES began sending customers on “fixed price” plans postcards stating that these customers would be billed a surcharge for an “RTO Expense Surcharge.” On the

postcards, FES stated that it has the right to increase customers' bills to recover "extremely high ancillary services costs" incurred in January 2014 and billed to FES by the PJM Interconnection.

On July 1, 2014, FES filed Preliminary Objections to the Complaint of the FES ICCC, as well as an Answer and New Matter to the FES ICCC. FES's Preliminary Objections argue that the Commission lacks jurisdiction over contracts and that the Commission lacks primary jurisdiction. The OCA submits that the Commission has jurisdiction over this matter and that FES's arguments are without merit.

II. ANSWER

The very integrity of the retail electric market hinges on the notion that the Commission, which licenses an electric generation supplier (EGS) to enter the marketplace, also has the authority to ensure that EGSs "provide adequate and accurate customer information . . . in an understandable format that enables consumers to compare prices and services on a uniform basis." 66 Pa. C.S. § 2807(d)(2). The Commission's regulations, at 52 Pa. Code § 54.3(1), support this statutory mandate by stating that EGSs shall "Use common and consistent terminology in customer communications, including marketing, billing and disclosure statements." 52 Pa. Code § 54.3(1); see also 52 Pa. Code §54.43. Section 54.3 applies to all customers, including large commercial and industrial customers. See 52 Pa. Code § 54.1(b). Therefore, the Commission has jurisdiction over this matter.

Second, the Public Utility Code, at 66 Pa. C.S. § 2809(a), requires an EGS to hold a license issued by the Commission to engage in the business of an EGS. This fact alone establishes the Commission's initial jurisdiction over an EGS. Additionally, Section 2809(b) states that a license will be issued to a "qualified applicant . . . [that] is fit, willing and able to . . . conform to the provisions of this title and the lawful orders and regulations of the commission

under this title, including the commission’s regulations regarding standards and billing practices.” 66 Pa. C.S. § 2809(b). The Commission promulgated regulations specifically tailored to address those practices. Section 54.43(1) of the Commission’s regulations states as follows:

A licensee shall provide accurate information about their electric generation services using plain language and common terms in communications with consumers. Information shall be provided in a format that enables customers to compare the various electric generation services offered and the prices charged for each type of service.

52 Pa. Code § 54.43(1).¹ The issue to be decided here requires a factual determination as to whether the FES ICCC customers were provided accurate and adequate information that enabled them to compare various service offers. That is a matter squarely in the Commission’s jurisdiction.

Third, Section 2809(b) of the Public Utility Code further states, “the proposed service . . . will be consistent with the public interest and the policy declared in this chapter.” 66 Pa. C.S. § 2809(b). The Commission has a significant interest—and indeed statutory authority—in assuring that the public is adequately protected with regard to EGS practices. See 66 Pa. C.S. § 2802(14).² This statutory policy declaration encompasses the issue at bar.

Fourth, the Commission previously opened a proceeding at Docket No. M-2013-2362961 regarding the use of pass-through clauses in EGSs’ terms and conditions for fixed price contracts. That proceeding culminated in the Commission’s issuance of a Final Order on November 14, 2013. See Use of Fixed Price Labels for Products With a Pass-Through Clause, Docket No. M-2013-2362961, Final Order (Nov. 14, 2013) (November 14 Order). In the

¹ Chapter 54 of the Commission’s regulations, 52 Pa. Code §§ 54.1 *et seq.*, applies to all customer classes, with the exception of Sections 54.4 through 54.9, which only apply to residential and small business customers. See 52 Pa. Code § 54.1(b).

² Section 2802(14) states, in relevant part, “The generation of electricity will no longer be regulated as a public utility function *except as otherwise provided for in this chapter*. Electric generation suppliers will be required to obtain licenses, demonstrate financial responsibility *and comply with such other requirements concerning service as the commission deems necessary for the protection of the public*. 66 Pa. C.S. § 2802(14) (emphasis added).

November 14 Order, the Commission determined that “fixed means fixed.” November 14 Order at 24. Indeed, FES participated in this docket. See Use of Fixed Price Labels for Products With a Pass-Through Clause, Docket No. M-2013-2362961, Comments of FirstEnergy Solutions Corp., (June 24, 2013). It is inapposite for FES to now argue that the Commission does not have jurisdiction over this issue.³

Fifth, FES cites to several cases to support its contention that the Commission lacks jurisdiction over this matter. The cases cited by FES, however, are erroneous and distinguishable from the matter *sub judice*. Therefore, they are not informative as to the Commission’s determination of this proceeding (i.e. this matter does not concern: 1) quality of service; 2) property rights; or 3) contracted prices and terms in the specific context of a Customer Assistance Program). As one example, FES cites to Allport Water Auth. v. Winburne Water Co., 258 Pa. Super. 555, 393 A.2d 673 (Pa. Super. 1978) for the proposition that the Commission lacks jurisdiction to decide “private contractual disputes . . . or interpret the terms and conditions of private contracts . . . [and that] these are matters of civil courts.” Preliminary Objections of FES ¶ 15. In Allport, however, the Superior Court of Pennsylvania held that the disputed contractual term “to provide adequate service” mirrored an obligation provided for in the Public Utility Code, and therefore, the Commission properly had jurisdiction. Allport, 393 A.2d at 559, 563. The Court further held that the matter required a factual determination that the Commission was best suited to decide. Id. at 560-61. In the matter currently pending before the Commission, FES’s standards and billing practices are at issue, as well as FES’s obligation to provide adequate and accurate information. Whether FES met these obligations as set forth in the Public Utility Code and the Commission’s regulations is a factual matter best determined by the

³ Furthermore, the Commission rejected FES’s contentions in its November 14 Order and FES did not file Exceptions or any appeal.

Commission. As such, this proceeding is properly before the Commission as articulated in Allport under the primary jurisdiction doctrine.⁴

In conclusion, the OCA submits that the Commission's jurisdiction over this matter is clear and respectfully requests that FES's Preliminary Objections be denied.

⁴ The Petition of PECO Energy for Approval of its Default Service Plan, Docket No. P-2012-2283641 (Order entered Mar. 12, 2014) (PECO DSP) is a second example of FES's cited cases providing no precedent. The very issue that FES uses the PECO DSP as support for is disputed and the subject of appeals filed by the OCA and CAUSE-PA. See CAUSE-PA v. Pa. Pub. Util. Comm'n, 445 C.D. 2014 and McCloskey v. Pa. Pub. Util. Comm'n, 596 C.D. 2014 (these matters have been consolidated).

WHEREFORE, the Office of Consumer Advocate respectfully requests that the Commission deny the Preliminary Objections of FirstEnergy Solutions Corp. and declare that FirstEnergy Solutions Corp.'s surcharge is not permitted as a matter of law, and grant such other relief the Commission deems appropriate.

Respectfully Submitted,



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Dated: July 11, 2014

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CERTIFICATE OF SERVICE

Re: 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 foregoing document, the Office of Consumer Advocate's Answer to the Preliminary Objections of FirstEnergy Solutions Corp., upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 11th day of July 2014.

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