



August 8, 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.; PETITION OF FIRSTENERGY SOLUTIONS CORP. FOR INTERLOCUTORY REVIEW AND ANSWER TO MATERIAL QUESTIONS; Docket No. P-2014-2421556

Dear Secretary Chiavetta:

Enclosed for filing with the Commission is FirstEnergy Solutions Corp.'s Petition for Interlocutory Review and Answer to Material Questions 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
Honorable Robert F. Powelson, Chairman
Honorable John F. Coleman, Vice Chairman
Honorable James H. Cawley, Commissioner
Honorable Pamela A. Witmer, Commissioner
Honorable Gladys M. Brown, Commissioner

VERIFICATION

I, Amy M. Klodowski, Attorney for 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).

Dated: August 8, 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 Petition of FirstEnergy Solutions Corp. for Interlocutory Review and Answer to Material Questions, 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: August 8, 2014



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Counsel for *FirstEnergy Solutions Corp.*

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

John R. Evans,
Small Business Advocate

v.

FirstEnergy Solutions Corp.

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Docket No. P-2014-2421556

**PETITION OF FIRSTENERGY SOLUTIONS CORP. FOR
INTERLOCUTORY REVIEW AND ANSWER TO MATERIAL QUESTIONS**

Pursuant to Section 5.302 of the Pennsylvania Public Utility Commission (“Commission”) regulations at 52 Pa. Code § 5.302, FirstEnergy Solutions Corp. (“FES”), by and through its undersigned counsel, files this Petition for Interlocutory Review and Answer to Material Questions (“Petition”), and in support thereof, avers as follows.

I. Introduction and Background:

1. On May 15, 2014, the Office of the Small Business Advocate filed a Petition for a Declaratory Order (“OSBA Petition”) requesting the Commission “issue an Order declaring that FES is not permitted to recover the costs billed to it by PJM for ancillary services costs as a ‘pass-through event’ under the terms of its fixed price contract with its customers.” OSBA Petition, Prayer for Relief.

2. In support of its Petition, the OSBA cites to one provision of FES’s Small Commercial Disclosure Statement. OSBA Petition, ¶ 4; *see also* OSBA Petition, Exh. A, ¶ 2. The OSBA, admitting that FES was billed for the charges by PJM, requests an interpretation of the contract and argues that “[t]he imposition of costs by PJM is the contractual language that triggers a pass-through event, and in this case, it simply did not happen.” OSBA Petition, ¶ 10.

3. In response to the OSBA Petition, FES, *inter alia*, filed a Preliminary Objection noting that FES is a licensed EGS and not a public utility, that FES’s contracts with its customers are private contracts, and that 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. FES argues that the OSBA Petition should be dismissed because of the Commission’s lack of subject matter jurisdiction. *See* FES Preliminary Objection, ¶¶ 9-18.

4. By Interim Order dated July 22, 2014 (the “Interim Order”), ALJ Dunderdale denied the FES Preliminary Objection. FES seeks interlocutory review of the Interim Order.

II. Material Questions, Need for Interlocutory Review and Discussion:

5. From the Interim Order, the following two material questions arise: (1) Did the Interim Order improperly expand the scope of the requested relief of the OSBA Petition? and (2) When the Commission’s review is properly framed to the limited relief sought in the OSBA Petition, does the Commission lack subject matter jurisdiction to grant the OSBA Petition? The suggested answer to both questions is yes.

6. Interlocutory review of these questions is needed to prevent potentially significant prejudice to FES. If this case proceeds to develop the issues described in the Interim Order – issues which were not raised in the OSBA Petition – FES has had no opportunity to answer these allegations and will have been denied basic due process. By preventing the development of issues never raised by the OSBA Petition, interlocutory review will avoid waste of the Commission’s and parties’ valuable time and resources.

7. In the Interim Order, the ALJ notes that OSBA admits that it wants the Commission to interpret the meaning of a contract,¹ but then improperly relies on the OSBA’s argument raised in its response to the Preliminary Objection that the matter is a billings practice issue over which the Commission has jurisdiction. Interim Order, pp. 4, 7-8.

8. By adopting the argument of the OSBA’s Preliminary Objection response, the ALJ has improperly allowed the OSBA to expand the scope of its case beyond the four corners of the OSBA Petition as pled. The OSBA Petition specifically focuses on the interpretation of what constitutes a “pass-through event” under the Small Commercial Disclosure Statement and opines that OSBA’s interpretation of that clause is the only one that is appropriate. OSBA Petition, ¶ 14. Only in its Answer to the Preliminary Objection, does OSBA seek to broaden the scope of its Petition to claim a “controversy regarding the billing practices of FES.” OSBA Answer to Preliminary Objection, ¶ 14. OSBA did not file a complaint with the Commission, rather it filed a Petition for a Declaratory Order which is a limited proceeding designed to declare rights, status, and legal relations between parties based on the facts as presented in the petition. OSBA cannot broaden the scope

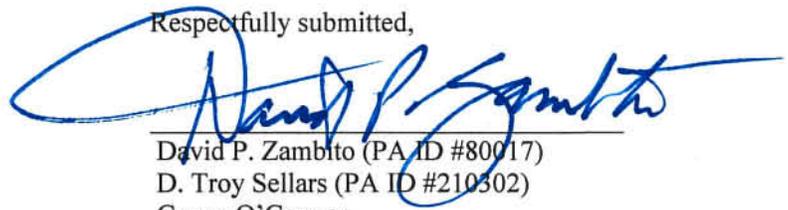
¹ See, e.g., Paragraph 13 of OSBA’s Answer to the Preliminary Objection (“It is admitted that the OSBA is asking the Commission to interpret the meaning of the pass-through-clause in FES’s fixed price contracts.”)

of its case to survive a preliminary objection by mere argument; it was incumbent on OSBA to state all of the facts it needed to support the limited relief it sought within the four corners of its petition. *See Professional Paramedical Services, Inc. v. Pa Pub. Util. Comm'n*, 525 A.2d 1274 (Pa. Cmwlth. 1987); *appeal denied*, 538 A.2d 879 (Pa. 1988); *see also* 52 Pa. Code § 5.402.

9. When the proper scope of the OSBA Petition is considered, it is clear that this matter boils down to a single point – the OSBA wants the Commission to interpret one provision of the contracts between FES and FES’s business customers in a manner that it believes is in the best interest of its constituency. It has long been recognized that “the PUC is not jurisdictionally empowered to decide private contractual disputes between a citizen and a utility.” *Allport Water Auth. v. Winburne Water Co.*, 258 Pa. Super. 555, 559, 393 A.2d 673, 675 (1978) (internal citations omitted). That proposition is even more applicable here as FES is not a public utility. *See* 66 Pa. C.S. §2802(14) (declaring that the policy of the Commonwealth is to deregulate the generation of electricity). Accordingly, the relief sought by OSBA is beyond the jurisdiction of the Commission and the Preliminary Objection of FES should have been granted.

WHEREFORE, FirstEnergy Solutions Corp. respectfully requests that this Honorable Commission undertake interlocutory review of the Interim Order, stay the instant proceedings pending the Commission’s action on the interlocutory review, answer the material questions in the positive, and grant FirstEnergy Solutions Corp.’s Preliminary Objection and dismiss the OSBA Petition.

Respectfully submitted,



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Dated August 8, 2014