

COMMONWEALTH OF PENNSYLVANIA



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August 18, 2014

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
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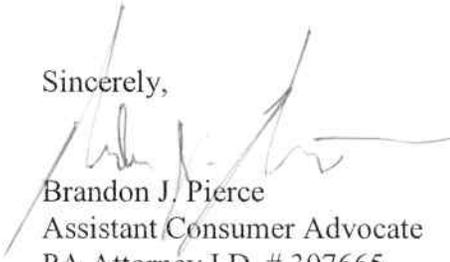
Re: John R. Evans, Small Business Advocate, Petitioner v. FirstEnergy  
Solutions Corporation, Respondent  
Docket No. P-2014-2421556

Dear Secretary Chiavetta:

Enclosed please find the Office of Consumer Advocate's Brief in Response to the  
Petition of FirstEnergy Solutions Corp. for Interlocutory Review and Answer to Material  
Questions in the above referenced proceeding.

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

Sincerely,



Brandon J. Pierce  
Assistant Consumer Advocate  
PA Attorney I.D. # 307665

Enclosures

cc: Honorable Katrina L. Dunderdale, ALJ  
Certificate of Service

184077

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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BRIEF OF THE OFFICE OF CONSUMER ADVOCATE  
IN RESPONSE TO THE PETITION OF  
FIRSTENERGY SOLUTIONS CORP. FOR  
INTERLOCUTORY REVIEW AND ANSWER TO  
MATERIAL QUESTIONS

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Pursuant to Section 5.302(b) of the Pennsylvania Public Utility Commission’s (Commission) regulations regarding Interlocutory Review, 52 Pa. Code § 5.302(b), the Office of Consumer Advocate (OCA) provides the following Brief in Response to the Petition of FirstEnergy Solutions Corp. (FES or the Company) for Interlocutory Review and Answer to Material Questions (Petition) in the above-captioned proceeding.

The OCA submits that FES has not presented compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding, as required by 52 Pa. Code § 5.302(a), and respectfully requests the Commission to deny or decline to answer the Petition. Second, in the event that the Commission determines that undertaking review is necessary as per Section 5.302(a), the OCA respectfully urges the Commission to answer FES’s two “material questions” in the negative.

## I. INTRODUCTION

On May 15, 2014, the Office of Small Business Advocate (OSBA) filed the Petition for Declaratory Order with the Commission seeking a determination that, as a matter of law, the language in FES's Terms and Conditions of Service for small business "fixed price" plans does not permit FES to bill small business customers for increases in the cost of meeting FES's existing obligations to provide regulation service and synchronized reserve service.

On May 29, 2014, the OCA filed an Answer supporting OSBA's Petition.

On June 4, 2014, FES filed Preliminary Objections asserting that the Commission lacked subject matter jurisdiction. FES also filed an Answer with New Matter on the same date.

On June 16, 2014, OSBA filed an Answer to the Preliminary Objections of FES, reasserting the positions taken in the Petition for Declaratory Order. On June 24, 2014, OSBA filed a Reply to New Matter.

On July 22, 2014, Administrative Law Judge (ALJ) Katrina L. Dunderdale issued the First Interim Order (*Interim Order*) that denied FES's Preliminary Objections on the basis that the Petition for Declaratory Order involves allegations that FES failed to comply with the Commission's regulations and statutes.<sup>1</sup>

On August 8, 2014, FES filed the instant Petition, posing two "material questions" as follows:

(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?

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<sup>1</sup> ALJ Dunderdale also issued an Order substantially similar to the Interim Order here on August 6, 2014 in *FES Industrial & Commercial Customer Coalition v. FirstEnergy Solutions Corp.*, Docket No. C-2014-2425989.

Petition ¶ 5. The OCA submits that the Commission deny the Petition or answer the questions in the negative.

## II. BRIEF IN RESPONSE TO PETITION

The OCA submits that FES has not presented compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding, as required by 52 Pa. Code § 5.302(a), and respectfully requests the Commission to deny or decline to answer the Petition. In the event that the Commission determines that undertaking interlocutory review is necessary as per Section 5.302(a), the OCA respectfully urges the Commission to answer FES's two "material questions" in the negative.

### A. FES has not presented compelling reasons why interlocutory review is necessary.

The Commission's regulations set out the standard for consideration of a Petition for Interlocutory Review. The regulations, in relevant part, provide as follows:

During the course of a proceeding, a participant may file a timely petition directed to the Commission requesting review and answer to a material question which has arisen or is likely to arise. The petition shall be in writing with copies served on all participants and the presiding officer and shall state, in not more than three pages, the question to be answered and the *compelling reasons* why interlocutory review will prevent *substantial prejudice* or expedite the conduct of the proceeding.

52 Pa. Code § 5.302(a) (emphasis added). In *Pa.PUC v. Wynnewood Sewer Corp.*, the Commission stated "we do not routinely grant interlocutory review except upon a showing by a petitioner of extraordinary circumstances or compelling reasons." *Pa.PUC v. Wynnewood Sewer Corp.*, Docket No. R-00963708, Order at 5 (December 6, 1996). In other words, the standard for the Commission to entertain an interlocutory review is high.

FES argues, in the matter *sub judice*, that interlocutory review “is needed to prevent potentially significant prejudice.” Petition ¶ 6. Specifically, FES contends as follows:

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.

Petition ¶ 6. Contrary to FES’s position, OSBA’s Petition for Declaratory Order does raise the issues described in the Interim Order.<sup>2</sup> Notwithstanding this fact, FES’s contention that it will have no opportunity to answer those allegations and will be denied due process is without merit. The Commission’s regulations provide FES with a standard procedural mechanism to remedy such a situation. Section 5.91 reads as follows:

(a) *Generally.* A modification of or supplement to an application, complaint, petition or other pleading shall be deemed as an amendment to the pleading, and must comply with the requirements of this subchapter relating to the pleading amended.

52 Pa. Code § 5.91(a). Section 5.1 of the Commission’s regulations includes an answer in its definition of pleadings allowed. *See* 52 Pa. Code § 5.1(4).

FES has the opportunity to amend its Answer to fully address the due process concern it raises in its Petition. Therefore, FES has not met the threshold requirement set out in Section 5.302 and enunciated in the *Wynnewood* decision that the petitioner must allege “extraordinary circumstances or compelling reasons.” Further, denying Preliminary Objections means only that the case moves forward; it does not end the case.<sup>3</sup> For these reasons, and because the

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<sup>2</sup> The OCA addresses these issues in Section B of this brief, *infra*.

<sup>3</sup> A prehearing conference is set for September 8, 2014 in this matter.

Commission does not routinely permit interlocutory reviews, the OCA respectfully requests that the Commission deny or decline to answer FES's Petition.<sup>4</sup>

**B. FES's two "material questions" should be answered in the negative if the Commission determines FES has presented compelling reasons why interlocutory review is warranted.**

1. Did the Interim Order improperly expand the scope of the requested relief of the OSBA Petition?

The OCA submits that the Interim Order did *not* expand—improperly or otherwise—the scope of the requested relief. First, OSBA's Petition for Declaratory Order, at paragraphs 2, 13, and 14 explicitly cites to the Public Utility Code Section 2807(d)(2), 66 Pa. C.S. § 2807(d)(2), and the Commission's *Use of Fixed Price Labels for Products With a Pass-Through Clause*, Docket No. M-2013-2362961 (Order entered November 14, 2013) (*November 14 Order*) (Fixed Price Docket). OSBA cites Section 2807(d)(2), which Chapter 54 of the Commission's regulations implements. *See* 52 Pa. Code 54.1, *et seq.* OSBA also cites the Fixed Price Docket, whereupon the Commission relies on Chapter 54. *See, e.g., November 14 Order* at 29, 30, 31, 32. Second, in addition to citing the Public Utility Code and Fixed Price Docket in its Petition for Declaratory Order, OSBA's Answer to the Preliminary Objection of FES specifically reaffirms and clarifies that part of its basis for relief is based on the Fixed Price Docket and the statutes and regulations discussed therein.<sup>5</sup> FES, in its Petition at paragraph 7 and in the

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<sup>4</sup> As in the Pa. Code, the Pa. Rules of Civil Procedure similarly provide a party an opportunity to amend its Answer if that party's Preliminary Objections are overruled. "If the preliminary objections are overruled, the objecting party shall have the right to plead over within twenty days after notice of the order or within such other time as the court shall fix." Pa. R.C.P. No. 1028(d).

<sup>5</sup> Again, this is in addition to the explicit reference to Section 2807(d)(2) of the Public Utility Code in paragraph 2 of its original Petition for Declaratory Order, as more fully described in throughout section B.1 of the OCA's Brief.

corresponding footnote, however, only cites to a portion of OSBA's Answer to the Preliminary Objection, which makes OSBA's basis for relief more difficult to ascertain. A more complete quotation of those responses that supports OSBA's argument is as follows:

13. Admitted in part and denied in part. 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. By way of further answer, the Commission has devoted an entire proceeding to the meaning of the terms and conditions contained in EGS' fixed price contracts, *Use of Fixed Price Labels for Products With a Pass-Through Clause*, Docket No. M-2013-2362961 (Order entered November 14, 2013). It is denied that the "private contracts" referenced by FES are somehow outside the Commission's jurisdiction.

14. Denied. It is specifically denied that this matter is a "private contractual dispute" between FES and its customers. This is a controversy regarding the billing practices of FES; about whether FES should be permitted to pass through to fixed-price customers additional fess billed to FES by PJM for ancillary services.

OSBA Answer to the Preliminary Objection of FES at ¶¶ 13-14. The ALJ properly viewed this Answer as OSBA's reliance on the Fixed Price Docket and the statutes and regulations discussed therein. It does not, however, expand the scope of the proceeding. It merely crystallizes it. Therefore, on these bases alone, FES's first "material question" must fail and should be answered in the negative.

FES also contends that the ALJ improperly relied on OSBA's argument "raised in response to the Preliminary Objections that the matter is a billings practice issue." Petition ¶ 7.

This contention is without merit. The ALJ's Interim Order states as follows:

At its core, Mr. Evans' complaint concerns whether a supplier may apply an allegedly arbitrary variable charge to a fixed price supply contract for small business ratepayers. Mr. Evans should be permitted to make the argument, through the pendency of this proceeding, that FES has violated the Commission's regulatory and statutory provisions that suppliers, *inter alia*, must provide *adequate and accurate customer information to enable customers, including small*

*business customers, to make informed choices regarding the purchase of all electricity services and to have that information provided in an understandable format that enables the ratepayer to compare prices and services.*

*Interim Order* at 8 (emphasis added). The ALJ's *Interim Order* appropriately recognizes that OSBA's Petition for Declaratory Order explicitly references Section 2807(d)(2) of the Public Utility Code and the Commission's Fixed Price Docket as the basis for denying FES's Preliminary Objection. See OSBA Petition for Declaratory Order ¶¶ 2, 13. The ALJ's Conclusions of Law confirm this clear understanding of OSBA's Petition for Declaratory Order as follows:

1. The Commission has jurisdiction over the parties to this dispute and over the subject matter of this dispute to the extent the Petition for Declaratory Order involves allegations of a failure by Respondent to comply with the Commission's regulations and statutes.
2. The Petition raises claims that, if proven, might show Respondent failed in some way to provide adequate and accurate customer information to enable small business customers to make informed choices regarding the purchase of all electricity services and to have that information provided in an understandable format.

*Interim Order* at 8-9. Therefore, FES's first "material question" must fail and the OCA respectfully requests the Commission answer it in the negative.

2. When the Commission's review is properly framed to the limited relief sought in the OSBA Petition for Declaratory Order, does the Commission lack subject matter jurisdiction to grant the OSBA Petition for Declaratory Order?

The Answer to this material question is no. The relief sought in OSBA's Petition for Declaratory Order is squarely within the Commission's jurisdiction.

First, OSBA's Petition for Declaratory Order cites to 66 Pa. C.S. § 2807(d)(2), which provides the authority for the Commission's duty to ensure that EGSs provide adequate and accurate customer information so that customers are able to make informed choices and compare prices and services on a uniform basis. The very integrity of the retail electric market hinges on the notion that the Commission, which licenses an 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), implement 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 customer classes. *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).<sup>6</sup> The issue to be decided here requires a determination as to whether small business customers were provided accurate and adequate information that enabled them to compare various service offers.<sup>7</sup> 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).<sup>8</sup> 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

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<sup>6</sup> 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).

<sup>7</sup> This was enunciated in OSBA’s Petition for Declaratory Order. *See* OSBA Petition for Declaratory Order at ¶ 2.

<sup>8</sup> 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.<sup>9</sup>

Fifth, 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.” FES Petition ¶ 9. This case does not support FES’s position. In *Allport*, 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 determination that the Commission was best suited to decide. *Id.* at 560-61. In the matter currently pending before the Commission, FES’s obligation to provide adequate and accurate information to enable consumers to make informed choices and compare prices and services, as well as FES’s standards and billing practices are at issue. Whether FES met these obligations as set forth in the Public Utility Code and the Commission’s regulations is a matter best determined by the Commission. As such, this proceeding is properly before the Commission as articulated in *Allport* under the primary jurisdiction doctrine.

In conclusion, the OCA submits that FES’s second “material question” must fail, as the Commission’s jurisdiction over this matter is clear. The OCA respectfully requests that the Commission answer it in the negative or not at all.

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<sup>9</sup> Furthermore, the Commission rejected FES’s contentions in its *November 14 Order*.



WHEREFORE, the Office of Consumer Advocate respectfully requests that the Commission deny or not answer both "material questions" propounded by the Petition of FirstEnergy Solutions Corp. for Interlocutory Review and Answer to Material Questions. If the Commission undertakes interlocutory review, the OCA submits that both questions must be answered in the negative.

Respectfully Submitted,



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Dated: August 18, 2014  
00188646

CERTIFICATE OF SERVICE

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Small Business Advocate, :  
Petitioner :  
 : Docket No. P-2014-2421556  
v. :  
 :  
FirstEnergy Solutions Corp., :  
Respondent :

I hereby certify that I have this day served a true copy of the foregoing document, the Office of Consumer Advocate's Brief In Response to the Petition of FirstEnergy Solutions Corp. for Interlocutory Review and Answer to Material Questions, 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 18th day of August 2014.

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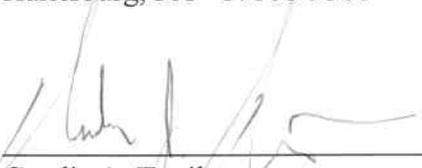
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