



August 18, 2014

VIA E-FILE

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Rosemary Chiavetta, Secretary
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Re: John R. Evans v. FirstEnergy Solutions Corp.; BRIEF OF FIRSTENERGY SOLUTIONS CORP. IN SUPPORT OF PETITION FOR INTERLOCUTORY REVIEW AND ANSWER TO MATERIAL QUESTIONS; Docket No. P-2014-2421556

Dear Secretary Chiavetta:

Enclosed for eFiling with the Commission is FirstEnergy Solutions Corp.'s Brief in Support of Petition for Interlocutory Review and Answer to Material Questions in the above-referenced proceeding. Copies of the Brief are being served on the Presiding Officer, Administrative Law Judge Katrina L. Dunderdale, and on all parties, as indicated on the enclosed Certificate of Service. A copy has also been e-mailed to the Commission's Office of Special Assistants.

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

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Honorable Katrina L. Dunderdale *(via first class mail)*
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Per Certificate of Service

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 FirstEnergy Solutions Corp.'s Brief in Support of Petition 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).

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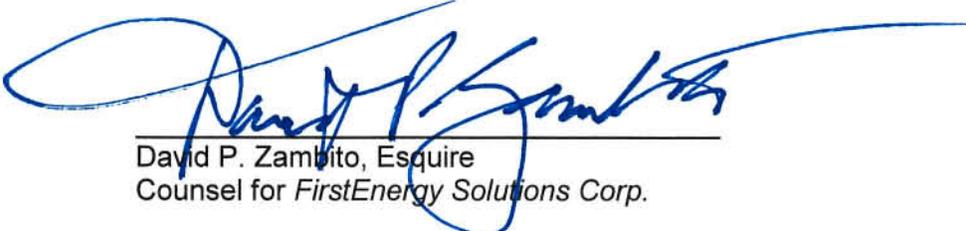
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DATED: August 18, 2014



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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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

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I. INTRODUCTION

In this proceeding, the Office of Small Business Advocate (“OSBA”) filed a Petition for a Declaratory Order (“OSBA Petition”) requesting that the Pennsylvania Public Utility Commission (“Commission”) decide a matter over which it has no jurisdiction, to wit: “that [FirstEnergy Solutions Corp. (“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, Request for Relief. FES filed a Preliminary Objection requesting dismissal of the OSBA Petition on the grounds that the Commission lacks subject matter jurisdiction to interpret provisions of a private contract, and that a customer’s disagreement with an EGS’s interpretation of a clause in a supply contract is properly heard by civil courts. The presiding Administrative Law Judge (“ALJ”) denied the Preliminary Objection by Interim Order dated July 22, 2014 (the “Interim Order”). Compounding the erroneous resolution of FES’s Preliminary Objection, the Interim Order also treats the OSBA Petition as a formal complaint asserting different claims than those actually raised by the OSBA Petition, claims to which FES has had no opportunity to respond. A prehearing conference to address these unasserted claims is scheduled for September 8, 2014.

On August 8, 2014, FES filed its Petition for Interlocutory Review and Answer to Material Questions, seeking review of the Interim Order. Through the instant request for interlocutory review, FES respectfully asks: (i) for the Commission to find that it does not have subject matter jurisdiction over the contract interpretation matter presented by OSBA; (ii) to have the Commission limit the scope of review of the OSBA’s requested relief to that actually contained within the four corners of the OSBA Petition; (iii) for the Commission to grant FES’s Preliminary Objection and dismiss or refuse to consider the OSBA Petition; and (iv) to have the

proceedings in the instant matter, including the September 8 prehearing conference, stayed pending Commission action on the Petition for Interlocutory Review. The lack of immediate Commission action will result in the waste of the Commission's and parties' time and resources in prosecuting and defending not only the deficient OSBA Petition but also a nonexistent complaint, in violation of FES's due process rights.

As explained below, the Commission's recognition that its legal authority with regard to EGSs' sales and marketing and billing does not extend to deciding disagreements over the interpretation of words or phrases in EGS contracts is based on sound policy. Attempted expansion of the Commission's legal authority over EGS contracts to include adjudication of contract disputes, in contravention to well-settled case law, will deter supplier participation and product innovation in Pennsylvania's retail market. Accordingly, the Interim Order should be reversed and FES's Preliminary Objection granted.

II. MATERIAL QUESTIONS PRESENTED

Pursuant to 52 Pa. Code § 5.302(b), FES files this Brief in support of its Petition for Interlocutory Review, which presents the following material questions for review by the Commission:

- (1) Does the Commission lack subject matter jurisdiction to grant the OSBA Petition requesting a declaratory order interpreting a provision of an EGS retail customer supply contract?; and,
- (2) Did the ALJ's Order improperly expand the scope of the requested relief of the OSBA Petition?

The proposed answer to both questions is "yes." If the Commission takes this action, all parties can avoid having to expand substantial resources litigating the OSBA Petition before the material

questions can be reviewed by the Commission. Additionally, 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 and will ensure that due process is afforded to FES.

III. SUMMARY OF ARGUMENT

The OSBA Petition does not allege any violations of the Public Utility Code or the Commission's regulations but rather seeks only an interpretation of the contracts between FES and FES's small business customers. *See* OSBA Petition, Request for Relief; Interim Order, p. 4; OSBA Answer to Preliminary Objection, ¶ 13. Stated differently, the OSBA does not dispute the existence of the pass-through provisions in the contracts nor that FES was billed the ancillary charges from PJM, it simply disagrees with FES's interpretation of the applicability of the pass-through provisions to those charges. The relief requested in the OSBA Petition is that the Commission decide whose interpretation is correct. The Commission lacks the jurisdiction to make that decision.

The Commission, as a creature of statute, has only the powers which are expressly conferred upon it by the legislature and those powers which arise by necessary implication. It must act within, and cannot exceed, its jurisdiction and jurisdiction may not be conferred by parties where none exists. Subject matter jurisdiction is a prerequisite to the Commission's exercise of power to decide a controversy.

FES is a licensed EGS. As an EGS, FES is not a public utility and, accordingly, the Commission's powers and duties with respect to FES are explicitly limited by statute (specifically, by the Pennsylvania Electricity Generation Customer Choice and Competition Act ("Competition Act"), 66 Pa. C.S. § 2801 *et seq.*). See 66 Pa. C.S. §§ 2802(14) (declaring as the policy of the Commonwealth that "the generation of electricity will no longer be regulated as a public utility function except as otherwise provided for in this chapter"); 2806(a) (providing, *inter alia*, that "[t]he generation of electricity shall no longer be regulated as a public utility"); 2809 (listing the requirements on EGSs pursuant to the Competition Act).

Contracts between FES and its customers are private contracts. It is well-settled that the interpretation of private contracts -- as well as the resolution of disputes under them -- is outside of the Commission's jurisdiction. Accordingly, the Preliminary Objection filed by FES should have been granted and the OSBA Petition dismissed.

In its Answer to FES's Preliminary Objection, the OSBA attempted to expand the scope and nature of its declaratory order filing to include a "controversy regarding the billing practices of FES." OSBA Answer to Preliminary Objection, ¶ 14. The Interim Order adopted this argument and by page 2 the Interim Order begins referencing and treating the OSBA Petition as a formal complaint. The Interim Order sets a course for this proceeding that concerns billing methods and marketing practices and is far beyond the scope of the OSBA Petition.¹

When the proper scope of the OSBA Petition is considered, it is clear that this matter boils down to a single point -- the OSBA disagrees with FES's interpretation of one provision of its contracts with small business customers. Because it has long been recognized that the

¹ As will be discussed in more detail below, OSBA cannot broaden the scope of its case to survive a preliminary objection by mere argument; it was incumbent on OSBA to state all the facts it needed to support the limited relief it sought within the four corners of its petition. *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.

Commission is not jurisdictionally empowered to decide private contractual disputes, the relief sought by OSBA is beyond the jurisdiction of the Commission and FES's Preliminary Objection should be granted.

IV. ARGUMENT

A. The Commission Lacks Subject Matter Jurisdiction to Grant the Specific Declaratory Relief Requested by the OSBA Petition.

As explained in more detail below, the Interim Order erred in finding that the scope of the instant declaratory order proceeding is broader than OSBA's request for an interpretation of a specific contractual provision. When the OSBA Petition for declaratory order is viewed within its proper scope, FES's Preliminary Objection must be granted. The interpretation of private contracts between an EGS and its customers is properly reserved for civil courts of competent jurisdiction.

The Commission, as a creature of statute, has only the powers which are expressly conferred by the legislature and those powers which arise by necessary implication. *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977). The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. Pub. Util. Comm'n*, 43 A.2d 348 (Pa. Super. 1945). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967). Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. *Hughes v. Pa. State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), *allocatur denied*, 637 A.2d 293 (Pa. 1993).

Pennsylvania appellate courts have long recognized that the Commission does not have authority to interpret the terms of, or settle disputes under, private contracts. *See Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673, 675 (Pa. 1978) (internal citations omitted)

(explaining that it has long been recognized that “the PUC is not jurisdictionally empowered to decide private contractual disputes between a citizen and a utility”); *Behrend v. Bell Telephone*, 363 A.2d 1152, 1158 (Pa. Super. 1976), *vacated and remanded on other grounds*, 374 A.2d 536 (Pa. 1977) (“The courts retain jurisdiction of a suit for damages based on negligence or breach of contract wherein a utility's performance of its legally imposed and contractually adopted obligations are examined and applied to a given set of facts.”) (citation and footnote omitted); *Adams et al. v. Pa. Pub. Util. Comm’n*, 819 A.2d. 631 (Pa. Cmwlth. 2003); *see also Leveto v. Nat’l Fuel Gas Dist. Corp.*, 366 A.2d 270 (Pa. Super. 1976); *Litman v. Peoples Natural Gas Co.*, 449 A.2d 720 (Pa. 1982).²

The OSBA Petition asks the Commission to adopt OSBA’s interpretation of what constitutes a “pass-through event” under FES’s Small Commercial contract. OSBA Petition, ¶ 11 and Prayer for Relief. The OSBA, admitting that FES was billed for the charges by PJM, requests an interpretation of the contract and argues that “the 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.

The OSBA Petition is not a complaint challenging FES’s marketing practices. Nor does the OSBA Petition assert that FES’s small commercial customer contract lacks any basis for FES to include an RTO Expense Surcharge in the customer’s bill, so that a customer’s bill is inconsistent with its contract. Rather, the OSBA Petition acknowledges that FES’s contract contains a pass-through clause, OSBA Petition ¶ 4, but disagrees with FES’s interpretation of the clause as it applies to the events of January 2014. Indeed, the OSBA admits that “the OSBA is

² The fact that FES is a not “public utility” further supports a legal conclusion that the Commission lacks jurisdiction to interpret its contracts. The Commission’s powers and duties with respect to FES are explicitly limited by statute, specifically the Competition Act, as FES is an EGS and not a public utility. *See* 66 Pa. C.S. §§ 2802(14), 2806(a), 2809.

asking the Commission to interpret the meaning of the pass-through clause in FES's fixed price contracts." OSBA Answer to Preliminary Objection, ¶ 13. This request for an interpretation of a provision in a private contract exceeds the Commission's jurisdiction and is reserved for the civil courts. Indeed, Pennsylvania county courts of common pleas have resolved contractual disputes between EGSs and their customers. *See, e.g., Tech Met, Inc. et al. v. Strategic Energy, LLC* (Court of Common Pleas of Allegheny County – Civil Division, Docket No. GD-05-030407, Memorandum and Order of Court (Wettick, J.) entered June 4, 2014) (A copy of Judge Wettick's Order granting summary judgment in favor of the EGS is attached hereto as **Appendix A**).

The Interim Order also appears to adopt an incorrect OSBA argument that the Commission, in its Final Order on "Guidelines for Use of Fixed Price Labels for Products With a Pass Through Clause" entered on November 14, 2013 at Docket No. M-2013-2362961 ("Pass Through Order"), "devoted an entire proceeding to examining and understanding the terms and conditions contained in fixed price contracts used by EGSs...." Interim Order, p. 4 (citing OSBA Answer ¶ 13). The OSBA further argues that in the Pass Through Order proceeding, FES did not dispute the Commission's authority to resolve a controversy surrounding pass-through clauses in fixed-price contracts." Interim Order, p. 4. Contrary to the OSBA's misleading suggestion, the Pass Through Order proceeding addressed the appropriateness of prospectively using the label "fixed price" for contracts which contain a pass-through clause. Thus, the OSBA's argument in opposition to FES's Preliminary Objection misstated the findings in the Pass Through Order and the recognition of the Commission's limited statutory ability to dictate contract terms between EGSs and their customers.

While the Commission recognized the existence of pass-through clauses allowing an EGS to pass through unanticipated costs, it never engaged in interpreting a pass-through clause's

language or applicability to a particular factual situation. The Pass Through Order proceeding provides no basis for a finding of Commission jurisdiction over the issues raised in the OSBA Petition.

In addition, the expansion of Commission jurisdiction to include the interpretation of particular words and phrases in EGS contracts would be bad policy. The policy of the Commonwealth, as expressed in the Competition Act, is that the generation of electricity be deregulated in order to control prices and encourage product innovation. *See, e.g.*, 66 Pa. C.S. §§ 2802(14), 2806(a), 2809. If the Commission began attempting to interpret words and phrases in EGS contracts as they relate to market developments, or to resolve contractual disputes with customers, it would create substantially higher regulatory risk that will deter EGS participation and product innovation in the Pennsylvania market. Because the OSBA Petition seeks relief beyond the jurisdictional limits of the Commission, the Preliminary Objection of FES should be granted.

B. The Interim Order Sustains the OSBA Petition By Improperly Expanding the Scope of the OSBA's Requested Relief.

The Interim Order improperly expands the scope of the requested relief of the OSBA Petition and exceeds the scope of relief that is proper as a result of a declaratory order action. Section 331(f) of the Public Utility Code, 66 Pa. C.S. § 331(f), provides that the Commission “may issue a declaratory order to terminate a controversy or remove uncertainty.” The Commission has approved the discussion of declaratory order practice before the Commission set forth in the Initial Decision of Administrative Law Judge Susan Colwell in *Petition of Reliant Energy, Inc. for a Declaratory Order*, Docket No. P-00072338 (Order entered June 25, 2008) (“*Reliant*”), p. 9. The *Reliant* Initial Decision explains that a declaratory order is a limited

proceeding designed to declare rights, status, and legal relations between parties based on the facts as presented in the petition. *See Petition of Reliant Energy, Inc. for a Declaratory Order*, Docket No. P-00072338 (Initial Decision dated Dec. 17, 2007, p. 9)(“[A] petition for a declaratory order has a very specific and very limited purpose in jurisprudence. It is not interchangeable with other legal actions and will not be granted or expanded as a matter of course The purpose of a declaratory order is to illuminate an existing right, status or legal relation.”)(citing *Doe v. Johns-Manville Corp.*, 471 A.2d 1252 (Pa. Super. 1984)).³ Also, the Presiding Officer’s Prehearing Order in *Reliant* explained the precision with which a request for declaratory order must be treated:

The term “declaratory order” has a specific legal meaning which prevents its use for any order not fitting its description, as given in this discussion. Further, where a declaratory order is the specific remedy sought, the case is shaped to the legal standard for granting the declaratory order. Either the case meets the standard, or it does not. There is no substitution of remedies.

Reliant, Prehearing Order dated November 15, 2007, p. 8 n.5.

Further, because such relief is discretionary, the Commission is not required to issue a declaratory order and, indeed, the Commission should be especially hesitant to issue a declaratory order where, as in the instant proceeding, there are any outstanding disputed facts. *See Harleysville Mutual Ins. Co. v. Phila. Transp. Co.*, 255 A.2d 516, 518 (Pa. 1969) (citing *McWilliams v. McCabe*, 179 A.2d 222 (Pa. 1962)); *Pa. Power Co. v. Township of Pine*, 926 A.2d 1241, 1246 (Pa. Cmwlth. 2007)(noting the Commission’s appropriate refusal to issue a declaratory order because, *inter alia*, there were outstanding issues of fact).

³ The OSBA Petition improperly seeks to have the Commission order the refund, with interest, of all funds received from the collection of the PJM ancillary charges. *See OSBA Petition, Request for Relief; Interim Order*, p. 4; OSBA Answer to Preliminary Objection, ¶ 13. This request demonstrates that the OSBA Petition seeks more than the limited scope of relief available through a declaratory order action. As discussed in this Section B., proper declaratory relief is limited to a declaration of the rights, status, and legal relations between parties.

Faced with the limited available relief under a petition for a declaratory order, and the Commission's inability to adjudicate private contractual disputes, the OSBA attempted to expand the parameters of its filing in order to survive FES's Preliminary Objection. Only in its Answer to the Preliminary Objection did 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 cannot broaden the scope of its case to survive a preliminary objection by mere argument. It was incumbent on OSBA to state all of the facts that 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.

The Interim Order improperly adopted the OSBA's expanded arguments and treats the OSBA Petition as a formal complaint proceeding involving a purported dispute regarding billing practices and adequate disclosure in sales and marketing practices. The incorrect treatment of the OSBA Petition for a Declaratory Order as a broad-based complaint proceeding begins on page 2 of the Interim Order, in the very first sentence of the Discussion, where the ALJ notes "FES objects to the formal complaint filed by Mr. Evans, and asks the Commission to dismiss the formal complaint for lack of subject matter jurisdiction." Interim Order, p. 2 (emphasis added). Throughout the Interim Order, it discusses the OSBA Petition as if it were in fact a formal complaint and imbues the Petition with the attributes of a formal complaint rather than the limited declaratory order petition it is. For example, the Interim Order discusses how OSBA should have an opportunity to argue, "through the pendency of this proceeding," that FES violated its legal obligations to "provide adequate and accurate customer information to enable customers, including small business customers, to make informed choices regarding the purchase

of all electricity services,” Interim Order, p. 8, how the OSBA Petition involves “allegations of a failure by Respondent [FES] to comply with the Commission’s regulations and statutes,” Conclusion of Law No. 1, and how “the OSBA Petition raises “claims” that FES may have “failed in some way to provide adequate and accurate customer information....” Conclusion of Law No. 2, Interim Order, pp. 8-9.

To the contrary, the OSBA Petition requested a declaration regarding the interpretation of a contractual provision. Because the OSBA Petition specifically sought the remedy of a declaratory order interpreting FES’s small commercial customer contract, it is inappropriate to use it to explore other unasserted allegations that do not meet the legal standard for declaratory relief.

Further, even if the OSBA Petition had made allegations of failure to comply with the law, such allegations would have had to be supported by issues of fact raised in the context of a complaint proceeding to which FES could respond and in which a complete factual record could be developed. Moreover, as a matter of fundamental due process, FES is entitled to notice and an opportunity to be heard regarding each and every individual allegation of misconduct. Such due process cannot be properly afforded in the context of a declaratory order action, much less in a complaint proceeding based on claims newly asserted in a petitioner’s answer to a preliminary objection.⁴

As explained above, the limited purpose of a declaratory order proceeding is to illuminate an existing right, status or legal relation. *See Reliant Energy, supra*. The OSBA Petition

⁴ As an administrative body, the Commission is bound by the due process provisions of constitutional law and by fundamental fairness. *Popowsky v. Pa. Pub. Util. Comm’n*, 805 A.2d 637 (Pa. Cmwlth. 2002). Due process is required in administrative proceedings, particularly when the administrative action is adjudicative and involves substantial property rights. *See ARRIPA v. Pa. Pub. Util. Comm’n*, 792 A.2d 636 (Pa. Cmwlth. 2002)(citing *Randolph v. Pa. Blue Shield*, 717 A.2d 508 (Pa. 1998)); *Conestoga Nat’l Bank v. Patterson*, 275 A.2d 6 (Pa. 1971). Due process requires notice and an opportunity to be heard. *See ARRIPA; Gross v. State Bd. of Psychology*, 825 A.2d 748 (Pa. Cmwlth. 2003); *Gruff v. Pa. Dep’t of State*, 913 A.2d 1008 (Pa. Cmwlth. 2006).

requests only the interpretation of a contractual provision – nothing more – and, as explained above, the Commission lacks subject matter jurisdiction to grant such requested relief. Accordingly, FES’s Preliminary Objection should be granted.

V. STAY OF PROCEEDING IS APPROPRIATE

A stay of this proceeding is appropriate pending Commission action on this request for interlocutory review. Without a stay, FES will be forced to proceed with the substantive aspects of the instant matter, including aspects which were not raised in the OSBA Petition and to which FES has not had a meaningful opportunity to respond, while this Petition for Interlocutory Review awaits action by the Commission. In consideration of the need for a thorough review, the Commission, by Secretarial Letter dated August 13, 2014, has extended the consideration period. Meanwhile, a Prehearing Conference Order dated August 1, 2014 schedules a September 8, 2014 telephonic prehearing conference, and appears to treat the conference as an evidentiary hearing requiring the parties to, among other things, prepare and distribute exhibits and be prepared to call witnesses. (A copy of the Prehearing Conference Order is attached hereto as **Appendix B**). The Commission should, in order to protect the due process rights of FES and avoid the unnecessary wasting of the Commission’s and the parties’ resources, stay the proceeding pending its resolution of the instant Petition for Interlocutory Review. FES cannot meaningfully prepare for an evidentiary hearing where it does not know the specific scope and nature of the allegations against it.

VI. CONCLUSION

The proper scope of relief for a petition for declaratory order is limited to a declaration of a right, status, or legal relationship. The OSBA Petition requested only a declaration regarding the interpretation of a contractual provision in FES's contracts with certain customers. The Commission lacks subject matter jurisdiction to interpret contracts. Accordingly, the Interim Order erred by not granting FES's Preliminary Objection. The Commission should dismiss or refuse to consider the OSBA Petition.

VII. REQUEST FOR RELIEF

WHEREFORE, for the reasons set forth above, FirstEnergy Solutions Corp. respectfully requests that this Honorable Commission:

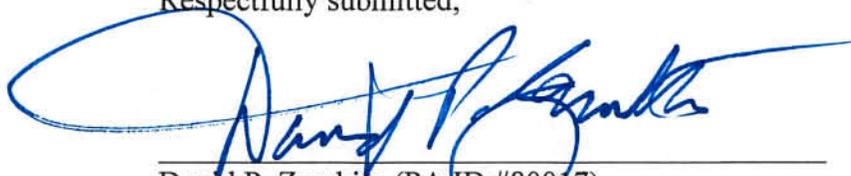
(i) find that the Commission does not have jurisdiction over the contract interpretation matter presented by OSBA;

(ii) limit the scope of the review of the OSBA's requested relief to that contained within the four corners of the OSBA Petition;

(iii) grant FES's Preliminary Objection and dismiss or decline to answer the OSBA Petition; and,

(iv) stay the proceedings in the instant matter pending Commission action on the Petition for Interlocutory Review.

Respectfully submitted,



David P. Zambito (PA ID #80017)

D. Troy Sellars (PA ID #210302)

Cozen O'Connor

305 North Front Street, Suite 400

Harrisburg, PA 17101-1236

Telephone: (717) 703-5892

Facsimile: (215) 989-4216

E-mail: dzambito@cozen.com

tsellars@cozen.com

Amy M. Klodowski, Esquire (PA ID #28068)

FirstEnergy Solutions Corp.

800 Cabin Hill Drive

Greensburg, PA 15601

Telephone: (724) 838-6765

Facsimile: (234) 678-2370

E-mail: aklodow@firstenergycorp.com

Dated August 18, 2014

Counsel for *FirstEnergy Solutions Corp.*

APPENDIX A

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

TECH MET, INC., ALFRED
POZZUTO, G. MONEY, INC.
d/b/a NORTH PARK
CLUBHOUSE, MR. MAGIC
CAR WASH, INC., and
JOHN TIANO, on their own
behalf and on behalf of all
others similarly situated,

Plaintiffs

vs.

STRATEGIC ENERGY, LLC,

Defendant

CIVIL DIVISION

NO. GD-05-030407

MEMORANDUM AND ORDER OF COURT

HONORABLE R. STANTON WETTICK, JR.

Counsel for Plaintiffs:

Philip A. Goldblum, Esquire
Suite 160
285 E. Waterfront Drive
Homestead, PA 15120

Counsel for Defendants:

Kevin C. Abbott, Esquire
Nicolle R. Snyder Bagnell, Esquire
Reed Smith Center
225 Fifth Avenue
Pittsburgh, PA 15222-2716

MEMORANDUM AND ORDER OF COURT

WETTICK, J.

This is a breach of contract class action brought against defendant, Strategic Energy, LLC ("Strategic") on behalf of all Pennsylvania commercial/business customers who entered into a Power Supply Coordination Service Agreement ("Service Agreement") with Strategic.¹ Plaintiffs contend that they have been overcharged.

Strategic is an electricity supplier. Strategic purchases electricity in large blocks from Duquesne Light or other sources which it resells to customers pursuant to the terms and conditions of its Service Agreement with the customer. With limited exceptions, through the Service Agreement, Strategic guarantees its customers that the price for electricity will not exceed a specified amount (the price set forth on its Pricing Attachment) for five years.²

Plaintiffs contend that Strategic has charged them amounts in excess of the amounts permitted by the Service Agreement. They seek to recover the difference between the amount paid for the electricity and the lesser amount permitted by the Service Agreement.

¹Attachment 1 is the Service Agreement between Strategic and Tech-Met Services, Inc. The other named plaintiffs executed similar writings; but see p. 5.

²Strategic contends that when electricity was undergoing deregulation in 2000, there was much uncertainty regarding electricity costs. The benefit of buying from Strategic, as opposed to buying directly from Duquesne Light, was to achieve price certainty in an uncertain market. (12/9/13 Argument T. 23.)

Strategic contends that its prices have never exceeded the amounts permitted by the Service Agreement.

The subject of this Memorandum and Order of Court is Strategic's motion for summary judgment seeking dismissal of plaintiffs' Complaint on the ground that plaintiffs were never overcharged.

Relevant discovery has been completed. Thus, the issue is whether the evidence, construed in plaintiffs' favor, will support a verdict in plaintiffs' favor.

The prices that Strategic may charge its customers are governed by the following provisions of the Service Agreement:

4. PSC Services Fee:

The PSC Services Fee is 0.3 cents per kilowatt-hour for each kilowatt-hour of Electricity provided under this Agreement. The PSC Services Fee is included in the price paid by the Buyer.

7. Price:

The Price to be paid by Buyer for the Electricity and BSC Services provided hereunder during the Term of this Agreement shall not exceed that set forth on the Pricing Attachment below. All pricing terms are inclusive of applicable costs for Energy, Capacity, Transmission, Ancillary Services, Delivery Services, applicable taxes up to the Point of Delivery, overhead expenses as defined by Strategic Energy, and the PSC Services Fee.

STRATEGIC'S INTERPRETATION

Strategic contends that under the Service Agreement (Attachment 1), the price it may charge shall not exceed the price set forth "on the Pricing Attachment" (Attachment 2). Plaintiffs do not challenge the evidence showing that Strategic has never charged a

price that exceeded that set forth on the Pricing Attachment. Thus, according to Strategic, summary judgment should be entered dismissing plaintiffs' Complaint.

PLAINTIFFS' INTERPRETATION

According to plaintiffs, the price set forth in the Pricing Attachment is only a ceiling. The actual price, if it does not exceed the ceiling, consists of the sum of Duquesne Light's costs for energy, capacity, transmission, ancillary services, delivery services, applicable taxes up to the point of delivery, overhead expenses as defined by Strategic Energy and PSC Services Fee. Under this interpretation of ¶ 7, the maximum price that Strategic may charge is the amount of Duquesne Light's actual costs plus 0.3 cents per kilowatt-hour.

COURT'S INTERPRETATION

I find that the only reasonable reading of ¶ 7 is that offered by Strategic.

The first sentence of ¶ 7 permits Strategic to charge the amount set forth in the Pricing Attachment. The second sentence protects the buyer by explaining that the price set forth in the Pricing Attachment includes costs which Strategic incurs for energy, capacity, transmission, ancillary services, delivery services, applicable taxes up to the point of delivery, overhead expenses as defined by Strategic, and the PSC Services Fee.

Paragraph 4 describes the PSC Services Fee and reiterates that it is included in the price paid by the buyer.

Plaintiffs contend that the first sentence of ¶ 7 only establishes a maximum price that may be charged because ¶ 7 states that the price "shall not exceed that set forth in

the Pricing Attachment below.” (Emphasis added.) According to plaintiffs, a contract uses the phrase “shall not exceed” only when there is another method for calculating price that may be less than the price set forth in the Pricing Attachment.

However, the Service Agreement cannot be read in the manner which plaintiffs propose unless the Service Agreement also provides for a lesser price under certain circumstances. In other words, it could not have been the intention of the parties for the first sentence of ¶ 7 to be construed as only setting a maximum price if the Agreement does not also include a lesser price that shall be charged under some circumstances.

Plaintiffs apparently propose that the second sentence of ¶ 7 be read as follows: “The price to be paid by the Buyer for the electricity and PSC services provided under the Service Agreement shall be the sum of the costs Strategic incurs for energy, capacity, transmission, ancillary services, delivery services, applicable taxes up to the point of delivery, overhead expenses as defined by Strategic Energy, and the PSC Services Fee.”

However, this is not a reasonable construction of the second sentence of ¶ 7. There is nothing in the language of ¶ 7 that in any way suggests that the price shall be based on Strategic’s costs. Thus, I am left with a single method governing the price that may be charged.

If ¶ 7 consisted of only the first sentence, the only reasonable construction of the Agreement would be that Strategic is permitted to charge the amount set forth in the Pricing Attachment. This is so because pricing is governed by ¶ 7, and this is the only provision governing the price to be paid. Where a second sentence is added that does

not refer to the price to be paid, there is no difference between the two-sentence paragraph and the one-sentence paragraph.

A contract shall be construed to give meaning to each sentence in ¶ 7. This is accomplished only if the second sentence is construed as describing costs that are included in the price to be paid by the buyer as set forth in the Pricing Attachment. The language of the second sentence does not support any other construction that gives meaning to both sentences.

At least one of the Service Agreements between plaintiffs and Strategic, at ¶ 7, included a second paragraph which reads as follows:

If, during the term of this Agreement, regulatory changes create additional charges, not currently included in the Price, which Buyer would be subject to regardless of whether Buyer was receiving service from Strategic Energy, the Host Utility or any other provider of electric service ("Incremental Charge"), and Strategic Energy is unable to mitigate such incremental Charge, then Strategic Energy shall pass through such incremental Charge to be paid by Buyer above the Price.

Plaintiffs contend that the inclusion of this second paragraph supports plaintiffs' position that the price to be paid consists of the sum of the costs. However, this additional paragraph is equally consistent with an interpretation that the price to be paid shall not exceed that set forth in the Pricing Attachment, but Strategic may pass on an incremental charge to be paid by the buyer "above the Price."

While I base my ruling on the language of the Agreement, I agree with Strategic that parol evidence also supports its construction of ¶ 7.

Strategic buys electricity at different times and at different prices. None of the purchases can be traced to specific customers. Thus, there is no way to calculate the costs of energy for individual customers.

The Service Agreements between Strategic and plaintiffs do not require Strategic to purchase only from Duquesne Light. Furthermore, it appears that Strategic does not purchase exclusively from Duquesne Light. These purchases from other sellers are not segregated from Strategic's purchases from Duquesne Light. (12/9/13 Argument T. 12.) Plaintiffs never explain how costs of energy will be calculated in these circumstances.

There is testimony in the record that where Strategic successfully managed down the price (see definition of *Power Supply Coordination (PSC) Services* at ¶ 5 of the Service Agreement), Strategic did not charge the full amount provided for in the first sentence of ¶ 7. (Wilson Dep. T. 124-28.) This is consistent with the use of the phrase *shall not exceed* in the first sentence of ¶ 7.

Finally, common sense dictates that Strategic would not have agreed to provide price certainty over a five-year period for a nominal payment of .3 cents per kilowatt-hour per month. See Deposition of Vogel at 148-49 and Exhibit G of Vogel Deposition—.3% of monthly charge for 6200 kilowatts is \$18.60.

CONCLUSION

In this case, there are only two interpretations offered by the parties. The language of the Service Agreement offers no support for calculating a price based on the sum of Strategic's costs for energy, capacity, transmission, ancillary services, delivery services, applicable taxes up to the point of delivery, overhead expenses as defined by Strategic Energy, and the PSC Services Fee. This leaves a construction supported by the language of ¶ 7, namely "the Price to be paid by the Buyer for the

Electricity and PSC Services provided hereunder during the Term of this Agreement shall not exceed that set forth in the Pricing Attachments below.”

For these reasons, I grant defendant’s motion for summary judgment and dismiss plaintiffs’ Complaint with prejudice.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

TECH MET, INC., ALFRED
POZZUTO, G. MONEY, INC.
d/b/a NORTH PARK
CLUBHOUSE, MR. MAGIC
CAR WASH, INC., and
JOHN TIANO, on their own
behalf and on behalf of all
others similarly situated,

Plaintiffs

vs.

STRATEGIC ENERGY, LLC,

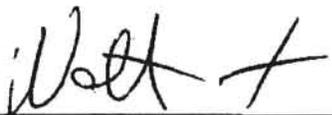
Defendant

NO. GD-05-030407

ORDER OF COURT

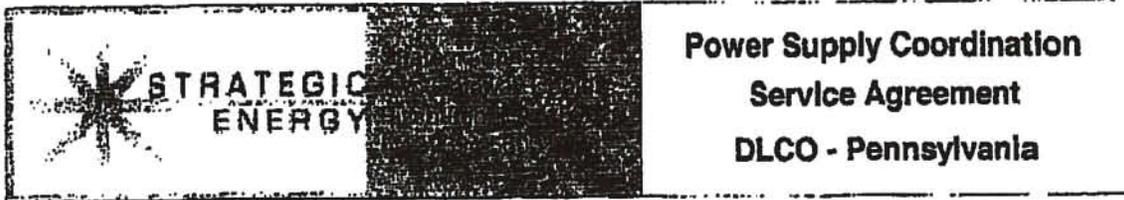
On this 4 day of June, 2014, it is hereby ORDERED that defendant's motion for summary judgment is granted, and plaintiffs' Complaint is dismissed with prejudice.

BY THE COURT:



WETTICK, J.

November 2000 - January 2006



**Power Supply Coordination
Service Agreement
DLCO - Pennsylvania**

This Agreement is entered into on September 28, 2000 and is between Strategic Energy L.L.C. ("Strategic Energy") and Tech-Met Services Inc. ("Buyer").

1. Nature of Service:

Upon execution of this Agreement by both parties, Strategic Energy agrees to provide Power Supply Coordination Services and Electricity for use at Buyer's Facilities described herein and Buyer agrees to receive and pay for Power Supply Coordination Services and Electricity for use at the Buyer's Facilities described herein. Strategic Energy will deliver Electricity to the Host Utility for delivery to Buyer's Facilities.

2. Term:

This Agreement shall be effective upon execution by both parties. Service hereunder shall commence as soon as practicable, but no later than on the second meter read date following execution by both parties and will continue through the term specified in the Pricing Attachment unless sooner terminated as provided herein.

3. Billing:

Where permitted and practicable, Buyer shall receive one bill for both Strategic Energy's services and all charges assessed by Buyer's Host Utility. Otherwise, Buyer shall receive separate bills from Strategic Energy and Buyer's Host Utility.

4. PSC Services Fee:

The PSC Services Fee is 0.3 cents per kilowatt-hour for each kilowatt-hour of Electricity provided under this Agreement. The PSC Services Fee is included in the price paid by Buyer.

5. Definitions:

As used herein, unless the context clearly indicates otherwise, the following terms shall have the meaning set forth below:

"Ancillary Services"

means wholesale electric services and products not included in the definitions of Electricity, Capacity, Distribution or Transmission, but required to facilitate delivery of Energy to the Host Utility.

"Capacity"

means the ability to provide Energy as needed, as measured in kilowatts (kW) or megawatts (MW).

"Distribution"

means all delivery service for Energy, Capacity and applicable Ancillary Services provided by the Host Utility.

"Electricity"

means Energy, Capacity, Transmission, Ancillary Services, distribution losses, and all charges for delivery services.

"Energy"

means electrical energy, as measured in kilowatts (kW) or megawatts (MW).

"Facility (ies)"

means the plants, works, operations and/or facilities that are owned, controlled, operated and/or managed by Buyer, which are set forth on the Pricing Attachment and covered by this Agreement.

"Firm"

means that parties may only suspend performance hereunder to the extent that such performance is prevented for reasons of Force Majeure.

"Force Majeure"

means an "Act of God" or unexpected and disruptive event beyond the control of either party that interferes with either party's ability to perform under this Agreement.

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ATTACHMENT 1



5. Definitions (cont.):

"Host Utility"

means any investor-owned utility, municipal utility, public utility, or other provider of electric lines whose system is directly interconnected with and which delivers Electricity to Buyer's Facilities.

"Point(s) of Delivery"

shall mean the point(s) where Electricity is delivered to the Host Utility.

"Power Supply Coordination (PSC) Services"

are the services provided by Strategic Energy in selecting the optimum mix of Electricity supplies (including provider of last resort service) to match the Facility load and selling any excess Electricity in order to maximize reliability and minimize cost in an effort to manage down the Price.

"Transmission"

means all delivery services for Energy, Capacity and applicable Ancillary Services to the Host Utility, at any voltage level, which are regulated by the Federal Energy Regulatory Commission ("FERC").

6. Type of Service:

Firm - subject only to Force Majeure.

7. Price:

The Price to be paid by Buyer for the Electricity and PSC Services provided hereunder during the Term of this Agreement shall not exceed that set forth on the Pricing Attachment below. All pricing terms are inclusive of applicable costs for Energy, Capacity, Transmission, Ancillary Services, Delivery Services, applicable taxes up to the Point of Delivery, overhead expenses as defined by Strategic Energy, and the PSC Services Fee.

8. Billing and Payment:

Depending on the Host Utility's meter read dates, Strategic Energy will receive Buyer's Electricity usage information monthly from the Host Utility. Within 10 days of receiving Buyer's usage information from the Host Utility, Strategic Energy will deliver an invoice to Buyer for amounts due. If Buyer has Facilities with different meter read dates and Buyer has chosen to receive one consolidated bill for all Facilities, Strategic Energy may choose to invoice on the day of the month that Strategic Energy deems appropriate.

9. Credit:

If Strategic Energy has good faith concerns about the creditworthiness of Buyer, Strategic Energy may demand that Buyer provide reasonable credit assurances. If such credit concerns cannot be resolved, Strategic Energy may require Buyer to provide a credit enhancement, including but not limited to, an escrow agreement to provide a mechanism for timely payment, letter of credit, parental guaranty, or surety bond. If such requested credit enhancement is not provided, then Strategic Energy may suspend deliveries under this Agreement.

10. Late Payment:

Payment to Strategic Energy is due 15 calendar days from receipt of invoice. If Buyer fails to remit payment in full by the due date, interest will be assessed on the late balance at the rate of 1.5% per month.

11. Title, Control and Possession:

Title to and control and possession of Electricity shall pass from Strategic Energy to Buyer at the Point of Delivery.

12. Load Change Information:

Buyer shall inform Strategic Energy if Buyer's monthly peak demand will vary from Buyer's historical monthly peak demand by more than 1,000 kilowatts or five percent (5%), whichever is greater. Buyer shall also inform Strategic Energy if Buyer's on-peak versus off-peak usage ratio will increase by twenty-five percent (25%) versus the historical ratio at the time of execution of this Agreement. If Buyer does not inform Strategic Energy in advance of such changes, any resulting balancing or scheduling penalties shall be borne by Buyer. In addition, if Buyer's monthly peak demand varies by more than 1,000 kilowatts or five percent (5%), whichever is greater, or the on-peak versus off-peak usage ratio increases by twenty-five percent (25%) or more, Strategic Energy has the right to renegotiate the Price hereunder.

13. Agreement to Indemnify:

Subject to the limitations set forth herein, each party shall defend, indemnify and hold harmless the other party, its affiliates and their respective employees, officers, agents or contractors against any damages and expenses, including reasonable attorneys' fees, incurred by any of them (including expenses and costs incurred by either party in enforcing this Agreement) arising out of a party's or its employees', contractors' or agents' acts, omissions or breaches of any obligations hereunder.

14. Limitation of Liability:

Liability is limited to direct actual damages as the sole and exclusive remedy and all other remedies or damages (at law, in equity, tort, contract or otherwise) are expressly waived. In no event shall either party be liable to the other for any incidental, consequential, or punitive damages, lost profits or other business interruption damages.

15. Auditing:

Each party shall have the right, at its sole expense and upon prior written notice, to examine the records of the other party to verify the accuracy of any statement, charge, notice or computation made pursuant to this Agreement. However, no adjustments shall be made to any statement charge, notice or computation after the lapse of twenty-four (24) months from the date of the last rendition.

16. Termination:

This Agreement may be terminated at any time after the date hereof by, (i) mutual consent in writing by Buyer and by Strategic Energy, (ii) Strategic Energy if there has been a material misrepresentation or breach of warranty, covenant or condition on the part of Buyer herein, including but not limited to the failure to pay when due any amount due hereunder and the failure to cooperate with Strategic Energy in the performance of its duties hereunder, or by Buyer if there has been a material misrepresentation or breach of warranty, covenant or condition on the part of Strategic Energy herein, including but not limited to the failure to provide PSC Services, (iii) Strategic Energy if, in its determination, there has been a material change in any law or in any technological application such that the continued performance of the PSC Services has been rendered impracticable, or (iv) pursuant to the provisions set forth in Paragraph 24.

17. Effect of Termination:

In the event of termination as provided in Paragraph 16 above, all further obligations of Strategic Energy to Buyer and of Buyer to Strategic Energy under this Agreement shall terminate without further liability of Buyer or Strategic Energy, except for the payment by Buyer of any sums due and owing to Strategic Energy for services rendered prior to the termination date and any indemnification obligation of either party which has arisen hereunder.

18. Choice of Law:

As to all matters of construction and interpretation, this Agreement shall be construed, interpreted, and governed under and by the laws of the Commonwealth of Pennsylvania, without regard to its choice of law provisions.

19. Parties, Assignment:

This Agreement shall inure to and benefit the parties hereto and their permitted successors and assigns. Neither party may assign this Agreement without the prior written consent of the other party, which consent shall not be unreasonably withheld.

20. Waiver:

No waiver by either party of any default or defaults by the other party under this Agreement shall operate as a waiver of any future default or defaults, whether of a like or different character or nature.

21. Severability:

The various provisions of this Agreement are severable. The invalidity, illegality or unenforceability of any portion or provision shall not affect the validity, legality or enforceability of any other portion or provision of this Agreement.

22. Entire Agreement:

This Agreement contains the entire understanding of the parties with respect to the subject matter contained herein. There are no promises, covenants or understanding other than those expressly set forth herein. This Agreement may only be amended by a written instrument executed by both parties.

23. Notices and Correspondence:

Any notice or other document to be given or served hereunder or under any document or instrument executed pursuant hereto shall be in writing or orally with a written confirmation delivered within a reasonable time and shall be delivered to the appropriate address specified below. Notice sent by facsimile or other electronic means shall be deemed to have been received by the close of the business day on which it was transmitted or such earlier time as is confirmed by the receiving party. Notice delivered by courier shall be deemed to have been received on the business day after it was sent or such earlier time as is confirmed by the receiving party. Notice delivered by mail shall be deemed to have been received at the end of the third business day after the date of mailing by prepaid registered mail, except that when there is a strike affecting delivery of mail, all notices shall be delivered by courier or by facsimile or other electronic means. Notices delivered orally shall be deemed to have been received when made provided that a written confirmation is received within a reasonable time.

Strategic Energy
Attn: Customer Service Manager
Two Gateway Center
Pittsburgh, PA 15222
Phone: (412) 394-5600
Fax: (412) 394-6578

Tech-Met Services Inc.
Attn: Scott Cupp
15 Allegheny Square
Glasport, PA 15045
Phone: (412) 678-8277
Fax: (412) 678-8348

24. Change of Property Management Company:

In the event Buyer is a property management company and Buyer's property management agreement is terminated for any property covered by this Agreement, Buyer may terminate this Agreement with respect to said property upon thirty (30) days written notice to Strategic Energy.

25. Counterparts:

This Agreement may be executed in one or more than one counterpart, and each executed counterpart shall be considered an original, all of which together shall constitute one and the same Agreement.

IN WITNESS WHEREOF the parties have caused this Agreement to be duly executed.

STRATEGIC ENERGY, L.L.C.
By: [Signature]
Title: Director
Date: 10/06/00

Tech-Met Services, Inc.
By: [Signature]
Title: OFFICE MGR.
Date: OCTOBER 2, 2000

Post-It® Fax Note	7871	Date	10-2-00	# of pages	3
To	BILEAN A. PEREZ	From	SCOTT CUPP		
Co./Dept.	STRATEGIC ENERGY	Co.	TECH MET		
Phone #		Phone #			
Fax #	412-394-6677	Fax #			

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STRATEGIC ENERGY

**PRICING ATTACHMENT TO POWER SUPPLY
COORDINATION SERVICES AGREEMENT**

SEL Proprietary

Two Gateway Center
Pittsburgh, PA 15222
(412) 394-8900

dated September 28, 2000 between
STRATEGIC ENERGY L.L.C.
and
Teach-Mat Services Inc.
from November 2000 to January 2008

Location	Host Utility	Account Number	Utility Rate Class	DLC's Total Price (cents/kWh)	Strategic Energy Ceiling Price (cents/kWh)	First Year Projected Savings (%)	Estimated Annual kWh	First Year Projected Savings (\$)
9th & Allegheny	DLCO	1000003757002	GM (Ind.)	17.73	15.67	11.60	76,200	1576
9th & Allegheny	DLCO	1000003757004	GM (Com.)	7.59	7.49	1.30	415,300	418
Totals							491,500	\$1,994.00

Billing Agent Authorization/Change of Address Form

To: Duquesne Light Company Customer Service Department
1-888-393-7100
fax: 412-393-6037 or 412-393-6042

The undersigned customer elects to have Strategic Energy L.L.C. act as billing agent on its behalf for receipt and payment of charges assessed by Duquesne Light.

Please change the billing address for the account(s) set forth below:

Federal Tax ID: 25-1687776

Phone Number: 412-678-3277

Effective Date of Change: November 2000

Customer Name: Tech-Met Services Inc.

Contact Name: Scott Cupp

Address: 15 Allegheny Square
Glassport, PA 15045

Account Numbers:

1000003757002

1000003757004

Customer authorizes Strategic Energy to request billing address change.

Scott Cupp
Customer Authorized Signature

OCTOBER 2, 2000
Date

New Billing Address:

Tech-Met Services Inc.
Strategic Energy, L.L.C.
Attn: Billing Department
Two Gateway Center, 8th Floor
Pittsburgh, PA 15222
412-394-5800

Agency Authorization

This Agency Authorization is entered into on November 1, 2000 and is between Strategic Energy LLC ("Strategic Energy") and Tech-Mat Services Inc. ("Buyer").

1. In conjunction with selecting Strategic Energy to be its provider of electricity, Buyer requests that Strategic Energy provide a single monthly invoice to contain the monthly charges of both Strategic Energy and Duquesne Light Company ("Duquesne Light").
2. In order to provide a single invoice to Buyer, Buyer desires that Strategic Energy act as Billing Agent on behalf of Buyer, and Buyer will authorize Duquesne Light to change the billing address for Buyer's account(s).
3. In its role as Billing Agent, Strategic Energy shall:
 - a. receive the invoices generated by Duquesne Light for the services rendered to Buyer; and
 - b. generate a single bill to contain the charges incurred for both the services rendered by Strategic Energy and Duquesne Light.

STRATEGIC ENERGY LLC
By: [Signature]
Title: Director
Date: 10/16/00

Tech-Mat Services Inc.
By: [Signature]
Title: OFFICE MGR.
Date: OCTOBER 2, 2000

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Two Gateway Center
Pittsburgh, PA 15222
(412) 394-5900

**PRICING ATTACHMENT TO POWER SUPPLY
COORDINATION SERVICES AGREEMENT**

dated September 28, 2008 between
STRATEGIC ENERGY L.L.C.
and
Tech-Mat Services Inc.
from November 2000 to January 2008

SEL Proprietary

Location	Host Utility	Account Number	Utility Rate Class	DLCO's Total Price (cents/kWh)	Strategic Energy/ Calling Price (cents/kWh)	First Year Projected Savings (%)	Estimated Annual kWh	First Year Projected Savings (\$)
GM & Allegheny 9th & Allegh 815	DLCO	1000005757002	GM (Ind.) GM (Com.)	17.73 7.59	18.67 7.49	11.60 1.30	76,300 416,500	1578 418
Totals		Accounts: 2					491,800	\$1,994.00

APPENDIX B

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

John R. Evans, Small Business Advocate	:	
	:	
v.	:	P-2014-2421556
	:	
FirstEnergy Solutions Corporation	:	

PREHEARING CONFERENCE ORDER

A telephonic prehearing conference in this case is scheduled for Monday, September 8, 2014, at 10:00 a.m. To participate in the hearing, you must dial the toll-free number listed below. You will be prompted to enter a PIN number, which is also listed below. You will be asked to speak your name and then the telephone system will connect you to the hearing. If you have any witnesses you want to have present during the hearing, you must provide them with the telephone number and PIN number.

Toll-free Bridge Number: 1-855-750-1027

PIN Number: 050995

You must call into the hearing on the scheduled day and time. If you fail to do so, your case will be dismissed. You will not be called by the Administrative Law Judge.

The parties also are hereby directed to comply with the following requirements:

1. A request for a change of the scheduled hearing date must state the agreement or opposition of other parties, and must be submitted in writing no later than five (5) days prior to the hearing. 52 Pa. Code §1.15(b). Requests for changes of hearing dates

must be sent to me and all parties of record. The correct address is:

Pennsylvania Public Utility Commission
Office of Administrative Law Judge
Piatt Place, Suite 220
301 Fifth Avenue
Pittsburgh, PA 15222
Telephone: (412) 565-3550
Fax: (412) 565-5692

Changes are granted only in rare situations where good cause exists.

2. If you intend to present any documents or exhibits for my consideration at the hearing, you must send three (3) copies of each document to me, and one (1) copy of each document to every other party in this case. Your documents or exhibits must be received by me and every other party one (1) week before the scheduled hearing. Be sure that you serve me directly with a copy of any document that you file in this proceeding at the time of its filing. If you send me any correspondence or document, you must also send a copy of that correspondence or document to every other party. For your convenience, a copy of the Commission's current service list of all parties to this proceeding is enclosed with this Order.

3. Each party must prepare and distribute a prehearing memorandum which sets forth the history of the proceeding, the issues you intend to present, and a listing of your proposed witnesses and the subject of their testimony.

4. Commission policy promotes settlements. 52 Pa. Code §5.231(a). The utility will contact the customer at least one (1) week before the scheduled hearing to talk about a possible settlement of this case. Even if you are unable to settle this case, you may still resolve many questions or issues during your talks. If an agreement is reached, a formal hearing will not be necessary and the scheduled hearing will be cancelled.

5. Pursuant to 52 Pa. Code §§1.21 & 1.22, you may represent yourself, if you are an individual, or you may have an attorney licensed to practice law in the Commonwealth of Pennsylvania, or admitted *Pro Hac Vice*, represent you. However, if you are a partnership, limited liability company, corporation, trust, association, or governmental agency or subdivision,

you must have an attorney licensed to practice law in the Commonwealth of Pennsylvania, or admitted *Pro Hac Vice*, represent you in this proceeding. Unless you are an attorney, you may not represent someone else. Attorneys shall insure that their appearance is entered in accordance with the provisions of 52 Pa. Code §1.24(b).

6. If you intend to subpoena witnesses for the hearing, you should review the procedures established in 52 Pa. Code §5.421. You must submit your written application to me sufficiently in advance of the hearing date so that the other parties will have the required ten (10) days' notice to answer or object, and so that you will have enough time to receive the subpoena and serve it.

7. Any party may conduct discovery to learn the factual basis of another party's position in this case. However, 52 Pa. Code §5.331(b) provides, in relevant part, that "[a] party shall initiate discovery as early in the proceedings as reasonably possible." Additionally, 52 Pa. Code §5.322 provides, in relevant part, that "parties are encouraged to exchange information on an informal basis." All parties are urged to cooperate in informal information exchanges and in conducting discovery. Cooperation is preferable to disagreements, which require my participation to resolve. There are limitations on discovery (52 Pa. Code §5.361) and sanctions for abuse of the discovery process (52 Pa. Code §§5.371 & 5.372).

8. The Complainant bears the burden of proof in this proceeding and must show by a preponderance of the evidence that the Respondent has violated the Public Utility Code or a regulation or an Order of this Commission so that the Complainant is entitled to the relief requested in the complaint. 66 Pa. C.S. §332(a).

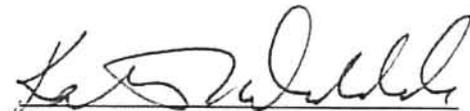
9. **YOU MAY LOSE THIS CASE, IF YOU DO NOT TAKE PART IN THIS HEARING AND PRESENT EVIDENCE ON THE ISSUES RAISED. 52 Pa. Code §5.245.**

10. Although the hearing is being conducted telephonically for the convenience of the parties, it is still a formal legal proceeding and will be conducted in accordance with the Commission's Rules of Practice and Procedure. 52 Pa. Code §§1.1, *et seq.*

11. If you, or anyone you plan to call as a witness on your behalf, have a limited ability to speak or understand English or are deaf or hearing-impaired, a qualified interpreter can be provided upon your request. If you want an interpreter, please contact the Scheduling Office at least ten (10) days before the scheduled Prehearing Conference or Hearing to make your request.

Scheduling Office: (717) 787-1399
AT&T Relay Service number for persons who are deaf or hearing-impaired:
1-800-654-5988.

Date: August 1, 2014


Katrina L. Dunderdale
Administrative Law Judge

P-2014-2421556 – JOHN R. EVANS, SMALL BUSINESS ADVOCATE v. FIRSTENERGY SOLUTIONS CORPORATION

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