



COMMONWEALTH OF PENNSYLVANIA

August 18, 2014

E-FILED

Rosemary Chiavetta, Secretary
Pa. Public Utility Commission
Commonwealth Keystone Building
P.O. Box 3265
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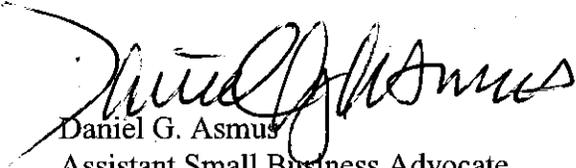
**Re: John R. Evans, Small Business Advocate, Petitioner v. FirstEnergy Solutions Corporation, Respondent
Docket No. P-2014-2421556**

Dear Secretary Chiavetta:

Enclosed for filing is the original of the Brief, on behalf of the Office of Small Business Advocate in the above-docketed proceeding. As evidenced by the enclosed certificate of service, two copies have been served on all active parties in this case.

If you have any questions, please contact me.

Sincerely,


Daniel G. Asmus
Assistant Small Business Advocate
Attorney ID #83789

Enclosures

cc: Parties of Record

Robert D. Knecht

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

CERTIFICATE OF SERVICE

I certify that I am serving two copies of the Brief, on behalf of the Office of Small Business Advocate, by e-mail and first-class mail (unless otherwise noted) upon the persons addressed below:

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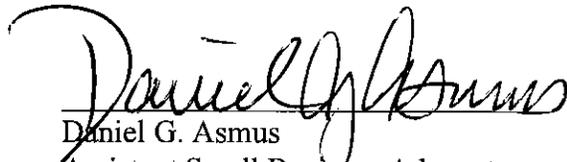
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Dated: August 18, 2014

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**JOHN R. EVANS,
SMALL BUSINESS ADVOCATE,
Petitioner**

v.

**FIRSTENERGY SOLUTIONS CORP.,
Respondent**

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Docket No. P-2014-2421556

**BRIEF ON BEHALF OF THE
OFFICE OF SMALL BUSINESS ADVOCATE
OPPOSING INTERLOCUTORY REVIEW**

**Daniel G. Asmus, Esq.
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**For: John R. Evans
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Dated: August 18, 2014

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I. INTRODUCTION

On May 15, 2014, John M. Evans, Small Business Advocate, through the Office of Small Business Advocate (“OSBA”), filed a Petition for a Declaratory Order (“Petition”) requesting that the Pennsylvania Public Utility Commission (“Commission”) order that FirstEnergy Solutions, Corp. (“FES”), Respondent in this proceeding, be denied permission to recover from small business ratepayers certain ancillary services costs billed to FES by the regional transmission organization, PJM Interconnection (“PJM”).

On June 4, 2014, FES filed a Preliminary Objection to the Petition (“PO”), and an Answer with New Matter asserting that the Commission lacks subject matter jurisdiction to grant the relief requested, that the Petition failed to demonstrate that FES violated any provision of the Public Utility Code or Commission’s regulations, and therefore, OSBA is not entitled to the relief requested.

The OSBA filed an Answer to FES’s Preliminary Objections on June 16, 2014, and a :
Reply to FES’s New Matter on June 24, 2014.

Administrative Law Judge (“ALJ”) Katrina Dunderdale was assigned to preside over this matter by the Commission. On July 22, 2014, ALJ Dunderdale issued a First Interim Order denying FES’s Preliminary Objections, concluding that the Commission does have jurisdiction over this dispute and over the subject matter of this dispute to the extent that the OSBA Petition alleges a failure of FES to comply with the Commission’s regulations and statutes..

On August 8, 2014, FES filed a Petition of FirstEnergy Solutions Corp. for Interlocutory Review and Answer to Material Questions (“FES Petition”). Pursuant to 52 Pa. Code § 5.302, the parties have 10 days after service of a Petition for Interlocutory Review to file a brief supporting or opposing the Petition and addressing the merits of the question to which an answer

is requested. The OSBA files this Brief pursuant to § 5.302 in opposition to the FES Petition and to answer the Material Questions raised therein.

II. ARGUMENT

FES seeks this interlocutory review of the July 22, 2014, First Interim Order issued by ALJ Dunderdale, alleging that two material questions arise from the Order: (1) Did the First 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? FES suggests that the answer to each of the questions is yes. The OSBA responds that the answer to each of the questions is no.

(1) Did the First Interim Order improperly expand the scope of the requested relief of the OSBA Petition?

No, the First Interim Order did not expand, improperly or otherwise, the scope of relief requested in the OSBA’s Petition. FES alleges that it has been denied due process by not having an opportunity to respond to the issue that the “billing practices” of FES are subject to the Commission’s jurisdiction. As it seems wont to do, FES tries to play “hide the ball” with this issue, much as it has tried to hide from customers the possibility that they could be charged for virtually any costs that FES might get stuck with, so long as those costs are “imposed” (read “billed”) to FES by PJM.

FES pretends to style this dispute as a private contractual dispute between FES and its small business customers, in hopes that this characterization will somehow stick, and that the

Commission will then somehow cede jurisdiction to another entity. Having assumed its characterization of this dispute, FES then goes on to allege that it was denied due process because it had no opportunity to respond to OSBA's claim that this involved FES's 4billing practices, over which the Commission clearly has jurisdiction.

In its Petition, the OSBA very specifically references the almost identical dispute that was at issue in *Use of Fixed Price Labels for Products with a Pass-Through Clause*, Docket No. M-2013-23622961 (Order entered November 14, 2013), a proceeding to which FES was a party and one over which the Commission clearly exercised its jurisdiction.¹ The basic question there, as here, was whether EGSs should be permitted to pass through to fixed price contract customers extra costs incurred for various operations. In that respect, the *Use of Fixed Price Labels* proceeding was focused on the billing practices of EGSs, not how EGSs should conduct private contractual disputes with customers. These are the same issues as in this dispute. FES was a party to that proceeding, and having read the reference to that proceeding in the OSBA's Petition, was given ample notice of the OSBA's position.

Further, in paragraphs 6 and 11 of its Petition, the OSBA alleges that FES would not have been able to "pass through" to customers these additional costs if it had purchased its ancillary services requirements from any source other than PJM. The OSBA continues to hold the position that these ancillary services costs were not imposed upon FES by PJM. The fact that FES *elected* to meet its obligations by purchasing these requirements from PJM rather than from some other source resulted in FES being billed by PJM for these ancillary requirements. In this way, and *only* in this way, could FES claim that these costs were *imposed* upon it by PJM, thereby triggering the contractual language with FES's fixed-price customers. Such a maneuver

¹ See OSBA Petition at paragraphs 13-14.

by FES clearly does not constitute a “private contractual dispute” with its customers, but it just as clearly *does* constitute a business practice of FES that relates to its billing of customers, whether that terminology is used or not.

Between the reference to the *Use of Fixed Price Labels* proceeding in paragraphs 13 and 14 of its Petition, and the allegations contained in paragraphs 6 and 11 of its Petition, the OSBA has given FES plenty of notice of the OSBA’s position and its theory of the case. Therefore, FES cannot claim to have been denied due process. It has been clear from the start of this proceeding what the OSBA’s position was, and this has not changed. The OSBA has *never* characterized this dispute as a private contractual matter. That has always been the characterization of this dispute as spun by FES.

(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 OSBA requested in its Petition is that the Commission determine that FES not be permitted to utilize the “pass-through” language in its fixed price contracts to burden small business customers with ancillary services costs, simply because FES elected to purchase ancillary services from (and be billed by) PJM rather than from another source that could not be “passed through.” This remains the relief requested by the OSBA, and has not changed since the filing of the OSBA’s Petition. OSBA has not broadened the scope of its request.

The relief sought by the OSBA has never been related to a private contractual dispute between FES and its customers. The relief sought by the OSBA has always been to stop FES’s practice of passing through to customers certain costs that could only have been billed to them if

the costs had been “imposed” upon FES by PJM, but could not have been passed through if FES had incurred those costs from a source other than PJM. That requested relief included the refund to customers of any such pass-through costs billed to the customers and paid by them. This is the extent of the relief requested in the OSBA Petition. It has not changed.

The relief sought by the OSBA is within the Commission’s jurisdiction to grant, in part because FES never informed fixed price contract customers that whether they are billed for ancillary services costs or not depends upon whether FES purchases those ancillary services from PJM (eligible for pass-through because it was “imposed”) or from another source (not eligible for pass-through). In failing to explain this, FES has failed to comply with Commission regulations. Under Section 2807(d)(2) of the Pennsylvania Public Utility Code (66 Pa.C.S. § 2807(d)(2)), the Commission has the duty to ensure that EGSs provide accurate and adequate information to customers so that customers may compare price and services.

The commission shall establish regulations to require each electric distribution company, electricity supplier, marketer, aggregator and broker to provide adequate and accurate customer information to enable customers to make informed choices regarding the purchase of all electricity services offered by that provider. Information shall be provided to consumers in an understandable format that enables consumers to compare prices and services on a uniform basis.²

In this instance, FES failed to provide customers information that would enable them to ascertain that FES could pass through to customers any costs billed to FES by PJM, but could not pass through any costs billed to FES by other vendors or entities. Further, FES failed to provide customers with the information that in the event of severe winter weather, it intended to fulfill its

² 66 Pa.C.S. §2807(d)(2).

extra power obligations by purchasing ancillary services from PJM rather than from a source whose costs FES could not “pass-through.”

As set forth in paragraph 4 of the OSBA’s Petition, FES disclosed to its small commercial fixed price customers the following information about their potential liability for pass-through costs:

In addition to the charges described above [basic service prices], if any regional transmission organization or similar entity, EDC, government entity or agency, North American Reliability Corporation or other industry reliability organization, or court requires a change to the terms of the Agreement, *or imposes upon FES new or additional charges or requirements*, or a change in the method or procedure for determining charges or requirements, relating to your Retail Electric Supply under this Agreement (any of the foregoing, a ‘Pass-Through Event’), which are not otherwise reimbursed to FES, Customer agrees that FES may pass through an additional cost of such Pass-Through Event, which may be variable, to Customer. Changes may include, without limitation, transmission or capacity requirements, new or modified charges or shopping credits, and other changes to retail electric customer access programs.³

What FES failed to tell these customers was that FES had choices about where it could obtain the services that were referenced in this disclosure statement. FES failed to disclose that if it chose to obtain these services from anywhere other than a “regional transmission organization or similar entity, EDC, government entity or agency, North American Reliability Corporation or other industry reliability organization,” then FES could *not* pass through the costs to its fixed price customers. Is it any wonder that FES made the business decision to purchase ancillary services from PJM rather than from another source?

Further, the Notice of the Pass-Through Surcharge sent by FES to customers stated as follows:

³ FES Small Commercial Disclosure Statement is attached to the OSBA’s Petition as Exhibit A (emphasis added).

NOTICE OF RTO EXPENSE SURCHARGE

Dear Customer:

January was an extremely cold month with temperatures reaching record lows, resulting in record levels of energy use. Throughout the month, PJM Interconnection (PJM) – the regional transmission organization (RTO) that coordinates reliability and wholesale electricity in our region – initiated emergency operations. As a result, PJM incurred extremely high ancillary services costs to purchase power needed to keep the electric system reliable throughout these severe conditions. PJM billed these additional costs to FirstEnergy Solutions.

Pursuant to your agreement with FirstEnergy Solutions, these ancillary service charges are a “pass-through event.” This means that FirstEnergy Solutions will adjust your bill through a one-time charge – called the RTO Expense Surcharge – which will be approximately \$5 to \$15 for an average residential customer and will appear on your May, June or July bill. The charge for small business customers will be approximately 1 to 3 percent of the total amount you spend on generation annually.

The RTO Expense Surcharge will not change your contract price. This is the first of two notices that you will receive regarding the charge. The next notice will follow in approximately four weeks, and will provide further details regarding the charge and outline your options. For more information, you can also go to fes.com/RTOexpense.

Thank you for choosing FirstEnergy Solutions as your electric generation supplier.⁴

This notice does not tell small business customers what FES was charged by PJM, nor does it tell them what to expect in terms of an amount for the surcharge, other than estimating 1-3% of a customer’s annual bill. This amount could vary widely, depending upon whether it ends up to be 1% or 3%. Why the variance? Did FES not know how much it had been charged by PJM? What determines whether it is 1% or 3%? Is it 1% for some customers and 3% for

⁴ Notice of RTO Expense Surcharge attached to OSBA Petition as Exhibit B.

others? If so, why? Is FES intending to recover all of the ancillary services costs from business and industrial customers?⁵ How are the costs billed by PJM allocated to the customer classes? What is the basis for allocating costs within a class - on a per customer basis, by customer usage, or by some other means? Who determines how these costs are allocated – FES? In its Notice of RTO Expense Surcharge, FES does not make any link between the costs it incurred from PJM and what it is charging its fixed price customers. What guarantee is there that these pass through costs bear any relation to the PJM charges?

These questions all logically flow from the Notice of RTO Expenses Surcharge sent by FES to its fixed-price customers. On a customer's usual bill, there are specific informational requirements set forth by the Commission (*see* 52 Pa. Code §§ 54.1-54.9). This Notice sent by FES meets none of the requirements set forth in Chapter 54 of the Public Utility Code, nor does anything that FES has stated in its pleadings shed any more light on this failure to comply with Commission regulations.

Further, the Notice sent to small business customers is essentially the same notice as was sent to residential customers. However, FES subsequently decided *not* to pass-through to residential customers the ancillary services costs that it continues to demand from small business customers. This unequal treatment of customer classes comes without any rationale for the discrepancy and without any assurance that small business customers will not now be burdened with paying for ancillary services costs that previously would have been paid by residential customers. The Commission surely has jurisdiction over issues such as these.

Because of this failure to comply with Commission regulations, and because of its decision to pass-through to customers the ancillary services costs billed by PJM, FES has

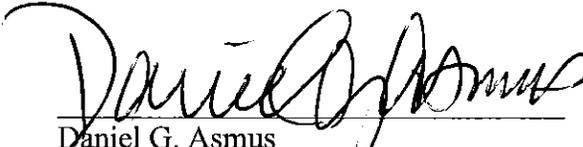
⁵ As noted in paragraph 6 of its Petition, the OSBA asserts that FES has rescinded its initial attempt to pass through these ancillary services costs to residential customers.

submitted itself to the Commission's jurisdiction. Therefore, ALJ Dunderdale was correct when she denied FES's Preliminary Objections and determined that the Commission does have jurisdiction over this dispute.

III. CONCLUSION

For the reasons stated above, the Commission should deny FES's Petition for Interlocutory Review.

Respectfully submitted,



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