



August 26, 2014

VIA E-FILE

**D. Troy Sellars**

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Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor North  
P.O. Box 3265  
Harrisburg, PA 17105-3265

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

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

Dear Secretary Chiavetta:

Enclosed for filing with the Commission is FirstEnergy Solutions Corp.'s Petition for Interlocutory Review and Answer to Material Questions in the above-referenced proceeding. A copy of this document has been served in accordance with the attached Certificate of Service.

If you have any questions regarding this filing, please direct them to me. Thank you for your attention to this matter.

Sincerely,

COZEN O'CONNOR

By: D. Troy Sellars  
Counsel for *FirstEnergy Solutions Corp.*

DTS/kmg  
Enclosure

cc: Per Certificate of Service  
Honorable Robert F. Powelson, Chairman  
Honorable John F. Coleman, Vice Chairman  
Honorable James H. Cawley, Commissioner  
Honorable Pamela A. Witmer, Commissioner  
Honorable Gladys M. Brown, Commissioner

**CERTIFICATE OF SERVICE**  
**FES Industrial & Commercial Customer Coalition v.**  
**FirstEnergy Solutions Corp.**  
**Docket No. C-2014-2425989**

I hereby certify that I have this day served a true copy of the Petition of FirstEnergy Solutions Corp. for Interlocutory Review and Answer to Material Questions, upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

**VIA E-MAIL and FIRST CLASS MAIL:**

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DATED: August 26, 2014

  
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D. Troy Sellars, Esquire  
Counsel for *FirstEnergy Solutions Corp.*

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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

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

**I. Introduction and Background:**

1. On or about June 11, 2014, FES Industrial & Commercial Customer Coalition (“FES ICCC”) filed a Complaint (the “Complaint”) challenging FES’s invocation of a “Pass-Through Event” clause in its Customer Service Agreements with FES ICCC members to pass through charges billed to FES by PJM Interconnection, L.L.C. (“PJM”). In the Complaint, FES ICCC requests the Commission “stay FES ICCC members’ liability for FES’s proposed charges” and “prohibit FES from attempting to recover from FES ICCC members the costs billed to it by PJM for ancillary costs during January 2014 via the Pass-Through Event clause under the terms of Members’ fixed-price agreements with FES.” Complaint, Prayer for Relief.

2. In support of its Complaint, FES ICCC alleges that its members’ contracts with FES do not permit FES to pass through the charges at issue. *See, e.g.*, Complaint, ¶ 24. FES ICCC further alleges that FES, by “inappropriately triggering a Pass-Through Event” where not allowed by its contracts, Complaint ¶ 29, is “violating several of the PUC’s rules and regulations...,” Complaint ¶ 30, including rules regarding billing practices and providing accurate information regarding EGS services, Complaint ¶¶ 31, 34, 35. Accordingly, FES ICCC’s allegations that FES has violated PUC rules depend on an interpretation of FES’s rights under its contracts with FES-ICCC members.

3. In response to the Complaint, FES filed Preliminary Objections noting that FES is a licensed EGS and not a public utility, that FES's contracts with its customers are private contracts, that the Commission lacks subject matter jurisdiction to decide private contractual disputes between EGSs and their customers or to interpret the terms and conditions of private contracts, and that the Commission lacks primary jurisdiction over the contract dispute. FES argues that the Complaint should be dismissed because of the Commission's lack of subject matter jurisdiction or, in the alternative, stayed until such time as a civil court of competent jurisdiction makes a final determination whether FES breached the contracts. *See* FES Preliminary Objections, ¶¶ 9-24.

4. By Interim Order dated August 6, 2014 (the "Interim Order"), Administrative Law Judge Dunderdale denied FES's Preliminary Objections. FES seeks interlocutory review of the Interim Order.

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

5. From the Interim Order, the following two material questions arise: (1) Does the Commission lack subject matter jurisdiction to interpret a provision of an EGS's retail customer supply contract as requested? and (2) Does the Commission's lack of primary jurisdiction require, at a minimum, a stay of the current proceedings pending action by a civil court of competent jurisdiction? The suggested answer to both questions is "yes."

6. Interlocutory review of these questions is needed to prevent potentially significant prejudice to FES. If this case proceeds FES will have been denied basic due process as it is axiomatic that a party cannot, consistent with due process, be compelled to defend itself in a forum that does not have proper jurisdiction of the issue. In addition, by preventing the litigation of matters in this case which are beyond the jurisdictional limits of the Commission, interlocutory review will prevent wasting the Commission's and parties' valuable time and resources.

7. The Commission's jurisdiction over FES is explicitly limited by statute since FES is an EGS and not a "public utility" under the Public Utility Code. *See* 66 Pa. C.S. §§ 2802(14), 2086(a), 2809.

8. The Interim Order incorrectly discredits FES's argument that the interpretation of its contracts with FES ICCC members are subject to the jurisdiction of civil courts of competent jurisdiction, and instead relies on FES ICCC's improper characterization of the dispute as a billing matter. *See* Interim Order, pp. 5, 8-9; *see also* Complaint, ¶ 31. However, the billing dispute of which the FES ICCC members complain arises only if the parties' contracts are interpreted to find that FES was not authorized to bill FES ICCC members for

the PJM charges at issue. That determination is within the purview of a civil court of competent jurisdiction, not the Commission. FES ICCC concedes that its Complaint cannot be sustained without the Commission interpreting its members' contracts with FES, and that the Commission lacks jurisdiction to decide private contractual disputes between EGSs and their customers. FES ICCC Answer to FES Preliminary Objections, ¶¶ 14, 15.

9. It is clear that the basis for the subject Complaint is a private contractual dispute over which the Commission holds neither subject matter<sup>1</sup> nor primary<sup>2</sup> jurisdiction.

WHEREFORE, FirstEnergy Solutions Corp. respectfully requests that this Honorable Commission: (i) undertake interlocutory review of the Interim Order; (ii) stay the instant proceedings pending the Commission's action on the interlocutory review; (iii) answer the material questions in the positive; and, (iv) grant FirstEnergy Solutions Corp.'s Preliminary Objections and dismiss the FES ICCC Complaint or, in the alternative, stay the proceedings pending review by a court of competent jurisdiction.

Respectfully submitted,



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Dated: August 26, 2014

<sup>1</sup> See *Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673, 675 (Pa. Super. 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); *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).

<sup>2</sup> The doctrine of primary jurisdiction dictates that the Commission should stay the matter and defer to the civil courts for an interpretation of the contractual provisions in dispute. See generally *In re Insurance Stacking Litigation*, 754 A.2d 702 (Pa. Super. 2002); *Pettko v. Pa. American Water Co.*, 39 A.3d 473 (Pa. Cmwlth. 2012), *allocatur denied*, 51 A.3d 839 (Pa. 2012). Certainly, when the court finds FES acted within its contractual rights in passing through the PJM charges, the Commission cannot reasonably conclude that FES engaged in deceptive billing practices.

**VERIFICATION**

I, Amy M. Klodowski, Attorney for FirstEnergy Solutions Corp., hereby state that the facts set forth above are true and correct to the best of my knowledge, information and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

Dated: 8/25/2014

  
Amy M. Klodowski