



September 5, 2014

VIA E-FILE

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Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
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Re: FES Industrial & Commercial Customer Coalition v. FirstEnergy Solutions Corp.;
Docket No. C-2014-2425989; BRIEF OF FIRSTENERGY SOLUTIONS CORP. IN
SUPPORT OF PETITION FOR INTERLOCUTORY REVIEW AND ANSWER TO
MATERIAL QUESTIONS

Dear Secretary Chiavetta:

Enclosed for eFiling with the Commission is the Brief of FirstEnergy Solutions Corp. 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

cc: Honorable Robert F. Powelson, Chairman (*via first class mail*)
Honorable John F. Coleman, Vice Chairman (*via first class mail*)
Honorable James H. Cawley, Commissioner (*via first class mail*)
Honorable Pamela A. Witmer, Commissioner (*via first class mail*)
Honorable Gladys M. Brown, Commissioner (*via first class mail*)
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Per Certificate of Service

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 Brief of FirstEnergy Solutions Corp. 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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DATED: September 5, 2014



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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. MATERIAL QUESTIONS PRESENTED	2
III. SUMMARY OF THE ARGUMENT	2
IV. ARGUMENT	4
A. The Commission Lacks Subject Matter Jurisdiction to Interpret a Provision of an EGS's Retail Customer Supply Contract	4
B. The Commission's Lack of Primary Jurisdiction Requires, at a Minimum, a Stay of the Current Proceeding Pending Action by a Civil Court of Competent Jurisdiction	8
V. STAY OF PROCEEDING IS APPROPRIATE	9
VI. CONCLUSION	9
VII. REQUEST FOR RELIEF	11

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Adams et al. v. Pa. Pub. Util. Comm'n</i> , 819 A.2d 631 (Pa. Cmwlth. 2003).....	5
<i>Allport Water Auth. v. Winburne Water Co.</i> , 393 A.2d 673 (Pa. 1978)	5
<i>Behrend v. Bell Telephone</i> , 363 A.2d 1152 (Pa. Super. 1976), <i>vacated and remanded on other grounds</i> , 374 A.2d 536 (Pa. 1977)	5
<i>City of Pittsburgh v. Pa. Pub. Util. Comm'n</i> , 43 A.2d 348 (Pa. Super. 1945)	4
<i>Feingold v. Bell Tel. Co. of Pa.</i> , 383 A.2d 791 (Pa. 1977).....	4
<i>Guidelines for Use of Fixed Price Labels for Products With a Pass Through Clause</i> entered on November 14, 2013, at Docket No. M-2013-2362961	7
<i>Hughes v. Pa. State Police</i> , 619 A.2d 390 (Pa. Cmwlth. 1992), <i>allocatur denied</i> , 637 A.2d 293 (Pa. 1993).....	4
<i>In re Insurance Stacking Litigation</i> , 754 A.2d 702 (Pa. Super. 2002)	8
<i>Leveto v. Nat'l Fuel Gas Dist. Corp.</i> , 366 A.2d 270 (Pa. Super. 1976)	5
<i>Litman v. Peoples Natural Gas Co.</i> , 449 A.2d 720 (Pa. 1982).....	5
<i>Lyness v. State Board of Medicine</i> , 605 A.2d 1204 (Pa. 1992)	2, 9
<i>Ostrov v. I.F.T., Inc.</i> , 586 A.2d 409 (Pa. Super. 1991).....	8
<i>Pettko v. Pa. American Water Co.</i> , 39 A.3d 473 (Pa. Cmwlth. 2012), <i>allocatur denied</i> , 51 A.3d 839 (Pa. 2012)	8
<i>Roberts v. Martorano</i> , 235 A.2d 602 (Pa. 1967)	4
<i>Tech Met, Inc. et al. v. Strategic Energy, LLC</i> (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).....	5
Statutes	
66 Pa. C.S. § 2801 <i>et seq.</i>	3
66 Pa. C.S. § 2802(14).....	3, 5
66 Pa. C.S. § 2806(a)	3, 5

66 Pa. C.S. § 2809.....3, 5

Regulations

52 Pa. Code § 5.302(b)2

I. INTRODUCTION

On or about June 11, 2014, FES Industrial & Commercial Customer Coalition (“FES ICCC”) filed a Complaint (the “Complaint”) challenging FES’s invocation of “Pass-Through Event” provisions in its Customer Service Agreements with FES ICCC members to pass through charges billed to FES by PJM Interconnection, L.L.C. (“PJM”). In support of its Complaint, FES ICCC alleges that the pass-through language in its members’ contracts with FES does 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 Electric Generation Supplier (“EGS”) services, Complaint ¶¶ 31, 34, 35. Accordingly, FES ICCC’s allegations that FES has violated Commission rules depend on an interpretation of FES’s rights under its contracts with FES-ICCC members.

In response to the Complaint, FES filed Preliminary Objections on the grounds that the Commission lacks subject matter jurisdiction to decide private contractual disputes between EGSs and their customers or to interpret the terms and conditions of private contracts. FES argues that the Complaint should be dismissed because of the Commission’s lack of subject matter jurisdiction. *See* FES Preliminary Objections, ¶¶ 9-24.

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. On Tuesday, August 26, 2014, FES filed a Petition for Interlocutory Review and Answer to Material Questions (“Petition”). Through that Petition, FES is seeking: (i) the Commission to undertake interlocutory review of the Interim Order; (ii) the Commission to answer the Material

Questions in the positive; (iii) the Commission grant FES's Preliminary Objections and dismiss the FES ICCC complaint; and (iv) a stay of the instant proceeding pending the Commission's action on the interlocutory review.

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 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 proposed answer to both questions is "yes." If the Commission takes this action, it can prevent 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. *See Lyness v. State Board of Medicine*, 605 A.2d 1204, 1207 (Pa. 1992). 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 of the Commission's and parties' valuable time and resources.

III. SUMMARY OF THE ARGUMENT

Despite the Complaint's attempt to allege all manner of billing, marketing, and PUC regulation violations, the entire Complaint is premised upon one key issue in controversy -- whether the private contracts between FES and the FES ICCC members permitted FES to pass-

through extraordinary and unforeseeable additional costs it incurred in connection with the FES ICCC members' electric supply under their agreements. In order to determine the answer to that issue, an adjudicative entity must interpret the contracts, review the facts surrounding the exercise of the pass-through provisions, and apply the facts to the private contracts between FES and the FES ICCC members. Those steps are singularly within the jurisdiction of civil courts and are not within the province of the Commission.

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. The 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.

Moreover, 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 further 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 "[t]he 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 service or function"); 2809 (listing the requirements on EGSs pursuant to the Competition Act).

While the Complaint alleges deceptive marketing and billing practices in violation of Commission rules, those allegations are all expressly based upon allegations that FES improperly invoked the pass-through provisions in its contracts with the FES ICCC members. Stated another way, FES ICCC does not dispute that the contracts contained the pass through provisions authorizing the pass-through of certain PJM charges, nor that PJM imposed the charges at issue on FES due to PJM's actions in response to the historically cold weather of January 2014. Rather, FES ICCC only disputes that the pass-through clause authorizes FES to pass through to the FES ICCC members the specific PJM charges at issue. If a court of competent jurisdiction determines that FES properly invoked the pass through provisions in these cases, then the rest of the Complaint's allegations fail. Accordingly, the Preliminary Objections filed by FES should have been granted and the Complaint dismissed.

IV. ARGUMENT

A. The Commission Lacks Subject Matter Jurisdiction to Interpret a Provision of an EGS's Retail Customer Supply Contract.

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

It is undisputed that the interpretation of private contracts is the central issue in the Complaint. As explained above, FES ICCC alleges that the pass-through language in its members’ contracts with FES does 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 Electric Generation Supplier (“EGS”) services, Complaint ¶¶ 31, 34, 35. FES ICCC further alleges that “[i]f FES is allowed to pass through these ancillary costs, FES’s fixed-price customers lose the benefit of their bargain....” Complaint ¶39. Accordingly, FES ICCC’s allegations that FES has violated Commission rules are contingent on an interpretation of FES’s rights under its contracts with FES ICCC members and a determination that FES has breached its contracts with FES ICCC members.

Indeed, in its Answer to FES’s Preliminary Objections, FES ICCC admits that the contracts that its members have with FES are private contracts. FES ICCC Answer to Preliminary Objections, ¶ 13. FES ICCC also admits that it is asking the Commission to interpret provisions of the private contracts between FES and the FES ICCC members. FES ICCC Answer to Preliminary Objections, ¶ 14. FES ICCC additionally recognizes that the Commission lacks jurisdiction to decide private contractual disputes between EGSs and their customers. FES ICCC Answer to Preliminary Objections, ¶¶ 15, 23 n.2. Accordingly, based upon those admissions alone, FES’s Preliminary Objections should have been granted and the Complaint should have been dismissed, since FES ICCC’s request for an interpretation of a provision in a private contract exceeds the Commission’s jurisdiction and is reserved for the civil courts.

Notwithstanding these admissions, the Interim Order posits – without citation to FES ICCC’s Answer to Preliminary Objections – that “FES ICCC denied private contracts (as referenced by FES) are beyond the Commission’s jurisdiction.” Interim Order, p. 5. Further, the

Interim Order incorrectly determined that the Commission has subject matter jurisdiction over the terms of EGS contracts based on the Commission’s 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”). Interim Order, pp. 7-8.¹ *See also* Interim Order, pp. 7-8. Contrary to the Interim Order’s interpretation, the Pass Through Order recognized the existence of pass-through clauses allowing an EGS to pass through unanticipated costs, but did not purport to interpret the pass-through clauses contained in various supplier contracts, or a particular pass-through clause’s applicability to a particular factual situation. Rather, the purpose of the Pass Through Order was to address whether or not contracts that contained such provisions could be marketed to residential and small commercial customers as “fixed price” contracts prospectively. Further, the Pass Through Order does not even apply to large commercial and industrial customers such as the FES ICCC members, whom the Commission recognized as sophisticated electric market participants.² The Pass Through Order provides no basis for a finding of Commission jurisdiction over the core issue of the Complaint, the resolution of a private contractual dispute between an EGS and large commercial/industrial customers as to whether the pass-through provisions in their contracts were appropriately invoked.

In addition, the limits on Commission jurisdiction over EGS contracts are necessary to achieve development of the retail market the General Assembly intended. If the Commission attempted to interpret words and phrases in EGS contracts as they relate to market developments,

¹ While the Interim Order attributes this argument to FES ICCC, Interim Order p. 5, it was in fact the Office of Consumer Advocate (“OCA”) which invoked the Pass Through Order in its Answer to FES’s Preliminary Objections. OCA Answer to Preliminary Objections, pp. 3-4. Notably, the OCA invoked the Pass Through Order to articulate an argument different – but no more tenable – than that described on page 5 of the Interim Order. Nowhere in its Complaint or Answer to the Preliminary Objections did FES ICCC reference the Pass Through Order.

² *See, e.g., Pass Through Order* at pp. 29-30.

or to resolve contractual disputes with customers, it would deter EGS participation and product innovation in the Pennsylvania market. Because the Complaint requires the interpretation of private contract provisions which is beyond the jurisdictional limits of the Commission, the Preliminary Objections of FES should be granted.

B. The Commission's Lack of Primary Jurisdiction Requires, at a Minimum, a Stay of the Current Proceeding Pending Action by a Civil Court of Competent Jurisdiction.

In its Preliminary Objections FES also invoked the doctrine of primary jurisdiction, which counsels courts and administrative agencies to refrain from exercising jurisdiction over a claim where an issue is within the jurisdiction of another court or administrative agency and involves complex subject matter beyond the knowledge of the fact finder. In application, this means “that where the resolution of a party’s claim depend[s] upon no rule or regulation predicated on the peculiar expertise of the PUC, no agency policy, no question of service or facilities owed to the general public, and no particular standard of safety or convenience articulated by the PUC, then the court should not refer the matter to the Commission.” *Ostrov v. I.F.T., Inc.*, 586 A.2d 409, 414 (Pa. Super. 1991) (internal quotations and citations omitted). *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).

Here, the resolution of the Complaint depends upon no Commission rule or regulation, but rather the interpretation of provisions within private contracts between non-utility entities. Indeed, the application of any Commission rule or regulation is predicated upon a judicial finding regarding the propriety of FES’s invocation of the pass-through provisions. Certainly,

when a court of competent jurisdiction finds FES acted within its contractual rights with the FES ICCC members, the Commission cannot reasonably conclude that FES violated any Commission rule or regulation. Accordingly, the doctrine of primary jurisdiction dictates that the Commission should, at a minimum, stay the matter and defer to the civil courts for an interpretation of the contractual provisions in dispute.

V. STAY OF PROCEEDING IS APPROPRIATE

A stay of this proceeding is appropriate pending Commission action on this request for interlocutory review. FES ICCC's allegations that FES violated Commission rules are contingent on a determination that FES breached its agreements with the FES ICCC members. Without a stay, FES will be forced to proceed with substantive aspects of the instant matter which this Commission lacks subject matter jurisdiction to decide, i.e., an interpretation of pass through provisions of the private contracts between FES and the FES ICCC members. Due process requires the stay of the proceedings 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. *See Lyness v. State Board of Medicine*, 605 A.2d 1204, 1207 (Pa. 1992) ("the basic elements of procedural due process are adequate notice, opportunity to be heard, and the chance to defend oneself before a fair and impartial tribunal having jurisdiction of the case."). Further, a stay is appropriate to preserve the resources of the Commission and the parties.

VI. CONCLUSION

The Complaint alleges a disagreement between FES and the FES ICCC members over the interpretation of the pass-through provisions of private contracts. This determination is

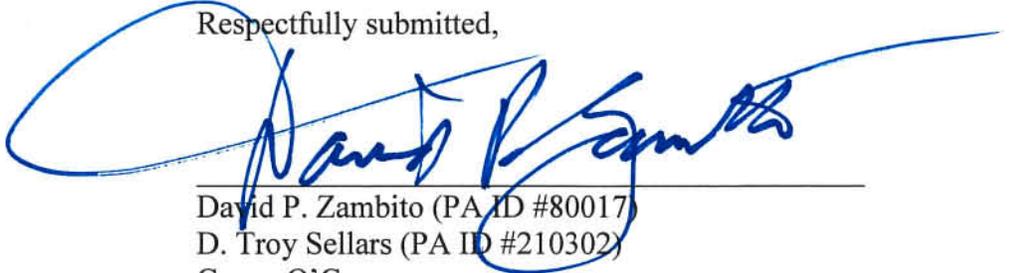
beyond the subject matter and primary jurisdiction of the Commission. Accordingly, the Commission should answer the material questions in the positive, grant FES's Preliminary Objections and dismiss the Complaint or stay the action pending action by a civil court of competent jurisdiction.

VII. REQUEST FOR RELIEF:

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

- (i) undertake interlocutory review of the Interim Order;
- (ii) answer the Material Questions in the positive;
- (iii) grant FES's Preliminary Objections and dismiss the FES ICCC complaint or, at a minimum, stay the proceeding pending review of the contract pass-through provision by a civil court of competent jurisdiction; and,
- (iv) stay the instant proceeding pending the Commission's action on the interlocutory review.

Respectfully submitted,



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Dated: September 5, 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.

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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

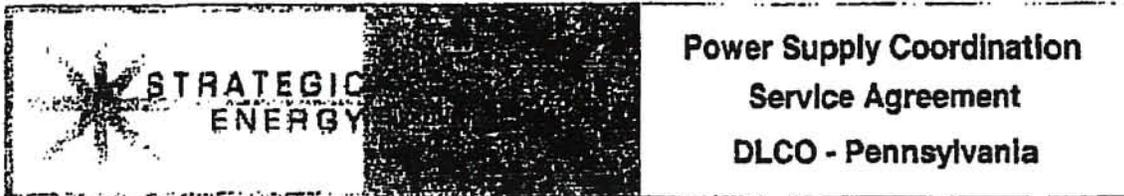
On this 4 day of June, 2014, it is hereby ORDERED that defendant's motion for summary judgment is granted, and plaintiffs' Complaint is dismissed with prejudice.

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
 Glassport, 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) 394-5900

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

Location	Heat Utility	Account Number	Utility Rate Class	DLCO'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	15.87	11.80	76,200	1,578
9th & Allegheny	DLCO	1000003757004	GM (Com.)	7.59	7.49	1.30	415,300	416
Totals		Accounts: 2					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: 412-678-8277
Effective Date of Change: November 2000
Customer Name: Tech-Met Services Inc.
Contact Name: Scott Cupp
Address: 15 Allegheny Square
Glasport, 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
412-394-5600

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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**STRATEGIC
ENERGY**

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

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

dated September 25, 2000 between
STRATEGIC ENERGY LLC.

and
Tech-Met 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 (\$)
971 & Allegheny	DLCO	10000003757002	GM (Ind.)	17.73	18.67	11.80	78,200	1578
971 & Allegheny	DLCO	10000003757004	GM (Com.)	7.59	7.49	1.50	415,300	418
Totals		Accounts: 2					491,500	\$1,994.00