

**PENNSYLVANIA PUBLIC UTILITY COMMISSION  
HARRISBURG, PENNSYLVANIA 17120**

John R. Evans, Small Business  
Advocate

Public Meeting November 13, 2014  
2421556-OSA  
Docket No. P-2014-2421556

v.

FirstEnergy Solutions Corporation

**JOINT MOTION OF  
CHAIRMAN ROBERT F. POWELSON AND  
VICE CHAIRMAN JOHN F. COLEMAN, JR.**

Before the Commission for consideration and disposition is the Petition for Interlocutory Review and Answer to Material Question filed on August 8, 2014 by FirstEnergy Solutions Corporation (FES). The Petition was filed during the pendency of the Small Business Advocate's (OSBA) Petition for a Declaratory Order, filed May 15, 2014.

The OSBA's Petition asks the Commission to prevent FES from recovering certain charges from small business customers pursuant to electricity supply contracts. We are of the opinion, however, that in doing so, the OSBA misapprehends the Commission's jurisdiction over retail electricity generation suppliers (EGSs). Thus, we believe it is prudent for the Commission to exercise its discretion<sup>1</sup> to not address the merits of the Petition for a Declaratory Order.

It is a basic tenet of Public Utility Law that the Commission only has those powers that are enumerated to it.<sup>2</sup> The Commission's jurisdiction over EGSs is set forth in Sections 2807 and 2809 of the Public Utility Code<sup>3</sup> and implemented in Chapter 54 of our Regulations.<sup>4</sup> A review of this authority makes it clear that Commission jurisdiction does not extend to interpreting the terms and conditions of a contract between an EGS and a customer to determine whether a breach has occurred or setting the rates an EGS can charge. Instead, the Commission can only ensure that an EGS is abiding by the standards of conduct and disclosure,<sup>5</sup> the marketing and sales Regulations,<sup>6</sup> the contract expiration/change-of-terms notice requirements<sup>7</sup> and that the rate billed by an EGS was calculated in accordance with those materials.

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<sup>1</sup> 66 Pa. C.S. § 331(f).

<sup>2</sup> *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977).

<sup>3</sup> 66 Pa. C.S. §§ 2807, 2809.

<sup>4</sup> 52 Pa. Code § 54.1, *et seq.* (Sections 54.4-54.10 apply to residential and small business customers only. Small business customers are defined as having a maximum peak load less than 25 kW in the prior 12 months. *See* 52 Pa. Code § 54.2).

<sup>5</sup> 52 Pa. Code § 54.5.

<sup>6</sup> 52 Pa. Code §§ 54.3, 54.6, and 54.7; 52 Pa. Code §§ 54.43(1) and 54.43(f); 52 Pa. Code § 54.122(3).

<sup>7</sup> 52 Pa. Code § 54.10.

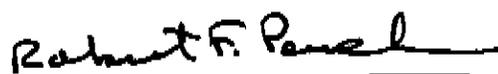
A review of the filings in this matter reveals that the OSBA's initial Petition requested the Commission to issue an Order "declaring that FES is not permitted to recover the costs billed to it by PJM for ancillary services costs as a 'pass-through event' under the terms of its fixed priced contract with its customers."<sup>8</sup> In order to make such a declaration, the Commission would need to interpret language in the FES contract. The Commission has no such authority.

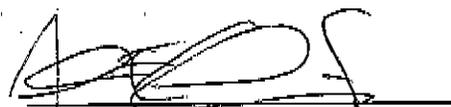
While the OSBA does appear to raise issues regarding the marketing of the contracts in question, over which the Commission could have jurisdiction, those issues were not raised until the OSBA's Brief Opposing Interlocutory Review (Brief). This is not enough to change the character of the original request for two reasons. First, allowing the OSBA to raise assertions in its Brief that were not raised in its original Petition changes the nature of the proceeding, which could negatively impact FES's due process rights. Second, an inquiry into whether FES violated the Public Utility Code or the Commission's Regulations during the marketing of these contracts would be very fact intensive, and as such, is not appropriate raised in a Petition for a Declaratory Order.

As a final point of clarification, the OSBA relied heavily upon our *Guidelines for Use of Fixed Price Labels for Products With a Pass-Through Clause Order*<sup>9</sup> in asserting its claim. This reliance is misplaced. The contracts implicated by the OSBA's Petition were entered into prior to our issuance of the Fixed Price Order. This Order was prospective in its effect and made no determination regarding contracts that pre-dated its effective date. Further, the Fixed Price Order did not prohibit EGSs from marketing contracts that include pass-through clauses. Indeed, such a prohibition would exceed the Commission's authority. Rather, pursuant to our mandate to ensure that marketing materials can clearly be understood by customers, the Commission, on a going-forward basis, prohibited contracts with pass-through clauses from being marketed as fixed-price contracts.

**THEREFORE, WE MOVE THAT:**

1. The Commission decline to issue a Declaratory Order in this matter;
2. The Office of Special Assistants prepare an Opinion and Order consistent with this Motion.

  
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ROBERT F. POWELSON  
CHAIRMAN

  
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JOHN F. COLEMAN, JR.  
VICE CHAIRMAN

**DATE: November 23, 2014**

<sup>8</sup> OSBA Petition at 7.

<sup>9</sup> Docket No. M-2013-2362961, Order entered November 14, 2013 (*Fixed-Price Order*).