**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

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|  | Public Meeting held June 14, 2018 |
| Commissioners Present:  Gladys M. Brown, Chairman  Andrew G. Place, Vice Chairman  Norman J. Kennard  David W. Sweet  John F. Coleman, Jr. |  |
| Petition of FirstEnergy Solutions Corporation for Renewal of Its 5% Reduced Financial Security Requirement For the Period June 10, 2018 Through June 10, 2019 | A-110078 |

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition for Reconsideration of Staff Action (*Petition for Reconsideration*) filed by FirstEnergy Solutions Corp. (Petitioner or FES) on May 8, 2018. The Petition was filed in response to the Secretarial Letter issued on April 18, 2018, by the Commission’s Bureau of Technical Utility Services (TUS or Staff) (*April 18 Letter*), in the above-captioned docket, which raised the Petitioner’s financial security level from 5% to 10% for the period from June 10, 2018, through June 10, 2019 (The 2018 Compliance period). No Response to the Petition has been filed. For the reasons set forth herein, we will deny the *Petition for Reconsideration*, consistent with this Opinion and Order.

**History of Proceeding**

FES is an electric generation supplier (EGS) licensed under the provisions of Chapter 28 of the Public Utility Code.

On March 9, 2018, FES submitted a Financial Security Reduction Petition Renewal for the period June 10, 2018, through June 10, 2019 (FES 2018 Renewal Petition), providing all supporting documentation as required in past renewal filings including:

1. a Tax Letter of Good Standing from the Pennsylvania Department of Revenue;
2. FES’ gross receipts from electric generation sales to retail customers in Pennsylvania for the most recent four quarters;
3. evidence of FES’ gross receipts tax (GRT) prepayment for 2018;
4. Evidence of FES’ compliance with the Alternate Energy Portfolio Standards (“AEPS”) requirements for the most recent reporting period; and,
5. a check in the amount of the necessary filing fee.

FES also informed Staff through a response to a Staff data request that FES had, on March 8, 2018, electronically prepaid in full its 2018 GRT prepayment liability for the period ending December 31, 2018.

*Petition for Reconsideration* at ¶ 10.

On April 2, 2018, FES provided the Commission with notice of a material change to its business operations, informing the Commission of the fact that on March 31, 2018, FES filed a voluntary petition in the United States Court for the Northern District of Ohio (“Court”) for relief pursuant to Chapter 11 of Title 11 of the United States Code.[[1]](#footnote-1)

As noted, the Staff issued the *April 18 Letter*[[2]](#footnote-2) denying FES’ petition for renewal of its security requirement at a 5% level. In raising FES’ security level from 5% to 10%, TUS stated:

*The financial security is designed “to ensure the financial responsibility of the electric generation supplier and the supply of electricity at retail in accordance with contracts, agreements and arrangements.” Because of Moody’s downgrade of FES’s rating outlook*, *we find considerable uncertainty regarding FES’s ability to fulfil [sic] its future annual obligations under Section 2809.*  In particular, we have concerns regarding FES’s ability to fulfil [*sic*] its obligations related to gross receipts taxes, Alternate Energy Portfolio Standards (AEPS) and the Commission’s Annual Fee levied on EGSs.

Because of these uncertainties, we believe that it is prudent to return FES’s financial security level to 10% of its most recent four quarters of revenue.

*April 18 Letter* (*emphasis added*).

On April 27, 2018, TUS issued a Secretarial Letter (*April 27 Letter*) which ordered FES to file a rider or amendment to increase its security to a 10% level by May 12, 2018.

On May 8, 2018, FES filed the *Petition for Reconsideration* of Staff action in both the denial of reduced bond in the *April 18 Letter*, and the direction to secure a new bond at the 10% level in the *April 27 Letter*.[[3]](#footnote-3) The *Petition for Reconsideration* sets forth in detail the relevant financial data which TUS has applied to the prior FES requests for the reduced 5% security level.[[4]](#footnote-4)

**Discussion**

Before us is FES’ *Petition for Reconsideration* of the Staff actions that denied FES’ request for a continued reduced bond level of 5% in the *April 18 Letter* and directed FES to file a rider or amendment to increase its security to a 10% level by May 12, 2018 in the *April 27 Letter*.

**Legal Standards**

We note that we are not required to consider expressly or at length each contention or argument raised in the Petition. Consolidated Rail Corp. v. Pa. PUC, 625 A.2d 741 (Pa. Cmwlth. 1993); *also* see, generally, University of Pennsylvania v. Pa. PUC, 485 A.2d 1217 (Pa. Cmwlth. 1984). Therefore, any issue that we do not specifically address or delineate in this decision shall be deemed to have been duly considered and denied without further discussion.

Section 5.44 of the Commission’s Regulations, 52 Pa. Code § 5.44, permits a party to seek the Commission’s reconsideration of actions taken by the Commission’s staff pursuant to the staff’s delegated authority from the Commission.[[5]](#footnote-5)

In pertinent part, Section 5.44 of the Commission’s Regulations, 52 Pa. Code § 5.44, provides as follows:

(a) Actions taken by staff, other than the presiding officer, under authority delegated by the Commission, will be deemed to be the final action of the Commission unless reconsideration is sought from the Commission within 20 days after service of notice of the action . . . .

(b) An action taken by staff under delegated authority will note the parties’ right to seek reconsideration of the action under this section.

(c) Petitions for reconsideration from the action of the staff will be addressed by the Commission at public meeting.

*Id*.

To warrant reconsideration pursuant to 52 Pa. Code § 5.44(a), a petitioner is required to provide substantial and credible evidence, or a preponderance of evidence, in support of the petition. *Samuel J. Lamberty, Inc.* v. *Pennsylvania PUC,* 578 A. 2d 600, 602 (Pa. Cmwlth. 1990), *See e.g., Pennsylvania PUC, Bureau of Technical Services* v. *R. Jean Ryan t/d/b a Scotty Taxi,* Docket No. P-2014-2399803 and A‑00108919 (Order entered May 22, 2014).

As an EGS licensed under the provision of Chapter 28, FES is required to meet certain financial requirements. 66 Pa. C.S. §2809 (c)(1)(i) provides in pertinent part:

In order to ensure the safety and reliability of the generation of electricity in the Commonwealth, no energy supplier license shall be issued or remain in force unless the holder complies with all of the following:

(i) *Furnishes a bond or other security approved by the commission in form and amount to ensure the financial responsibility of the electric generation supplier and the supply of electricity at retail in accordance with contracts, agreements or arrangements*.

*Id. (emphasis added)*.

Our current policy on the appropriate bond amount is set forth in our Order on bonding and security, and states as follows:

[T]he bond or security for an EGS after the first year of operation should be in the amount of 5% of the EGS’s most recent twelve months of revenue or $250,000, whichever is *higher . . . ,* provided the bond or security meets the other criteria required under the Commission’s regulations.

*Public Utility Commission Bonding/Security Requirements for Electric Generation Suppliers; Acceptable Security Instruments*, Docket No. M-2013-2393141, (Order entered July 24, 2014) (*Bonding/Security Order*).

We authorize the reduction in security because:

[R]equiring an EGS to post a bond or security in the amount of 10% of reported gross receipts after the first year of EGS operation may be excessive in relation to the risk intended to be secured.

*Id*.

Where Staff denies an EGS’ request for the reduced security amount, Staff’s Secretarial Letter should state “how the request is not consistent with the Public Utility Code (Code) and the Commission’s bonding/security regulations.” *Bonding/Security Order* at 13.

**Disposition**

Based on our review of the record, we find that FES fails to assert substantial and credible evidence to warrant the grant of the *Petition for Reconsideration* of TUS’ requirement that FES increase its security bond level from 5% to 10%. We find that TUS’ decision to increase FES’ security bond level from 5% to 10% is justified on the basis stated in TUS’ *April 18 Letter* and consistent with Section 2809 of the Public Utility Code, 66 Pa. C.S. § 2809.

FES’ *Petition for Reconsideration* relies upon a showing that FES satisfied the prerequisite criteria for seeking a renewal of a reduced bond requirement outlined in our April 8, 2016 Secretarial Letter providing *Guidance on Electric Generation Supplier Licensee Financial Security*, Docket No. M-2013-2393141. FES asserts that its petition for renewal included all the specified eligibility criteria which had previously been relied upon by TUS in granting FES’ reduced bond requirement. *See*, FES 2018 Renewal Petition.

Our *Bond/Security Order* and subsequent Secretarial Lettersetting out the guidance on requesting a reduced security requirement state:

To be eligible for the renewal [of reduced security require-ments], [an EGS] must provide annual documentation of its eligibility for a bond reduction at least ninety (90) days prior to the current security’s expiration date. Such documentation *should include but may not be limited to:*

• a petition for renewal, filed with the Commission’s Secretary’s Bureau

• a $350 filing fee

• proof of service of the petition on the statutory advocates and affected EDCs

• a Tax Letter of Good Standing from the Department of Revenue, and

• the company’s gross receipts for the most recent four quarters

*Guidance on Electric Generation Supplier Licensee Financial Security*, Docket No. M‑2013-2393141, Secretarial Letter (April 8, 2016) (*emphasis added*). Notably, our guidance specified certain documentation to request renewal but also stated that establishing eligibility *may not be limited to* the specified documentation. *Id*.

FES’ ability to satisfy the specified criteria in the Commission’s guidance for seeking renewal of a reduced bond level does not equate to eligibility for a reduced bond level. By specifying certain relevant criteria, the Commission’s guidance does not limit the Commission’s authority to consider other relevant financial information when necessary in determining eligibility for a reduced bond requirement under the Public Utility Code.

TUS’ denial of FES’ 2018 Renewal Petition was based upon other relevant financial information, *i.e.*, the material change in FES’ business operations *via* filing Chapter 11 Bankruptcy and the subsequent Moody’s downgrade of FES’s rating outlook.  *April 18 Letter* at 1. As TUS noted, the Moody’s downgrade of FES’ rating outlook was sufficient to create substantial uncertainty regarding FES’ continued ability to meet its financial obligations under the Section 2809 of the Code. *Id*.

Under Section 2809 of the Public Utility Code, 66 Pa. C.S. § 2809, the Commission is granted discretion to set the level of the bond requirement to “ensure the safety and reliability of the generation of electricity.” *Id*. Therefore, the underlying financial stability and credit worthiness of an EGS’ business operation remains relevant to TUS’ consideration whether to discount a bond amount intended as financial security to ensure the financial stability of the EGS and the supply of electricity at retail.

As FES acknowledges, the filing of Chapter 11 Bankruptcy is a material change in business operations. As a general matter, Bankruptcy Court exists for a debtor claiming the court’s protection from repayment of debt obligations. Although FES has provided financial data which supports its assertion of a stable financial position, the filing of Chapter 11 bankruptcy is, itself, a measure of financial uncertainty. Further, a Moody’s “rating outlook” is an opinion issued by Moody’s Investor Services regarding the likely direction of a company’s credit rating over the medium term. Therefore, the Moody’s downgrade of FES’ rating outlook indicates uncertainty as to FES’ financial stability during the period covered by the bond requirement.

FES’ filing of Chapter 11 and FES’ Moody’s rating outlook downgrade, together, are sufficient justification for TUS’ uncertainty regarding FES’ ability to meet its financial obligations related to gross receipts taxes, Alternative Energy Portfolio Standards and the Commissions Annual Fee levied on EGS. In view of TUS’ justified uncertainty regarding FES’ financial stability going forward, TUS’ requirement that FES raise its bond level to 10% was reasonable to achieve the purpose outlined in Section 2809, in ensuring the safety and reliability of the generation of electricity. 66 Pa. C.S. § 2809 (c)(1)(i).

Under the given circumstances, the *April 18 Letter* denying FES’ 2018 Petition for renewal of the 5% bond level, based on the Moody’s downgrade of FES’ rating outlook is reasonable. TUS’ subsequent notice to FES to file a rider or amendment to increase its security to a 10% level is also reasonable and in accordance with the bond requirement under the Section § 2809 of the Code.

**Conclusion**

Based upon our review of the record and the applicable law, and consistent with the discussion herein, we shall deny the *Petition for Reconsideration* because we find that FES fails to assert substantial and credible evidence to warrant the grant of its request to reconsider TUS’ requirement that FES increase its security bond level from 5% to 10%; **THEREFORE,**

**IT IS ORDERED:**

1.That the Petition for Reconsideration of Staff Action filed by FirstEnergy Solutions Corporation on May 8, 2018, at Docket No. A-110078, pertaining to the denial of its Petition for Renewal of Its 5% Reduced Financial Security Requirement for the Period June 10, 2018 Through June 10, 2019, by Secretarial Letter issued April 18, 2018, is denied.

2. That FirstEnergy Solutions Corporation is required to comply with the Secretarial Letter of April 27, 2018, directing FirstEnergy Solutions Corporation to file a rider or amendment to increase its security bond to a 10% level within thirty (30) days from the date of entry of this Opinion and Order.

3. That the record at this docket is clarified to reflect the correct utility name, FirstEnergy Solutions Corporation, on all communications and documents.

**BY THE COMMISSION,**



Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: June 14, 2018

ORDER ENTERED: June 27, 2018

1. Notice of the material change in business operations was provided to the Commission in compliance with 52 Pa. Code 54.34. (*Petition for Reconsideration* at para. 11). [↑](#footnote-ref-1)
2. The *April 18 Letter* misstates the company name, FirstEnergy Solutions Corp., as “FirstEnergy Service Corporation,” while the April 27, 2018 Secretarial Letter correctly addresses the company by the name of “FirstEnergy Solutions Corporation.” The record should be clarified to reflect that all communication and orders at this docket pertain to FirstEnergy Solutions Corp. [↑](#footnote-ref-2)
3. FES notes that the *April 27 Letter*’s instructions were not clearly stated; however, FES is clearly directed to file a rider or amendment increasing its security to a 10% level. [↑](#footnote-ref-3)
4. *Petition for Reconsideration* at 19-24. [↑](#footnote-ref-4)
5. To deal efficiently with various routine and non-controversial matters that require the Commission’s approval, the Commission has expressly delegated its approval authority to staff regarding certain matters that are deemed to be routine, ministerial and non-policy making in nature. Thus, for specific delegated matters, in lieu of action at public meeting, individual bureaus may exercise the Commission’s authority by Secretarial Letter. [↑](#footnote-ref-5)