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September 5, 2014

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor  
Harrisburg, PA 17120

**VIA ELECTRONIC FILING**

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

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission ("PUC" or "Commission") is FES Industrial & Commercial Customer Coalition's ("FES ICC") Brief In Opposition To FirstEnergy Solutions Corporation Petition For Interlocutory Review And Answer To Material Questions in the above-referenced proceeding.

Service of this filing is being made as reflected on the attached Certificate of Service. Thank you.

Very truly yours,

McNEES WALLACE & NURICK LLC

By   
Susan E. Bruce

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Enclosures  
c: Certificate of Service

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I hereby certify that I have this day served a true copy of the foregoing document upon the participants listed below in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

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Counsel to the FES Industrial & Commercial  
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Dated this 5<sup>th</sup> day of September, 2014 at Harrisburg, Pennsylvania.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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**BRIEF OF THE FES INDUSTRIAL & COMMERCIAL CUSTOMER COALITION  
IN OPPOSITION TO  
FIRSTENERGY SOLUTIONS CORPORATION PETITION FOR INTERLOCUTORY  
REVIEW AND ANSWER TO MATERIAL QUESTIONS**

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Dated: September 5, 2014

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## I. INTRODUCTION

On June 9, 2014, the FES Industrial & Commercial Customer Coalition ("FES ICCC") filed with the Pennsylvania Public Utility Commission ("PUC" or "Commission") a Complaint against FirstEnergy Solutions Corporation ("FES"). In the Complaint, FES ICCC requested: (1) a stay of its members' responsibilities for FES's proposed "RTO Expense Surcharge"; (2) a prohibition against FES's ability to pass through such a surcharge under members' fixed-price agreements with FES; and (3) PUC review of the appropriateness of FES's Electric Generation Supplier ("EGS") license.

On June 17, 2014, the Office of Consumer Advocate ("OCA") filed a Notice of Intervention and Public Statement ("OCA Answer") in this proceeding. On July 1, 2014, FES filed an Answer and New Matter to FES ICCC's Complaint as well as Preliminary Objections. FES ICCC submitted an Answer to the Preliminary Objections on July 11, 2014, and a Reply to FES's Answer and New Matter on July 21, 2014. Also on July 11, 2014, the OCA filed an Answer to FES's Preliminary Objections.

This proceeding was assigned to Administrative Law Judge ("ALJ") Katrina L. Dunderdale on July 16, 2014. The ALJ issued the First Interim Order on August 6, 2014 ("First Interim Order"), denying FES's Preliminary Objections, and directing the ALJ's Office to schedule a Prehearing Conference in this proceeding. *See* First Interim Order at 10.

On August 26, 2014, FES filed a Petition for Interlocutory Review and Answer to a Material Question ("Petition"), posing the following "material questions":

- (1) Does the Commission lack subject matter jurisdiction to interpret a provision of an EGS's retail customer supply contract as requested?

(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?

FES Pet. ¶ 5.

For the reasons set forth below, FES ICCC respectfully submits that FES has not presented compelling reasons as to why interlocutory review is needed to prevent substantial prejudice or expedite the conduct of the proceeding, as required by the Commission's regulations. As such, FES ICCC urges the Commission to deny or decline to answer the material questions posed in the Petition. *See* 52 Pa. Code § 5.302(a). To the extent the PUC determines that interlocutory review is warranted, then FES ICCC submits that FES's "material questions" should be answered in the negative for the reasons discussed herein.

## II. ARGUMENT

### A. **FES Has Failed To Meet the Standard for Interlocutory Review.**

The Commission's regulations provide, in relevant part:

During the course of a proceeding, a party may file a timely petition directed to the Commission requesting review and answer to a material question which has arisen or is likely to arise. The petition ... shall state ... the question to be answered and the *compelling reasons why interlocutory review will prevent substantial prejudice* or expedite the conduct of the proceeding.

*Id.* (emphasis added). Pursuant to Commission precedent, the "pertinent consideration is whether interlocutory review is necessary in order to prevent substantial prejudice that is, the error and any prejudice flowing therefrom could not be satisfactorily cured during the normal Commission review process." *See Pa. Pub. Util. Comm'n v. Snyder Brothers, Inc.*, Docket No. C-2014-2402746, at 4-5 (entered July 24, 2014); *see also Joint Application of Bell Atlantic Corp. and GTE Corp.*, 92 Pa. P.U.C. 493 (entered June 14, 1999).

Moreover, the Commission "does not routinely grant interlocutory review except upon a showing by the petitioner of extraordinary circumstances or compelling reasons." *Snyder*

*Brothers* at 5; see also *Application of Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985). A petitioner may accomplish such a showing by its proving that "without such interlocutory review, some harm would result which would not be reparable through normal avenues, that the relief sought should be granted now, rather than later, and that granting interlocutory review would prevent substantial prejudice or expedite the proceeding." *Snyder Brothers* at 6; see also *Pa. Pub. Util. Comm'n v. Phila. Gas Works*, Docket Nos. P-2009-2097639 *et al.* (entered Apr. 15, 2010). In general, Petitions for Interlocutory Review are "not favored"; the "preferred approach is to permit proceedings to move forward in the normal course in order to provide all parties, the presiding officer, and the Commission with a full opportunity to develop the record, brief issues, and present arguments at each stage." *Snyder Brothers* at 5. In sum, a petitioner must satisfy the "high threshold of extraordinary circumstances or compelling reasons necessary for granting interlocutory review." *Application of Rasier-PA LLC*, Docket No. P-2014-2431743, 2014 WL 3763963 at \*7 (Pa. P.U.C.) (July 24, 2014). As discussed below, FES's Petition does not make the necessary showing to satisfy the Commission's high standard for interlocutory review.

FES contends that interlocutory review "is needed to prevent potentially significant prejudice to FES" because FES will allegedly be faced with "significant" prejudice due to the Commission's purported lack of jurisdiction to adjudicate FES ICCC's Complaint. FES Pet. ¶ 6.<sup>1</sup> According to FES, this prejudice will occur through the expenditure of time and resources for litigation of a "non-jurisdictional" proceeding before the Commission. *Id.* FES's reasons and circumstances for seeking interlocutory review, however, do not rise to the level of compelling or extraordinary.

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<sup>1</sup> As a threshold matter, although FES is surely cognizant of the "substantial prejudice" standard in the Commission's regulations, it is telling that FES itself stops short of characterizing its "potential" prejudice as "substantial."

FES contends that preventing litigation before the Commission (*i.e.*, the purportedly improper forum) will "prevent wasting" valuable time and resources. *Id.* As to this line of argument, the Commission has recognized "the possibility of expending substantial resources in litigation" is present in many cases and "does not constitute the extraordinary circumstances or compelling reasons that would justify granting interlocutory review." *Petition of West Penn Power Co.*, Docket No. P-2010-2158084, at 10-11 (entered Nov. 8, 2010). Contrary to FES's claim, the expenditure of time and resources in litigation does not amount to substantial prejudice.

Thus, the Petition is improper because it fails to present compelling reasons that granting interlocutory review will prevent substantial prejudice to FES. The Petition also fails because FES does not demonstrate extraordinary circumstances that would not be reparable through the Commission's complaint process. Accordingly, the Commission should decline to answer the material questions presented in the Petition and allow this proceeding to move forward consistent with the Commission's normal review process. To find otherwise based on FES's rationale would undermine the Commission's high standards for granting interlocutory review and opens the door to similar petitions by EGSs if facing alleged violations of the Competition Act, PUC regulations, or public policies and wish to escape accountability to the Commission or their customers.

**B. To the Extent the Commission Determines That Interlocutory Review Is Warranted, Then FES's "Material Questions" Should Be Answered in the Negative.**

**1. The Subject Matter of FES ICC's Complaint Is Squarely Within the Commission's Jurisdiction.**

FES's first "material question" is: "Does the Commission lack subject matter jurisdiction to interpret a provision of an EGS's retail customer supply contract as requested?" FES Pet. ¶ 5. The answer to this material question is an unequivocal no – the Commission does not lack such

subject matter jurisdiction. This proceeding does not involve an ordinary contract dispute, and FES's attempt to narrowly frame this proceeding as such would so grossly and inappropriately limit this Commission's jurisdictional scope that it could not fulfill its statutory obligations. Without question, this attempt must be summarily rejected.

While this proceeding may involve supply contracts between FES and FES ICCG members, the issue before the Commission is whether FES's billing practices conform to Pennsylvania statutes, regulations, and policies applicable to EGSs licensed by the Commission. The oversight of EGS billing practices, in particular, and the competitiveness of the retail market, in general, are squarely within the PUC's expertise and jurisdiction. To the extent necessary to carry out its responsibilities, the Commission may interpret relevant provisions of a supply contract between an EGS and its customers.

**a. The Commission Has Unequivocal, Albeit Limited, Jurisdiction Over EGSs and Certain EGS Activities, Including Billing Practices.**

In its Petition, FES erroneously claims that the Commission lacks subject matter jurisdiction to interpret a provision in a supply contract between an EGS and its customer. FES Pet. ¶ 9. In making these claims, FES ignores the plain language of the Electricity Generation Customer Choice and Competition Act ("Competition Act"). *See* 66 Pa. C.S. §§ 2800, *et seq.* The Competition Act clearly vests the Commission with unquestionable, albeit, limited, jurisdiction, over EGSs and certain EGS activities to protect the public interest and realize the Commonwealth's policy objectives. *See PECO Energy Co. v. Pa. Pub. Util. Comm'n*, 791 A.2d 1155 (Pa. 2002) (finding that the General Assembly "imbues the Commission with authority in enabling statutes"); *see also ARRIPA v. Pa. Pub. Util. Comm'n*, 966 A.2d 1204, 1211 (Pa. Commw. 2009) [hereinafter, "*ARRIPA*"] ("Even if a statute's text does not provide the

Commission with specific authority, a strong and necessary implication from such text may, nonetheless, provide such authority.").

As a threshold matter, FES incorrectly argues that, because it is an EGS, it is beyond the Commission's jurisdiction, as FES suggests that the PUC's jurisdiction only applies to public utilities. FES Pet. ¶ 7. While the definition of "public utility" does not generally include EGSs, an explicit exception exists in the Competition Act relative to EGSs "for the limited purposes as described in section[] 2809." 66 Pa. C.S. § 102. Section 2809 directly relates to the licensing requirements for EGSs. *Id.* § 2809. Thus, FES, as a licensed EGS, is subject to the Commission's jurisdiction for purposes of application of Section 2809. *See Delmarva Power & Light Co. v. Pa. Pub. Util. Comm'n*, 870 A.2d 901, 910 (Pa. Commw. 2005).

Section 2809 vests the Commission with jurisdiction over EGSs, including FES, for certain activities that affect the public interest. For example, Section 2809(a) requires an EGS, prior to serving any class of customers, to secure a license issued by the Commission. 66 Pa. C.S. § 2809(a). Similarly, Section 2809(b) provides that an EGS must be:

[F]it, willing and able to perform properly the service proposed and *to conform to the provisions of this title and the lawful orders and regulations of the commission under this title, including the commission's regulations regarding standards and billing practices*, and that the proposed service, to the extent authorized by the license, will be consistent with the public interest and the policy declared in this chapter.

*Id.* § 2809(b) (emphasis added). Section 2809(b) explicitly authorizes the Commission to ensure that an EGS "conforms to the provisions" of the Competition Act and the Commission's "lawful orders and regulations" in accordance with the Competition Act, including regulations regarding "billing practices," consistent with the public interest. *Id.* To be clear, nothing in the Competition Act limits the "public interest" to the interests of a particular customer class or

customers of a certain size; the Commission's duty under Section 2809 applies to all customer classes.<sup>2</sup>

In this instance, FES ICCC has raised specific allegations that FES's billing practices (*i.e.*, inappropriately attempting to collect purported increased "ancillary charges" via a Pass-Through Clause even though no Pass-Through Event as defined by FES's agreements occurred that would allow for the use of such a clause) are deceptive and fraudulent. Because the Commission has jurisdiction over an EGS's billing practices, and FES ICCC's Complaint specifically raises concerns regarding FES's billing practices, the Commission has jurisdiction to adjudicate FES ICCC's Complaint pursuant to Section 2809 of the Competition Act.

Moreover, the Commission has other jurisdictional duties, including: (1) ensuring that an EGS's authorized service is consistent with the public interest and stated policies of the Competition Act;<sup>3</sup> (2) establishing licensing and other such requirements deemed necessary for the protection of the public; and (3) requiring EGSs to provide adequate and accurate information that allows customers to make informed choices regarding the purchase of electricity services. *See* 66 Pa. C.S. §§ 2809(b), 2802(14), 2807(d)(2). In this instance, FES ICCC's Complaint specifically questions whether FES's attempt to inappropriately utilize its Pass-Through Clause when no Pass-Through Event has occurred is contrary to the requirements of the Competition Act, warrants a review of FES's EGS licensing, and creates confusion for customers attempting to obtain a fixed-price contract. In other words, all of the issues raised in FES ICCC's Complaint are those in which the PUC specifically retains jurisdiction over EGSs such as FES.

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<sup>2</sup> Chapter 54, which sets forth the regulations promulgated to implement the Competition Act, applies to all customer classes with the exception of Section 54.4 through 54.9, which apply only to residential and business customers and provide additional customer safeguards. *See* 52 Pa. Code § 54.1(b). The purpose of Chapter 54 is to require EGS to provide customers with information to make informed decisions about electricity purchases by providing adequate and accurate information. *Id.* § 54.1(a).

<sup>3</sup> The Competition Act's policy declarations include requiring EGSs to obtain licenses and demonstrate financial responsibility. *See* 66 Pa. C.S. § 2802(14).

Thus, the PUC has jurisdiction over FES ICC's Complaint, and FES's suggestion otherwise must be ignored.<sup>4</sup>

Importantly, in a recent proceeding, the Commission reviewed the nomenclature to be utilized by EGSs when providing fixed-price contracts to customers. As part of that proceeding, the PUC recognized that Section 2807(d)(2) of the Competition Act obligates the Commission "to ensure that the EGS is appropriately communicating the price to consumers" and, to the extent that the EGS fails to follow Commission guidance, the EGS "takes the risk that a consumer...may file a complaint asserting a violation of the Public Utility Code, Commission regulations, or the Unfair Trade Practices and Consumer Protection Law." *See Guidelines for Use of Fixed Price Labels for Products With a Pass-Through Clause*, Docket No. M-2013-2362961, at 24 (entered Nov. 14, 2013); *id.* at 24 (noting "there is nothing to prevent a customer holding a current contract from *filing a complaint with this agency* or another agency about *their contractual terms*") (emphasis added). While the Commission's Order specifically provided a carve-out for Large Commercial and Industrial customers as it relates to the nomenclature to be utilized by EGSs in contracts, nothing in the Commission's Order prevents any customer from filing a complaint with the PUC regarding contractual concerns, especially concerns regarding fraudulent and deceptive billing by an EGS.

Finally, the legislature conferred on the Commission broad duties to protect the public interest. Specifically, the Commission has jurisdiction to monitor the retail electric market and take steps to prevent anticompetitive conduct. 66 Pa. C.S. § 2811. If FES is allowed to move forward with billing practices inconsistent with the plain language of its contracts, shielded by

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<sup>4</sup> In fact, FES recognized the Commission's jurisdiction over EGSs pursuant to Section 2807(d): "FES appreciates the Commission's duty to ensure that EGSs provide adequate and accurate customer information to enable customers to make informed choices," and that "[i]nformation...[is] provided to consumers in an understandable format that enables consumers to compare prices and services on a uniform basis." *See* Comments of FirstEnergy Solutions Corp., Docket No. M-2013-2362961, at 8 (filed June 24, 2013); *id.* at 11.

the complexity of the wholesale markets, FES's fixed-priced customers lose the benefit of their bargains. Such an outcome risks the integrity of the fixed-price contracts for all customer classes. These issues are imbued with the public interest that the Commission's jurisdictional powers are intended to protect. This general grant of jurisdiction provides the PUC with an additional, independent basis to adjudicate this dispute.

**b. The PUC Has The Authority To Review and Interpret Supply Contracts to the Extent Necessary To Fulfill Its Statutory Duties.**

The Commission generally does not have jurisdiction over ordinary contract disputes, such as those arising from breach of contract or negligence claims.<sup>5</sup> The Commission, however, may review and interpret contracts to the extent necessary to carry out its statutory duties, including ensuring that EGSs conform to the requirements of the Competition Act, as well as applicable regulations and public policies the Commission is tasked with administering.

In a case raising issues directly comparable to those raised by FES ICCC, the Commission found that it may exercise jurisdiction over a complaint involving a gas supply agreement between a customer and a natural gas supplier ("NGS"). *See generally Schmidt v. Dominion Retail, Inc., t/a Peoples Plus*, Docket No. C-20066726 (Feb. 22, 2007) (reversing the Initial Decision concluding that the Commission lacked subject matter jurisdiction). In rendering this conclusion, the Commission stated:

[NGSs] are not public utilities as defined in Section 2202 of the Public Utility Code...Peoples Plus is an NGS and, as such, is not subject to Commission regulation, except in limited circumstances defined in the Natural Gas Choice and Competition Act.

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<sup>5</sup> *See, e.g., Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673 (Pa. Super. 1978); *Behrend v. Bell Telephone*, 363 A.2d 1152 (Pa. Super. 1976).

[A]s a general rule, the Commission is not authorized to review and interpret the provisions of a contract between an NGS and its customer, *except as provided in Section 2206(c)*.

*Id.* at 4-5 (emphasis added); *see also* 66 Pa. C.S. § 2206(c) (setting forth the Commission's responsibilities towards customers of both NGSs and natural gas distribution companies with regard to customer information). Notably, Section 2206(c) of the Natural Gas Act closely mirrors the language in Section 2807(d)(2) of the Competition Act.<sup>6</sup> *See supra* at n.3. Just as the Commission exercised jurisdiction to review and interpret a gas supply agreement in which the Natural Gas Act's customer information requirements were at issue in *Schmidt*, the Commission may exercise jurisdiction to review and interpret an electric supply agreement in this case where the Competition Act's nearly identical customer information requirements are in controversy.

The courts have also recognized that the Commission has jurisdiction to consider contractual issues that require the Commission's expertise. In *ARRIPA*, the Commission was presented with a question regarding the ownership of renewable energy credits under purchase power agreements. *See generally* *ARRIPA*, 966 A.2d 1204. According to the court: "Considering the unique nature of alternative energy credits and the provision in the [Alternative Energy Portfolio Standards] for the Commission's extensive oversight of them, we believe...that resolving this dispute is not a matter of ordinary contract interpretation, but rather a process that implicates the particular expertise of the Commission." *ARRIPA*, 966 A.2d at 1212; *see also*

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<sup>6</sup> Section 2206(c) of the Natural Gas Act provides:

The commission shall, by order or regulation, establish requirements that each natural gas distribution company and natural gas supplier provide adequate, accurate customer information to enable retail gas customers to make informed choices regarding the purchase of all natural gas services offered by that provider. Information shall be provided to retail gas customers in an understandable format that enables retail gas customers to compare prices and services on a uniform basis.

66 Pa. C.S. § 2206(c).

*Petition of Verizon Pennsylvania, Inc.*, Docket No. P-00042088 at 8 (July 9, 2004) (finding the specialized nature of an interconnection agreement and technical issues regarding service obligations necessitated the PUC's peculiar expertise in addressing the merits of the contractual dispute).

FES ICCC's Complaint requests the Commission interpret certain provisions of the fixed-price contracts between FES and FES ICCC members to determine whether FES has run afoul of the Commission's EGS billing requirements through utilizing deceptive and possibly fraudulent billing practices. The Complaint, however, does not ask the Commission to interpret such contract language in order to rule on an ordinary contract claim, and the Commission should disregard and dismiss FES's efforts to inaccurately characterize the Complaint as such. Rather, at issue in this proceeding is FES's billing practices as an EGS licensed by this Commission. Consistent with established precedent, the Commission may review and interpret contracts as necessary to fulfill its statutory duties under the Competition Act, especially considering the contractual issues at hand require the Commission's particular expertise.

FES's efforts to pass through ancillary costs to FES ICCC members with fixed-price contracts constitute deceptive, if not fraudulent, billing practices, contravene statutory requirements, violate EGS licensing regulations, and thwart the consumer protection of the Competition Act. Based on the foregoing, the Competition Act unequivocally vests the Commission with jurisdiction over the regulation of certain EGSs activities, including billing practices, and the authority to enforce compliance with any other requirements necessary to protect the public interest. Established precedent authorizes the Commission to review and interpret contractual provisions where doing so is necessary to perform its statutory responsibilities.

In conclusion, FES ICCC respectfully submits that FES's first material question must be answered in the negative, as the Commission's subject matter jurisdiction over the issues raised in the Complaint is clear. Therefore, FES ICCC respectfully requests that the Commission answer the first material questions in the negative or not at all.

**2. The Commission Does Not Lack Primary Jurisdiction, and a Stay of the Current Proceeding Is Not Required.**

The second material question posed by FES is: "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?" FES Pet. ¶ 5. This question should also be answered in the negative, if at all.

As a threshold matter, the doctrine of primary jurisdiction applies where an administrative agency cannot provide complete redress to a complaining party. *See Ostrov v. I.F.T., Inc.*, 586 A.2d 409, 413-414 (Pa. Super. 1991). As discussed below, the doctrine of primary jurisdiction does not apply here because the Commission has the authority to provide the relief requested in the FES ICCC Complaint.

Even assuming the doctrine of primary jurisdiction were applicable, however, the doctrine provides that a *civil court* would be required to defer to the Commission under the circumstances of this case. As recognized by the Superior Court:

In general, the doctrine of primary jurisdiction holds that *where an agency has been established to handle a particular class of claims, the court should refrain from exercising its jurisdiction until the agency has made a determination*. Hence, although the court may have subject matter jurisdiction, the court defers its jurisdiction until an agency ruling has been made.

Thus, the doctrine of primary jurisdiction applies where the administrative agency cannot provide a means of complete redress to the complaining party and yet the dispute involves issues that are clearly better resolved in the first instance by the administrative agency charged with regulating the subject matter of the dispute.

[...]

Therefore, *where the subject matter is within an agency's jurisdiction and where it is a complex matter requiring special competence....the proper procedure is for the court to refer the matter to the appropriate agency.* Also weighing in the consideration should be the need for uniformity and consistency in agency policy and the legislative intent. Where, on the other hand, the matter is not peculiarly within the agency's area of expertise, but is one which the courts are equally well-suited to determine, the court must not abdicate its responsibility.

*See id.* (emphasis added). As discussed in Section II.B.1, *supra*, the allegations in the Complaint fall squarely within the Commission's subject matter jurisdiction and expertise regarding the regulation of EGSs in accordance with the Competition Act's statutory mandates.

In addition to possessing the jurisdiction to adjudicate the types of claims set forth in the Complaint, the Commission has the authority to provide redress to FES ICCC. *Id.* Specifically, the Commission has the authority to grant FES ICCC's requested relief, which entails: (1) staying FES ICCC members' liability for FES's so-called RTO Expense Surcharge; (2) prohibiting FES from attempting to recover from FES ICCC members for FES's so-called RTO Expense Surcharge; (3) reviewing the appropriateness of FES's EGS license; and (4) providing any additional or necessary relief as appropriate.

Under Section 501(a) of the Public Utility Code, the Commission has "full power and authority...to enforce, execute and carry out, by its...orders...the provision of [the Public Utility Code]." 66 Pa. C.S. § 501(a). The Commonwealth Court has affirmed the Commission's ability to issue "cease and desist" directives under Section 501(a). *See Mid-Atlantic Power Supply Assoc. v. Pa. Pub. Util. Commission*, 755 A.2d 723 (Pa. Commw. 2000) (ordering PECO to refrain from certain marketing practices and ensure that current advertising is not deceptive or inaccurate). The Commission also has the authority to "institute injunction, mandamus or other

appropriate legal proceedings, to restrain such violations of the provisions of this part, or of the regulations, or orders of the commission, and to enforce obedience thereto." 66 Pa. C.S. § 502. Furthermore, Section 2809(b) provides the PUC with the duty to ensure that a licensed EGS conforms to the applicable statutes, regulations, and PUC orders governing EGSs. *Id.* § 2809(b). Section 2802(14) gives the PUC powers and duties to impose other requirements on EGS companies that the PUC finds necessary to protect the public. Thus, each request for relief in the FES ICCC Complaint has a statutory basis in the Public Utility Code. Even if the primary jurisdiction doctrine were applicable (which it is not since the PUC can provide complete redress to FES ICCC), the Complaint is properly before the Commission.

As to legislative intent, the Competition Act clearly contemplates that the Commission will assume responsibility for imposing requirements necessary to protect the public. *Id.* § 2802(14). FES's billing practices at issue in this proceeding threaten the integrity of the retail market. In its role as the overseer of Pennsylvania's competitive retail market, the Commission is best suited to realize the Competition Act's public protection intent as well as ensure consistent and uniform policy for EGSs, specifically, and retail market competition, in general.

Thus, and contrary to FES's claim, the doctrine of primary jurisdiction is not implicated here. The Commission does not lack primary jurisdiction and a stay of the current proceedings pending action by a court of competent jurisdiction is not required. Notwithstanding, in the event that FES ICCC's claims regarding FES's compliance with EGS rules and regulations were brought before a civil court, the doctrine of primary jurisdiction, as applied under the circumstances of this case, provides that the civil court would be required to either refrain from acting until the Commission ruling has been made or refer the matter to the Commission.

For these reasons, to the extent the Commission chooses to grant interlocutory review, the second material question should be answered in the negative.

### III. CONCLUSION

**WHEREFORE**, the FES Industrial & Commercial Customer Coalition respectfully requests that the Pennsylvania Public Utility Commission deny or decline to answer the material questions posed in FirstEnergy Solution Corporation's Petition for Interlocutory Review. In the alternative, to the extent the Commission grants interlocutory review, FES ICCC respectfully submits that both questions must be answered in the negative.

Respectfully submitted,

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