

December 29, 2014

**VIA HAND DELIVERY**

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

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

**FIRSTENERGY SOLUTIONS CORP. PETITION FOR CLARIFICATION**

Dear Secretary Chiavetta:

Enclosed for filing with the Commission is FirstEnergy Solutions Corp.'s Petition for Clarification in the above-referenced proceeding. A copy of this document has been served in accordance with the attached Certificate of Service.

If you have any questions regarding this filing, please direct them to me. Please date-stamp the extra copy and return it with our courier. 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: Per Certificate of Service  
Honorable Robert F. Powelson, Chairman  
Honorable John F. Coleman, Vice Chairman  
Honorable James H. Cawley, Commissioner  
Honorable Pamela A. Witmer, Commissioner  
Honorable Gladys M. Brown, Commissioner

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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

FES INDUSTRIAL & COMMERCIAL  
CUSTOMER COALITION,

Complainant

v.

FIRSTENERGY SOLUTIONS CORP.,

Respondent

Docket No. C-2014-2425989

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PETITION OF FIRSTENERGY SOLUTIONS CORP.  
FOR CLARIFICATION OF  
THE COMMISSION'S ORDER ENTERED DECEMBER 12, 2014

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Date: December 29, 2014

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FirstEnergy Solutions Corp. (“FES”), pursuant to 52 Pa. Code § 5.572 and Section 703(g) of the Public Utility Code (“Code”), 66 Pa. C.S. § 703(g), petitions the Pennsylvania Public Utility Commission (“Commission”) for clarification of the Commission’s Opinion and Order entered December 12, 2014 (“December 12 Order”).

## **I. INTRODUCTION**

1. The *Complaint of the FES Industrial & Commercial Customer Coalition* (“FES ICC”) challenges FES’s right to invoke the “pass-through” clause in its private contracts with FES ICC members.

2. In the December 12 Order, the Commission ruled that it lacks jurisdiction and authority to interpret the terms and conditions of a contract between an EGS and its customer, but declined to dismiss the Complaint because it found the Complaint raises other issues that are within the Commission’s subject matter jurisdiction, including alleged violations of 66 Pa. C.S. § 2807(d)(2). The December 12 Order remanded the Complaint to the Presiding ALJ for further proceedings.

3. On December 18, 2014, the Presiding ALJ issued a Second Interim Order which directs that an Initial Call-In Telephonic Hearing be scheduled, and that “the issue to be determined at the Initial Call-In Telephonic Hearing will be whether FES violated Section 2807(d)(2) of the Code, 66 Pa.C.S.A. § 2807(d)(2), and Sections 54.43(1) and 54.43(f) of the Commission’s Regulations, 52 Pa. Code § 54.43(1) and 54.43(f).”

4. FES does not dispute that the Commission has subject matter jurisdiction to determine whether the Code and/or its regulations have been violated, that the Commission has the authority to redress any such demonstrated violations, nor that the Commission has

jurisdiction over claims pleaded in the Complaint which do not require an interpretation of the contracts between FES and the FES ICCC members. As explained below, however, the Complaint is lacking in allegations of regulatory violations by FES that are not conditioned on an interpretation of the contract in FES ICCC's favor. Indeed, review of the Complaint identifies only one instance of an alleged regulatory violation by FES that is not conditioned on a determination that FES breached the terms and conditions of its contracts. The remaining allegations in the Complaint allege that FES breached its contracts, and in doing so, violated the Code and/or Commission regulations. Further, the Complaint does not contain references to certain statutes and/or regulations cited in the December 12 Order, much less allege violations of those statutes and/or regulations.

5. As a result, clarification of the December 12 Order is necessary to ensure due process and administrative economy. Specifically, FES requests that the December 12 Order be clarified to direct that proceedings on remand be limited in scope to the single non-contract-based regulatory violation alleged in the Complaint, or in the alternative, to direct that FES ICCC amend its Complaint to plead FES's alleged violations of Commission regulations with the specificity due process requires, so that FES has a sufficient opportunity to respond to the allegations.

## **II. STANDARD FOR CLARIFICATION**

6. The standard the Commission uses when considering a petition for clarification is the same as that used for a petition for reconsideration. *Application of PPL Electric Utilities Corporation*, Docket Nos. A-2009-2082652 *et al.*, (Order entered Apr. 23, 2010). In determining whether to grant or deny reconsideration, the Commission applies the standard set forth in *Duick v. Pennsylvania Gas and Water Co.*, 56 Pa. P.U.C. 553 (1982):

A petition for reconsideration, under the provisions of 66 Pa. C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part.

In this regard we agree with the court in the *Pennsylvania Railroad Company* case, wherein it was stated that

Parties . . . cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically decided against them . . . what we expect to see raised in petitions for reconsideration are new and novel arguments, not previously heard or considerations which appear to have been overlooked or not addressed by the Commission.

*Duick*, 53 Pa. P.U.C. at 559. Accordingly, reconsideration is appropriate where there are considerations which appear to have been overlooked or not addressed.

7. In the instant case, clarification is needed because the Complaint lacks allegations explaining how FES allegedly violated the Public Utility Code or Commission regulations, other than by imposing a charge it allegedly had no contractual right to impose. Clarification is necessary for FES to understand the alleged violations it must defend against consistent with the requirements of due process.

### **III. REQUEST FOR CLARIFICATION**

8. In the December 12 Order, the Commission ruled that it lacks jurisdiction and authority to interpret the terms and conditions of the contract between an EGS and a customer concerning whether a breach has occurred, but declined to dismiss the Complaint because it found the Complaint raises other issues that are within the Commission's subject matter jurisdiction:

The FES ICCC Complaint raises issues beyond contract interpretation; allegations that FES' actions violated Section 2807(d)(2) of the Code, 66 Pa. C.S. § 2807(d)(2), and Section 54.43(1) of the Commission's Regulations, 52 Pa. Code § 54.43(1), are included. Under these sections, FES is required to provide adequate and accurate information to customers, including commercial and industrial customers, regarding its services. The FES ICCC also raises the issue of whether FES has violated Section 54.43(f) of the Commission's Regulations, 52 Pa. Code § 54.43(f), under which FES is responsible for any fraudulent or deceptive billing acts. Therefore, we conclude that the FES ICCC Complaint has raised issues that are within the Commission's subject matter jurisdiction.

December 12 Order, p. 21 (footnote omitted). In a footnote, the Commission further explained, “Section 54.122(3) of the Commission’s Regulations also precludes EGSs from engaging in false or deceptive advertising to customers. See 52 Pa. Code § 54.122(3).” Accordingly, the Complaint has been remanded to the ALJ for further proceedings that address alleged violations of the Code and/or Commission regulations but do not require the interpretation of contractual terms and conditions.

9. As noted above, FES does not dispute that the Commission has subject matter jurisdiction to determine whether the Code and/or its regulations have been violated, nor that the Commission has the authority to redress any such demonstrated violations. However, further clarification is necessary because the Complaint’s allegations do not articulate acts of FES allegedly violating the Code and/or the Commission’s regulations – that are not dependent upon an initial interpretation of the contract in FES ICCC’s favor – sufficiently for FES to prepare a defense. As an initial matter, contrary to the December 12 Order, the Complaint contains no citation to either 66 Pa. C.S. § 2807(d)(2) or 52 Pa. Code. § 54.122(3).

10. The Complaint includes three instances where FES ICCC identifies actions of FES that allegedly violated the Code or Commission regulations. Each of these instances

requires a preliminary ruling interpreting the contract's terms and conditions in FES ICCC's favor. In other words, FES ICCC alleges FES violated the Code and/or Commission regulations by FES doing something the contracts do not allow FES to do:

**Instance No. 1:**

Because these “ancillary costs” are expressly included within the fixed price for energy set forth in agreements entered into by FES and its fixed-price customers, and not the result of any change in law or implementation of a new or additional cost that may trigger a “Pass-Through Event” under the fixed-price agreements, FES’s proposed actions are deceptive, if not fraudulent; contravene the PUC’s statutory requirements; violate the conditions of FES’s license issued by the PUC; and defy the intentions of the General Assembly in enacting the Electricity Generation Customer Choice and Competition Act (“Competition Act”).

Complaint, p. 1 (emphasis added).

**Instance No. 2:**

Unfortunately, rather than recognizing that fixed-price customers have already remitted a risk premium to FES to avoid this market volatility, FES is now avoiding responsibility for these charges and instead attempting to circumvent these customers’ contracts by inappropriately triggering a Pass-Through Event.

In doing so, FES is violating several of the PUC’s rules and regulations, as well as the intention of the Competition Act. . . .

Complaint, ¶¶ 29-30 (emphasis added).

**Instance No. 3:**

By inappropriately attempting to collect these higher (but not new or additional) charges from fixed-price customers through its inapplicable Pass-Through Event clause, FES is engaging in deceptive and possibly fraudulent behavior. In this instance, FES ICCC members entered into fixed-price contracts that specifically included ancillary costs in the fixed price for energy. By attempting to circumvent this fixed price to require customers to remit additional ancillary costs, FES is engaging in deceptive, if not fraudulent, behavior.

Complaint, ¶ 34 (emphasis added).

Because each of these alleged violations are based upon a preliminary determination that FES breached a contractual provision, a determination to be made by a civil court, they cannot be the subject of proceedings on remand unless and until a civil court has interpreted the contract in FES ICCC's favor.

11. Review of the Complaint identifies only one instance in which the Complaint arguably alleges an action of FES that does not require an interpretation of the contract:

31. As part of that compliance, the EGS must conform to the PUC's standard billing practices, including providing accurate information regarding services. Most importantly, an EGS will be held responsible for any fraudulent and deceptive billing acts.

32. In this instance, FES has notified its fixed-price customers that, even though these customers have negotiated to include ancillary costs in their fixed-price and paid a risk premium to FES in order to avoid market volatility, FES will be allocating and collecting additional charges from these customers due to a "Pass-Through Event."

33. In addition to failing to provide any concrete information regarding how the events of January 2014 triggered a Pass-Through Event, further review of the marketplace in January 2014 confirms that no circumstances occurred that would actually trigger such an "Event."

Complaint ¶¶ 31-33 (footnotes omitted). Therefore, the only allegations of regulatory violations not conditioned on a breach of contract, of which FES had notice when it responded to the Complaint, concern FES's alleged "fail[ure] to provide any concrete information regarding how the events of January 2014 triggered a Pass-Through Event...."

12. However, the presiding ALJ's December 18, 2014 Second Interim Order states "[t]hat the issue to be determined at the Initial Call-In Telephonic Hearing will be whether FES violated Section 2807(d)(2) of the Code, 66 Pa.C.S.A. § 2807(d)(2), and Sections 54.43(1) and

54.43(f) of the Commission's Regulations, 52 Pa. Code § 54.43(1) and 54.43(f)." Ordering Paragraph 2.

13. Because the Commission-jurisdictional issues to be determined on remand exceed the Commission-jurisdictional issues pleaded in the Complaint, FES requests that the Commission clarify the December 12 Order by directing that the scope of proceedings on remand should be limited to FES ICCC's Commission-jurisdictional allegation that "FES "fail[ed] to provide any concrete information regarding how the events of January 2014 triggered a Pass-Through Event...."

14. In the alternative, FES requests that the Commission clarify the December 12 Order by directing FES ICCC to file an amended complaint pleading FES's alleged violations of Commission regulations with the specificity due process requires. As a matter of due process, FES must have notice of its alleged violations of the Code and/or Commission regulations at the time it is required to file its response to the Complaint. At this time, FES has never been given notice and an opportunity to respond to allegations of violations of 66 Pa.C.S. § 2807(d)(2) or 52 Pa. Code § 54.122(3), or to allegations of other regulatory violations not conditioned on a finding that FES breached its contracts. An amended complaint would also promote administrative economy and efficiency by defining the issues to be litigated and facts to be developed on remand.

#### **IV. REQUEST FOR RELIEF**

For the foregoing reasons, FirstEnergy Solutions Corp. respectfully requests that:

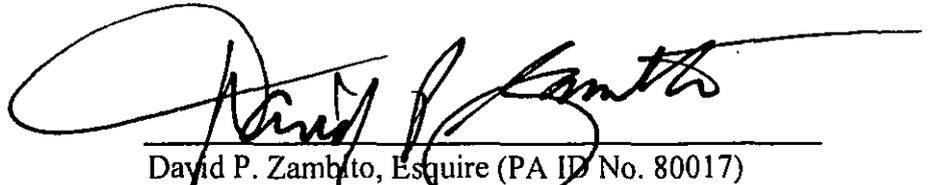
- (i) The Petition for Clarification of FirstEnergy Solutions Corp. be granted;
- (ii) That the *December 12 Opinion and Order* be clarified to (1) limit the scope of proceedings on remand to FES ICCC's allegation of an alleged violation that does not require

contractual interpretation, as explained above; or, in the alternative, (2) to direct FES ICCC to file an amended complaint pleading alleged violations of the Code and/or Commission regulations consistent with due process; and,

(iii) The Commission provide such other relief as is necessary and proper.

Respectfully submitted,

COZEN O'CONNOR

A large, stylized handwritten signature in black ink, appearing to read "David P. Zambito", is written over a horizontal line.

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Counsel for *FirstEnergy Solutions Corp.*

Dated: December 29, 2014

**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 FirstEnergy Solutions Corp.'s Petition for Clarification, upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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

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DATED: December 29, 2014

  
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