



100 Pine Street • PO Box 1166 • Harrisburg, PA 17108-1166
Tel: 717.232.8000 • Fax: 717.237.5300

Vasiliki Karandrikas
Direct Dial: 717.237.5274
Direct Fax: 717.260.1707
vkarandrikas@mwn.com

January 8, 2015

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

VIA ELECTRONIC FILING

RE: FES Industrial and 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 the FES Industrial and Commercial Customer Coalition's ("FES ICC") Answer in Opposition to the Petition For Clarification filed by FirstEnergy Solutions Corporation in the above-referenced proceeding.

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

Sincerely,

McNEES WALLACE & NURICK LLC

By *Vasiliki Karandrikas*
Vasiliki Karandrikas

VK/emp

Enclosures

c: Administrative Law Judge Katrina L. Dunderdale (via E-mail and First-Class Mail)
Certificate of Service
Honorable Robert F. Powelson, Chairman (via e-mail and First Class Mail)
Honorable John F. Coleman Jr., Vice Chairman (via e-mail and First Class Mail)
Honorable James H. Cawley, Commissioner (via e-mail and First Class Mail)
Honorable Pamela A. Witmer, Commissioner (via e-mail and First Class Mail)
Honorable Gladys M. Brown, Commissioner (via e-mail and First Class Mail)

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CERTIFICATE OF SERVICE

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).

VIA EMAIL AND FIRST-CLASS MAIL

Amy M. Klodowski, Esq.
FirstEnergy Corp.
800 Cabin Hill Dr.
Greensburg, PA 15601
aklodow@firstenergycorp.com

David P. Zambito, Esq.
D. Troy Sellars, Esq.
Cozen O'Connor
305 North Front Street, Suite 400
Harrisburg, PA 17101-1236
dzambito@cozen.com
tsellars@cozen.com

Daniel G. Asmus, Esq.
Office of Small Business Advocate
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, PA 17101
jorevan@pa.gov
dasmus@pa.gov

Johnnie E. Simms, Esq.
Pennsylvania Public Utility Commission
Bureau of Investigation & Enforcement
P.O. Box 3265
Harrisburg, PA 17105-3265
josimms@pa.gov

Candis A. Tunilo, Esq.
Brandon J. Pierce, Esq.
Office of Consumer Advocate
555 Walnut Street
Forum Place - 5th Floor
Harrisburg, PA 17101-1921
ctunilo@paoca.org
bpierce@paoca.org

Scott J. Rubin, Esq.
333 Oak Lane
Bloomsburg, PA 17815
scott.j.rubin@gmail.com



Vasiliki Karandrikas

Counsel to the FES Industrial and Commercial
Customer Coalition

Dated this 8th day of January, 2015 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.	:	

**FES INDUSTRIAL & COMMERCIAL CUSTOMER COALITION'S
ANSWER IN OPPOSITION TO
FIRSTENERGY SOLUTIONS CORPORATION'S PETITION FOR CLARIFICATION**

Pursuant to the provisions of 52 Pa. Code §§ 5.61 and 5.572, the FES Industrial & Commercial Customer Coalition ("FES ICCC") hereby files this Answer in Opposition ("Answer") to FirstEnergy Solutions Corporation's ("FES") Petition for Clarification ("Petition") with the Pennsylvania Public Utility Commission ("PUC" or "Commission"). *See* 52 Pa. Code §§ 5.61 and 5.572. FES's Petition seeks clarification of the Commission Opinion and Order entered on December 12, 2014 ("December 12 Order"), in the above-referenced proceeding. As discussed below, the Petition: (1) fails to meet the legal standard applicable to petitions for clarification and inappropriately provides FES another "bite at the apple;" (2) attempts to inappropriately narrow the issues in this proceeding contrary to the Commission's directives; and (3) requests unnecessary and irrelevant modifications to FES ICCC's Complaint that would unreasonably extend the timeframe for this proceeding, thereby increasing the risk to FES ICCC members of contract cancellations during the pendency of their billing disputes. For these reasons, FES ICCC respectfully requests that the Commission deny the FES Petition. In support of its position, FES ICCC avers as follows:

I. BACKGROUND

On June 9, 2014, FES ICCC filed with the Commission a Complaint against FES alleging that, by 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 clause, FES's billing practices are deceptive and fraudulent and in violation of applicable statutory and regulatory provisions. *See* 66 Pa. C.S. §§ 2802(14), 2809(b), 2802(6) & 2802(9); *see also* 52 Pa. Code §§ 54.43 & 54.42; *see also* FES ICCC Complaint at 8-9 & 13-14. As such, upon a finding by the Commission that FES's actions are deceptive, if not fraudulent, in direct contravention of the PUC's statutory requirements, violate the conditions of FES's Electricity Generation Supplier ("EGS") license, and thwart the legislative intent underlying the Electricity Generation Customer Choice and Competition Act ("Competition Act"), FES ICCC requests relief in the form of: (1) a stay of its members' alleged payment 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 EGS license.

On July 1, 2014, FES filed an Answer and New Matter to FES ICCC's Complaint. Contemporaneously, FES filed Preliminary Objections requesting that the Commission dismiss the Complaint due to its lack of subject matter and primary jurisdiction over the allegations in the Complaint, which FES attempted to characterize as "issues of private contract." *See* FES Preliminary Objections at 1. 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.

Presiding Administrative Law Judge ("ALJ") Katrina L. Dunderdale issued the First Interim Order on August 6, 2014 ("First Interim Order"), denying FES's Preliminary Objections. *See* First Interim Order at 10. The ALJ concluded that the Commission has jurisdiction over the

subject matter of the dispute to the extent the Complaint involves arguments that FES failed to comply with Commission statutes and regulations, noting that the "Commission has held consistently that its subject matter jurisdiction includes, *inter alia*, the authority to impose reasonable and necessary requirements upon an EGS if needed to maintain the quality of service experienced with the EGS as co-equal with the quality of service experienced with the EDS." *Id.* at 8. The First Interim Order concluded that the Complaint raises claims that, if proven, might show FES failed to provide adequate and accurate customer information to enable industrial and commercial customers to make informed choices regarding the purchase of all electricity services and to have that information provided in an understandable format. *Id.* at 9.

Upon denial of its Preliminary Objections, on August 26, 2014, FES filed a Petition for Interlocutory Review and Answer to a Material Question ("Petition for Interlocutory Review"), which, in large measure, reiterated the arguments in its Preliminary Objections. FES's Petition for Interlocutory Review posed 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; 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? FES Pet. for Interlocutory Review at ¶ 5. On September 5, 2014, FES ICCC filed a Brief in Opposition to the FES Petition for Interlocutory Review, and FES filed a Brief in Support of its petition.

In its December 12 Order, the Commission answered the first material question affirmatively, noting the Commission's lack of jurisdiction "to interpret the terms and conditions of the contract between an EGS and a customer *concerning whether a breach has occurred.*" December 12 Order at 20 (emphasis added). Importantly, for purposes of this new petition, the

Commission answered the second material question in the negative. *Id.* at 21. According to the December 12 Order, primary jurisdiction "does not apply" in this instance because "the Commission has subject matter jurisdiction to determine whether the Code and/or its regulations have been violated, as alleged in the Complaint, and has the authority to redress any such demonstrated violation." *Id.* Accordingly, the Commission concluded, "[a]s the FES ICCC has sufficiently raised issues that implicate the Commission's jurisdiction, this matter should be remanded...for further proceedings as may be necessary, consistent with this Opinion and Order." *Id.* at 22.

On December 18, 2014, ALJ Dunderdale issued the Second Interim Order requesting the scheduling of a telephonic hearing and identifying the issues to be determined as "whether FES violated Section 2807(d)(2) of the Code and Sections 54.43(1) and 54.43(f) of the Commission's Regulations." Second Interim Order at 5 (internal citations omitted).

FES's Petition purports to seek clarification of the December 12 Order.

II. LEGAL STANDARDS

Petitions for clarification, like petitions for reconsideration, are decided by the application of the standards set forth in *Duick v. Pennsylvania Gas & Water Co.*, 56 Pa. P.U.C. 553 (1982). *See Application of PPL Elec. Util. Corp.*, Docket Nos. A-2009-2082652, *et al.*, Opinion and Order, 2010 WL 1711074 at p. 2 (entered Apr. 23, 2010) ("April 2010 Order"). The Commission recently explained:

A petition seeking relief under the *Duick* standard may properly raise any matter designed to convince the Commission that it should exercise its discretion under 66 Pa. C.S. §§ 101, *et seq.*, to rescind or amend a prior order in whole or in part. However, the *Duick* standard does not permit a petitioner to raise questions considered and decided below such that the petitioner obtains a second opportunity to argue properly settled matters.

[...]

Petitions for reconsideration or amendment must show 'new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission.' The last portion of this phrase contains the operative language of the *Duick* standard – 'by the Commission.' The *Duick* standard focuses on deliberations of the Commission – not the arguments of parties.

Pa. P.U.C. v. PPL Elec. Util. Comm'n, Docket No. R-2012-2290597, Opinion and Order, 2014 WL 2427092 at *2 (entered May 22, 2014) ("May 2014 Order") (internal citations omitted). For the reasons explained below, FES has not satisfied the applicable standards in its request for clarification.

III. ANSWER IN OPPOSITION TO FES PETITION

A. The FES Petition Fails To Meet the *Duick* Standard Applicable to Petitions for Clarification.

FES's Petition seeks to resurrect challenges to the Commission's jurisdiction over the allegations of fraudulent and deceptive billing practices set forth in the FES ICCC Complaint that the Commission has repeatedly considered and decided, albeit not in FES's favor. The use of a petition for clarification for such purposes is clearly inconsistent with the *Duick* standard. Accordingly, the Petition should be denied.

According to FES, the December 12 Order purportedly stands for the proposition that the Commission lacks jurisdiction over any of the allegations of deceptive and fraudulent billing practices pleaded in FES ICCC's Complaint that would require a review of the contracts between FES and the FES ICCC members. *See* FES Pet. 1-2. In other words, because rendering a determination regarding FES ICCC's allegations would require a review of the underlying terms and conditions upon which FES agreed to provide service (*i.e.*, reviewing the contracts), FES asserts that the Commission may not consider the allegations of deceptive and fraudulent billing practices set forth in FES ICCC's Complaint because the Commission lacks jurisdiction to

interpret contracts between an EGS and its customers. Not surprisingly, FES then argues that all but one of the Complaint's allegations have their origin in FES ICCC members' FES supply contracts. *Id.* at. 2. On this basis, FES seeks "clarification" of the December 12 Order by narrowing the scope of this proceeding to a single allegation of fraudulent and deceptive billing that does not arise out of the FES ICCC members' supply agreements with FES. *Id.*

According to *Duick*, petitions for reconsideration must show "new and novel arguments" or "considerations which appear to have been overlooked or not addressed by the Commission." May 2014 Order at *2. Petitions for reconsideration may not be used as a second chance to argue matters already decided by the Commission. *Id.*; *see also* April 2010 Order (providing that petitions for clarification, like petitions for reconsideration, are subject to the *Duick* standard). A plain reading of the Petition demonstrates that FES raises no new and novel arguments that the Commission did not previously consider, as required by *Duick*. The Petition is simply another attempt by FES to prevent FES ICCC from bringing its Complaint before the PUC following Preliminary Objections and a Petition for Interlocutory Review resulting in determinations that were unfavorable to FES. For the reasons discussed below, the Commission should deny the Petition because it fails to meet the requirements of *Duick*.

Despite its nomenclature, the Petition does not seek mere clarification of the December 12 Order, but reconsideration of jurisdictional questions that have already been considered and decided by the Commission. In its Preliminary Objections, FES unsuccessfully challenged the Commission's jurisdiction over FES ICCC's allegations of fraudulent and deceptive billing practices by attempting to characterize them as "issues of private contract." *See* FES Preliminary Objections at 1; *see also* First Interim Order at 10 (denying FES's Preliminary Objections).

Shortly thereafter, FES presented substantially similar jurisdictional challenges in a Petition for Interlocutory Review. The ensuing December 12 Order recognized the Commission could not interpret competitive supply contracts to address ordinary contract claims, such as a breach of contract, but it did not go so far as to bar the Commission from reviewing such contracts in the face of customer allegations that FES engaged in fraudulent and deceptive billing practices in violation of applicable statutory and regulatory provisions within the PUC's jurisdiction. *See* December 12 Order at 20-22.

The Petition now attempts to rehash arguments regarding the Commission's lack of jurisdiction to interpret the supply contracts between FES and FES ICCC members based on FES's misplaced assertions that this proceeding involves ordinary breach of contract claims. *See, e.g.,* FES Pet. at 6 ("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."). FES presented similar arguments in its Preliminary Objections to the Complaint as well as in its Petition for Interlocutory Review. In both cases, FES's arguments were unpersuasive and denied. FES's continued attempts to frame this proceeding as arising from an ordinary contract dispute, and thus block the PUC from determining whether FES's billing practices adhere to applicable law, must not be permitted to succeed. FES's arguments have already been considered and rejected by the Commission, and FES must not be allowed to take a third "bite at the apple" through this Petition.

In the December 12 Order at issue here, the Commission most recently considered the scope of its jurisdiction over the supply contracts between FES and FES ICCC members and determined 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." December 12 Order at 20 (emphasis added). As a threshold matter, FES ICCC's Complaint does not request this Commission to decide whether FES has breached its agreements with its customers. Moreover, the Commission certainly has the authority to "ensure that an EGS is abiding by the standards of conduct and disclosure, the marketing and sales Regulations, and the contract expiration/change-of-terms notice requirements, and that the rate billed by an EGS was calculated in accordance with those materials." *Id.* According to the Commission, the Complaint raises issues "beyond contract interpretation," including questions regarding the adequacy and sufficiency of the information provided to customers and potentially fraudulent and deceptive billing acts, and such issues "are within the Commission's subject matter jurisdiction." *Id.* at 22.

Thus, the December 12 Order clearly recognized that this proceeding does not involve a breach of contract dispute, as contended by FES, but rather, will focus on the specific claims made by FES ICCC regarding FES's duty to provide adequate and accurate information to customers regarding its services pursuant to 52 Pa. Code § 54.43(1) and the prohibition against engaging in deceptive and fraudulent billing acts pursuant to 52 Pa. Code § 54.43(f). *Id.*

In addition, the December 12 Order also reflects that the Commission must have considered that the Complaint's disposition will necessarily require the Commission to review certain provisions of the contracts between FES and FES ICCC members to determine whether FES has run afoul of applicable statutes and regulations by utilizing deceptive and possibly fraudulent billing practices.¹ Inherent in the December 12 Order is the understanding that contract review will be necessary to inform the PUC's decision-making process on the issues

¹ See *Schmidt v. Dominion Retail, Inc., t/a Peoples Plus*, Docket No. C-20066726 (Feb. 22, 2007) (reviewing a competitive supply agreement in which the Natural Gas Act's customer information requirements were at issue).

within its subject matter jurisdiction, which do not include breach of contract claims, but rather, focus on FES's adherence to statutes and regulations governing EGS billing practices.² To suggest that the PUC can only review the single line item placed on a customer's bill (e.g., "RTO Expense Surcharge"), without any review or understanding of the terms and conditions under which the EGS is providing service to that customer, would not allow the PUC to effectively determine whether fraudulent and deceptive billing has occurred.³ Unfortunately, the aforementioned scenario is exactly the one which FES seeks to implement pursuant to its Petition. To provide the clarification sought by FES would force the Commission to view customer invoices containing the RTO Expense Surcharge without the contractual context, thereby inappropriately limiting the Commission's ability to fulfill its statutory obligations to ensure EGS's billing practices conform to Pennsylvania statutes, regulations, and policies applicable to EGSs licensed by the Commission and matters affecting the competitiveness of the retail market.

Thus, the Petition offers no new and novel arguments, factual or otherwise, not already considered and addressed by the Commission, as required by *Duick*. Because the Petition does not meet the legal standard applicable to petitions for clarification, the Petition should be denied.

B. This Scope of This Proceeding Should Not Be Limited as Requested by FES Because it Contravenes Commission Directives.

As previously stated, FES seeks a Commission directive that this proceeding be limited to an examination of FES's failure to provide concrete information regarding how the events of January 2014 triggered a Pass-Through Event. *See* FES Pet. at 6-7. FES's position appears to

² In fact, as noted above, the Complaint does not ask the Commission to interpret supply contract language in order to rule on a breach of contract claim, nor does the Complaint seek damages against FES in this venue.

³ Extrapolated to its logical conclusion, FES's argument would also bar the PUC from examining the terms and conditions of service between a competitive supplier and a residential customer, thereby limiting the PUC's review to a single line item on a residential customer bill. Such an outcome is clearly inconsistent with the Commission's jurisdiction to oversee EGS billing practices.

suggest that a Commission inquiry into the mere furnishing of information regarding the RTO Expense Surcharge would suffice. This is not the case, nor is it consistent with the Commission's earlier pronouncements in this proceeding. Simply providing information about the derivation of a surcharge on a customer's bill does not, by itself, excuse a supplier from its responsibility to avoid deceptive billing practices that undermine the integrity of Pennsylvania's retail electric market.

In the First Interim Order, the ALJ concluded that FES ICCC's Complaint proceeding should be permitted to proceed so that the Commission may determine whether FES violated the Commission's regulatory and statutory provisions that suppliers, *inter alia*, must provide adequate and accurate customer information to enable customers, including industrial and commercial customers, to make informed choices regarding the purchase of all electricity services and to have that information provided in an understandable format that enables the ratepayer to compare prices and services. *See* First Interim Order at 9. In the December 12 Order, the Commission determined that all the issues in the Complaint are within its subject matter jurisdiction and require the Commission's particular expertise. *See* December 12 Order at 22. Thus, based on the foregoing orders, the Commission clearly envisioned that this proceeding would include an evaluation of FES's billing practices in light of applicable law and in the context of the contractual relationship between FES and FES ICCC members, as set forth in the Complaint.⁴ Accordingly, FES's request to circumscribe the scope of this proceeding must be denied. Otherwise, if FES were to prevail in changing the scope of this proceeding, the result would be to eliminate allegations of fraudulent and deceptive billing practices from the

⁴ Notably, narrowing the scope of this proceeding, as requested by FES, would also preclude FES ICCC from examining whether FES's decision to waive the RTO Expense Surcharge for residential customers, but not for industrial and commercial customers, is evidence of discrimination in FES's perpetuation of fraudulent billing practices.

Commission's purview. Therefore, denying the FES Petition is consistent with due process, administrative efficiency, and public policy.

C. FES's Request for an Amended Complaint Is Meritless and Inconsistent with Administrative Efficiency.

In the alternative, FES requests that the Commission direct FES ICCC to file an amended Complaint pleading alleged violations of the Code and/or Commission regulations consistent with due process. *See* FES Pet. at 7. Specifically, FES claims that it 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)"⁵ because the Complaint does not include citations to the foregoing provisions. *Id.* at 4 & 7. FES claims that its requested "clarification" of the December 12 Order is necessary to ensure due process and "administrative economy and efficiency." *Id.* at 2 & 7. FES's request for an amended Complaint is a meritless delay tactic that is inconsistent with administrative efficiency; it should be denied.

Section 2807(d)(2) of the Code directs the Commission to establish regulations to require each EGS to provide adequate and accurate information that allows customers to make informed choices regarding the purchase of electricity services and to provide such information in an understandable format that enables customers to compare prices and services on a uniform basis. 66 Pa. C.S. § 2807(d)(2). In this instance, the regulations are set forth in 52 Pa. Code § 54.43(1), under which an EGS is required to provide accurate information to customers, including commercial and industrial customers, regarding its services and in a format that enables customers to compare services and prices for each type of service, and 52 Pa. Code § 54.43(f),

⁵ FES also claims that it has been deprived of the opportunity to respond to allegations of other regulatory violations not conditioned on a finding that FES breached its contracts. FES Pet. at 7. As previously discussed, no breach of contract claims are at issue here.

under which an EGS is responsible for "any fraudulent, deceptive or other unlawful marketing or billing acts." *See* 52 Pa. Code §§ 54.43(1) and 54.43(f).

Although the Complaint does not cite Section 2807(d)(2) of the Code, the Complaint does cite to the Commission regulations implementing that statutory provision.⁶ *See, e.g.*, FES ICCC Complaint at 8 & 13. Because FES ICCC's Complaint has cited the regulations at issue in this proceeding, and Section 2807(d)(2) merely permits the PUC to implement the aforementioned regulations, pleading to Section 2807(d)(2) of the statute is irrelevant. Thus, FES has been afforded notice and the opportunity to respond to allegations derived from Section 2807(d)(2) and, therefore, FES's alleged claims of due process violations are simply disingenuous.

Similarly, FES claims that its due process rights have been violated because it has not had notice and an opportunity to respond to alleged violations of 52 Pa. Code § 54.122(3), which precludes an EGS from engaging in false or deceptive advertising to customers. *See* 52 Pa. Code § 54.122(3). This claim is also disingenuous. Neither the Complaint nor any subsequent FES ICCC pleading in this proceeding asserts a claim against FES based on false or deceptive advertising. The first and apparently only reference to this regulation appears in footnote 15 of the December 12 Order, in which the Commission states "54.122(3) of the Commission's Regulations also precludes EGSs from engaging in false or deceptive advertising to customers." December 12 Order at n.15. The December 12 Order seems to include the reference to Section 54.122(3) as supplemental information regarding the scope of the Commission's jurisdiction over certain EGS activities. Based on the foregoing, FES's purported due process claims are meritless. Therefore, the request for an amended Complaint should be denied.

⁶ The Commission regulations state that Chapter 54, Subchapter B (§§ 54.31-54.43) is intended to implement the provisions of Section 2807, among other provisions issued under the Competition Act. *See* 52 Pa. Code, Subchapter B, Authority.

Furthermore, contrary to FES's contention, the filing of an amended Complaint is inconsistent with administrative efficiency. As a threshold matter, the FES ICCC Complaint does not make a claim against FES for false or deceptive advertising, nor does FES ICCC intend to make such an allegation.⁷ To request that FES ICCC file an amended Complaint on this basis would contravene the principle of administrative efficiency. Additionally, the filing of an amended Complaint could trigger a second opportunity for Preliminary Objections and Answers thereto, resulting in the additional and substantial expenditure of time and resources by the parties and the Commission. Extending the procedural schedule also would further delay resolution of the Complaint, which has been pending before the Commission since June 2014. FES ICCC is concerned that continued delay will increase the risk of FES seeking to terminate the supply agreements given the prolonged nature of the underlying billing dispute, which could jeopardize the operations of FES ICCC members. Finally, the regulatory uncertainty stemming from this proceeding is harmful to competitive retail markets in general and to large commercial and industrial customers in particular.

For these reasons, FES's request for the filing of an amended Complaint should be rejected as unnecessary and inconsistent with administrative efficiency.

⁷ In fact, in the spirit of administrative efficiency, FES ICCC agrees that it will not assert a claim against FES pursuant to 52 Pa. Code § 54.122(3).

IV. REQUEST FOR RELIEF

WHEREFORE, the FES Industrial & Commercial Customer Coalition respectfully requests that the Commission deny FirstEnergy Solutions Corporation's Petition for Clarification for the reasons set forth herein.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By 
Susan E. Bruce (Pa. I.D. No. 80146)
Charis Mincavage (Pa. I.D. No. 82039)
Vasiliki Karandrikas (Pa. I.D. No. 89711)
Andrew S. Ziegler (Pa. I.D. No. 314859)
McNEES WALLACE & NURICK LLC
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
Phone: (717) 232-8000
Fax: (717) 237-5300
sbruce@mwn.com
cmincavage@mwn.com
vkarandrikas@mwn.com
azeigler@mwn.com

Counsel to the FES Industrial & Commercial
Customer Coalition

Dated: January 8, 2015