



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

Charis Mincavage
Direct Dial: 717.237.5437
Direct Fax: 717.260.1725
cmincavage@mwn.com

June 29, 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 & Commercial Customer Coalition v. FirstEnergy Solutions Corp.;
Docket No. C-2014-2425989

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission is the Prehearing Memorandum of the FES Industrial & Commercial Customer Coalition ("FES ICC") 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 
Charis Mincavage

Counsel to the FES Industrial & Commercial Customer Coalition

Enclosure

c: Administrative Law Judge Katrina L. Dunderdale (via Email and First-Class Mail)

www.mwn.com

HARRISBURG, PA • LANCASTER, PA • SCRANTON, PA • STATE COLLEGE, PA • COLUMBUS, OH • WASHINGTON, DC

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

Brian J. Knipe, Esq.
FirstEnergy Service Company
76 S. Main Street
Akron, OH 44308
bknipe@firstenergycorp.com

John R. Evans
Office of Small Business Advocate
300 North Second Street, Suite 202
Harrisburg, PA 17101-1313
jorevan@pa.gov

David P. Zambito, Esq.
D. Troy Sellars, Esq.
Cozen O'Connor
17 North Second Street, Suite 1410
Harrisburg, PA 17101
dzambito@cozen.com
tsellars@cozen.com

Johnnie E. Simms, Esq.
Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
400 North Street, 2nd Floor West
Harrisburg, PA 17120
josimms@pa.gov

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

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



Charis Mincavage

Counsel to the FES Industrial and Commercial
Customer Coalition

Dated this 29th day of June, 2015 at Harrisburg, Pennsylvania.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**PREHEARING MEMORANDUM OF
THE FES INDUSTRIAL AND COMMERCIAL CUSTOMER COALITION**

Pursuant to Administrative Law Judge ("ALJ") Katrina L. Dunderdale's May 20, 2015, Prehearing Conference Order, the FES Industrial and Commercial Customer Coalition ("FES ICC") hereby submits this Prehearing Memorandum in the above-captioned proceeding.

I. HISTORY OF THE PROCEEDING

On June 9, 2014, FES ICC filed a Complaint against FirstEnergy Solutions Corp. ("FES"), an electric generation supplier ("EGS") licensed by the Pennsylvania Public Utility Commission ("PUC" or "Commission"). According to correspondence received by FES ICC members from Respondent, FES proposes to utilize a "Pass-Through Event" clause for customers with fixed-price agreements due to purported increased "ancillary costs" FES incurred during January 2014. 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 a 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 ICC's complaint submits that FES's proposed actions are in violation of several PUC statutes and regulations.

On June 17, 2014, the Office of Consumer Advocate ("OCA") filed a Notice of Intervention and Public Statement agreeing with FES ICCC that the Commission should issue a determination to provide guidance concerning whether an electric generation supplier has the right to impose a such a surcharge on industrial and/or commercial ratepayers but not on residential ratepayers.

On July 1, 2014, FES filed an Answer and New Matter, as well as Preliminary Objections. In its Answer, FES admitted it imposed a surcharge on industrial and commercial ratepayers but asserted the charges were contemplated in the fixed-price contracts. FES asserted in its New Matter that the Commission lacked subject matter jurisdiction to decide this dispute, claiming it involved private contractual matters between an EGS and its customers. FES asked the Commission to dismiss the formal complaint filed by FES ICCC.

On July 11, 2014, FES ICCC filed an Answer to FES' Preliminary Objections, requesting the Commission exercise its authority to oversee EGSs in order to determine if an EGS (in this case, FES) engaged in deceptive and potentially fraudulent billing practices.

Also on July 11, 2014, OCA filed an Answer to the Preliminary Objections of FES and asserted the integrity of the retail electric market in Pennsylvania hinges on the ability of the Commission to ensure EGSs provide adequate and accurate information to customers in an understandable format that enables consumers to compare prices and services.

On August 6, 2014, the ALJ denied FES' preliminary objections and concluded the Commission had jurisdiction to determine if FES complied with the Commission's regulations. The ALJ also determined that FES ICCC should have an opportunity to prove its claim that FES failed to provide adequate and accurate customer information in an understandable format to its industrial and commercial customers.

On August 8, 2014, FES requested interlocutory review and an answer to two questions that arose in connection with the First Interim Order dated August 6, 2014, denying its preliminary objections. In its Petition, FES raised the following questions for the Commission's interlocutory review and answer:

1. Does the Commission lack subject matter jurisdiction to interpret a provision of an [Electric Generation Supplier's (EGS's)] retail customer supply contract as requested?
2. Does the Commission's lack of primary jurisdiction require, at minimum, a stay of the current proceedings pending action by a civil court of competent jurisdiction?

By Joint Motion of Chairman Robert F. Powelson and Vice Chairman John F. Coleman, Jr. ("Joint Motion") dated November 13, 2014, the Commission answered Material Question No. 1 in the affirmative and Material Question No. 2 in the negative. The Commission returned this proceeding to the Office of Administrative Law Judge for such further proceedings as deemed necessary. On December 12, 2014, the Commission issued its Opinion and Order detailing its reasoning in the November 13, 2014, Joint Motion.

On December 18, 2014, the ALJ issued the Second Interim Order notifying the parties that an Initial Telephonic Hearing would be scheduled in this matter and specifying the remaining judicable issue was whether FES violated 66 Pa.C.S.A. § 2807(d)(2), and 52 Pa.Code § 54.43(1) and § 54.43(f). On January 7, 2015, the Office of Administrative Law Judge Scheduler scheduled this proceeding for an initial hearing on February 11, 2015, via telephone.

On December 29, 2014, FES filed a Petition for Clarification with the Commission based on the Second Interim Order dated December 18, 2014. On January 28, 2015, FES ICC submitted a written request for a general continuance in this proceeding until such time as the Commission would enter an order resolving the aforementioned Petition for Clarification. On

January 30, 2015, the ALJ granted the continuance request and cancelled the initial hearing scheduled for February 11, 2015.

On May 7, 2015, the Commission issued an Opinion and Order denying FES' Petition for Clarification. The Commission found FES' petition represented a collateral attack on the Second Interim Order's delineation of the issues remaining in dispute. The Commission found the issues as stated in the Second Interim Order dated December 18, 2014, accurately described to FES the issues which FES should be prepared to defend at the initial hearing.

On May 19, 2015, the Office of Administrative Law Judge issued a notice scheduling a telephonic prehearing conference for Tuesday, June 30, 2015. On May 20, 2015, the presiding officer issued a Prehearing Conference Order which required the parties to provide prehearing memorandum on or before June 29, 2015 and other procedural rules.

On June 23, 2015, FES ICCC submitted a written request for a general continuance lasting at least ninety days. FES ICCC represented that FES supported the continuance and OCA did not oppose the continuance request. FES ICCC averred the additional time was needed in order to afford the parties with an opportunity to explore the possibility of a settlement and conduct discovery. On June 26, 2015, FES ICCC received the ALJ's Fourth Interim Order denying this request for extension. FES ICCC presents this Prehearing Memorandum in anticipation of the June 30 Prehearing Conference.

The membership of FES ICCC was set forth in Appendix "A" attached to the FES ICCC Complaint. As referenced in Footnote 15 of said Complaint, FES ICCC reserved the right to update membership throughout the course of this proceeding. To that end, FES ICCC updated its Appendix A on June 30, 2014, July 7, 2014, August 5, 2014, and March 25, 2015.

II. SERVICE LIST

For purposes of this proceeding, FES ICCC will be represented by the following counsel:

Susan E. Bruce (I.D. No. 80146)
Charis Mincavage (I.D. No. 82039)
Vasiliki Karandrikas (I.D. No. 89711)
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
vkandrikas@mwn.com

Please direct all correspondence to the attention of Susan Bruce; however, for purposes of electronic service lists, FES ICCC requests that all attorneys be included on any correspondence.

III. ANTICIPATED ISSUES AND SUB-ISSUES

FES ICCC expects to pursue the following issues in this proceeding: (1) whether FES provided adequate and accurate information to customers regarding the use of the Pass Through provision; (2) whether FES provided any such information in an understandable format to customers using common and understandable terms; (3) whether FES's actions were fraudulent; and (4) whether FES's actions were deceptive. FES ICCC reserves the right to raise additional issues and sub-issues during the course of this proceeding as appropriate.

IV. PROPOSED WITNESSES

Because the parties are in the preliminary stage of discovery at this time, FES ICCC is still evaluating the appropriate witnesses to provide testimony. Similarly, once full discovery has occurred, FES ICCC submits that it may be in a better position to determine the exact number of witness that may be necessary or whether the majority of this proceeding could occur through exhibits and briefing.

Once FES ICCC has confirmed its witness list, it will inform the parties and the ALJ as soon as possible of the intended witnesses. FES ICCC also intends to participate in this proceeding through the submission of discovery, cross-examination of other parties' witnesses, and the submission of briefs, exceptions, and reply exceptions, as necessary.

V. DISCOVERY

As noted in the procedural history, this proceeding involved several protracted procedural issues. Only recently was confirmation received regarding the issues to be addressed in this proceeding. In light of these outstanding issues, and in order to ensure judicial efficiency, FES ICCC has not moved forward with discovery until this point. Specifically, FES ICCC was concerned that, if questions remained regarding the substantive parameters of this proceeding, any resulting discovery could be at risk for procedural objections, which would have required further review and rulings by the ALJ. Now that the PUC has confirmed the issues to be addressed herein, FES ICCC plans to move forward with the discovery phase of this proceeding.

VI. PROCEDURAL SCHEDULE

Because the issues for this proceeding have only recently been confirmed, FES ICCC would request that the parties be given ample opportunity to engage in both discovery and settlement discussions. By engaging in discovery, the parties can determine the number of witnesses that will be necessary, how many rounds of testimony will be necessary, and the timeframe for evidentiary hearings. Similarly, allowing time for settlement discussions will provide the parties with the opportunity to determine if some or all of the issues in this proceeding can be resolved without full litigation.

In order to engage in both settlement and discovery, and to allow the parties to further narrow the evidentiary requirements, FES ICCC respectfully requests that, rather than

determining the procedural schedule at this time, a second Prehearing Conference be scheduled for September 30, 2015. At that time, the parties can report back to the ALJ with a procedural schedule based upon the results of completed discovery and settlement.

If, however, the ALJ would prefer to establish a procedural schedule at this time, FES ICCC will work with the parties and the ALJ to establish a procedural schedule.

V. POSSIBILITY OF SETTLEMENT

Pursuant to FES ICCC's June 23, 2015, Request for Extension letter, the parties have begun to discuss settlement. FES ICCC respectfully submits that additional time will be required in order to determine whether resolution can be achieved.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By Charis Mincavage
Susan E. Bruce (I.D. No. 8046)
Charis Mincavage (I.D. No. 82039)
Vasiliki Karandrikas (I.D. No. 89711)
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
vkandrikas@mwn.com

Counsel to the FES Industrial and Commercial
Customer Coalition

Dated: June 29, 2015