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August 6, 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

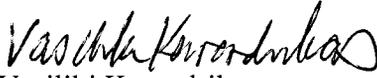
Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission is the Motion to Compel 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 
Vasiliki Karandrikas

Counsel to the FES Industrial & Commercial Customer Coalition

Enclosure

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

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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

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Vasiliki Karandrikas

Counsel to the FES Industrial and Commercial
Customer Coalition

Dated this 6th day of August, 2015 at Harrisburg, Pennsylvania.

- iii. A citation to the change in law;
 - iv. The term(s) in the Electricity Supply Agreement affected by the change in law, including any price impact;
 - v. An explanation of the change to the Electricity Supply Agreement terms due to the change in law;
 - vi. The number of FES customers affected by the change in law;
 - vii. The class of each FES customer affected by the change in law;
 - viii. A description of how FES notified impacted customers of the change in law; and
 - ix. All documents supporting FES's responses.
- b) Imposed new or additional changes or requirements relating to an Electricity Supply Agreement between FES and any FES customer? If yes, provide the following:
- i. The identity of the regional transmission organization or similar entity;
 - ii. A description of the new or additional changes or requirements;
 - iii. A citation to the new or additional changes or requirements;
 - iv. The term(s) in the Electricity Supply Agreement affected by the new or additional changes or requirements, including any price impact;
 - v. An explanation of the change to the Electricity Supply Agreement terms due to the new or additional changes or requirements;
 - vi. The number of FES customers affected by the new or additional changes or requirements;
 - vii. The class of each FES customer affected by the new or additional changes or requirements;
 - viii. A description of how FES notified impacted customers of the new or additional changes or requirements; and
 - ix. All documents supporting FES's responses.
- c) Required or imposed a change in the method or procedure for determining charges or requirements relating to the Electric Supply Agreement between FES and any FES customer? If yes, provide the following:
- i. The identity of the regional transmission organization or similar entity;
 - ii. A description of the required or imposed change in the method or procedure for determining charges or requirements;
 - iii. A citation to the required or imposed change in the method or procedure for determining charges or requirements;
 - iv. The term(s) in the Electricity Supply Agreement affected by the required or imposed change in the method or procedure for determining charges or requirements;
 - v. An explanation of the change to the Electricity Supply Agreement terms due to the required or imposed change in the method or procedure for determining charges or requirements;
 - vi. The number of FES customers affected by the required or imposed change in the method or procedure for determining charges or requirements;
 - vii. The class of each FES customer affected by the required or imposed change in the method or procedure for determining charges or requirements;

- viii. A description of how FES notified impacted customers of the required or imposed change in the method or procedure for determining charges or requirements; and
- ix. All documents supporting FES's responses.

FES ICCC to FES Set II, Question No. 3

In the last five years, has any electric utility with a service area within which FES provides service:

- a) Experienced a change in law requiring a change to the terms of an Electricity Supply Agreement between FES and any FES customer? If yes, provide the following:
 - i. The identity of the electric utility;
 - ii. A description of the change in law;
 - iii. A citation to the change in law;
 - iv. The term(s) in the Electricity Supply Agreement affected by the change in law, including any price impact;
 - v. An explanation of the change to the Electricity Supply Agreement terms due to the change in law;
 - vi. The number of FES customers affected by the change in law;
 - vii. The class of each FES customer affected by the change in law;
 - viii. A description of how FES notified impacted customers of the change in law; and
 - ix. All documents supporting FES's responses.
- b) Imposed new or additional changes or requirements relating to an Electricity Supply Agreement between FES and any FES customer? If yes, provide the following
 - i. The identity of the electric utility;
 - ii. A description of the new or additional changes or requirements;
 - iii. A citation to the new or additional changes or requirements;
 - iv. The term(s) in the Electricity Supply Agreement affected by the new or additional changes or requirements, including any price impact;
 - v. An explanation of the change to the Electricity Supply Agreement terms due to the new or additional changes or requirements;
 - vi. The number of FES customers affected by the new or additional changes or requirements;
 - vii. The class of each FES customer affected by the new or additional changes or requirements;
 - viii. A description of how FES notified impacted customers of the new or additional changes or requirements; and
 - ix. All documents supporting FES's responses.
- c) Required or imposed a change in the method or procedure for determining charges or requirements relating to the Electric Supply Agreement between FES and any FES customer? If yes, provide the following:
 - i. The identity of the regional transmission organization or similar entity;
 - ii. A description of the required or imposed change in the method or procedure for determining charges or requirements;
 - iii. A citation to the required or imposed change in the method or procedure for determining charges or requirements;

- iv. The term(s) in the Electricity Supply Agreement affected by the required or imposed change in the method or procedure for determining charges or requirements;
- v. An explanation of the change to the Electricity Supply Agreement terms due to the required or imposed change in the method or procedure for determining charges or requirements;
- vi. The number of FES customers affected by the required or imposed change in the method or procedure for determining charges or requirements;
- vii. The class of each FES customer affected by the required or imposed change in the method or procedure for determining charges or requirements;
- viii. A description of how FES notified impacted customers of the required or imposed change in the method or procedure for determining charges or requirements; and
- ix. All documents supporting FES's responses.

FES ICCC to FES Set II, Question No. 4

In the last five years, has any governmental entity or agency with jurisdiction over FES:

- a) Experienced a change in law requiring a change to the terms of an Electricity Supply Agreement between FES and any FES customer? If yes, provide the following:
 - i. The identity of the governmental entity or agency;
 - ii. A description of the change in law;
 - iii. A citation to the change in law;
 - iv. The term(s) in the Electricity Supply Agreement affected by the change in law, including any price impact;
 - v. An explanation of the change to the Electricity Supply Agreement terms due to the change in law;
 - vi. The number of FES customers affected by the change in law;
 - vii. The class of each FES customer affected by the change in law;
 - viii. A description of how FES notified impacted customers of the change in law; and
 - ix. All documents supporting FES's responses.
- b) Imposed new or additional changes or requirements relating to an Electricity Supply Agreement between FES and any FES customer? If yes, provide the following:
 - i. The identity of the governmental entity or agency;
 - ii. A description of the new or additional changes or requirements;
 - iii. A citation to the new or additional changes or requirements;
 - iv. The term(s) in the Electricity Supply Agreement affected by the new or additional changes or requirements, including any price impact;
 - v. An explanation of the change to the Electricity Supply Agreement terms due to the new or additional changes or requirements;
 - vi. The number of FES customers affected by the new or additional changes or requirements;
 - vii. The class of each FES customer affected by the new or additional changes or requirements;
 - viii. A description of how FES notified impacted customers of the new or additional changes or requirements; and

- ix. All documents supporting FES's responses.
- c) Required or imposed a change in the method or procedure for determining charges or requirements relating to the Electric Supply Agreement between FES and any FES customer? If yes, provide the following:
 - i. The identity of the governmental entity or agency;
 - ii. A description of the required or imposed change in the method or procedure for determining charges or requirements;
 - iii. A citation to the required or imposed change in the method or procedure for determining charges or requirements;
 - iv. The term(s) in the Electricity Supply Agreement affected by the required or imposed change in the method or procedure for determining charges or requirements;
 - v. An explanation of the change to the Electricity Supply Agreement terms due to the required or imposed change in the method or procedure for determining charges or requirements;
 - vi. The number of FES customers affected by the required or imposed change in the method or procedure for determining charges or requirements;
 - vii. The class of each FES customer affected by the required or imposed change in the method or procedure for determining charges or requirements;
 - viii. A description of how FES notified impacted customers of the required or imposed change in the method or procedure for determining charges or requirements; and
 - ix. All documents supporting FES's responses.

FES ICCC to FES Set II, Question No. 5

In the last five years, has the North American Electric Reliability Corporation ("NERC") or any other industry reliability organization with jurisdiction over FES:

- a) Experienced a change in law requiring a change to the terms of an Electricity Supply Agreement between FES and any FES customer? If yes, provide the following:
 - i. Whether the entity involved was NERC or another industry reliability organization and, if the latter, the name of such organization;
 - ii. A description of the change in law;
 - iii. A citation to the change in law;
 - iv. The term(s) in the Electricity Supply Agreement affected by the change in law, including any price impact;
 - v. An explanation of the change to the Electricity Supply Agreement terms due to the change in law;
 - vi. The number of FES customers affected by the change in law;
 - vii. The class of each FES customer affected by the change in law;
 - viii. A description of how FES notified impacted customers of the change in law; and
 - ix. All documents supporting FES's responses.
- b) Imposed new or additional changes or requirements relating to an Electricity Supply Agreement between FES and any FES customer? If yes, provide the following:
 - i. Whether the entity involved was NERC or another industry reliability organization and, if the latter, the name of such organization;

- ii. A description of the new or additional changes or requirements;
 - iii. A citation to the new or additional changes or requirements;
 - iv. The term(s) in the Electricity Supply Agreement affected by the new or additional changes or requirements, including any price impact;
 - v. An explanation of the change to the Electricity Supply Agreement terms due to the new or additional changes or requirements;
 - vi. The number of FES customers affected by the new or additional changes or requirements;
 - vii. The class of each FES customer affected by the new or additional changes or requirements;
 - viii. A description of how FES notified impacted customers of the new or additional changes or requirements; and
 - ix. All documents supporting FES's responses.
- c) Required or imposed a change in the method or procedure for determining charges or requirements relating to the Electric Supply Agreement between FES and any FES customer? If yes, provide the following:
- i. Whether the entity involved was NERC or another industry reliability organization and, if the latter, the name of such organization;
 - ii. A description of the required or imposed change in the method or procedure for determining charges or requirements;
 - iii. A citation to the required or imposed change in the method or procedure for determining charges or requirements;
 - iv. The term(s) in the Electricity Supply Agreement affected by the required or imposed change in the method or procedure for determining charges or requirements;
 - v. An explanation of the change to the Electricity Supply Agreement due to the required or imposed change in the method or procedure for determining charges or requirements;
 - vi. The number of FES customers affected by the required or imposed change in the method or procedure for determining charges or requirements;
 - vii. The class of each FES customer affected by the required or imposed change in the method or procedure for determining charges or requirements;
 - viii. A description of how FES notified impacted customers of the required or imposed change in the method or procedure for determining charges or requirements; and
 - ix. All documents supporting FES's responses.

FES ICCC to FES Set II, Question No. 6

In the last five years, has any court with jurisdiction over FES:

- a) Experienced a change in law requiring a change to the terms of an Electricity Supply Agreement between FES and any FES customer? If yes, provide the following:
- i. The name of the court;
 - ii. A description of the change in law;
 - iii. A citation to the change in law;
 - iv. The term(s) in the Electricity Supply Agreement affected by the change in law, including any price impact;

- v. An explanation of the change to the Electricity Supply Agreement terms due to the change in law;
 - vi. The number of FES customers affected by the change in law;
 - vii. The class of each FES customer affected by the change in law;
 - viii. A description of how FES notified impacted customers of the change in law; and
 - ix. All documents supporting FES's responses.
- b) Imposed new or additional changes or requirements relating to an Electricity Supply Agreement between FES and any FES customer? If yes, provide the following:
- i. The name of the court;
 - ii. A description of the new or additional changes or requirements;
 - iii. A citation to the new or additional changes or requirements;
 - iv. The term(s) in the Electricity Supply Agreement affected by the new or additional changes or requirements, including any price impact;
 - v. An explanation of the change to the Electricity Supply Agreement terms due to the new or additional changes or requirements;
 - vi. The number of FES customers affected by the new or additional changes or requirements;
 - vii. The class of each FES customer affected by the new or additional changes or requirements;
 - viii. A description of how FES notified impacted customers of the new or additional changes or requirements; and
 - ix. All documents supporting FES's responses.
- c) Required or imposed a change in the method or procedure for determining charges or requirements relating to the Electric Supply Agreement between FES and any FES customer? If yes, provide the following:
- i. The name of the court;
 - ii. A description of the required or imposed change in the method or procedure for determining charges or requirements;
 - iii. A citation to the required or imposed change in the method or procedure for determining charges or requirements;
 - iv. The term(s) in the Electricity Supply Agreement affected by the required or imposed change in the method or procedure for determining charges or requirements;
 - v. An explanation of the change to the Electricity Supply Agreement terms due to the required or imposed change in the method or procedure for determining charges or requirements;
 - vi. The number of FES customers affected by the required or imposed change in the method or procedure for determining charges or requirements;
 - vii. The class of each FES customer affected by the required or imposed change in the method or procedure for determining charges or requirements;
 - viii. A description of how FES notified impacted customers of the required or imposed change in the method or procedure for determining charges or requirements; and
 - ix. All documents supporting FES's responses.

FES ICCC to FES Set II, Question No. 7

Refer to Paragraph 6 in FES's Answer and New Matter, which was filed in the above-referenced proceeding on July 1, 2014, and Exhibit 1 of FES ICCC's Complaint, which was filed on June 9, 2014. FES admits that it "sent a letter substantially similar to Exhibit 1 to certain customers" (hereafter, "March Notice Letter").

- a) Did FES send a March Notice Letter to each FES ICCC member listed in Appendix A of the FES ICCC Complaint filed on June 9, 2014? If so, provide a copy of each such March Notice Letter.
- b) What percentage of FES's large commercial and industrial ("C&I") customers with fixed price contracts received a March Notice Letter?
- c) How many of FES's large C&I customers with fixed price contracts received a March Notice Letter? With respect to these large C&I customers, identify:
 - i. The states in which they are located; and
 - ii. The regional transmission organization or similar entity overseeing the wholesale power market in their respective states.
- d) What percentage of FES's large C&I customers with variable priced contracts received a March Notice Letter?
- e) How many of FES's large C&I customers with variable priced contracts received a March Notice Letter? With respect to these large C&I customers, identify:
 - i. The states in which they are located; and
 - ii. The regional transmission organization or similar entity overseeing the wholesale power market in their respective states.
- f) What percentage of FES's small C&I customers with fixed price contracts received a March Notice Letter?
- g) How many of FES's small C&I customers with fixed price contracts received a March Notice Letter? With respect to these small C&I customers, identify:
 - i. The states in which they are located; and
 - ii. The regional transmission organization or similar entity overseeing the wholesale power market in their respective states.
- h) What percentage of FES's small C&I customers with variable priced contracts received a March Notice Letter?
- i) How many of FES's small C&I customers with variable priced contracts received a March Notice Letter? With respect to these small C&I customers, identify:
 - i. The states in which they are located; and
 - ii. The regional transmission organization or similar entity overseeing the wholesale power market in their respective states.
- j) What percentage of FES's residential customers with fixed price contracts received a March Notice Letter?
- k) How many of FES's residential customers with fixed price contracts received a March Notice Letter? With respect to these residential customers, identify:
 - i. The states in which they are located; and
 - ii. The regional transmission organization or similar entity overseeing the wholesale power market in their respective states.
- l) What percentage of FES's residential customers with variable priced contracts received a March Notice Letter?

- m) How many of FES's residential customers with variable priced contracts received a March Notice Letter? With respect to these residential customers, identify:
 - i. The states in which they are located; and
 - ii. The regional transmission organization or similar entity overseeing the wholesale power market in their respective states.
- n) Other than the March Notice Letters identified in response to FESICCC-II-7-a through FESICCC-II-7-m, did FES provide any FES customer with any other documents or materials regarding the following:
 - i. The RTO Expense Surcharge;
 - ii. The "Polar Vortex";
 - iii. The extreme weather in January 2014;
 - iv. Pass-Through Events;
 - v. Billing adjustments for bills rendered after January 2014;
 - vi. Termination of services;
 - vii. Cancellation of service agreements; or
 - viii. Default notices?

If the answer to any question in FESICCC-II-7-n-i through FESICCC-II-7-n-viii is yes, provide all documents supporting such answer.

FES ICCC to FES Set II, Question No. 8

Refer to Exhibit 1, the March Notice Letter, of the FES ICCC Complaint.

- a) State the total dollar amount of "additional costs and charges" invoiced by PJM Interconnection, L.L.C. ("PJM") to FES. Provide all supporting documents.
- b) Referencing the response to FESICCC-II-8-a, itemize the "additional costs and charges" by PJM billing line item.
- c) Referencing the response to FESICCC-II-8-a, provide a breakdown of the "additional costs and charges" allocated to the following customer classes as well as all supporting documents:
 - i. FES's residential customers;
 - ii. FES's small C&I customers; and
 - iii. FES's large C&I customers.
- d) Provide the formula(s) used by FES to calculate the charge designed to recover the additional costs and charges invoiced by PJM from the following customer classes as well as all supporting documents:
 - i. FES's residential customers;
 - ii. FES's small C&I customers; and
 - iii. FES's large C&I customers.
- e) Of the "additional costs and charges" invoiced by PJM to FES, how much has not been recovered from customers to date? Provide all supporting documents.

FES ICCC to FES Set II, Question No. 10

Reference the press release entitled "FirstEnergy Solutions Waives Polar Vortex Surcharge for Residential Customers" (Apr. 25, 2014) at https://www.firstenergycorp.com/content/fecorp/newsroom/news_releases/firstenergy-solutions-waives-polar-vortex-surcharge-for-resident.html. FES states "we have decided we won't seek reimbursement from residential customers for the added costs."

- a) Explain FES's rationale for not seeking reimbursement from residential customers.
- b) Explain FES's treatment of the costs attributable to FES's residential customers.
- c) Explain FES's rationale for seeking reimbursement from small C&I customers.
- d) Explain FES's rationale for seeking reimbursement from large C&I customers.
- e) Has FES waived reimbursement of such costs from any small C&I customers? If yes:
 - i. What percentage of such customers received a waiver; and
 - ii. Describe FES's treatment of the waived costs.
- f) Has FES waived reimbursement of such costs from any large C&I customers? If yes:
 - i. What percentage of such customers received a waiver; and
 - ii. Describe FES's treatment of the waived costs.
- g) Prior to FES's determination that it will not seek reimbursement from residential customers, provide the following:
 - i. What was the total amount of dollars related to the Polar Vortex be allocated to FES customers?
 - ii. Of the total set forth in FESICCC-II-10-g-i, how much was to be allocated to residential customers?
 - iii. Of the total set forth in FESICCC-II-10-g-i, how much was to be allocated to small C&I customers?
 - iv. Of the total set forth in FESICCC-II-10-g-i, how much was to be allocated to large C&I customers?
- h) Following FES's determination that it will not seek reimbursement from residential customers, provide the following:
 - i. What was the total amount of dollars related to the Polar Vortex be allocated to FES customers?
 - ii. Of the total set forth in FESICCC-II-10-h-i, how much was to be allocated to residential customers?
 - iii. Of the total set forth in FESICCC-II-10-h-i, how much was to be allocated to small C&I customers?
 - iv. Of the total set forth in FESICCC-II-10-h-i, how much was to be allocated to large C&I customers?

FES ICCC to FES Set II, Question No. 11

Reference the newspaper article entitled, "Case against FirstEnergy Solutions disputes cold weather fee for fixed price customers" (May 19, 2015) at <http://powersource.post-gazette.com/powersource/consumers-powersource/2015/05/19/Case-against-FirstEnergy-Solutions-disputes-utility-cold-weather-fee-for-fixed-price-energy-customers/stories/201505190005>. The article quotes Ms. Diane Francis, FES spokeswoman, as follows: "The vast majority of customers who did not receive this charge did pay."

- a) Identify the "customers" referenced by Ms. Francis.
- b) Identify the "charge" referenced by Ms. Francis.
- c) What percentage of FES customers paid the charge? Of these customers, how many were:
 - i. Residential customers;
 - ii. Small C&I customers; or
 - iii. Large C&I customers?

- d) Of the percentage of FES customers paying the charge, how many of them were on variable rate contracts?
- e) What percentage of FES customers did not pay the charge? Of these customers, how many were:
 - i. Residential customers;
 - ii. Small C&I customers; or
 - iii. Large C&I customers?
- f) What actions has FES taken against the following customers who have not paid the charge:
 - i. Residential customers;
 - ii. Small C&I customers; or
 - iii. Large C&I customers?

2. As discussed more fully herein, FES has not met the burden of proving that the information requested by FES ICCC's Set II Interrogatories, Question Nos. 2-8 and 10-11, is irrelevant for purposes of this proceeding. Moreover, FES has not demonstrated that providing the requested information would be unduly burdensome, redundant, or involve the furnishing of privileged information.

3. Under Section 5.342(g) of the Commission's regulations, "[w]ithin 10 days of service of an objection to interrogatories, the party submitting the interrogatories may file a motion requesting the presiding officer to dismiss an objection and compel that the interrogatory be answered." *See* 52 Pa. Code § 5.342(g). Accordingly, FES ICCC hereby files this Motion to Compel.

II. MOTION TO COMPEL

A. FES Should Be Compelled To Answer FES ICCC's Set II, Questions Nos. 2-6, as Claims of Irrelevancy, Unreasonableness, and Vagueness Are Unsupported.

4. FES objects to Question Nos. 2-6 on the basis that they seek purportedly irrelevant information and are not likely to lead to the discovery of relevant admissible evidence. *See* FES Objections, pp. 5-7, 9-11, 13-14, 16-19 & 21-23. FES also contends that Question Nos. 2-6 would cause unreasonable annoyance, oppression, burden or expense or would require unreasonable investigation. *Id.* Finally, FES objects because Question Nos. 2-6 allegedly address improper issues and are, in some cases, vague. *Id.* at pp. 6, 10-11, 14, 18 & 22-23. Contrary to FES's assertions, Question Nos. 2-6 focus on obtaining information about FES's past practices regarding its use of the Pass-Through Event provision. Information about FES's past practices is intended to establish a benchmark by which to evaluate FES's conduct at issue in this proceeding. Specifically, as the lawfulness of FES's billing and marketing practices, as well as FES's provision of accurate and adequate information to customers regarding its services, are the central issues in this proceeding, FES's historical application of the Pass-Through Event provision to both FES ICCC members and non-FES ICCC members in Pennsylvania and other markets in which FES does business is extremely relevant to determining whether FES engaged in deceptive and possibly fraudulent billing and marketing practices with respect to FES ICCC members. Accordingly, FES ICCC's Set II Interrogatories, Question Nos. 2-6 are reasonably calculated to lead to the discovery of admissible evidence.

i. FES's Claims of Irrelevancy Are Unsupported.

5. Pursuant to PUC regulations, "[a] party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action...."

52 Pa. Code § 5.321(c). "Relevancy should be interpreted broadly and liberally, and any doubts regarding the relevancy of subject matter should be resolved in favor of relevancy." *Koken v. One Beacon Ins. Co.*, 911 A. 2d 1021, 1025 (Pa. Commw. Ct. 2006). The party contending discovery is not relevant has the burden of proving irrelevancy. *Id.*

6. According to Your Honor's Second Interim Order, the issue to be determined in this proceeding is "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)." *See* Second Interim Order, Ordering Paragraph 2 (Dec. 18, 2014). Section 54.43 sets forth consumer protection measures with which Pennsylvania's electric generation suppliers ("EGS") must comply in the provision of electric generation service. *See* 52 Pa. Code § 54.43. Specifically, Section 54.43(a) provides:

A licensee shall provide accurate information about their electric generation services using plain language and common terms in communications with consumers. When new terms are used, the terms shall be defined again using plain language. Information shall be provided in a format that enables customers to compare various electric generation services offered and the prices charged for each type of service.

Id. at § 54.43(1). In addition, Section 54.43(f) states, in relevant part: "A licensee is responsible for any fraudulent, deceptive or other unlawful marketing or billing acts performed by the licensee, its employees, agents or representatives." *Id.* at § 54.43(f); *see also id.* at § 54.122(3) (precluding EGSs from engaging in false or deceptive advertising to customers); 66 Pa. C.S.A. § 2807(d) (requiring the provision of adequate and accurate information in an understandable format). According to the Second Interim Order, "these sections require FES to provide adequate and accurate information to customers, including commercial and industrial customers, regarding its services" and hold FES "responsible for any fraudulent or deceptive billing acts." Second Interim Order, p. 4.

7. Question Nos. 2-6 are intended to obtain general information about FES's practices in previous years regarding the application of its Pass-Through Event clause for the purpose of comparing its actions relative to FES ICCC in this proceeding. Question Nos. 2-6 have been calculated to explore the workings of FES's Pass-Through Event provision, including the circumstances under which FES has used the Pass-Through Event provision as a cost collection mechanism in the form of the RTO Expense Surcharge, the corresponding dates, the types of customers impacted, and the magnitude of the impact, as well as any documents supporting FES's responses. Question Nos. 2-6 also seek to identify the type of information provided to customers regarding the use of the Pass-Through Event provision, including communications explaining FES's application of such provision. Accordingly, FES ICCC Question Nos. 2-6 should be answered by FES because this information is clearly "relevant to the subject matter involved in the pending action...." 52 Pa. Code § 5.321(c).

8. Notably, FES challenges the relevance of the Interrogatories' request for information pertaining to the last five years, claiming, among other things, the time period is "overly broad" and "arbitrary." *See* FES Objections, pp. 6, 13, 17-18 & 22. The significance of the five-year period, however, stems from the fact that 2010 marked the year when the remaining generation rate caps in Pennsylvania expired, and the significant majority of Large Commercial and Industrial ("C&I") customers began shopping for generation with EGSs.² Given the historical significance of 2010 in the evolution of Pennsylvania's competitive retail market, coupled with the fact that FES obtained its EGS license in 1998,³ the five-year term referenced in Question Nos. 2-6 was intended to reasonably limit any burden on FES while establishing a meaningful period of time over which to evaluate FES's past practices.

² For example, two of FES's affiliated electric distribution companies (*i.e.*, Metropolitan Edison Company and Pennsylvania Electric Company) had their generation rate caps expire in 2010.

³ *See* PUC Supplier List at http://www.puc.state.pa.us/consumer_info/electricity/suppliers_list.aspx.

9. FES further asserts that the aforementioned Interrogatories are not relevant because they are "not geographically limited.," In FES's view, because the Interrogatories seek information regarding "any regional transmission organization or similar entity with a footprint within which FES provides service," FES Objections, p. 5, or "any other reliability organization with jurisdiction over FES," *id.* at p. 17, or "any court with jurisdiction over FES," they are not relevant to this proceeding. *Id.* at p. 21. As a threshold matter, the terminology utilized in these Interrogatories mirrors the language of FES's Pass-Through Event provision.⁴ Moreover, it is FES ICCC's understanding that FES does business in a total of six states, including Pennsylvania, and the two organized wholesale markets within which these states are located.⁵ FES ICCC's addition of language such as "within which FES provides service" was intended to reasonably limit the scope of the question to the states and regional markets in which FES does business. Furthermore, FES's attempt to limit the scope of discovery to "FES's dealings with individual FES-ICCC members" should be rejected because it would unreasonably hinder FES ICCC from obtaining important information regarding FES's past practices. Again, the information sought by these Interrogatories is intended to provide historical information regarding FES's application of the Pass-Through Event clause for purposes of establishing a benchmark against which to compare the FES practices at issue in this proceeding as well as provide context regarding the circumstances under which FES imposed the RTO Expense Surcharge upon FES ICCC members.

10. In addition, FES claims that these Interrogatories call for "contract interpretation," an issue that is beyond the scope of the Commission's jurisdiction and, therefore, irrelevant.⁶ *See*

⁴ Interestingly, FES does not define this terminology in the Pass-Through Event provision or elsewhere in its contracts.

⁵ *See* FES website at <https://www.fes.com/content/fes/home/about-us.html>.

⁶ FES ICCC addresses FES's objections based on confidentiality in Section II.E., *infra*.

FES Objections, pp. 6, 10, 14, 18 & 22. In the December 12 Order, the Commission considered the scope of its jurisdiction over the supply contracts between FES and FES ICCC 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." *See* December 12 Order at 20. However, 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, as set forth in FES ICCC's Complaint. Thus, inherent in the December 12 Order is the understanding that familiarity with certain contract provisions will be necessary to inform the PUC's decision-making process on the issues within its subject matter jurisdiction, which do not include breach of contract claims, but rather, FES's adherence to statutes and regulations governing EGS billing and marketing practices and the furnishing of adequate and accurate information to customers.

11. To limit discovery in the manner sought by FES would unreasonably hinder FES ICCC from obtaining important information regarding FES's actions and whether these actions adhere to Pennsylvania statutes and regulations applicable to EGSs licensed by the Commission. By contrast, dismissing FES's objections to Question Nos. 2-6 would enable FES ICCC to gather evidence that would provide important information regarding FES's historical practices concerning the Pass-Through Event clause as well as context regarding the terms and conditions under which FES imposed the RTO Expense Surcharge. The latter approach comports with the Commission's regulations, which allow discovery on "any matter, not privileged, which is relevant to the subject matter involved in the pending action..." and precedent which directs any

doubt as to relevancy be resolved in favor of relevancy. 52 Pa. Code § 5.321(c); *see Koken*, at 1025.

12. Even assuming, *arguendo*, that the information produced by FES in response to Question Nos. 2-6 is ultimately determined to be not relevant for purposes of presentation into the evidentiary record, the Commission regulations governing discovery explicitly reject such grounds for objections. Rather, the Commission's regulations permit discovery "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* While FES claims in its general objections that FES ICCC's Interrogatories will not lead to the discovery of admissible evidence, FES fails to provide any specific basis for this claim. In this instance, FES ICCC is seeking information regarding FES's previous invocation of its Pass-Through Event clause. Information regarding FES's past practices on this issue could lead to relevant information regarding whether FES's actions at issue in this proceeding constitute fraudulent and deceptive marketing or billing practices. Therefore, while crafted to obtain relevant information from FES, Question Nos. 2-6 are, at a minimum, reasonably calculated to lead to the discovery of admissible evidence. Consequently, FES's relevancy objections should be dismissed.

13. FES has not met its burden of showing that the information sought by Question Nos. 2-6 is irrelevant, particularly in consideration of the Commission's requirement that any doubt as to relevancy be resolved in favor of relevancy. *See Koken*, at 1025. As FES ICCC's Set II Interrogatories, Question Nos. 2-6 are relevant to the subject matter involved in this proceeding and reasonably calculated to lead to the discovery of admissible evidence, FES ICCC requests that FES be required to respond to these Interrogatories in full.

ii. FES's Claims of Unreasonableness Are Unsupported.

14. As previously stated, in its July 27 Objections, FES contends that FES ICCC's Set II Interrogatories, Question Nos. 2-6, would cause unreasonable annoyance, oppression, burden or expense or would require unreasonable investigation. *See* FES Objections, pp. 5-7, 9-11, 13-14, 16-19 & 21-23. FES, however, only asserts a general objection regarding the unreasonableness of these Interrogatories. For the reasons discussed below, FES's claims of unreasonableness are unsupported and should be dismissed.

15. The Commission prohibits discovery only under specific circumstances, such as cases where furnishing discovery responses "would cause unreasonably annoyance, embarrassment, oppression, burden or expense" or "would require unreasonable investigation." 52 Pa. Code § 5.361(a). Importantly, persuasive precedent provides that "merely showing that the production will occasion some investigative effort and expense, without some evidence that the burden so imposed would be unreasonable, is not sufficient to prevail under Rule 4011."⁷ *Weber v. Campbell Soup Co.*, 41 Pa. D. & C.3d 229, 233 (Apr. 11, 1985).

16. Contrary to FES's contentions, providing the information requested by Question Nos. 2-6 should not impose an unreasonable burden upon FES. As previously stated, these Interrogatories are intended to obtain information about FES's practices related to FES's collection of costs using the Pass-Through Event provision. *See* Paragraph 7, *supra*. Moreover, FES ICCC has reasonably tailored the requested information based upon relevant timing issues and geographic location. *See* Paragraphs 8-9, *supra*. Although some degree of effort must be made by FES to gather the requested information, FES fails to demonstrate such effort

⁷ Section 5.321(c) includes the same discovery limitations found in Rule 4011 of the Pennsylvania Rules of Civil Procedure. *See* 52 Pa. Code § 5.321; *see also* Pa. R.C.P. No. 4011(b).

constitutes an unreasonable investigation, imposes an unreasonable effort, or subjects FES to unreasonable expense, annoyance, or oppression.

17. Thus, responding to FES ICCC Set II, Question Nos. 2-6, would not cause unreasonable annoyance, embarrassment, oppression, burden or expense or require unreasonable investigation by FES because these questions seek general information and limit the relevant time period and geographic scope with respect to issues that are relevant to this proceeding. Accordingly, the Commission should compel FES to answer the Interrogatories in full.

iii. FES's Claims of Impropriety and Vagueness Are Unsupported.

18. Finally, FES contends that the Interrogatories seek "legal conclusions," which are "improper in discovery," and that certain questions are "vague" because they utilize phrases such as "electric utility" (*i.e.*, Question No. 3) or "any court with jurisdiction over FES" (*i.e.*, Question No. 6). *See* FES Objections, pp. 6, 10-11, 14, 18 & 22-23. For the reasons discussed below, FES's claims of impropriety and vagueness are unsupported and should be rejected.

19. FES's assertions that the Interrogatories seek legal conclusions are disingenuous. The terms used in Question Nos. 2-6 mirror language found in FES's Pass-Through Event provision. In fact, each Interrogatory includes a modifier following the phrase "change in law" that ties to language in FES's Pass-Through Event provision.⁸ The Interrogatories were constructed in this manner to explore FES's application of the Pass-Through Event provision, including obtaining information demonstrating FES's understanding of the "change in law" scenarios under which FES purports to trigger the Pass-Through Event provision. This information is relevant because it pertains to FES's billing practices, particularly, FES's imposition of the RTO Expense Surcharge. Such information is reasonably calculated to lead to

⁸ Again, FES's customer contracts fail to provide definitions for the terminology at issue herein.

the discovery of admissible evidence related to the question of FES's potentially fraudulent or deceptive billing practices vis-à-vis FES ICCC members.

20. FES also asserts that Question Nos. 3 and 6 are vague, because they utilize phrases such as "electric utility" (*i.e.*, Question No. 3), "industry reliability organizations with jurisdiction over FES," (Question No. 5) and "any court with jurisdiction over FES" (*i.e.*, Question No. 6) without providing definitions. *See* FES Objections, pp. 10, 18, and 22. The phrases "electric utility," "industry reliability organizations" and "any court," however, are the same terms used by FES in its Pass-Through Event provision. Moreover, to focus the Interrogatories in order to discover relevant information, FES ICCC modified these terms by limiting them to those entities with jurisdiction over FES. Accordingly, FES's claims of vagueness are disingenuous and should be dismissed. FES should be compelled to answer these Interrogatories with FES's intended meaning of the aforementioned terms.

21. For the foregoing reasons, FES's claims are unsupported and should be dismissed. Accordingly, FES should be compelled to answer Question Nos. 2-6 in full.

B. FES Should Be Compelled To Answer FES ICCC's Set II, Question No. 7, as Claims of Irrelevancy and Unreasonableness Are Unsupported.

22. FES also objects to subparts (b) through (n) of Question No. 7, arguing that this question seeks irrelevant information and is not likely to lead to the discovery of relevant admissible evidence. *See* FES Objections, pp. 25-26. FES further asserts that Question No. 7, subparts (b) through (n), would cause unreasonable annoyance, oppression, burden or expense or would require unreasonable investigation. *Id.* To the contrary, Question No. 7, subparts (b) through (n), seeks to obtain information regarding FES's practices concerning the disclosure of information related to the assessment of the RTO Expense Surcharge. One of the central issues in this proceeding is FES's provision of accurate and adequate information to customers

regarding its services in accordance with Commission regulations. Accordingly, FES's practices concerning the dissemination of information related to the RTO Expense Surcharge are relevant and providing such information is not unreasonable.

23. Unlike Question Nos. 2-6, which focus on the workings of FES's Pass-Through Event provision and seek to gather information about FES's past practices in that regard, Question No. 7, subparts (b) through (n), seek information pertaining to FES's statement that it sent notice letters regarding the RTO Expense Surcharge to "certain customers."⁹ While not objecting to Question No. 7(a), which requests copies of notices provided to FES ICCC members, FES objects to the remaining subparts, which explore FES's practices pertaining to the furnishing of information about the RTO Expense Surcharge to FES customers in general. As previously stated, information regarding FES's information disclosure practices is necessary to establish a benchmark for evaluating whether FES's practices at issue here comport with PUC regulations requiring EGSs to furnish accurate and adequate information. To minimize FES's burden, Question No. 7, subparts (b) through (n), request only high-level statistical data and customer materials focused on issues relevant to this proceeding.

i. FES's Claims of Irrelevancy Are Unsupported.

24. FES ICCC incorporates by reference Paragraph 5.

25. FES ICCC incorporates by referenced Paragraph 6.

26. Question No. 7, subparts (b) through (n), seek information regarding FES's customer information disclosure practices as to each of its customers classes which is reasonably calculated to lead to the discovery of admissible evidence in this proceeding. For example, FES may have provided information to its residential or small C&I customers that was not provided to FES ICCC members. By way of further example, FES's disclosure practices may have varied

⁹ FES made this statement in its Answer and New Matter, p. 6, which was filed on July 1, 2014.

depending on the variable or fixed price nature of its contracts. Additionally, FES ICCC seeks to explore any potential correlation between the customers or customer classes that received information about the RTO Expense Surcharge and FES's subsequent willingness to "forgive" the costs related to the RTO Expense Surcharge initially assessed against residential customers.

27. Even assuming, *arguendo*, that the information produced by FES in response to Question No. 7, subparts (b) through (n), is ultimately determined to be not relevant for purposes of presentation into the evidentiary record, the Commission regulations governing discovery explicitly reject such grounds for objections. Rather, the Commission's regulations permit discovery "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *See* 52 Pa. Code § 5.321(c). While FES claims in its general objections that FES ICCC's Interrogatories will not lead to the discovery of admissible evidence, FES fails to provide any specific basis for this claim. In this instance, FES ICCC is seeking information regarding FES's customer information disclosure practices. Information regarding FES's disclosure practices could lead to relevant information regarding whether FES's actions at issue in this proceeding violate the Commission's regulations regarding an EGS's obligation to provide accurate and adequate information to customers. Therefore, while crafted to obtain relevant information from FES, Question No. 7, subparts (b) through (n) are, at a minimum, reasonably calculated to lead to the discovery of admissible evidence. Consequently, FES's relevancy objections should be dismissed.

28. For these reasons, FES has not met its burden of proving that the information sought by subparts (b) through (n) of Question No. 7 is irrelevant, particularly in consideration of the Commission's requirements that any doubt as to relevancy be resolved in favor of relevancy. *See Koken*, at 1025. As FES ICCC's Set II Interrogatories, Question No. 7, subparts (b) through

(n) are relevant to the subject matter involved in this proceeding and reasonably calculated to lead to the discovery of admissible evidence, FES ICCC requests that FES be required to respond to this Interrogatory in full.

ii. FES's Claims of Unreasonableness Are Unsupported.

29. In its July 27 Objections, FES contends that FES ICCC's Set II Interrogatories, Question No. 7, subparts (b) through (n), would cause unreasonable annoyance, oppression, burden or expense or would require unreasonable investigation. *See* FES Objections, p. 25. FES, however, only asserts a general objection regarding the unreasonableness of these Interrogatories. For the reasons discussed below, FES's claims of unreasonableness are unsupported and should be dismissed.

30. FES ICCC incorporates by reference Paragraph 15.

31. Contrary to FES's contentions, providing the information requested by Question No. 7, subparts (b) through (n), should not impose an unreasonable burden upon FES. As previously stated, these Interrogatories are intended to obtain information about FES's practices related to FES's furnishing of information to customers. *See* Paragraphs 23 & 26, *supra*. Moreover, FES ICCC has crafted Question Nos. 7(b) through 7(n) to minimize any burden upon FES by requesting only high-level statistical information and customer materials regarding issues relevant to this proceeding. Although some degree of effort must be made by FES to gather the requested information, FES fails to demonstrate such effort constitutes an unreasonable investigation, imposes an unreasonable effort, or subjects FES to unreasonable expense, annoyance, or oppression.

32. Thus, responding to FES ICCC Set II, Question Nos. 7(b)-7(n), would not cause unreasonable annoyance, embarrassment, oppression, burden or expense or require unreasonable

investigation by FES because these questions seek high-level data and customer information pertaining to the issues that are relevant to this proceeding. Accordingly, the Commission should compel FES to answer the Interrogatories in full.

33. For the foregoing reasons, FES's claims are unsupported and should be dismissed, and FES should be compelled to answer Question No. 7, subparts (b) through (n), in full.

C. FES Should Be Compelled To Answer FES ICCC's Set II, Questions Nos. 8 and 10, as Claims of Irrelevancy and Unreasonableness Are Unsupported.

34. FES objects to Question Nos. 8 and 10 because these questions purportedly seek irrelevant information and are not likely to lead to the discovery of relevant admissible evidence. *See* FES Objections, pp. 27-29 & 30. FES further asserts that Question Nos. 8 and 10 would cause unreasonable annoyance, oppression, burden or expense or would require unreasonable investigation. *Id.* Contrary to FES's objections, these questions seek to discover information in accordance with the Commission's regulations governing discovery. The information sought is relevant or reasonably calculated to lead to the discovery of admissible evidence; providing such information is not unreasonably burdensome and would not require an unreasonable investigation.

i. FES's Claims of Irrelevancy Are Unsupported.

35. FES ICCC incorporates by reference Paragraph 5.

36. FES ICCC incorporates by reference Paragraph 6.

37. Question No. 8 seeks information regarding the March Notice Letter regarding FES's assessment of the RTO Expense Surcharge. In the March Notice Letter, FES indicates that the RTO Expense Surcharge is being assessed to collect "additional costs and charges" invoiced by PJM. Question No. 8 requests further information regarding these "additional costs and charges," including the total dollar amount of these costs and charges, the services reflected in

this amount, the customer classes to which these costs and charges are attributable, FES's cost allocation formula, and the amount of the costs and charges recovered to date.

38. Question No. 10 seeks to discover information with respect to an April 2014 press release by FES. In the press release, FES states "we have decided we won't seek reimbursement from residential customers for the added costs."¹⁰ Similar to Question No. 8, this Interrogatory requests information pertaining to the RTO Expense Surcharge and, in particular, FES's decision to waive the surcharge for residential customers only. In addition, Question No. 10 is designed to obtain information based on FES's communications to customers regarding its billing practices, particularly the Pass-Through Event clause.

39. Because the potentially unlawful nature of FES's billing and marking practices, as well as FES's alleged failure to comply with its duty to provide accurate and adequate information to customers regarding its services, are the focus of this proceeding, the information requested by Question Nos. 8 and 10 is relevant to the subject matter of this proceeding. Therefore, FES's relevancy objections to FES ICCC Set II, Question Nos. 8 and 10 should be dismissed and FES should be compelled to answer these questions.

40. As to FES's relevancy arguments, which, yet again, inaccurately attempt to frame this proceeding as involving an ordinary contract dispute, such arguments must be dismissed.

41. FES ICCC incorporates by reference Paragraph 10.

42. To limit discovery in the manner sought by FES would unreasonably hinder FES ICCC from obtaining important information regarding FES's actions and whether these actions adhere to Pennsylvania statutes and regulations applicable to EGSs licensed by the Commission. By contrast, dismissing FES's objections to Question Nos. 8 and 10 would enable FES ICCC to

¹⁰ See "FirstEnergy Solutions Waives Polar Vortex Surcharge for Residential Customers" (Apr. 25, 2014) at https://www.firstenergycorp.com/content/fecorp/newsroom/news_releases/firstenergy-solutions-waives-polar-vortex-surcharge-for-resident.html

gather evidence that would provide important information regarding FES's assessment of the RTO Expense Surcharge, and waiver thereof, as well as related communications to customers. The latter approach comports with the Commission's regulations, which allow discovery on "any matter, not privileged, which is relevant to the subject matter involved in the pending action..." and precedent which directs any doubt as to relevancy be resolved in favor of relevancy. 52 Pa. Code § 5.321(c); *see Koken*, at 1025.

43. Even assuming, *arguendo*, that the information produced by FES in response to Question Nos. 8 and 10 is ultimately determined to be not relevant for purposes of presentation into the evidentiary record, the Commission regulations governing discovery explicitly reject such grounds for objections. Rather, the Commission's regulations permit discovery "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 52 Pa. Code § 5.321(c). While FES claims in its general objections that FES ICC's Interrogatories will not lead to the discovery of admissible evidence, FES fails to provide any specific basis for this claim. In this instance, FES ICC is seeking information regarding FES's assessment of the RTO Expense Surcharge, and waiver thereof, as well as related communications to customers. Information regarding such matters could lead to relevant information regarding whether FES's actions at issue in this proceeding violate the Commission's regulations requiring EGS to provide customer with adequate and accurate information. Therefore, while crafted to obtain relevant information from FES, Question Nos. 8 and 10 are, at a minimum, reasonably calculated to lead to the discovery of admissible evidence. Consequently, FES's relevancy objections should be dismissed.

44. For these reasons, FES has not met its burden of showing that the information sought by Question Nos. 8 and 10 is irrelevant, particularly in consideration of the Commission's

requirement that any doubt as to relevancy be resolved in favor of relevancy. *See Koken*, at 1025. As FES ICCC's Set II Interrogatories, Question Nos. 8 and 10, are relevant to the subject matter involved in this proceeding and reasonably calculated to lead to the discovery of admissible evidence, FES ICCC requests that FES be required to respond to these Interrogatories in full.

ii. FES's Claims of Unreasonableness Are Unsupported.

45. In its July 27 Objections, FES contends that FES ICCC's Set II Interrogatories, Question Nos. 8 and 10, would cause unreasonable annoyance, oppression, burden or expense or would require unreasonable investigation. *See* FES Objections, pp. 27-29 and 31-33. FES, however, only asserts a general objection regarding the unreasonableness of these Interrogatories. For the reasons discussed below, FES's claims of unreasonableness are unsupported and should be dismissed.

46. FES ICCC incorporates by reference Paragraph 15.

47. Contrary to FES's contentions, providing the information requested by Question Nos. 8 and 10 should not impose an unreasonable burden upon FES. As previously stated, these Interrogatories are intended to obtain information about FES's practices related to FES's assessment of the RTO Expense Surcharge, and waiver thereof, as well as related communications to customers. *See* Paragraphs 37 and 38, *supra*. Although some degree of effort must be made by FES to gather the requested information, FES fails to demonstrate such effort constitutes an unreasonable investigation, imposes an unreasonable effort, or subjects FES to unreasonable expense, annoyance, or oppression.

48. Thus, responding to FES ICCC Set II, Question Nos. 8 and 10, would not cause unreasonable annoyance, embarrassment, oppression, burden or expense or require unreasonable

investigation by FES because these questions seek general information with respect to issues that are relevant to this proceeding. Accordingly, the Commission should compel FES to answer the Interrogatories in full.

49. For the foregoing reasons, FES's claims are unsupported and should be dismissed and FES should be compelled to answer Question Nos. 8 and 10 in full.

D. FES Should Be Compelled To Answer FES ICCC's Set II, Questions No. 11, as Claims of Irrelevancy, Hearsay and Unreasonableness Are Unsupported.

50. FES objects to Question No. 11, which seeks to explore representations made by an FES spokeswoman in a newspaper article appearing in May 2015, by arguing that the information sought by these questions is irrelevant and not likely to lead to the discovery of admissible evidence. *See* FES Objections, pp. 31-33. FES's Objections are primarily, and perhaps not surprisingly, based on FES's mischaracterization of its spokeswoman's statements as related to the issue of contract interpretation over which the Commission lacks jurisdiction. *Id.* at pp. 32-33. FES also claims that the newspaper article "constitutes hearsay" and, consequently, discovery is "patently unreasonable." *Id.* at pp. 31-32.

i. FES's Claims of Irrelevancy Are Unsupported.

51. FES ICCC incorporates by reference Paragraph 5.

52. Contrary to FES's claims, Question No. 11 focuses on obtaining information concerning FES's communications regarding its billing practices, including the use of the Pass-Through Event clause.

53. Based on this representation, Question No. 11 seeks to explore FES's decision to waive the RTO Expense Surcharge for certain customers. Because the potentially unlawful nature of FES's billing and marketing practices, as well as FES's alleged failure to comply with its duty to provide accurate and adequate information to customers regarding its services, are the

focus of this proceeding, the information requested by Question No. 11 is relevant to the subject matter of this proceeding. Therefore, FES's relevancy objections to FES ICCC Set II, Question No. 11 should be dismissed, and FES should be compelled to answer this question.

ii. FES's Hearsay Claims Are Unsupported.

54. With respect to its hearsay objection, and as a threshold matter, FES ICCC challenges FES's classification of the newspaper article as hearsay. While Commission regulations do not define hearsay, the Pennsylvania Rules of Evidence provide the following definition: "a statement that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers into evidence to prove the truth of the matter asserted in the statement." *See* Pa.R.E. 801(c). Thus, a statement is only hearsay if it is offered to prove the truth of the matter asserted in the statement in the context of a formal proceeding. Consequently, no hearsay issue exists.

55. Moreover, even assuming the newspaper article constitutes hearsay (which it does not), FES fails to cite a legal basis for its position that the statements in the newspaper article are not subject to discovery. Based on a plain reading of the Commission's discovery rules, no support for FES's attempt to limit discovery in this manner exists. Furthermore, "[e]vidence of a statement, particularly if it is proven untrue by other evidence, may imply the existence of...fraud."¹¹ In other words, such information may be offered for a purpose other than to provide the truth of the matter asserted. One of the issues in this proceeding is whether FES engaged in deceptive or fraudulent billing practices. Thus, the information sought by Question No. 11 may lead to information supporting FES ICCC's claims of fraudulent billing practices.

56. Furthermore, this question is reasonably calculated to lead to the discovery of admissible evidence, consistent with the Commission's regulations. *See* 52 Pa. Code § 5.321(c).

¹¹ *See* Comment to Pa.R.E. 801 at <http://www.pacode.com/secure/data/225/chapter8/s801.html>.

FES ICCC is seeking information regarding FES's decision to waive the RTO Expense Surcharge. The information provided by FES's spokeswoman in the aforementioned article raises questions regarding whether the understanding set forth publicly by FES regarding its imposition of the RTO Expense Surcharge was the same as the information conveyed to its customers prior to and shortly after invoking the Pass-Through Event clause. Even, assuming, *arguendo*, that the newspaper article itself would be classified as hearsay or irrelevant, information gleaned through discovery regarding this article is reasonably calculated to lead to the discovery of admissible evidence. Thus, pursuant to PUC regulations, these discovery requests are permissible.

iii. FES's Claims of Unreasonableness Are Unsupported.

57. FES claims that FES ICCC's Set II Interrogatories, Question No. 11 would cause unreasonable annoyance, oppression, burden or expense or would require unreasonable investigation. *See* FES Objections, pp. 31-33. FES, however, only asserts a general objection regarding the unreasonableness of these Interrogatories. For the reasons discussed below, FES's claims of unreasonableness are unsupported and should be dismissed.

58. FES ICCC incorporates by reference Paragraph 15.

59. Contrary to FES's contentions, providing the information requested by Question No. 11 should not impose an unreasonable burden upon FES. As previously stated, this Interrogatory is intended to obtain information about FES's communications regarding its billing practices, including the use of the Pass-Through Event clause. *See* Paragraph 52, *supra*. Although some degree of effort must be made by FES to gather the requested information, FES fails to demonstrate such effort constitutes an unreasonable investigation, imposes an unreasonable effort, or subjects FES to unreasonable expense, annoyance, or oppression.

60. Thus, responding to FES ICCC Set II, Question No. 11, would not cause unreasonable annoyance, embarrassment, oppression, burden or expense or require unreasonable investigation by FES because these questions seek general information that is relevant to this proceeding. Accordingly, the Commission should compel FES to answer the Interrogatories in full.

61. For the foregoing reasons, FES has failed to meet its burden of demonstrating that the information sought by Question No. 11 is irrelevant, particularly when Commission precedent requires any doubt as to relevancy to be resolved in favor of relevancy. *See Koken*, 1025. In fact, Question No. 11 seeks information that is relevant to the issues before the Commission. Moreover, FES's hearsay objection is inapposite here, as no hearsay exists. Furthermore, FES's assertions of unreasonable are unsupported. Therefore, FES's Objections should be dismissed, and FES should be compelled to answer Question No. 11.

E. FES Should Be Compelled To Answer FES ICCC's Set II, Question Nos. 2-8 and 10-11 as FES's Sweeping Claims Regarding the Privileged, Confidential or Otherwise Protected Status of Such Information Are Disingenuous, at Best.

62. In the July 27 Objections, FES also generally objects to FES ICCC, Set II, Question Nos. 2-8 and 10-11 as seeking privileged, confidential or otherwise protected information. *See* FES Objections, pp. 1-2. Given the general nature of FES's objections, it appears that FES is claiming that Question Nos. 2-8 and 10-11, in their entirety, are seeking privileged, confidential or otherwise protected information. FES's sweeping claims regarding the privileged, confidential or otherwise protected status of the requested information are disingenuous, at best.

63. As a preliminary matter, FES's objections are overly broad. FES ICCC does not believe that FES may assert, in good faith, that *all* information requested by Question Nos. 2-8

and 10-11 is privileged, confidential or otherwise protected and, thus, not subject to discovery. Each component of FES ICCC's nine discovery requests is readily identifiable. Notwithstanding, FES opted to utilize a sweeping blanket objection to claim that questions such as "What percentage of FES's large C&I customers with variable priced contracts received a March Notice Letter," *see* FES ICCC Set II, No. 7(d), are subject to privileged, confidential or other protected treatment.

64. Further, in the event FES is able to meet its burden that some of the information requested by Question Nos. 2-8 and 10-11 is confidential or otherwise protected, FES ICCC would accept the provision of such information pursuant to a Protective Order that is acceptable to the parties in this proceeding. To the extent that information requested by Question Nos. 2-8 and 10-11 is privileged and not otherwise subject to discovery, FES has failed to identify such discovery requests, or parts thereof, with an adequate degree of specificity for further response by FES ICCC.

65. Based on the foregoing, FES ICCC requests that Your Honor dismiss FES's blanket objections as to the privileged, confidential or otherwise protected status of the information requested by Question Nos. 2-8 and 10-11, and direct FES to provide responses, subject to a Protective Order if reasonably necessary, unless FES provides adequate information to support its claims that any portions of the requested information are privileged and not properly discoverable.

III. CONCLUSION

WHEREFORE, FES ICCC respectfully requests that the Pennsylvania Public Utility Commission provide relief as follows:

1. Dismiss FES's Objections to the Interrogatories, Set II, Nos. 2-8 and 10-11 of FES ICCC; and
2. Compel FES to respond to the Interrogatories, Set II, Nos. 2-8 and 10-11 of FES ICCC consistent with this Motion.

Respectfully submitted,

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