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July 11, 2014

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

VIA ELECTRONIC FILING

RE: FES Industrial 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 ICCC") Answer to the Preliminary Objections filed by FirstEnergy Solutions Corporation ("FES") in response to FES ICCC's Complaint in the above-referenced proceeding.

As evidenced by the attached Certificate of Service, all parties to the proceeding are being served with a copy of this document. Thank you.

Sincerely,

McNEES WALLACE & NURICK LLC

By Susan E. Bruce
Susan E. Bruce

Counsel to the FES Industrial and Commercial Customer Coalition

Enclosure
c: Chief Administrative Law Judge Charles E. Rainey, Jr. (via E-mail and First-Class Mail)
Certificate of Service

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).

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Counsel to the FES Industrial and Commercial
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Dated this 11th day of July, 2014 at Harrisburg, Pennsylvania.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

ANSWER OF THE FES INDUSTRIAL & COMMERCIAL CUSTOMER COALITION TO THE PRELIMINARY OBJECTIONS OF FIRSTENERGY SOLUTIONS CORPORATION

Pursuant to 52 Pa. Code Sections 5.61(a)(2) and 5.101, the FES Industrial & Commercial Customer Coalition ("FES ICCC") hereby submits this Answer to the Preliminary Objections filed by FirstEnergy Solutions Corporation ("FES") in response to FES ICCC's Complaint ("Complaint"). For the reasons stated herein, FES ICCC respectfully requests that the Commission deny the Preliminary Objections of FES.[1] By and in support hereof, FES ICCC states as follows:

1. FES ICCC submits that Paragraph 2 of the Complaint speaks for itself and no response is required.

2. FES ICCC submits that Paragraph 10 of the Complaint speaks for itself and no response is required. By way of clarification, FES ICCC members are Large Commercial and

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[1] On July 1, 2014, FES also filed an Answer and New Matter to the Complaint of FES ICCC in this proceeding. The Commission's regulations provide that "replies to answers seeking affirmative relief or to new matter shall be filed with the Commission and served within twenty days after the service of the answer." 52 Pa. Code § 5.63. In accordance with Section 5.63, FES ICCC intends to file a Reply to FES's New Matter on or before July 21, 2014.

Industrial ("C&I") customers receiving electric generation supply service from FES under fixed-price contracts.

3. FES ICCC submits that Paragraph 12 of the Complaint speaks for itself and no response is required.

4. FES ICCC submits that Paragraphs 6-9 of the Complaint speak for themselves and no response is required.

5. FES ICCC submits that Paragraphs 12-15 of the Complaint speak for themselves and no response is required.

6. FES ICCC submits that Paragraphs 12-15 of the Complaint speak for themselves and no response is required.

7. FES ICCC submits that Paragraphs 34, 35, 39, and 40 of the Complaint speak for themselves and no response is required.

8. FES ICCC submits that the request for relief section of the Complaint speaks for itself and no response is required.

I. ANSWER TO PRELIMINARY OBJECTION 1: LACK OF COMMISSION JURISDICTION OVER CONTRACTS

9. The averment in Paragraph 9 is a conclusion of law to which no response is needed.

10. The averments in Paragraph 10 are conclusions of law to which no response is needed.

11. The averments in Paragraph 11 are conclusions of law to which no response is needed. By way of further response, Section 2802(14) of the Electricity Generation Customer Choice and Competition Act ("Competition Act") also provides: "[e]lectric generation suppliers will be *required to obtain licenses*, demonstrate financial responsibility and *comply with such*

other requirements concerning service as the commission deems necessary for the protection of the public." 66 Pa. C.S. § 2802(14) (emphasis added). Section 2809 outlines the requirements for electric generation suppliers ("EGSs"), including the form of regulation of EGSs. *Id.* at § 2809. Thus, with respect to EGSs, the Commission possesses the power to regulate EGS licensing and enforce compliance with any other requirements necessary to protect the public.

12. Admitted in part and denied in part. FES ICCC admits that FES is a licensed EGS. FES ICCC denies that FES is excluded from the definition of public utility. By way of further response, the definition of "public utility" does not include "electric generation supplier companies, *except for the limited purposes as described in section[] 2809 (relating to requirements for electric generation suppliers).*" *Id.* at § 102 (emphasis added); *id.* at § 2809 (setting forth EGS licensing requirements). Thus, as an EGS, FES is a public utility for the limited purpose of Section 2809. *See Delmarva Power & Light Co. v. Pa. Pub. Util. Comm'n*, 870 A.2d 901, 910 (Pa. Commw. Ct. 2005). Accordingly, FES is subject to regulation by the PUC based on the Commission's jurisdiction over the licensing of EGSs that supply electric generation services to retail customers in the Commonwealth.

13. Admitted in part. FES ICCC admits that the contracts with FES ICCC members are private contracts. FES ICCC lacks sufficient information to respond to the nature of the contracts between FES and its customers who are not members of FES ICCC.

14. To the extent that the averments in Paragraph 14 reference the Complaint, the document speaks for itself and no response is necessary. By way of further answer, FES ICCC's Complaint demonstrates that FES's efforts to pass through ancillary costs to FES ICCC members with fixed-price contracts constitute deceptive, if not fraudulent, billing practices, that contravene statutory requirements, violate EGS licensing regulations, and thwart the consumer

protection intent of the Competition Act. The Commission has the "full power and authority" as well as the "duty to enforce, execute and carry out, by its regulations, orders, or otherwise...the provisions of [the Public Utility Code], and the full intent thereof." 66 Pa. C.S. § 501(a). In addition, where the Commission believes that any person or corporation, among other things, "failed, omitted, neglected, or refused, or is about to fail, omit, neglect, or refuse, to obey any lawful requirement, regulation or order made by the commission...the commission may institute an injunction, mandamus or other appropriate legal proceedings, to restrain such violations of the provisions of this part, or of the regulations, or orders of the commission, and to enforce obedience thereto." *Id.* at § 502. To this end, the Complaint requests that the Commission interpret and enforce the rules and regulations governing EGSs consistent with its statutory mandate to regulate EGSs. In doing so, the Commission will need to interpret certain provisions of the fixed-price contracts between FES and FES ICCC members to determine whether FES has run afoul of the Commission's EGS billing requirements. The Complaint, however, does not ask the Commission to interpret such contract language in order to rule on any breach of contract claim, and the Commission should disregard and dismiss FES's efforts to inaccurately characterize the Complaint as involving such claims. At issue in this proceeding is FES's billing practices as an EGS licensed by this Commission.

15. Admitted in part. FES ICCC admits that the Commission lacks jurisdiction to decide private contractual disputes between EGSs and their customers. FES ICCC denies all other averments in this paragraph. By way of further answer, it is firmly established that "the courts will not originally adjudicate matters within the jurisdiction of the PUC. Initial jurisdiction in matters concerning the relationship between public utilities and the public is in the PUC not in the courts." *See Borough of Lansdale v. Philadelphia Elec. Co.*, 170 A.2d 565, 567

(Pa. 1961). The Competition Act directed the establishment of licensing requirements and any other requirements concerning service the Commission deems necessary "for the protection of the public." 66 Pa. C.S. § 2802(14). The EGS licensing requirements directly relate to the regulation of the service relationship between EGSs and their customers. Moreover, the regulation of EGSs and the promulgation of licensing requirements are exclusively within the Commission's jurisdiction. By logical conclusion, any challenges pertaining to the billing practices of a PUC-jurisdictional EGS are within the Commission's jurisdiction. Any requests to order such practices to be discontinued or terminated, or to revoke or suspend an EGS's license, are well within the Commission's power and authority. *See* 66 Pa. C.S. §§ 501-502; *see also* 52 Pa. Code 54.42. Accordingly, the Commission has jurisdiction to adjudicate FES ICCC's Complaint against FES. Furthermore, the Commission has the responsibility to monitor the retail electricity market and to take steps to prevent anticompetitive conduct. *See* 66 Pa. C.S. § 2811. If FES is allowed to move forward with billing practices inconsistent with their contracts, shielded by the complexity of the whole markets, FES's fixed-price customers lose the benefit of their bargain. Such an outcome risks the integrity of fixed-priced contracts for all customer classes and undermines the integrity of Pennsylvania's competitive retail market for electricity.

16. The averments in Paragraph 16 are conclusions of law to which no response is needed. By way of further response, the Complaint does not request that the Commission decide a contractual dispute. Rather, the Complaint requests that the Commission exercise its authority to oversee EGSs in order to determine whether FES engaged in deceptive and potentially fraudulent billing practices.

17. The averments in Paragraph 17 are conclusions of law to which no response is needed. By way of further response, the Complaint does not request the Commission exercise

jurisdiction over a contract or decide a private contractual dispute. FES ICCC also incorporates by reference its responses in Paragraphs 14 and 16.

18. The averments in this paragraph are conclusions of law to which no response is needed. By way of further answer, the Commission has the authority to grant FES ICCC's requested relief, which entails: (1) stay of FES ICCC members' liability for FES's proposed charges; (2) prohibiting FES from attempting to recover from FES ICCC members the costs billed to it by PJM for ancillary costs during January 2014 via the "Pass-Through Event" clause under the fixed-price contracts with FES; and (3) provide any additional or necessary relief as appropriate. Under Section 501(a) the Commission has "full power and authority...to enforce, execute and carry out, by its...orders...the provision of [the Public Utility Code]." 66 Pa. C.S. § 501(a). The Commonwealth Court has affirmed the Commission's ability to issue "cease and desist" directives under Section 501(a). *See Mid-Atlantic Power Supply Assoc. v. Pa. Pub. Util. Commission*, 755 A.2d 723 (Pa. Commw. Ct. 2000) (ordering PECO to refrain from certain marketing practices and ensure that current advertising is not deceptive or inaccurate). In addition, the Commission has the authority to "institute injunction, mandamus or other appropriate legal proceedings, to restrain such violations of the provisions of this part, or of the regulations, or orders of the commission, and to enforce obedience thereto." 66 Pa. C.S. § 502. Furthermore, Section 2802(14) gives the PUC powers and duties to impose other requirements on EGS companies that the PUC finds necessary to protect the public. Thus, each request for relief in the FES ICCC Complaint has a statutory basis in the Public Utility Code.

19. Denied. By way of further response, the Commission clearly possesses jurisdiction over the subject matter of the Complaint. *See supra* ¶¶ 9-18. Therefore, the Commission should reject FES's claim that the Complaint should be dismissed.

II. ANSWER TO PRELIMINARY OBJECTION 2: LACK OF COMMISSION PRIMARY JURISDICTION

20. The averments in Paragraph 20 are conclusions of law to which no response is needed.

21. The averments in Paragraph 21 are conclusions of law to which no response is needed.

22. FES ICCC submits that Paragraphs 34, 35, 39, and 40 speak for themselves and no response is needed.

23. Denied. By way of further response, the doctrine of primary jurisdiction provides that a *civil court* would be required to defer to the Commission under the circumstances of this case. As recognized by the Superior Court:

> In general, the doctrine of primary jurisdiction holds that *where an agency has been established to handle a particular class of claims, the court should refrain from exercising its jurisdiction until the agency has made its determination.* Hence, although the court may have subject matter jurisdiction, the court defers its jurisdiction until an agency ruling has been made.
>
> Thus, the doctrine of primary jurisdiction applies where the administrative agency cannot provide a means of complete redress to the complaining party and yet the dispute involves issues that are clearly better resolved in the first instance by the administrative agency charged with regulating the subject matter of the dispute.
>
> [...]
>
> Therefore, *where the subject matter is within an agency's jurisdiction and where it is a complex matter requiring special competence....the proper procedure is for the court to refer the matter to the appropriate agency.* Also weighing in the consideration should be the need for uniformity and consistency in agency policy and the legislative intent. Where, on the other hand, the matter is not peculiarly within the agency's area of expertise, but is one which the courts are equally well-suited to determine, the court must not abdicate its responsibility.

See Ostrov v. I.F.T., Inc., 586 A.2d 409, 413-414 (Pa. Super. 1991) (emphasis added). The allegations in the Complaint fall squarely within the Commission's subject matter jurisdiction and unique expertise regarding the regulation of EGSs.[2] *See supra* at ¶¶ 9-19. Moreover, the Commission has the power to handle the types of claims set forth in the Complaint, and the authority to provide redress to FES ICCC. *Id.* Furthermore, as to legislative intent, the Competition Act clearly contemplates that the Commission will assume responsibility for imposing requirements necessary to protect the public. 66 Pa. C.S. § 2802(14). FES's questionable billing practices threaten the integrity of the retail market. In its role as the overseer of the competitive retail market, the Commission is best suited to realize the Competition Act's public protection intent as well as ensure consistent and uniform policy for EGSs, specifically, and retail market competition, in general. Thus, and contrary to FES, FES ICCC's claims are not contingent upon a final finding by a civil court of competent jurisdiction. Based on the foregoing, in the event that FES ICCC's claims regarding FES's compliance with EGS rules and regulations were brought before a civil court, the doctrine of primary jurisdiction, as applied under the circumstances of this case, provides that the civil court would be require to either refrain from acting until the Commission ruling has been made or refer the matter to the Commission.

24. Denied. By way of further response, FES ICCC incorporates its response in Paragraph 23.

[2] In the event a customer served by an EGS would seek to pursue a breach of contract claim, FES ICCC recognizes that such claims fall outside the scope of the Commission's jurisdiction and, consequently, it would be necessary to pursue such claims before the appropriate civil court.

WHEREFORE, the FES Industrial and Commercial Customer Coalition respectfully requests that FirstEnergy Solutions Corporation's Preliminary Objections be denied.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By

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Dated: July 11, 2014