



June 29, 2015

VIA E-FILE

David P. Zambito

Direct Phone 717-703-5892
Direct Fax 215-989-4216
dzambito@cozen.com

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

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

FIRSTENERGY SOLUTIONS CORP. PREHEARING MEMORANDUM

Dear Secretary Chiavetta:

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

If you have any questions regarding this filing, please direct them to me. Thank you for your attention to this matter.

Sincerely,

COZEN O'CONNOR

By: David P. Zambito
Counsel for *FirstEnergy Solutions Corp.*

DPZ/kmg
Enclosure

cc: Honorable Katrina L. Dunderdale
Per Certificate of Service

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

I hereby certify that I have this day served a true copy of FirstEnergy Solutions Corp.'s Prehearing Memorandum, upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

VIA ELECTRONIC AND FIRST CLASS MAIL:

Honorable Katrina L. Dunderdale
Pennsylvania Public Utility Commission
Suite 220, Platt Place
301 Fifth Avenue
Pittsburgh, PA 15222
kdunderdal@pa.gov

Susan E. Bruce, Esquire
Charis Mincavage, Esquire
Vasiliki Karandrikas, Esquire
Andrew S. Ziegler, Esquire
McNees Wallace & Nurick LLC
100 Pine Street, P.O. Box 1166
Harrisburg, PA 17108-1166
sbruce@mwn.com
cmincavage@mwn.com
vkarandrikas@mwn.com
aziegler@mwn.com
**Counsel for FES Industrial & Commercial
Customer Coalition**

Candis A. Tunilo, Esquire
Brandon J. Pierce, Esquire
Office of Consumer Advocate
555 Walnut Street
Forum Place, 5th Floor
Harrisburg, PA 17101-1923
ctunilo@paoca.org
bpierce@paoca.org
**Counsel for Office of Consumer
Advocate**

DATED: June 29, 2015



David P. Zambito, Esquire
Counsel for FirstEnergy Solutions Corp.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Administrative Law Judge
Katrina L. Dunderdale

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

**PREHEARING CONFERENCE MEMORANDUM OF
FIRSTENERGY SOLUTIONS CORP.**

FirstEnergy Solutions Corp. (“FES”), by and through its attorneys, Cozen O’Connor, hereby files this Prehearing Memorandum in the above-captioned complaint proceeding filed by the FES Industrial & Commercial Customer Coalition (“FES-ICCC”), and states as follows:

I. PROCEDURAL HISTORY

FES incorporates herein by reference the history of the proceeding as set forth in Your Honor’s “Fourth Interim Order,” dated June 24, 2015.¹

¹ FES’s incorporation of the history of proceeding however does not indicate FES’s concurrence with or acquiescence to any legal conclusions of the Commission, Your Honor, and the other parties expressed therein.

II. SERVICE OF DOCUMENTS

Please list Attorneys David P. Zambito and D. Troy Sellars collectively on the service list on behalf of FES using the following contact information:

David P. Zambito, Esquire (PA ID No. 80017)
D. Troy Sellars, Esquire (PA ID No. 210302)
Cozen O'Connor
17 North Second Street, Suite 1410
Harrisburg, PA 17101
Phone: 717-703-5892
Fax: 215-989-4216
E-mail: dzambito@cozen.com
tsellars@cozen.com

FES agrees to receive service of documents electronically in this proceeding. FES attorneys are authorized to accept service on behalf of FES in this proceeding. FES requests that the Commission and all parties of record serve copies of all discovery requests and answers, correspondence, Commission Orders, and any other documents issued in this proceeding on its attorneys in Harrisburg, Pennsylvania. FES requests that Attorneys Zambito and Sellars as well as Attorney Brian J. Knipe (bknipe@firstenergycorp.com) be included on any electronic service list.

III. WITNESSES

FES has not yet identified the witnesses whom it intends to call in this proceeding. As explained in more detail below, the Commission has determined that the primary issue of FES-ICCC's complaint (a contract interpretation issue) is not properly before the Commission. The identification of specific witnesses is largely dependent upon the residual issues that FES-ICCC ultimately elects to pursue. Based upon discovery that FES intends to propound on the

individual FES-ICCC members, FES will identify its witnesses in a timely manner prior to any scheduled evidentiary hearings in this proceeding.

IV. ISSUES

FES-ICCC's complaint was initially focused on a specific contract interpretation issue that was purportedly common to all members of FES-ICCC. The Commission has however made clear on interlocutory review that it lacks jurisdiction and authority to interpret the terms and conditions of a contract between FES and an FES-ICCC member concerning whether a breach has occurred. Opinion and Order entered Dec. 12, 2014 (December 12th Order), p. 20. As such, any attempt by FES-ICCC to raise contract interpretation issues should be promptly quashed. FES specifically reserves its right to file or otherwise make motions in limine should FES-ICCC attempt to raise issues of contract interpretation.

The remaining issues of the complaint are far from clear, and are very fact-intensive as they relate to each individual FES-ICCC member. Moreover, it is unfortunately unclear whether FES-ICCC intends to pursue only a unified remedy for its group as a whole or intends to pursue individual remedies for each member of its group.

In general terms, the Commission's authority is limited to ensuring "that an EGS is abiding by the standards of conduct and disclosure, the marketing and sales Regulations, and the contract expiration/change-of-terms notice requirements; and that the rate billed by an EGS was calculated in accordance with those materials." December 12th Order, p. 20 (footnotes omitted). In denying FES's Petition for Clarification in this matter, the Commission indicated that FES-ICCC will have the burden of establishing that FES "has violated any applicable Commission statute or Regulation" or has otherwise engaged in false or deceptive advertising to customers.

Opinion and Order entered May 7, 2015, p. 11. This inquiry, by necessity, is fact-specific. A determination that FES committed a violation will be dependent upon what FES did with respect to each individual member of FES-ICCC. For instance, each customer received different sales materials, received different statements from FES, and may have communicated with different sales representatives and account executives. If this case is not settled and proceeds to hearing and adjudication, an in-depth review and analysis of FES's relationship with each individual FES-ICCC member will be required.

FES submits that FES-ICCC, as an *ad hoc* group without a formal legal existence of its own, lacks privity of contract with FES and cannot be afforded relief through this proceeding. Instead, each individual member of FES-ICCC is a *de facto* complainant and has a burden of demonstrating that FES committed a violation against it over which the Commission has statutory authority. These specific allegations are not spelled out in FES-ICCC's complaint and, until they are, FES cannot reasonably respond and defend itself.

At some point in this proceeding, it may become necessary to sever the FES-ICCC complaint into individual complaints by each FES-ICCC member. FES specifically reserves the right to make such a motion to sever. If it deems necessary, FES may propound discovery upon each individual FES-ICCC member to determine the specific nature of each member's allegations against FES and, upon receiving meaningful responses, will decide whether to move to sever individual allegations of each FES-ICCC member into separate complaints. In addition, severance may be necessary because of the highly-sensitive pricing information related to each FES-ICCC member. FES would strenuously object, for business competitive reasons, to the sharing of such information among FES-ICCC members. The protection of proprietary information is complicated by the fact that FES-ICCC is not a legal

entity. While individual members of FES-ICCC may or may not be current customers of FES, upon information and belief FES avers that they continue to be active participants in the competitive electric generation supply retail market. It will be very challenging in this solitary complaint proceeding to keep proprietary information with regard to one FES-ICCC member (such as pricing information) from the other FES-ICCC members.

Aside from FES's objection to the sharing of its pricing information among FES-ICCC members, certain FES-ICCC members may not want their business expenditure information and negotiated terms and conditions of electricity service disclosed to other FES-ICCC members – particularly if they are competitors. For instance, there are two glass manufacturers, two food manufacturers, and two regional medical facility operators among FES-ICCC's membership.

Therefore, for the reasons stated above, it may become necessary to sever this complaint proceeding into individual complaint proceedings for each FES-ICCC member.

V. PROTECTIVE ORDER

While contract interpretation issues are not properly raised in this proceeding, the exchange of proprietary information regarding competitive pricing and contract terms will inevitably occur. Accordingly, a protective order will be required to keep FES's competitive business information confidential for the record of this proceeding, and also among the individual members of the *ad hoc* FES-ICCC group as described in Section IV above.² FES will work with FES-ICCC to determine whether a consensus can be reached as to a motion for protective order.

² In this regard, FES notes that, because the Complaint itself contains competitively sensitive information, FES-ICCC had to file a confidential version of the Complaint under seal with the Commission's Secretary.

VI. DISCOVERY

As there is no statutory deadline for disposition of this matter, FES proposes that the parties abide by the Commission's standard Rules of Practice and Procedure without modification. FES will work in good faith with FES-ICCC to resolve any discovery disputes that may arise during the course of this proceeding. Because FES-ICCC is not a legal entity and there are unique facts and circumstances involving each individual FES-ICCC member, FES reserves its right to serve discovery upon individual FES-ICCC members as opposed to solely upon FES-ICCC as a loosely-affiliated *ad hoc* group formed for the purpose of this litigation.

VII. LITIGATION SCHEDULE

While this case has been pending for approximately a year, there have been no undue delays or unreasonable lapses of time. The case involves complicated issues of first impression regarding the Commission's jurisdiction and authority over the relationship between an EGS and its customers. Much of the lapsed time was the result of interlocutory review by the Commission of fundamental jurisdictional issues. Such Commission review was necessary to avoid the wasting of the Commission's and the parties' time and resources.

Until the parties received guidance from the Commission on the proper scope of issues to be considered in this proceeding, it did not make sense for the parties to engage in discovery. Attempts at discovery likely would have simply lead to disputes regarding the relevancy of certain information. Moreover, attempts at settlement would have been futile because the parties could not reasonably assess their risk without guidance from the Commission on underlying, fundamental jurisdictional issues.

FES and FES-ICCC are now engaged in active settlement negotiations and have, to date, refrained from propounding discovery in order to afford the maximum opportunity to focus on settlement. They desire to continue to engage in settlement discussions in order to find amicable resolutions to the various disputes between FES and the individual members of FES-ICCC. Along these lines, FES notes that each individual member of FES-ICCC has unique circumstances and a business relationship with FES that must be addressed either through settlement or litigation.

FES supports a 90-day period for the parties to continue to engage in meaningful settlement discussions and, if necessary, to conduct discovery. FES proposes that Your Honor schedule a further prehearing conference for 10:00am on September 30, 2015, at which time the parties would have to be prepared to present a litigation schedule for testimony, evidentiary hearings, and briefing.

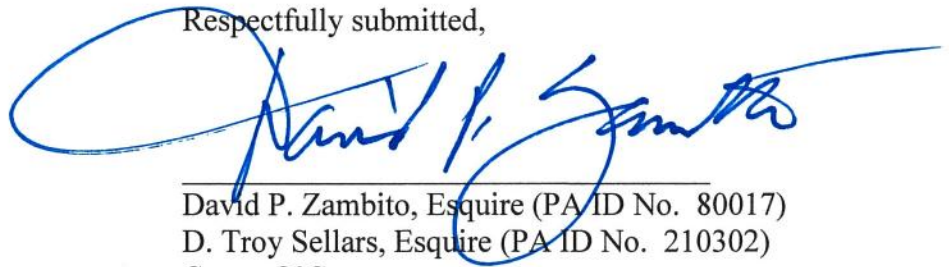
In support of a 90-day period for additional settlement discussions, FES notes that Commission policy promotes settlements. *See* 52 Pa. Code § 5.231. Settlements lessen the time and expense that the parties must expend litigating a case and, at the same time, conserve precious administrative resources. The Commission has indicated that settlement results are often preferable to those achieved at the conclusion of a fully-litigated proceeding. *See* 52 Pa. Code § 69.401.

VIII. SETTLEMENT DISCUSSIONS

As mentioned above and in accord with the Commission's policy encouraging settlements, FES and FES-ICCC are already engaged in settlement discussions. FES respectfully

requests additional time in order to determine whether amicable resolutions can be reached with each individual FES-ICCC member. These settlement discussions involve not only regulatory considerations but also private contractual and business considerations, and accordingly are more complicated and time-consuming than a typical customer complaint. In light of the fact that there is no statutory deadline for resolution of this complaint matter, the 90 days requested above for settlement discussions and discovery prior to a further prehearing conference is appropriate.

Respectfully submitted,



Dated: June 29, 2015

David P. Zambito, Esquire (PA ID No. 80017)
D. Troy Sellars, Esquire (PA ID No. 210302)
Cozen O'Connor
17 North Second Street, Suite 1410
Harrisburg, PA 17101
Phone: 717-703-5892
Fax: 215-989-4216
E-mail: dzambito@cozen.com
tsellars@cozen.com

Brian J. Knipe, Esquire (PA ID No. 82854)
FirstEnergy Solutions Corp.
76 South Main St.
Akron, OH 44308
Telephone: (330) 384-5795
Facsimile: (330) 384-3875
E-mail: bknipe@firstenergycorp.com

Counsel for *FirstEnergy Solutions Corp.*