

**PENNSYLVANIA PUBLIC UTILITY COMMISSION  
HARRISBURG, PENNSYLVANIA 17105-3265**

**Joint Application of West Penn Power Company d/b/a Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy Corp. for a Certificate of Public Convenience under Section 1102(a)(3) of the Public Utility Code approving a change of control of West Penn Power Company And Trans-Allegheny Interstate Line Company**

**PUBLIC MEETING: February 24, 2011  
2176520-OSA**

**Docket No. A-2010-2176520  
Docket No. A-2010-2176732**

**JOINT MOTION OF COMMISSIONERS  
ROBERT F. POWELSON AND  
JOHN F. COLEMAN, JR.**

Before the Commission for disposition is the Joint Application of West Penn Power Company (“West Penn”), Trans-Allegheny Interstate Line Company (“TrAILCo”) and FirstEnergy Corp. (“FirstEnergy”) (collectively, “Joint Applicants”) for approval of a change of control such that FirstEnergy would acquire the assets of West Penn and TrAILCo in a \$4.7B stock transfer transaction. Approval of the merger would mean that FirstEnergy-controlled utilities will have a total of approximately six million distribution customers, two million of which would be in Pennsylvania. Post-merger, Pennsylvania will have the second-largest concentration of FirstEnergy customers and will only be 100,000 customers behind FirstEnergy’s largest state, Ohio.

It is with this factual backdrop that we review the proposed merger. Legally, the Commission must find that the merger is “necessary or proper for the service, accommodation, convenience, or safety of the public.” 66 Pa. C.S. § 1103(a). To satisfy this standard, the merger must be shown to produce “affirmative public benefits.” *City Of York v. Pa. Pub. Util. Comm’n*, 449 Pa. 136, 295 A.2d 825 (1972). Further, the Commission is also required to determine that the merger will not “prevent retail electricity customers in this Commonwealth from obtaining the benefits of a properly functioning and workable competitive retail electricity market[.]” 66 Pa. C.S. § 2811(e)(2). If the Commission finds that the merger is not necessary or proper and/or that the merger is likely to result in anticompetitive or discriminatory conduct that will result in a market that is not workably competitive, then the Commission must either reject the merger or impose appropriate conditions on the merger to cure the projected deficiencies. *Id.*

The Commission adopts the Recommended Decision insofar as it accepts the proposed conditions set forth in the Settlement Agreement entered into by the Joint Applicants, Office of Consumer Advocate, Office of Trial Staff, Pennsylvania State University, West Penn Power Industrial Intervenors, Pennsylvania Department of Environmental Protection, and Met-Ed Industrial Users Group.

The Settlement Agreement, however, was not unanimous and left various issues related to the merger’s impact on retail competition unresolved. Direct Energy and the Retail Electric Supply Association (“RESA”) introduced several pieces of evidence demonstrating the potential

harm to retail markets in the merged entity's distribution footprint that could occur should the merger be allowed as originally proposed.

While we are sympathetic to the issues raised by Direct and RESA, we note that those concerns are largely speculative, and so we decline to adopt their proposed conditions in their entirety. Nonetheless, we are mindful of our obligation to ensure a properly functioning and workable competitive retail electricity market pursuant to Section 2811(e). However, rather than attempting to make changes piecemeal as a result of a litigated proceeding, we believe that any issues related to the structure of the retail electricity market in Pennsylvania should be addressed on a statewide level. To that end, we will open a statewide investigation into Pennsylvania's retail electricity market, with the goal of making recommendations for improvements to ensure a properly functioning and workable competitive retail electricity market exists in the state. This investigation will be initiated within 60 days and will examine both the legislative and the regulatory framework behind Pennsylvania's competitive retail electricity markets, including an analysis of the current default service model and whether, as currently structured, that model is hindering competition. Additionally, the investigation will include a process to identify interested alternative suppliers of electric generation services qualified to provide default service throughout the state and should result in recommendations for legislative changes, as well as changes the Commission can initiate on its own, to improve competition in Pennsylvania's retail markets.

In addition to the statewide investigation, we believe there are certain actions that should be taken immediately with regard to the relationships between electric distribution companies (EDCs) and their affiliate electric generation suppliers (EGSs) in order to ensure a properly functioning competitive retail market in Pennsylvania. The following provisions should be added to the Code of Conduct Rulemaking currently underway at Docket No. L-2010-2160942: (1) protections so that EDC-affiliated EGSs do not inappropriately benefit from the use of resources shared with its affiliate EDC; (2) prohibitions on joint EDC/EGS marketing, sales, and promotional activities; (3) provisions to prevent direct or indirect cross-subsidies, such as the use of the affiliate EDC for credit support for affiliated EGS sales; and (4) an examination of whether the Commission should require EDC-affiliated EGSs to change their trade names so as to be dissimilar from both the EDC affiliate and corporate parent.

Regarding FirstEnergy specifically, in addition to the retail market enhancements and protections included in the Settlement Agreement, within 30 days after the close of the merger, the merged entity shall coordinate a meeting with all interested EGSs to address the operational issues set forth in the record of this proceeding including, but not limited to: (1) not implying a right of rescission in customer enrollment confirmation letters; (2) implementing an EDI Advance Notice of Drop; (3) providing PLC factors; (4) developing procedures for seamless moves; and (5) addressing account attribute changes for shopping customers by eliminating any operational or other rules that provide a disincentive for customers to either switch to a competitive electricity provider, or once switched, to remain a customer of an EGS, when a person initiates service or when a customer moves or his or her customer information changes (this should include prohibitions against any rule that requires an applicant to take default service for any period of time before being able to obtain service from an EGS). FirstEnergy shall hold these operational calls with suppliers on a monthly basis for 24 months after consummation of the merger and thereafter as may be necessary. The purpose of these meetings is to assist suppliers with technical and operational issues and to reach mutually satisfactory resolutions for

the operational problems as they may arise. FirstEnergy shall commit to working cooperatively with the EGSs on addressing these issues.

In addition, the Commission shall address any affiliate transaction concerns by directing the Bureau of Audits or its contractors, in its next regular schedule audit, to examine the merged entity's business activities and specifically affiliate transactions on a confidential basis to ensure that none of the FirstEnergy EDCs are discriminating in favor of its affiliated EGS. The Bureau of Audits shall audit the companies' cost allocation practices and affiliate relationships to identify and remove any direct or indirect cross subsidies that provide a benefit to either default service or an affiliated retail supplier.

**THEREFORE, WE MOVE THAT:**

1. The exceptions of the OSBA, the RESA, Direct Energy, and Citizens Power be denied consistent with this Motion.
2. The Joint Application of Allegheny, TrAILCo, and FirstEnergy, as amended by the Joint Petition For Partial Settlement filed October 25, 2010, be granted conditional upon the Joint Applicants agreeing in writing to accept each and every condition set forth in the Joint Petition for Partial Settlement and this Motion.
3. The Office of Special Assistants prepare the appropriate Order consistent with this Motion.

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**ROBERT F. POWELSON**  
**COMMISSIONER**

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**JOHN F. COLEMAN, JR.**  
**COMMISSIONER**

**Dated: February 24, 2011**