

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

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June 14, 2010

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

RE: Joint Application of West Penn Power Company doing business as Allegheny Power Company, Trans-Allegheny Interstate Line Company and FirstEnergy Corporation 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  
Docket Nos. A-2010-2176520  
A-2010-2176732

Dear Secretary Chiavetta:

Enclosed for filing is the Protest and Public Statement of the Office of Consumer Advocate, in the above-referenced proceeding.

Copies have been served as indicated on the Certificate of Service.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Darryl Lawrence', written over a horizontal line.

Darryl Lawrence  
Assistant Consumer Advocate  
PA Attorney I.D. # 93682

Enclosures

cc: Honorable Wayne L. Weismandel  
Office of Special Assistants

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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Joint Application of West Penn Power	:	
Company doing business as Allegheny	:	
Power Company, Trans-Allegheny	:	
Interstate Line Company and FirstEnergy	:	Docket Nos. A-2010-2176520
Corporation for a Certificate of Public	:	A-2010-2176732
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	:	

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PROTEST OF THE  
OFFICE OF CONSUMER ADVOCATE

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The Office of Consumer Advocate (OCA) files this Protest in the above-captioned Joint Application pursuant to the provisions of the Rules of Practice and Procedure of the Pennsylvania Public Utility Commission (Commission), 52 Pa. Code Sections 5.51-5.53, and Chapters 11, and 28 of the Public Utility Code. Through this Joint Application filed on May 14, 2010, West Penn Power Company doing business as Allegheny Power (West Penn), Trans-Allegheny Interstate Line Company (TrAILCo) (collectively, Allegheny) and FirstEnergy Corporation (FirstEnergy) (Joint Applicants) are seeking to obtain the approval of the Commission for a change of control of West Penn and TrAILCo to be effected by the merger of Allegheny Energy, Inc. (Allegheny) with Element Merger Sub, Inc. (Merger Sub), a wholly-owned subsidiary of FirstEnergy. The Joint Applicants also request Commission approval of certain revisions to

affiliated interest arrangements that are designed to facilitate the sharing of services between the Allegheny and FirstEnergy systems. In brief, FirstEnergy will acquire all of the outstanding stock of Allegheny. FirstEnergy shareholders will own approximately 73% and Allegheny's former shareholders will own approximately 27% of the combined company.

The OCA files this Protest in order to ensure that the merger is approved only if (1) it is found to be in the public interest; (2) it provides substantial, affirmative benefits to the Joint Applicants ratepayers; (3) it does not adversely affect retail electric competition in Pennsylvania; and (4) it is in accordance with the Public Utility Code.

Specifically, the OCA avers as follows:

1. The Protestant is Irwin A. Popowsky, Consumer Advocate, 555 Walnut Street, 5th Floor, Forum Place, Harrisburg, PA 17101-1923. Protestant's attorneys for the purpose of receiving service of all documents in this proceeding are Tanya J. McCloskey, Senior Assistant Consumer Advocate and Darryl Lawrence, Assistant Consumer Advocate.

2. The OCA is authorized by law to represent the interests of utility ratepayers in all proceedings before the Commission. 71 P.S. §§ 309-1, *et seq.* This Protest is filed by the OCA to ensure that the interests of Allegheny's and FirstEnergy's Pennsylvania ratepayers are protected in the proposed transactions.

3. The Joint Application must be examined pursuant to Chapters 11 and 28 of the Public Utility Code.

4. Section 1102 of the Public Utility Code requires that the Commission issue a Certificate of Public Convenience as a legal prerequisite to offering service, abandoning service and certain property transfers by public utilities or their affiliated interests. 66 Pa.C.S. §1102(a)(1)-(3). It is the position of the OCA that this Commission has jurisdiction over this transaction under

Section 1102 of the Public Utility Code and that this transaction must be examined by the Commission. As set forth below, the Commission also must examine this transaction under the provisions of Chapter 21 and Chapter 28 of the Code.

5. The Code requires that a certificate shall only be granted upon findings that the granting of such certificate is “necessary or proper for the service, accommodation, convenience or safety of the public.” 66 Pa.C.S. §1103(a). The Supreme Court has construed this section of the Code as requiring a finding that a proposed merger will affirmatively benefit the public and specifically will “affirmatively promote the ‘service, accommodation, convenience or safety of the public’ in some substantial way.” City of York v. Pennsylvania Public Utility Commission, 449 Pa. 136, 141, 295 A.2d 825, 828 (1973), *see also*, Irwin A. Popowsky v. Pennsylvania Public Utility Commission, 594 Pa. 583; 937 A.2d 1040 (2007).

6. Additionally, Section 1103 explicitly allows the Commission to impose conditions upon the issuance of a Certificate of Public Convenience. 66 Pa.C.S. §1103(a). Section 1103(a) of the Code provides: “The Commission, in granting such a certificate, may impose such conditions as it may deem to be just and reasonable.” The OCA submits that the Commission may wish to consider the imposition of conditions in order to ensure that the affirmative benefits standard is met.

7. Section 2102 of the Public Utility Code states that prior to any arrangement providing for the furnishing of certain services, e.g., management, supervisory, legal, etc., between a public utility and any affiliated interest, Commission approval must be obtained.

8. Pursuant to Section 2811 of the Public Utility Code, enacted as a provision of the Electricity Generation Customer Choice and Competition Act, the Commission has responsibility for “monitor[ing] the market for the supply and distribution of electricity to retail customers and to . . . prevent anticompetitive or discriminatory conduct, including the unlawful exercise of market

power.” 66 Pa.C.S. §2811(a). In furtherance of this obligation, Section 2811(b) states: “Upon complaint or upon its own motion for good cause shown, the commission shall conduct an investigation of the impact on the proper functioning of a fully competitive retail electricity market, including the effect of mergers, consolidations, acquisition or disposition of assets or securities of electricity suppliers, transmission congestion and anticompetitive or discriminatory conduct affecting the retail distribution of electricity.”

As to approval of mergers, consolidations, acquisitions or dispositions, the Commission “shall consider whether the proposed merger, consolidation, acquisition or disposition is likely to result in anticompetitive or discriminatory conduct, including the unlawful exercise of market power, which will 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)(1). Section 2811(e)(2) requires that upon request for approval of a merger or acquisition, notice and an opportunity for open, public evidentiary hearing shall be afforded. Section 2811(e)(2) also requires that the Commission only approve such transaction upon terms and conditions it finds necessary to preserve the benefits of a properly functioning and workable competitive retail electricity market.

10. Based upon the OCA’s preliminary review of the Joint Application, the Joint Application raises a number of important issues that must be resolved by the Commission before granting approval of this merger and issuing Certificates of Public Convenience to FirstEnergy and Allegheny. The OCA submits that the Joint Application and proposals of the Joint Applicants as filed do not support a conclusion that the merger will provide substantial, affirmative benefits to the public and will affirmatively promote the service, accommodation, convenience or safety of the

public in some substantial way or that it will not adversely affect retail electric competition in Pennsylvania.

11. Preliminarily, the OCA has identified the following areas that require further consideration by the Commission and must be resolved prior to Commission approval of this merger.

a. Affirmative Ratepayer Benefits: The Application and its proposals do not demonstrate that this acquisition will provide substantial, affirmative ratepayer benefits in accordance with Pennsylvania law. If approved, the acquisition will provide immediate benefits for shareholders through a premium stock price. Application at 4. The Application, however, provides no information or assurances as to how this acquisition will provide substantial, affirmative benefits for all ratepayers, other than to say that the Merger could give rise to lower rates in the future. Application at 15. The request for acquisition approval should not be granted unless and until the Applicants can demonstrate that affirmative, substantial ratepayer benefits from this acquisition, such as through rate reductions, rate stability and enhanced quality of service will be provided

b. Merger Savings/Synergies: The Application provides that there will be no immediate impact on customer rates, rules or approved default service procurement plans. Application at 15. The OCA submits that the Commission should examine the proposed transaction to determine if, in fact, the proposed acquisition is in the best interest of the ratepayers considering that the acquisition as proposed may lack any synergies or savings that bring substantial, affirmative benefits to ratepayers.

c. Costs to Achieve: Particularly in light of the contention that there are no expected synergies or savings from this transaction that are proposed to be flowed through to ratepayers, the OCA submits that whatever the costs are to achieve this acquisition should be solely borne by the Applicants.

d. Quality of Service: The Application provides no specific proposal to ensure that quality of service to West Penn ratepayers will be maintained or improved because of this acquisition. Application at 12, 13. Therefore, the OCA submits that the Commission must, at a minimum, ensure that West Penn's quality of service, including reliability, customer service, and billing service, are maintained and enhanced as a result of the acquisition.

e. Impact on Rates: The Application provides that the Merger will have no present impact on rates and could give rise to lower rates in the future. Application at 15. The Joint Applications have not proposed any type of rate relief. In addition, the OCA submits that the Commission must examine the impact the proposed acquisition will have on the eventual capital structure of the utilities involved, which may adversely affect rates through high levels of equity.

f. Market Power and Effects on Competitive Markets: Under Section 2811, the Commission must examine the effect of this acquisition on the competitive retail electric market. The possible impact on the market should be further explored to assure that the acquisition does not negatively impact the retail electric market.

g. Corporate Structure: The proposed corporate structure raises several issues that should be explored and resolved prior to approval of the transaction. For example, appropriate accounting protocols to prevent cross-subsidization must be in place. In addition, appropriate Codes of Conduct must be in place to govern the relationships between the operating companies. The proposed corporate structure also must be reviewed to assure that there are no adverse tax effects.

h. Universal Service: The Application does not discuss the continuation and improvement of West Penn's universal service programs. The Commission must examine West Penn's universal service programs to ensure that these programs receive appropriate funding and local management attention and to assure that the programs continue to improve to meet the needs of

low-income and payment troubled customers in West Penn's service territories. It is also important to maintain and enhance the participation of local community-based organizations in the development and implementation of these programs.

i. Continuation of PUC Jurisdiction: Post corporate-restructuring, the Commission must ensure that it retains sufficient jurisdiction, as well as access to appropriate books and records of all subsidiaries, to ensure the continued provision of safe, adequate and reliable service in Pennsylvania, and to ensure against inappropriate cross subsidies at the expense of Pennsylvania consumers.

11. The OCA reserves the right to raise additional issues as the case proceeds and further information is obtained from the Company.



**WHEREFORE**, the Office of Consumer Advocate respectfully requests that the Pennsylvania Public Utility Commission investigate and hold full hearings, including public input hearings in the service territory of West Penn and FirstEnergy, regarding the above-captioned Application. The OCA further requests that the Commission not approve this Application unless it finds that: (1) it is in the public interest; (2) it provides substantial, affirmative benefits to the Joint Applicants ratepayers; (3) it does not adversely affect retail electric competition in Pennsylvania; and (4) it is in accordance with the Public Utility Code. Additionally, the OCA requests that the Commission impose such terms and conditions upon the proposed acquisition as are necessary to ensure that the Application meets the requirements set forth above.

Respectfully Submitted,



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Dated: June 14, 2010

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PUBLIC STATEMENT OF THE  
OFFICE OF CONSUMER ADVOCATE  
PURSUANT TO 71 P.S. SECTION 309-4(e)

Act 161 of the Pennsylvania General Assembly, 71 P.S. Section 309-2, as enacted July 9, 1976, authorizes the Consumer Advocate to represent the interests of consumers before the Pennsylvania Public Utility Commission (Commission). In accordance with Act 161, and for the following reasons, the Consumer Advocate determined to file a Protest and participate in the proceeding before the Commission involving the Application of FirstEnergy Corporation (FirstEnergy) and Allegheny Energy, Inc.

On May 14, 2010, West Penn Power Company doing business as Allegheny Power (West Penn), Trans-Allegheny Interstate Line Company (TrAILCo) (collectively, Allegheny) and FirstEnergy Corporation (FirstEnergy) (Joint Applicants) filed an Application seeking to obtain the approval of the Commission under Chapters 11, and 28 of the Public Utility Code. The Application also seeks Commission approval for a change of control of West Penn and TrAILCo to be effected by the merger of Allegheny Energy, Inc. with Element Merger Sub, Inc., a wholly-owned subsidiary of FirstEnergy. The Joint Applicants also request the Commission to approve certain revisions to affiliated interest arrangements that are designed to facilitate the sharing of services between the Allegheny and FirstEnergy systems. In brief, FirstEnergy will acquire all of the outstanding stock of Allegheny. FirstEnergy shareholders will own approximately 73% and Allegheny's former shareholders will own approximately 27% of the combined company.

The Consumer Advocate has filed this Protest with the Commission to ensure that the merger is approved only if: (1) it is found to be in the public interest; (2) it provides substantial, affirmative benefits to FirstEnergy's and West Penn's ratepayers; (3) it does not adversely affect retail electric competition in Pennsylvania; and (4) it is in accordance with the Public Utility Code.

Among the areas to be addressed by the OCA are: affirmative ratepayer benefits, merger savings/synergies, costs to achieve, quality of service, market power and effects on competitive markets, impact on universal service programs, and necessary ratepayer protections. The OCA will seek to ensure that affirmative benefits from the merger are provided to Pennsylvania ratepayers and ratepayers are properly protected.

CERTIFICATE OF SERVICE

Joint Application of West Penn Power :  
Company doing business as Allegheny :  
Power Company, Trans-Allegheny :  
Interstate Line Company and FirstEnergy : Docket Nos. A-2010-2176520  
Corporation for a Certificate of Public : A-2010-2176732  
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 :

I hereby certify that I have this day served a true copy of the foregoing document, Protest and Public Statement of the Office of Consumer Advocate, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 14<sup>th</sup> day of June 2010.

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