



Pennsylvania Department of Environmental Protection

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August 12, 2010

Bureau of Regulatory Counsel

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Honorable Rosemary Chiavetta, Secretary
Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

RE: Joint Application of West Penn Power Company, D/B/A
Allegheny Power, 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
PUC Docket No. A-2010-2176520
A-2010-2176732

Dear Secretary Chiavetta:

On behalf of the Pennsylvania Department of Environmental Protection, enclosed for filing is the Department's original Motion to Dismiss Objections and Compel Response to its Interrogatories, Set I to West Penn Power Company, d/b/a/ Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy Corp.. Also enclosed is the electronic filing confirmation page. Copies of this document have been served in accordance with the attached Certificate of Service.

Thank you for your assistance.

Sincerely,

Kurt E. Klapkowski
Assistant Counsel

cc: Certificate of Service
Honorable Wayne Weismandel, PUC ALJ, w/enc.
Honorable Mary D. Long, PUC ALJ, w/enc.



**COMMONWEALTH OF PENNSYLVANIA
BEFORE THE PUBLIC UTILITY COMMISSION**

**JOINT APPLICATION OF WEST :
PENN POWER COMPANY, D/B/A :
ALLEGHENY POWER, 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 No. A-2010-2176520
A-2010-2176732**

CERTIFICATE OF SERVICE

Via Electronic and First Class Mail

I hereby certify that this day I served a copy of the attached Motion to
Compel upon the persons listed below in the manner indicated in accordance with the requirements
of 52 Pa. Code § 1.54.

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Dated: August 12, 2010



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**COMMONWEALTH OF PENNSYLVANIA
BEFORE THE PUBLIC UTILITY COMMISSION**

JOINT APPLICATION OF WEST	:	
PENN POWER COMPANY, D/B/A	:	
ALLEGHENY POWER, TRANS-	:	
ALLEGHENY INTERSTATE LINE	:	
COMPANY AND FIRSTENERGY	:	
CORPORATION FOR A	:	
CERTIFICATE OF PUBLIC	:	Docket No. A-2010-2176520
CONVENIENCE UNDER SECTION	:	A-2010-2176732
1102(A)(3) OF THE PUBLIC UTILITY	:	
CODE APPROVING A CHANGE	:	
OF CONTROL OF WEST PENN	:	
POWER COMPANY AND TRANS-	:	
ALLEGHENY INTERSTATE	:	
LINE COMPANY	:	

**MOTION OF THE PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION
TO DISMISS OBJECTIONS AND COMPEL ANSWERS TO
INTERROGATORIES, SET I, QUESTIONS 1-16 AND 46-51**

Pursuant to 52 Pa. Code § 5.342, the Commonwealth of Pennsylvania, Department of Environmental Protection (“Department”) hereby requests that the Presiding Officers, Administrative Law Judges Wayne L. Weismandel and Mary D. Long, compel West Penn Power Company, d/b/a/ Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy Corporation (collectively, “Joint Applicants”) to reply promptly to Interrogatories of the Department, Set I, Questions 1-16 and 46-51 (“Department Set I”). The Department served Department Set I on the Joint Applicants after noon on July 30, 2010. Because July 30, 2010 was a Friday, pursuant to the June 23, 2010 Scheduling and Briefing Order (“Scheduling Order”), the Department’s Interrogatories are deemed to have been issued on the following Monday, August 2, 2010. On August 9, 2010, the Joint Applicants filed objections to certain of these

Interrogatories. The Department moves to compel responses. In support of its Motion, the Department sets forth the following:

1. On May 18, 2010, the Joint Applicants filed a joint application pursuant to Chapters 11 and 28 of the Pennsylvania Public Utility Code for a change of control whereby Allegheny Energy, Inc. (Allegheny), the ultimate parent of West Penn and TrAILCo, would become a wholly-owned subsidiary of FirstEnergy. Additionally, the Joint Applicants are requesting approval of revisions to affiliated interest agreements pursuant to Chapter 21 of the Pennsylvania Public Utility Code, 66 Pa.C.S. § 2102.

2. On June 14, 2010, the Department filed a Petition to Intervene in order to ensure that the Department's interests are adequately represented in this proceeding. The Department's Petition was granted by the Administrative Law Judge's June 23, 2010 Order Granting Petitions to Intervene.

3. As part of its investigation, the Department served Department Set I (attached hereto as Appendix A) on the Joint Applicants on July 30, 2010 after noon. In accordance with Paragraph 10 of the Scheduling Order, the Joint Applicants have ten (10) calendar days from August 2, 2010, or until August 12, 2010, to respond to Department Set I. On August 9, 2010, the Joint Applicants filed Objections to Department Set I, Questions 1-16 and 46-51. In accordance with Paragraph 10(d) of the Scheduling Order, this Motion to Compel is due within 3 calendar days of receipt of objections, or August 12, 2010.

4. The information requested in Department Set I, Questions 1-16 and 46-51 is required in order for the Department to effectively review the Joint Applicants' proposed merger application and testimony so that the Department can present its case in

this proceeding. *See, 52 Pa.Code § 5.321(f)*. The Department submits that the Joint Applicants should be compelled to provide answers to these interrogatories within a reasonable time as established in an Order granting this Motion.

Grounds to Dismiss Objections and Compel Responses to Questions 1-9

5. The Joint Applicants object to Questions 1-9 as pertaining to environmental compliance issues and therefore outside of the scope of the jurisdiction of the Commission. At the outset, the Department notes that the Commission's regulations concerning discovery allow for a broad scope of discovery. Whether or not the Commission will eventually rule in the Department's favor on the substantive issues raised by this discovery request is immaterial to the decision of whether or not an interrogatory is reasonably calculated to lead to the discovery of relevant, admissible evidence.

6. These interrogatories are reasonably calculated to lead to the discovery of relevant, admissible evidence for four reasons. First, as noted by the Commonwealth Court in *ARIPPA v. Pa. P.U.C.*, environmental matters are within the Commission's jurisdiction to consider in determining whether a certificate of public convenience is in the public interest pursuant to 66 Pa.C.S. § 1103(a). *See, ARIPPA v. Pa. P.U.C.*, 792 A.2d 636 at 657 (Pa.Commw. 2002) (the Commission has the power to deny a certificate of public convenience that is inconsistent with the public interest, *including environmental concerns*), *Application of Pennsylvania Power & Light Company for Approval of Restructuring Plan under Section 2806 of the Public Utility Code*, PUC Docket R-00973954, 1998 Pa.PUC LEXIS 131 (rejecting environmental claims based on

the record but declining to adopt Administrative Law Judge Kashi's ruling that the Commission lacked jurisdiction over environmental matters).

7. Second, the Supreme Court has construed 66 Pa.C.S. § 1103(a) as requiring a finding that a proposed merger will affirmatively benefit the public. *City of York v. Pennsylvania Public Utility Commission*, 449 Pa. 136, 141, 295 A.2d 825, 828 (1973). In *Joint Application of Bell Atlantic Corporation and GTE Corporation for Approval of Agreement and Plan of Merger*, 1999 Pa.PUC LEXIS 86 (November 4, 1999), the Commission reiterated that the public interest standard is a "broad standard that encompasses examining whether, for example, the 'merger will have an anti-competitive effect or will impair the technical, managerial or financial fitness' of the jurisdictional utilities affected to continue to provide adequate telecommunications services to Pennsylvania customers at just and reasonable rates." (*citation omitted*). In *Middletown Township v. Pennsylvania Public Utility Com.*, 482 A.2d 674 (Pa. Commw. 1984), the Commonwealth Court reasoned that the benefits and detriments of a merger will be measured under the public interest test as they impact on "all affected parties", not just a particular group or geographic subdivision. In *Joint Application for Approval of the merger of GPU, Inc. with FirstEnergy Corp.*, 2001 Pa. PUC Lexis 23 (2001), *affirmed as to the merger, remanded on other grounds, ARIPPA v. Pa. PUC*, 792 A.2d 636 (Pa. Commw. 2002), the Commission reiterated that there is no "inherent right to merge" and that the Commission is obligated to consider the benefits and detriments as they impact on all affected parties. *Id.* at *23-*24. In protecting the public interest, the Commission's review is broader than what the Joint Applicants suggest. In imposing conditions on the GPU/FirstEnergy merger, the Commission outlined the public interest

standard, stating: “The conditions we impose herein are critical to our approval of the merger, and are designed to counteract any possible detriments that may result to Pennsylvania customers and to the Commonwealth as a result of the consummation of the proposed merger.” *Id.* at *29. The Commission must review the impact on the Commonwealth and communities, as well as ratepayers.

8. Third, the Commission has found that environmental benefits are appropriately considered when determining that a particular merger affirmatively benefited the public. *Application of PECO Energy Company, Pursuant To Chapters 11, 19, 21, 22 And 28 Of The Public Utility Code, For Approval Of (1) A Plan Of Corporate Restructuring, Including The Application Creation Of A Holding Company And (2) The Merger Of The Newly Formed Holding Company And Unicom Corporation*, PUC Docket No. A-110550f0147 (2000); *Joint Application of PECO Energy Company And Public Service Electric and Gas Company for Approval of the Merger of Public Service Enterprise Group, Inc. with and into Exelon Corporation*, PUC Docket No. A-110550F0160 (2006). If such considerations can help to form the basis for the Commission’s determination that a particular merger will result in affirmative public benefits, then such considerations should be a proper subject for discovery in the instant proceeding.

9. Fourth, the Department acknowledges that the Commission has declined to accept jurisdiction over environmental matters in past proceedings. See, e.g., *Rovin, D.D.S. v. Pennsylvania Public Utility Commission*, 502 A.2d 785 (Pa. Commw. 1986) and *Country Place Waste Treatment Company, Inc. v. Pennsylvania Public Utility Commission*, 654 A.2d 72 (Pa. Commw. 1995). In those cases, the Commonwealth Court

upheld the Commission's decisions that it lacked jurisdiction over issues involving air and water quality. Those cases are distinguishable from the instant case, however, as they involved claims that would have amounted to collateral attacks on the Department's decisions under the relevant environmental statutes. In the instant case, the Department intervened in the Commission proceedings for the express purpose of outlining ongoing environmental compliance issues at the Joint Applicants' facilities. As described below, these compliance issues may have a significant impact on the merged entity as well as the ratepayers located in the Joint Applicants' distribution service territories.

10. For the reasons outlined in paragraphs 5-9, the Joint Applicants should be compelled to answer the Department's Questions 1-9. Further, the Department notes that Questions 1-9 are not specifically limited in their terms to the Joint Applicants' electric generation units. The Joint Applicants do not appear to dispute that the distribution and transmission elements of the merged entity are subject to the jurisdiction of the Commission. As discussed below, the Department's position is that discovery related to the Joint Applicants' generation units is relevant and should be allowed. Without conceding that point, at a minimum Your Honors should direct the Joint Applicants' to respond to the Department's Questions 1-9 as the questions relate to the Joint Applicants' distribution and transmission elements.

Grounds to Dismiss Objections and Compel Responses to Questions 10-16

11. At their essence, the Joint Applicants' objections to the Department's Questions 1-9 and 10-16 are based on the grounds that these Questions are directly related to the Joint Applicants' generation units, which the Joint Applicants state are outside the jurisdiction of the Commission in this proceeding. Again, the Department

notes that the Commission's regulations concerning discovery allow for a broad scope of discovery. Whether or not the Commission will eventually rule in the Department's favor on the substantive issues raised by this discovery request is immaterial to the decision of whether or not an interrogatory is reasonably calculated to lead to the discovery of relevant, admissible evidence.

12. As noted above, Questions 1-9 address general compliance with environmental acts at the Joint Applicants' facilities, including generation units. Questions 10-11 address the Joint Applicant's plans to manage coal ash waste at their coal-fired power stations. Questions 12-16 address the Joint Applicant's handling of low-level radioactive wastes generated at their nuclear power stations and the plans for decontaminating and decommissioning such power stations.

13. The Joint Applicants' objections to Questions 1-9 and 10-16 appear to be premised on the argument that the Department is inquiring into matters outside the scope of this proceeding and outside the scope of the jurisdiction of the Commission because generation was removed from Commission regulation by the Electricity Generation Customer Choice and Competition Act ("Act"), (Act of December 3, 1996, No. 138, P.L. 802, 66 Pa.C.S §§ 2801-2812). From that basic premise, the Joint Applicants further argue that public health and safety issues associated with electricity generation are not a proper subject for discovery in the instant proceeding. Section 2802 of the Act states in relevant part:

This chapter requires electric utilities to unbundle their rates and services and to provide open access over their transmission and distribution systems to allow competitive suppliers to generate and sell electricity directly to consumers in this Commonwealth. *The generation of electricity will no longer be regulated as a public utility*

function except as otherwise provided for in this chapter.
Electric 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*). However, the Commission still maintains significant jurisdiction and authority over generation matters. Indeed, the Joint Applicants' ratepayers may continue to support generation functions in numerous respects. For example, those ratepayers may be required to pay stranded cost charges for the uneconomic portion of generating plants, including for paying all of the decommissioning costs for PECO's nuclear plants. 66 Pa.C.S. § 2808(c)(1). Customers pay these costs in base rates and in a nuclear decommissioning cost adjustment clause. Finally, the Department notes that section 2802(21) of the Act specifically contemplates the Commission consulting with the Department on issues relating to air quality concerns, especially interstate transportation of pollution, during the ongoing transition to retail competition.

14. It appears that a significant portion of the benefits merger relied on by the Joint Applicants pertain to attributes of the generation facilities. See, Joint Application at 11-12. These benefits are speculative and could be significantly diminished if the costs associated with complying with environmental laws are not adequately considered. Thus, inquiry into these issues is appropriate.

15. The Commission appears to be concerned with potential impacts on the Joint Applicants' distribution side of the merged entity from expenditures required on the generation side. In its June 3, 2010 Secretarial Letter, the Commission indicated that,

along with other items, it was directing that the following be “investigated in detail before the Administrative Law Judge:”

4. What, if any, ring-fencing mechanisms are presently in place, or proposed as part of this transaction, to protect West Penn Power, Met-Ed, Penn Power, and Penelec from the business and financial risk of the parent and other non-regulated affiliates? Are any changes or additions necessary to better protect the public interest and make the regulated electric distribution subsidiaries bankruptcy remote?

* * *

6. How will the merger affect the capital structure of FirstEnergy Corporation? Will the merger create a more leveraged organization? How will the proposed merger impact the credit rating of FirstEnergy?

16. The matters inquired into by the Department’s Questions 1-9 and 10-16 relating to the Joint Applicants’ generation units have the potential to have a large impact on the answers to these questions. Managing coal ash or low-level radioactive waste, installing air quality or water quality controls and decontaminating and decommissioning a nuclear power stations can be extremely expensive undertakings. They have the potential to significantly impact the bottom line of the merged entity. It is impossible to judge this potential impact if no discovery is allowed on these issues, however.

17. The Department further notes that such expenditures may have the possibility of direct impacts on the ratepayers located in the Joint Applicants’ distribution service territories. As noted in Joint Applicants’ Statement No. 4, pages 13-14, the Joint Applicants’ generation units serve customers in the four distribution service territories subject to the Commission’s jurisdiction. As stated in that document, “the substantial majority of [FirstEnergy Solutions’] competitively won retail supply customers are distribution service customers in the service areas of its affiliated operating companies.”

Id. Without some understanding of the scope of these potential impacts, the Commission

cannot adequately establish conditions to address the issues identified as a concern in the June 3, 2010 Secretarial Letter.

18. For the reasons outlined in paragraphs 10-17, the Joint Applicants should be compelled to answer the Department's Questions 1-9 and 10-16 as they relate to the Joint Applicants' electric generation units.

Grounds to Dismiss Objections and Compel Responses to Questions 46-51

19. At their essence, the Joint Applicants' objections to the Department's Questions 46-50 are also based on the grounds that these Questions are directly related to electric generation, which the Joint Applicants state are outside the jurisdiction of the Commission in this proceeding. As such, the Department incorporates paragraphs 10-18 as grounds to dismiss these objections and compel responses to these Questions.

20. The Department notes that Questions 46-49 are directly related to the rates paid by Pennsylvania customers in the Joint Applicants' distribution service territories, and are therefore directly relevant to the instant proceeding. The Department further notes that these Questions do not require the Joint Applicants to conduct any analyses but merely to provide them if they conducted such studies or directed that such studies be conducted.

21. As to Questions 50 and 51, the Joint Applicants object to these Questions because the Department could conduct the requested analysis, representing an unreasonable burden and expense for the Joint Applicants. The Department responds that the requested "price submission" analysis is not one that the Department could conduct, as it specifically requests an analysis of the impacts of such developments on the Joint Applicants distribution revenues. While the Department could conduct a generic analysis

of these impacts, the specific impacts on each of the Joint Applicants distribution company revenues is beyond the ability of the Department to calculate because the Department is not in possession of the necessary company-specific data to conduct such a study.

WHEREFORE, the Department of Environmental Protection requests that the Presiding Officers, Administrative Law Judges Wayne L. Weismandel and Mary D. Long,

- (1) grant this motion;
- (2) dismiss the Joint Applicants' objections to the Department's Interrogatories, Set I, Questions 1-16 and 46-51;
- (3) compel the Joint Applicants to answer said Interrogatories within a reasonable time as established in the Order compelling those answers; and
- (4) grant any other relief deemed appropriate.

Respectfully submitted,



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Dated: August 12, 2010

APPENDIX A

In The Matter of the Joint Application of West Penn Power Company, D/B/A Allegheny Power, 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 No. A-2010-2176520; A-2010-2176732

**Interrogatories of the Department of Environmental Protection
Set I**

1. Have the Companies prepared or directed to be prepared any studies, analyses, memos or other documents analyzing the current compliance status under the environmental acts at the Companies' facilities?
2. If the answer to Question 1 is yes, provide copies of any such studies, analyses, memos or other documents.
3. If the answer to question 1 is no, describe any plans the Companies have to conduct such studies, analyses, memos or other documents analyzing the current compliance status under the environmental acts at the Companies' facilities.
4. For units that are not currently in compliance with applicable state and federal environmental requirements, have the Companies developed remedial or corrective action proposals or plans?
5. If the answer to question 4 is yes, provide a copy of any such studies, analyses, memos or other documentation.
6. If the answer to question 4 is no, how does the Company plan to address the compliance issues at such units? Describe the plans or arrangements that the Companies will develop to comply with the applicable environmental acts.
7. For units that are not currently in compliance with applicable state and federal environmental requirements, have the Companies developed any cost estimates for necessary remedial or corrective action?
8. If the answer to question 7 is yes, provide any studies, analyses, memos or other documentation analyzing or outlining such costs.
9. If the answer to question 7 is no, describe any plans the Companies have to develop such studies, analyses, memos or other documents analyzing any cost estimates for necessary remedial or corrective action.
10. For the Companies' power stations that are coal-fired and located in the Commonwealth, proper management of coal ash is a critical issue. Describe the

plans and arrangements that currently exist or are anticipated to manage the coal ash that is generated at such power stations.

11. Will the proposed merger affect in any way the plans or arrangements described in response to question 10? If so, describe the effects of the merger on the plans or arrangements.
12. Identify the Companies' nuclear power stations that are located within the area covered by the Appalachian States Low-Level Radioactive Waste Compact.
13. Describe the plans and arrangements that currently exist or are anticipated to manage the low-level radioactive waste that is generated at the nuclear power stations identified in response to question 12.
14. Describe the current schedules and plans for decontaminating and decommissioning the nuclear power plants identified in question 12, the funds currently available and those projected to be needed to safely dispose for low-level radioactive waste generated during decontaminating and decommissioning.
15. Will the proposed merger affect in any way the plans or arrangements described in response to questions 12-14?
16. If the response to question 15 is yes, describe the effects of the merger on the plans or arrangements.
17. Have the Companies conducted or directed to be conducted any studies, analyses, memos or other documents related to consumer electricity usage reduction and demand reduction related to Advanced Metering Infrastructure deployment?
18. If the answer to question 17 is yes, provide any such any studies, analyses, memos or other documents related to consumer electricity usage reduction and demand reduction related to Advanced Metering Infrastructure deployment.
19. Have the Companies conducted or directed to be conducted any studies, analyses, memos or other documents related to consumer electricity usage reduction and demand reduction resulting from implementation of the smart meter capabilities detailed in the Pennsylvania Public Utility Commission Implementation Order (June 18, 2009, Docket Number M-2009-2092655)?
20. If the answer to question 19 is yes, provide any such studies, analyses, memos or other documents related to consumer electricity usage reduction and demand reduction resulting from implementation of the smart meter capabilities detailed in the Pennsylvania Public Utility Commission Implementation Order.
21. Have the Companies conducted or directed to be conducted any studies, analyses, memos, other documents and conclusions related to consumer

42. Provide calculations, supporting documentation and conclusions leading to the decision to rely on critical peak rebate rate.
43. Provide calculations, supporting documentation and conclusions justifying the addition of the smart strip program for the commercial sector.
44. Explain the organization and operations of the Home Performance Model. Provide the analysis and conclusions used to select this Model.
45. For each Act 129 plan, provide a breakdown, with supporting documentation, of funds used for direct program measures, for administration of programs by contractors, for administration of programs by the company, and for other purposes. Specify any other costs.
46. Have the Companies conducted or directed to be conducted any studies, memos, analyses and recommendations related to the “price suppression” impact of new generation entering the electricity market?
47. If the answer to question 46 is yes, provide copies of any such studies, memos, analyses and recommendations prepared by or for the Companies related to the “price suppression” impact of new generation entering the electricity market.
48. Have the Companies conducted or directed to be conducted any studies, memos, analyses and recommendations related to the “price suppression” impact of only new renewable generation entering the electricity market?
49. If the answer to question 48 is yes, provide copies of any such studies, memos, analyses and recommendations related to the “price suppression” impact of only new renewable generation entering the electricity market.
50. For the years 2011 through 2015, and using currently operating, under construction and planned alternative energy projects within the PJM Interconnection area, calculate the impact of price suppression on the distribution revenues of each of the Companies’ Pennsylvania subsidiaries.
51. For the years 2011 through 2015, calculate the overall impact of the Pennsylvania Alternative Energy Portfolio Standards Act, including price suppression impacts, on the distribution revenues of each of the Companies’ Pennsylvania subsidiaries.
52. On page 14 of the Supplemental Testimony of Anthony J. Alexander (Joint Applicants Statement No. 1-S), lines 3-9 there appears to be an ambiguous statement relating to staffing levels. The statement is that there will be no net reductions due to involuntary attrition as a result of the merger for employees of Allegheny Energy Service Corporation who are “assigned to positions in the Allegheny Power Utilities comparable to their counterparts who are employed by the FirstEnergy Utilities.” Please clarify the timeframe for when the determination of “assignment” is made – does the term “assigned” refer to