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October 6, 2010

**Via Electronic Filing**Rosemary Chiavetta, Secretary  
PA Public Utility Commission  
PO Box 3265  
Harrisburg, PA 17105-3265

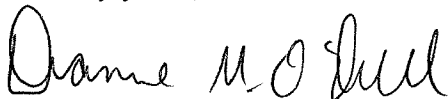
Re: Joint Application of West Penn Power Company d/b/a Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy Corp. for a Certificate of Public Convenience under Section 1102(a)(3) of the Public Utility Code approving a change of control of West Penn Power Company and Trans-Allegheny Interstate Line Company, Docket Nos. A-2010-2176520 and A-2010-2176732

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Dear Secretary Chiavetta:

On behalf of the Retail Energy Supply Association ("RESA") enclosed please find the original of its Motion to Permit Access to Joint Applicants' Highly Sensitive Material along with the electronic filing confirmation page. Copies served in accordance with the attached Certificate of Service.

Sincerely yours,



Deanne M. O'Dell, Esq.

DMO/lww  
Enclosurecc: Hon. Wayne Weisman, w/enc.  
Hon. Mary Long, w/enc.  
Cert. of Service, w/enc.

## CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of RESA's Motion to Permit Access to Joint Applicants' Highly Sensitive Material upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

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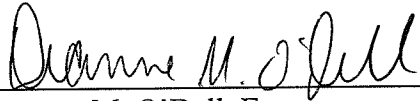
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\_\_\_\_\_  
Deanne M. O'Dell, Esq.

Dated: October 6, 2010

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Joint Application of West Penn Power :  
Company d/b/a Allegheny Power, Trans- : Docket No. A-2010-2176520  
Allegheny Interstate Line Company and : Docket No. A-2010-2176732  
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 :

**RETAIL ENERGY SUPPLY ASSOCIATION'S  
MOTION TO PERMIT ACCESS TO JOINT APPLICANTS' HIGHLY SENSITIVE  
MATERIAL**

The Retail Energy Supply Association (“RESA”),<sup>1</sup> pursuant to 52 Pa. Code §§ 5.1(a)(6), 5.103, the Scheduling and Briefing Order of June 23, 2010 and the Protective Order of June 29, 2010, requests an Order directing West Penn Power Company d/b/a Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy Corp. (“Joint Applicants”) to permit RESA’s witness, Richard J. Hudson, Jr., access to materials that they have produced during discovery and in testimony and have marked “highly sensitive.” In support of this Motion, RESA submits as follows:

**BACKGROUND**

1. RESA is an intervener in this proceeding and Richard J. Hudson, Jr. has submitted RESA St. No. 1, RESA St. No. 1-R and RESA St. No. 1-SR on its behalf.

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<sup>1</sup> RESA’s members include ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energy Plus Holdings, LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; NextEra Energy Services; PPL EnergyPlus; Reliant Energy Northeast LLC; Sempra Energy Solutions LLC. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

2. A Protective Order was entered in this matter on June 29, 2010 which permits a party to designate “confidential” and “highly sensitive confidential information.” Before having access to such confidential materials, persons seeking access are required to sign an acknowledgment form confirming that they have read and understand the Protective Order.

3. On August 5, 2010, Mr. Hudson signed the acknowledgement form which was then distributed to the parties.<sup>2</sup> Mr. Hudson, consistent with the terms of the Protective Order, proceeded to review the “confidential” materials submitted in discovery and, in fact, relied upon his review of such materials in preparing the direct testimony submitted on behalf of RESA. RESA St. No. 1 at 9.

4. Subsequently, on September 7, 2010, an Order Granting Motion to Compel Production of Documents was entered requiring Joint Applicants to produce the Hart-Scott-Rodino (“HSR”) discovery materials which were designed as “highly sensitive” information to other parties in accordance with the Protective Order.

5. After entry of the September 7, 2010 Order, counsel for Joint Applicants proposed to restrict review of the HSR material to outside counsel and outside experts and to prohibit parties with “competitive interests” from providing access to the material in any form to in-house counsel.<sup>3</sup>

6. Subsequently, counsel for RESA sought Joint Applicants’ agreement to permit Mr. Hudson to review the HSR materials. The Joint Applicants’ refused.<sup>4</sup>

7. In the process of preparing surrebuttal testimony, in direct response to Joint Applicants’ claim in rebuttal testimony that Mr. Hudson’s review of the discovery was “far from

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<sup>2</sup> Attachment A.

<sup>3</sup> Attachment B, September 9, 2010 email from counsel for Joint Applicants to all parties.

<sup>4</sup> Attachment C, emails between counsel for Joint Applicants and RESA dated September 24, 2010 and September 27, 2010.

complete,”<sup>5</sup> Mr. Hudson sought to further review highly sensitive confidential discovery that had been submitted but was not related to the HSR. Given the uncertainty about Joint Applicants’ interpretation of the scope of Mr. Hudson’s permissible review of confidential materials, counsel for RESA confirmed with counsel for Joint Applicants their view that Mr. Hudson was not permitted to review any highly sensitive confidential information.

### **RELIEF REQUESTED**

8. The Protective Order permits a producing party to designate “highly sensitive confidential information that may not be viewed by the employees of an inspecting party who are involved in competitive activities absent agreement of the producing party.” Protective Order at ¶ 4. However, the Protective Order specifically reserves the right of the Commission or the Administrative Law Judge to permit access to confidential information. Protective Order at ¶ 6.

9. Joint Applicants have improperly denied Mr. Hudson access to all the highly sensitive confidential materials provided in this matter. While the Joint Applicants may be concerned that the release of “highly sensitive” materials to a representative of a trade organization of electric generation suppliers (“EGS”) may somehow aid the competitors of the Joint Applicants’ EGS affiliates, the Protective Order requested and obtained by Joint Applicants satisfies any legitimate confidentiality, proprietary or trade secret concerns. *See* 52 Pa. Code §§ 5.362(7), 5.423 (concerning protective orders). The Protective Order – an enforceable Order of this Commission – guards against the use of the improper use of such disclosed information. The Protective Order expressly precludes the possession, use or disclosure of “Confidential Information” for the purpose of business or competition or any purpose other than the preparation for, and conduct of, this proceeding or any administrative or judicial review thereof. Protective Order, at ¶ 6. Further, disclosure is permitted to counsel who may only copy the

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<sup>5</sup> Joint Applicants St. No. 7-R at 24-25.

information “for the limited purpose of review by a party’s expert or consultant” or to outside experts who are testifying in the proceeding. The disclosed materials must be either returned or destroyed upon the completion of this proceeding. *See also* Protective Order, at ¶¶ 4, 10. In fact, the purpose of a protective order is to enable parties to share sensitive information while placing appropriate confines around the release and use of that information, all of which Mr. Hudson has agreed to honor if permitted to review this information. The Joint Applicants’ position in essence presumes Mr. Hudson will not abide by the Protective Order.

10. Mr. Hudson is appearing in this matter on behalf of a trade organization of EGSs and he is employed by ConEdison *Solutions*, a licensed EGS. Mr. Hudson should be permitted access for several reasons.

11. First, Mr. Hudson has presented testimony in this proceeding on behalf of RESA. As the members of RESA are all competitors of one another, their use of one witness is limited to representing their joint interests rather than, as the Joint Applicants may fear, acquiring highly sensitive competitive material for use of any one or all of the competitors. Further, and perhaps more importantly, Mr. Hudson has signed the Protective Order acknowledgement verifying that his use of confidential information acquired in this proceeding would be limited to the purposes of this proceeding and not shared with other employees of his company or the members of RESA, which is the exact intent of the Protective Order.

12. Second, Mr. Hudson is employed by ConEdison *Solutions* as the Director of Regulatory and Legislative Affairs. He is not responsible for pricing nor developing pricing models. While he does interact with the sales team on an as needed basis, Mr. Hudson is not the ultimate decision maker for ConEdison *Solutions* regarding competitive activities. Furthermore, pursuant to the terms of the Protective Order to which Mr. Hudson agreed, he would not share



any information acquired in this proceeding with other employees of ConEdison *Solutions* or RESA members.

13. By denying Mr. Hudson access to the highly sensitive confidential information in this case, RESA is being denied a full and fair opportunity to review the discovery and present RESA's positions even while the Joint Applicants attempt to use this denial of access to their advantage.<sup>6</sup> When the extent of the confidential information that the Joint Applicants intended to shield from Mr. Hudson became questionable, surrebuttal testimony needed to be finalized. However, Mr. Hudson made clear in that testimony that he had been prevented from accessing the highly sensitive confidential discovery in this proceeding. RESA St. No. 1-SR at 1. Therefore, if this motion is granted and Mr. Hudson is permitted access to the highly sensitive confidential material, he should also be permitted, to the extent necessary, to supplement his surrebuttal testimony which can be provided prior to the start of the hearings. While the testimony in this matter has been served, Mr. Hudson's ability to review this highly sensitive information disclosed in discovery and testimony will assist in preparation for and during the hearings.

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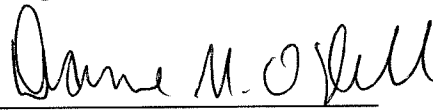
<sup>6</sup> Joint Applicants St. No. 1-R at 24-25. ("Mr. Hudson's quick review . . . is far from complete.")

WHEREFORE, RESA requests that Your Honors and the Pennsylvania Public Utility

Commission:

- (1) Grant this Motion to Permit Mr. Hudson access to all the highly sensitive confidential materials provided in discovery pursuant to the terms of the Protective Order;
- (2) Permit RESA to file supplemental surrebuttal testimony, to the extent necessary, to incorporate any highly sensitive confidential information necessary to support RESA's testimony prior to the start of the hearings; and,
- (3) Grant any other relief deemed reasonable and appropriate.

Respectfully submitted,



Daniel Clearfield, Esq.  
Deanne M. O'Dell, Esq.  
Carl Shultz, Esq.  
Eckert Seamans Cherin & Mellott, LLC  
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717.237.7173

Dated: October 6, 2010

# ATTACHMENT A

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

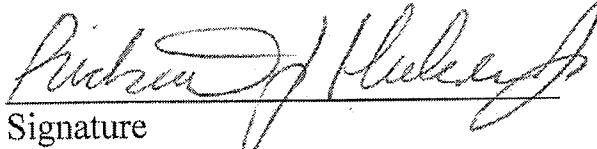
**JOINT APPLICATION OF WEST PENN  
POWER COMPANY doing business as  
ALLEGHENY POWER, TRANS-  
ALLEGHENY INTERSTATE LINE  
COMPANY AND FIRSTENERGY CORP.  
FOR A CERTIFICATE OF PUBLIC  
CONVENIENCE UNDER SECTION  
1102(A)(3) OF THE PUBLIC UTILITY CODE  
APPROVING A CHANGE OF CONTROL OF  
WEST PENN POWER COMPANY AND  
TRANS-ALLEGHENY INTERSTATE LINE  
COMPANY**

**DOCKET NOS. A-2010-2176520  
A-2010-2176732**

TO WHOM IT MAY CONCERN;

The undersigned is the expert, counsel, employee, member or officer of the Retail Energy Supply Association (RESA) (the retaining party).

The undersigned has read and understands the Protective Order issued in the above-captioned proceeding deals with the treatment of Confidential Information. The undersigned agrees to be bound by, and comply with, the terms and conditions of said Order. The undersigned agrees that any Confidential Information shall be used or disclosed only for purposes of preparation for, and conduct of the above-captioned proceeding, and any administrative or judicial review thereof, and shall not be disclosed or used for purposes of business or competition.

  
Signature

Richard J. Hudson, Jr.  
Print Name

603 North Taylor Avenue,  
Pittsburgh, PA 15212  
Address

**Pennsylvania State Chairman for RESA**  
ConEdison Solutions  
Employer

Date: August 5, 2010

# ATTACHMENT B



"Kulak, Kenneth M."  
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09/09/2010 11:28 AM

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bcc

Subject Joint Application of West Penn Power Company d/b/a



History:

📧 This message has been forwarded.

Dear Counsel: In accordance with the ALJs' September 7th Order, the Joint Applicants will be producing HSR material previously provided to the statutory parties by overnight mail today for delivery tomorrow.

Due to the nature of the material, we are proposing that those parties which have competitive interests restrict the review of this material to outside counsel and outside experts consistent with paragraph 4 of the Protective Order (i.e., parties with competitive interests would not provide this material in any form to in-house counsel). We understand that this additional restriction is acceptable to Direct Energy.

Please let us know if you have any objections to the above restriction no later than 3:30 pm today. In the event that the intervenor you represent does have competitive interests but you do not have outside counsel, the Companies will produce the HSR material being produced today at a later date to outside counsel you may retain in this proceeding should you determine that such review is required (subject to same restriction and the "highly sensitive" provisions of the Protective Order).

As always, please let us know if you have any questions regarding the above. Thank you.

Best Regards,

Ken Kulak

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Assistant: Thomasina Pierce | 215.963.4799 | [tpierce@morganlewis.com](mailto:tpierce@morganlewis.com)

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# ATTACHMENT C





"Kulak, Kenneth M."  
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09/27/2010 05:22 PM

To Deanne M O'Dell/ESCM@ESCM  
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"Gadsden, Thomas P." <tgadsden@morganlewis.com>  
bcc

Subject RE: Request on behalf of RESA to review HSR materials

History: This message has been forwarded.

Deanne - I have conferred with counsel for the Joint Applicants regarding your request below, and FirstEnergy and Allegheny Energy will not agree to review of any HSR materials by Mr. Hudson. Please call if you have any questions.

Best Regards,

Ken

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Assistant: Thomasina Pierce | 215.963.4799 | tpierce@morganlewis.com

-----Original Message-----

From: DODell@eckertseamans.com [mailto:DODell@eckertseamans.com]  
Sent: Friday, September 24, 2010 3:33 PM  
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Cc: DClearfield@eckertseamans.com  
Subject: Request on behalf of RESA to review HSR materials

Ken/Tom,

The purpose of this email is to request your client's agreement, pursuant to paragraph 4 of the Protective Order, to permit Ritchie Hudson, on behalf of RESA, to review the Highly Confidential materials contained in the HSR. As you know, Mr. Hudson is RESA's witness in this matter. He is employed by ConEdison Solutions as Director of Regulatory and Legislative Affairs. He is not responsible for pricing nor developing pricing models but he does interact with the sales team on an as needed basis. He is seeking to review the HSR information in preparation for this case only and, consistent with the terms of the protective order, he will not share the information with any other employee of his company or any other RESA member.

If you need more information, please feel free to give me a call to discuss.

Thanks.

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