

Deanne M. O'Dell
717.255.3744
dodell@eckertseamans.com

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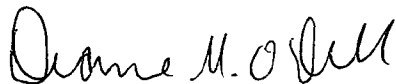
Rosemary Chiavetta, Secretary
PA Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

Enclosed please find the original of Direct Energy Services, LLC's Answer to the Joint Applicants' Motion to Dismiss Objections and Compel Response to Set III Interrogatories by the Joint Applicants Witness along with the electronic filing confirmation page. Copies have been served in accordance with the attached Certificate of Service.

Very truly yours,



Deanne M. O'Dell, Esq.

DMO/jls
Enclosure

cc: Cert. of Service w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of Direct Energy's Answer to the Joint Applicants' Motion to Dismiss Objections and Compel Response to Set III Interrogatories by the Joint Applicants upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via Email and/or First Class Mail

Randall B. Palmer, Esq.
Jennifer L. Petrisek, Esq.
Allegheny Energy, Inc.
800 Cabin Hill Dr.
Greensburg, PA 15601
rpalmer@alleghenyenergy.com
jpetrisek@alleghenyenergy.com

Wendy E. Stark, Esq.
Bradley A. Bingaman, Esq.
FirstEnergy Service Company
2800 Pottsville Pike
PO Box 16001
Reading, PA 19612-6001
starkw@firstenergycorp.com

Alan Michael Seltzer, Esq.
W. Edwin Ogden, Esq.
Ryan, Russell, Ogden & Seltzer, PC
1150 Berkshire Blvd., Suite 210
Wyomissing, PA 19610-1208
aseltzer@ryanrussell.com
wogden@ryanrussell.com

Thomas P. Gadsden, Esq.
Kenneth M. Kulak, Esq.
Morgan, Lewis & Bockius
1701 Market St.
Philadelphia, PA 19103-2921
tgadsden@morganlewis.com
kkulak@morganlewis.com

Scott Rubin, Esq.
333 Oak Lane
Bloomsburg, PA 17815
Scott.j.rubin@gmail.com

Darryl Lawrence, Esq.
Tanya J. McCloskey, Esq.
Office of Consumer Advocate
5th Floor, Forum Place
555 Walnut Street
Harrisburg, PA 17101-1923
Dlawrence@paoca.org
tmccloskey@paoca.org

Daniel Asmus, Esq.
Office of Small Business Advocate
1102 Commerce Building
300 N. Second St.
Harrisburg, PA 17101
dasmus@state.pa.us

Allison C. Kaster, Esq.
Carrie B. Wright, Esq.
Office of Trial Staff
PO Box 3265
Harrisburg, PA 17101-3265
akaster@state.pa.us
carwright@state.pa.us

Charis Mincavage, Esq.
McNees Wallace & Nurick LLC
100 Pine Street
PO Box 1166
Harrisburg, PA 17108-1166
cmincavage@mwn.com

Derrick Price Williamson, Esq.
Barry Naum, Esq. Spilman Thomas & Battle
1100 Bent Creek Blvd., Suite 101
Mechanicsburg, PA 17050
dwilliamson@spilmanlaw.com
bnaum@spilmanlaw.com

Vasiliki Karandrikas, Esq.
McNees Wallace & Nurick LLC
100 Pine Street
PO Box 1166
Harrisburg, PA 17108-1166
vkandrikas@mwn.com

Thomas J. Sniscak, Esq.
Hawke McKeon & Sniscak LLP
100 N. Tenth St.
PO Box 1778
Harrisburg, PA 17105
tjsniscak@hmslegal.com

Benjamin L. Willey, Esq.
7272 Wisconsin Ave., Suite 300
Bethesda, MD 20814
blw@bwilleylaw.com

Kurt E. Klappkowski, Esq.
Jason E. Oyler, Esq.
Department of Environmental Protection
RCSOB, 9th Floor
400 Market St.
Harrisburg, PA 17101-2301
kklappkowsk@state.pa.us
joyler@state.pa.us

Stephen H. Jordan, Esq.
Rothman Gordon, P.C.
Third Floor, Grant Building
310 Grant St.
Pittsburgh, PA 15219

Theodore Robinson, Esq.
Staff Attorney
Citizen Power
2121 Murray Ave.
Pittsburgh, PA 15217
robinson@citizenpower.com

Divesh Gupta, Esq.
Constellation Energy
111 Market Place, Suite 500
Baltimore, MD 21202
Divesh.gupta@constellation.com

Charles E. Thomas, Jr., Esq.
Thomas, Long, Niesen & Kennard
212 Locust St.
PO Box 9500
Harrisburg, PA 17108-9500
cthomas@thomaslonglaw.com

John K. Baillie, Esq.
Charles McPhedran, Esq.
Citizens for Pennsylvania's Future
425 Sixth Ave., Suite 2770
Pittsburgh, PA 15219
baillie@pennfuture.org
mcphedran@pennfuture.org

Gary A. Jack, Esq.
Kelly L. Geer, Esq.
Duquesne Light Company
411 Seventh Ave., 16-4
Pittsburgh, PA 15219
gjack@duqlight.com
kgeer@duqlight.com

Thomas T. Niesen, Esq.
Thomas, Long, Niesen & Kennard
212 Locust St.
PO Box 9500
Harrisburg, PA 17108-9500
tniesen@thomaslonglaw.com

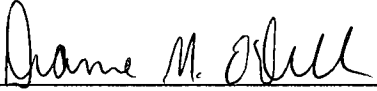
Regina L. Matz, Esq.
Thomas, Long, Niesen & Kennard
212 Locust St.
PO Box 9500
Harrisburg, PA 17108-9500
rmatz@thomaslonglaw.com

Susan E. Bruce, Esq.
McNees Wallace & Nurick LLC
100 Pine Street
PO Box 1166
Harrisburg, PA 17108-1166
sbruce@mwn.com

Scott H. Strauss, Esq.
Spiegel & McDiarmid LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

Eric P. Cheung, Esq.
Clean Air Council
135 S. 19th St., Suite 300
Philadelphia, PA 19103

Michael D. Fiorentino, Esq.
42 E. Second St., Suite 200
Media, PA 19063
mdfiorentino@gmail.com



Deanne O'Dell, Esq.

Dated: October 12, 2010

**BEFORE THE
PENNSYLVANIA 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 :

**ANSWER OF DIRECT ENERGY SERVICES
TO THE JOINT APPLICANTS'
MOTION TO DISMISS OBJECTIONS AND COMPEL RESPONSE
TO SET III INTERROGATORIES
BY THE JOINT APPLICANTS**

Pursuant to 66 Pa. C.S. § 333(d) and 52 Pa. Code §§ 5.342(c) and (e), Direct Energy Services (“Direct Energy”) files this Answer in opposition to the Motion to Dismiss Objections and Compel Response to Set III Interrogatories (“Motion”) propounded by West Penn Power Company, Trans-Allegheny Interstate Line Company, and FirstEnergy Corp. (collectively, “Joint Applicants”) to Direct Energy.

I. INTRODUCTION

Notwithstanding the objections Direct Energy has raised and not waived, Direct Energy has provided full responses to five of Joint Applicants’ Set III interrogatories – Interrogatory Nos. III-1, III-8, III-9, III-12 and III-13 – including two highly sensitive confidential responses. Nevertheless, Joint Applicants continue to press their Motion with respect to Interrogatory Nos. III-1 through III-11. These outstanding discovery requests seek extremely detailed and irrelevant information about the operation of Direct Energy’s generation plants in Texas, detailed information about Direct Energy’s PJM power purchases, Direct Energy’s views on carbon

regulation, Direct Energy's purchase or investment in any transmission assets, and Direct Energy's purchase of Alternative Energy Credits ("AEPs"). As further explained below, none of these requests are within the permissible scope of discovery and Joint Applicants' Motion to compel should be denied.

On September 28, 2010, Joint Applicants served their Set III interrogatories on Direct Energy. On October 4, 2010, Direct Energy presented Joint Applicants with Direct Energy's objections to Joint Applicants' Set III interrogatories. On October 7, 2010, Joint Applicants served Direct Energy with their Motion. On October 8, 2010, Direct Energy provided its Set III responses to Joint Applicants.

This Answer is organized as follows. Direct Energy's general objections to Joint Applicants' Set III interrogatories and argument supporting those objections is set forth in Section II. Due to the number of Joint Applicants' Set III interrogatories, and their wide ranging and inappropriate nature, Direct Energy's arguments in support of its objections to III-1 through III-11 are set forth in Section III.

II. GENERAL OBJECTIONS

A. Joint Applicants' Set III Interrogatories Seek Irrelevant Information

The interrogatories are not related to the matters at issue in this proceeding or likely to lead to admissible evidence. As characterized by Joint Applicants, their Set III interrogatories are intended to explore the "breadth and depth of Direct Energy's electric generation and retail activities." Mot. at 1. As discussed below, Joint Applicants have failed to establish that the "breadth and depth of Direct Energy's electric generation and retail activities" are remotely related to the issues the Commission must resolve in this proceeding. Those issues are, of course, whether the proposed merger "will prevent retail electricity customers in this Commonwealth from obtaining the benefits of a properly functioning and workable competitive

retail electricity market,”¹ and whether the proposed merger will provide net benefits to the public.² Indeed, rather than being related to the merger issues, Joint Applicants’ Set III interrogatories are fairly equated with the “fishing expedition” precluded in *City of York*.³ Unfortunately, because of the “depth and breadth” of the net cast by the Joint Applicants’ expansive and granular requests, Direct Energy must respond here in sufficient scope to redirect each side trip taken by Joint Applicants.

B. Discovery at this Juncture is Properly Limited to Issues related Surrebuttal Testimony

None of these questions have anything to do with the surrebuttal testimony that Direct Energy served on October 1, 2010. To the extent, Joint Applicants believe this discovery is fairly related to Direct Energy’s direct testimony (which it is not), that testimony was served on August 17, 2010 – almost two months ago. Instead of seeking this discovery in a reasonable time frame, Joint Applicants waited until the very last week available for discovery – which was the same week surrebuttal testimony was due and a week prior to the start of hearings – to serve their voluminous and irrelevant Set III interrogatories. Joint Applicants attempt to claim that the information sought in their Set III interrogatories is necessary to make their case is belied by their delayed timing in serving the questions.

C. Joint Applicants’ Set III Interrogatories are Unduly Burdensome

Joint Applicants’ Set III interrogatories are unduly burdensome. The interrogatories that Direct Energy has not responded to seek material that is not subject to discovery directed toward intervenors in the normal course of Commission proceedings related to utility mergers.

¹ 66 Pa. C.S. § 2811(e).

² *E.g.*, *City of York v. Public Util. Comm’n*, 295 A.2d 825 (Pa. 1972). *See* 66 Pa. C.S. § 1102(a)(3).

³ *City of York v. Public Util. Comm’n*, 281 A.2d 261 (Pa. Commw. 1971).

Assuming *arguendo*, that this information were relevant to this proceeding, which it obviously is not, Joint Applicants' Set III interrogatories are patently ridiculous in their scope and granularity. These interrogatories seek to obtain a volume of competitive information that seems to be intended to unreasonably annoy, oppress, burden, and cause expense to Direct Energy rather than obtain information necessary to respond to Direct Energy's surrebuttal (or any) testimony. This obviously is not a proper reason for discovery.

D. Joint Applicants have not Demonstrated Relevance in their Motion

Joint Applicants' weak attempt to demonstrate relevance of the materials sought in its Set III interrogatories is found solely in the third paragraph of its Motion. Joint Applicants note that Direct Energy has taken the position that, in the context of Joint Applicants' proposed merger, a workable competitive market will not be achievable for residential and small business customers in Joint Applicants' Pennsylvania retail service territories, and that Direct Energy has proposed that the Commission condition the proposed merger on changes to the default service structure in those territories. Then, Joint Applicants reproduce a media quote of Direct Energy's Cory Byzewski, in which Mr. Byzewski indicated that rising Duquesne Light prices provide "a great opportunity there and Pennsylvania has done a great job to make sure that the markets are open and competitive." From there, Joint Applicants take the giant leap to conclude:

Given Direct Energy's recommendations in this proceeding to change Pennsylvania's default service structure in order to allow the market to become competitive, and Direct Energy's public statements regarding how well Pennsylvania markets are currently functioning, the Joint Applicants are entitled to discovery to determine the extent to which Direct Energy is currently competing and intends to compete in Pennsylvania's retail markets under the existing default structure.

Joint Applicants fail to explain, nor could they explain, how Mr. Byzewski's statement pertaining to competition in the Duquesne markets has anything to do with issues relevant to this

proceeding. In fact, the statement has been taken completely out of context and obviously pertains to a market where a merger is not at issue and where the merger standards are not applicable. Joint Applicants have failed to explain how such a statement could possibly justify the ridiculously expansive discovery sought in their Set III interrogatories. And Joint Applicants have failed to explain how discovery related to how “Direct Energy is currently competing and intends to compete in Pennsylvania’s retail markets under the existing default structure” has anything to do with relevant issues. Put another way, whether or not Direct Energy competes or intends to compete in Duquesne’s service territory has nothing to do with the issues before this Commission. And, even if such an inquiry was pertinent, Joint Applicants’ Set III Interrogatories charts an expedition far beyond the nearby waters of retail competition data (which Direct Energy has provided) and out into the deep blue sea of virtually all of Direct Energy’s operational, financial and business data.

E. Joint Applicants Ignore the Discovery Boundaries Established by Prior Orders in this Proceeding

In propounding their irrelevant and voluminous Set III interrogatories, Joint Applicants ignore the boundaries Your Honors have previously imposed on discovery in this proceeding. For example, in the July 15, 2010 Order on Motion to Dismiss Objections and Compel Answers to Interrogatories and Production of Documents (“July 15 Order”), Your Honors dismissed Direct Energy’s motion to compel to the extent it sought answers to interrogatories related “to market share information of the energy supply affiliates of the Joint Applicants”⁴ As discussed in more detail below, Joint Applicants have failed to even attempt to distinguish their Set III interrogatories from the interrogatories at issue in the July 15 Order. This is telling, given

⁴ July 15 Order at 2.

that Joint Applicants' Set III interrogatories specifically seek market share information from Direct Energy and seek information with respect to markets as far away as Texas.

Similarly, in the August 20, 2010 Order on Motion to Dismiss Objections and Compel Answers to Interrogatories and Production of Documents, Your Honors stated:

We will also deny Direct Energy's motion to dismiss and compel an answer to Interrogatory No. 1(c). This interrogatory seeks the total load data by customer class for the Joint Applicants. The Joint Applicants object to answering this interrogatory on the grounds that retail market share information is highly confidential, especially in view of the fact that Direct Energy is a competitor in the retail market. We agree with the Joint Applicants that market share data in this context is confidential. Moreover, as we discussed when we denied Direct Energy's motion to compel answers to similar Set I interrogatories, there is a significant amount of publicly available information that is relevant to any argument that Direct Energy might make concerning the dominance of the Joint Applicants in the retail marketplace and whether their merger will negatively impact the workability of the marketplace. Although Direct Energy's Set II interrogatories seek "aggregate" information rather than the company-specific information sought by the Set I interrogatories, we do not believe this cures our concerns about requiring the Joint Applicants to reveal sensitive information to a competitor, nor has Direct Energy satisfied us that the information it has already received in discovery or has available via public sources is insufficient.⁵

Joint Applicants have failed to demonstrate how the market share information sought in their Set III interrogatories is not substantially similar to the material at issue in the August 20 Order.

Joint Applicants have not addressed how Your Honors' concerns expressed in the August 20 Order regarding revealing sensitive competitive information are not equally of concern in relation to their Set III interrogatories to Direct Energy. Nor have Joint Applicants distinguished the material sought in their Set III interrogatories from information already provided in relation to prior data requests, or from publicly available information.

⁵ August 20 Order at 1-2.

F. Direct Energy's Costs of Providing Service are not Relevant to this Proceeding

As demonstrated below, the thrust of most, if not all, of Joint Applicants' voluminous interrogatories in Request JA(Direct)-III appear intended to discover elements of Direct Energy's costs of obtaining wholesale electric supply in order to provide service to its retail customers. In the Motion, Joint Applicants correctly acknowledge that Direct Energy takes the position that the proposed merger will make a workable competitive market unachievable in Joint Applicants' utility service territories. However, Direct Energy has not taken the position that the wholesale costs Joint Applicants seek to discover in Request JA(Direct)-III bear on Direct Energy's ability to compete in Pennsylvania retail markets. Direct Energy has not put these issues fairly in play in this proceeding and neither have Joint Applicants.

The scope of this proceeding is limited to the merger approval standards and Direct Energy's mitigating proposal. That proposal is in no way dependent upon such speculative future data such as the proportion of Direct Energy retail load that might be served from various resources and the cost of those resources, as is sought in Request JA(Direct)-III(4), for example. The entire point of Direct Energy's proposal is to ensure the retail market achieves a state of competition where one supplier's pricing does not determine the prices paid by retail customers. Accordingly, Joint Applicants' Motion should be denied.

III. SPECIFIC RESPONSE TO JOINT APPLICANTS' MOTION TO COMPEL

A. Request JA(Direct)-III-1

In Request JA(Direct)-III-1, Joint Applicants sought identification of "each electric generation facility owned or controlled by Direct Energy, and provide its source of fuel and its capacity (in MW)." Direct Energy objected to Request JA(Direct)-III-1 on the basis that it falls

outside the scope of permissible discovery and is not relevant to the subject matter involved in this proceeding nor is it reasonably calculated to lead to the discovery of admissible evidence. Without waiving its objections to Request JA(Direct)-III-1, Direct Energy responded, providing the names, fuel type, and capacity of the three electric generating facilities that Direct Energy owns in Texas. Based on the foregoing, the Joint Applicants' Motion should be dismissed as moot with respect to Request JA(Direct)-III-1.

In their Motion, Joint Applicants fail to explain how the identification of generation facilities owned by Direct Energy relates to the issues before the Commission in this proceeding, or how a response to Request JA(Direct)-III-1 is reasonably calculated to lead to the discovery of admissible evidence. Request JA(Direct)-III-1 was not limited to any particular geographic scope. In fact, as stated in Direct Energy's response, the only generation facilities owned or controlled by Direct Energy are situated in Texas, in the ERCOT market, which is situated within an entirely separate synchronous electrical interconnection, over a thousand miles away. Joint Applicants have not demonstrated how this information is relevant to this proceeding. Direct Energy submits that Joint Applicants cannot possibly demonstrate how Direct Energy's ownership of particular generating units in ERCOT is in anyway relevant to either the standards of review applicable to Joint Applicants' proposed merger, or the mitigating proposal Direct Energy advances. Moreover, this information is publicly available and, therefore, not subject to discovery in this proceeding.

B. Request JA(Direct)-III-2

In Request JA(Direct)-III-2, Joint Applicants identified eighteen sub-interrogatories seeking confidential competitive information pertaining to operation of Direct Energy's generating facilities. Joint Applicants posed these eighteen sub-interrogatories with "respect to

each facility identified in response to Interrogatory No. III-1.” Direct Energy objected to Request JA(Direct)-III-2, on the basis that it falls outside the scope of permissible discovery and is not relevant to the subject matter involved in this proceeding nor is it reasonably calculated to lead to the discovery of admissible evidence. Direct Energy also objected on the basis that the question is overly broad and would cause unreasonable annoyance, embarrassment, oppression, burden or expense to Direct Energy. Finally, Direct Energy objected on the basis that this question seeks information that is not within the control or possession of Direct Energy and would require Direct Energy to undertake an unreasonable investigation of publicly available information.

Because Request JA(Direct)-III-2 is based on Request JA(Direct)-III-1, Direct Energy reiterates that, in its Motion, Joint Applicants fail to explain how the identification of generation facilities owned by Direct Energy relate to the issues before the Commission in this proceeding, or how a response to Request JA(Direct)-III-1 is reasonably calculated to lead to the discovery of admissible evidence. Joint Applicants cannot possibly demonstrate how Direct Energy’s ownership of particular generating units in ERCOT is in any way relevant to either the standards of review applicable to Joint Applicants’ proposed merger, or the mitigating proposal Direct Energy advances. Accordingly, Request JA(Direct)-III-2 is irrelevant as well.

Further, even assuming *arguendo*, that Direct Energy’s ownership of particular generating units in ERCOT, the eighteen sub-interrogatories contained in Request JA(Direct)-III-2 are the epitome of the type of “fishing expedition” precluded in *City of York*. For example, Request JA(Direct)-III-2(a) seeks “all financial projections associated with [each] facility.” Request JA(Direct)-III-2(e) seeks “the expected output of [each] facility, between the present and December 31, 2014, expressed in terms of MWh in the most granular time intervals possible

(e.g., hourly is preferred over monthly, monthly is preferred over annual.” Request JA(Direct)-III-2(l) seeks “any forecasts of the prices and total costs of fuel inputs (e.g., coal, natural gas) expected to be paid to operate [each] facility between the present and December 31, 2014, and the effects on Direct Energy’s pricing for its retail market customers.” Request JA(Direct)-III-2(p) seeks “any forecasts of the book and tax depreciation associated with [each] facility between the present and December 31, 2014, and the effects on Direct Energy’s pricing for its retail market customers.” Joint Applicants have utterly failed in even attempting to justify these sub-interrogatories, because they cannot.

Again, assuming *arguendo*, that information pertaining to Texas generating facilities is relevant to this proceeding, which it obviously is not, the eighteen sub-interrogatories contained in Request JA(Direct)-III-2 are patently ridiculous in their scope and granularity. These eighteen sub-interrogatories seek to obtain a volume of competitive information that, by design, is intended to unreasonably annoy, oppress, burden, and cause expense to Direct Energy. Intent is demonstrated by the fact that these materials are irrelevant, enormous in scope, rarified, and that the interrogatories were served days prior to the end of the third round of written testimony, on the last week of discovery and just days in advance of the hearings scheduled in this proceeding. Accordingly, Direct Energy submits that this sub-interrogatory in particular, and Request JA(Direct)-III in general, were intended to disrupt Direct Energy’s ability to effectively participate in this proceeding.

Finally, Request JA(Direct)-III-2 seeks information that is not within the control or possession of Direct Energy and would require Direct Energy to undertake an unreasonable investigation of publicly available information. A number of the eighteen interrogatories go beyond seeking facts and figures, and seek specific analyses that in many cases Direct Energy

has not performed, and therefore, does not possess or control. For example, Request JA(Direct)-III-2(j) seeks “forecasts of the prices and revenues from any renewable energy credits generated by the facility between the present and December 31, 2014, and the effects on Direct Energy’s pricing for its retail market customers.” Given that Direct Energy’s generating fleet consists of its three combined cycle gas turbine generation facilities in Texas (publicly available facts), no such forecasts of prices and revenues, to say anything about effects on customers, exist, or could exist.

C. Request JA(Direct)-III-3

In Request JA(Direct)-III-3, Joint Applicants sought, “For 2010 to date, . . . the amount (in MWh) and percentage of Direct Energy’s retail customer load in PJM, by utility service territory and customer class, that will be served by [:]”

- (a) purchases of energy in the PJM real-time energy market;
- (b) purchases of energy in the PJM day-ahead market;
- (c) purchases of energy from generation owned or controlled by Direct Energy; and
- (d) purchases pursuant to bilateral contracts between Direct Energy and other parties.

Further, with regard to the answer to Request JA(Direct)-III-3(c), Joint Applicants sought information pertaining to whether “energy not explicitly scheduled to serve the customer load, but that is intended to act as a financial hedge, and with regard to the answer to Request JA(Direct)-III-3(d), the identity of “the counterparty . . . and the price paid for energy and capacity. . . .”

Direct Energy objected to Request JA(Direct)-III-3, on the basis that it falls outside the scope of permissible discovery and is not relevant to the subject matter involved in this proceeding nor is it reasonably calculated to lead to the discovery of admissible evidence. With respect to the request for information regarding contracts, Direct Energy objected on the basis that contracts may contain confidentiality and/or non-disclosure provisions that would preclude

the production of such information. Direct Energy also objected on the basis that the question is overly broad and would cause unreasonable annoyance, embarrassment, oppression, burden or expense to Direct Energy. Finally, Direct Energy objected on the basis that this question seeks information that is not within the control or possession of Direct Energy and would require Direct Energy to undertake an unreasonable investigation of publicly available information.

In their Motion, Joint Applicants fail to explain how discovery of Direct Energy's detailed confidential competitive information pertaining to Direct Energy's wholesale market transactions relates to the issues before the Commission in this proceeding, or how a response to Request JA(Direct)-III-3 is reasonably calculated to lead to the discovery of admissible evidence. Direct Energy submits that Joint Applicants cannot possibly demonstrate how Direct Energy's detailed wholesale market participation data is in any way relevant to either the standards of review applicable to Joint Applicants' proposed merger, or the mitigating proposal Direct Energy advances. Moreover, this information is publicly available and, therefore, not subject to discovery in this proceeding.

More troubling, Joint Applicants fail to explain how the information sought in this third request is related even to the Joint Applicants' postulation of the issue raised: "Whether Direct Energy is competing or intends to compete in the retail market." Even if that were the appropriate inquiry, the requested information goes way beyond what might answer the inquiry directly or even indirectly.

Moreover, this information is clearly not relevant to whether the Joint Applicants' merger meets the relevant standards of review, as it pertains to Direct Energy, rather than Joint Applicants. To the extent Joint Applicants attempted to argue that this material is relevant in relation to Direct Energy's mitigating proposal, which they have not in any particular way, the

crazy train of logic might be as follows: Joint Applicants seek Direct Energy's wholesale market costs, such that Joint Applicants may predict the prices which Direct Energy might offer its retail customers, in order to determine whether or not Direct Energy may or may not be a successful participant in those retail markets, as some predictor of whether the mitigating proposal may be a success. Of course, it is antithetical to the proper functioning of competitive markets that the Commission would sanction one competitor's access to the detailed competitive pricing information of another. Therefore, the requested information is not relevant to Direct Energy's mitigating proposal.

Given that the bi-lateral contract information Joint Applicants seek in Request JA(Direct)-III-3 is not relevant to this proceeding, Direct Energy is not willing to voluntarily produce confidentiality provisions from any actual bi-lateral contracts it may have. However, in support of Direct Energy's objection to Request JA(Direct)-III-3 based on confidentiality and non-disclosure provisions, Direct Energy submits for Your Honors' consideration the following provision from the Edison Electric Institute's ("EEI") Master Power Purchase & Sale Agreement, an industry-leading wholesale umbrella trading agreement, typically used for bi-lateral wholesale power transactions:

10.11 Confidentiality. If the Parties have elected on the Cover Sheet to make this Section 10.11 applicable to this Master Agreement, neither Party shall disclose the terms or conditions of a Transaction under this Master Agreement to a third party (other than the Party's employees, lenders, counsel, accountants or advisors who have a need to know such information and have agreed to keep such terms confidential) except in order to comply with any applicable law, regulation, or any exchange, control area or independent system operator rule or in connection with any court or regulatory proceeding; provided, however, each Party shall, to the extent practicable, use reasonable efforts to prevent or limit the disclosure. The Parties shall be entitled to all remedies available at law or in

equity to enforce, or seek relief in connection with, this confidentiality obligation.⁶

That Request JA(Direct)-III-3 is overly broad is clear from the fact that it seeks information pertaining to Direct Energy's participation in the region-wide PJM wholesale markets, but also seeks the percentage of Direct Energy's overall PJM retail load, "broken down by utility service territory and customer class" Joint Applicants have not, nor can they, demonstrate how Direct Energy's retail load in utility service territories outside Joint Applicants service territories, in Pennsylvania, and outside Pennsylvania, is relevant to either the standards applicable to their proposed merger, or Direct Energy's mitigating proposal. Moreover, this material is akin to the competitive material Your Honors declined to compel production of in the August 20 Order.

Finally, Request JA(Direct)-III-3 should be denied to the extent it seeks information that would require Direct Energy to undertake an unreasonable investigation of publicly available information. As PJM market participants themselves, Joint Applicants should be well aware that PJM real-time and day-ahead market data is available directly from PJM. Pricing under bi-lateral agreements is reported to the Federal Energy Regulatory Commission ("FERC"), in Electronic Quarterly Reports ("EQRs"), on a delayed basis, pursuant to guidelines FERC has established to ensure that access to such data by competitors does not facilitate anti-competitive activity in the wholesale markets. To the extent portions of the bi-lateral data Joints Applicants seek is not yet publicly available, it is for good reason. With respect to Joint Applicants' follow-on request pertaining to output from generating facilities owned or controlled by Direct

⁶ The template EEI Master Power Purchase & Sale Agreement is available in full at <http://www.eei.org/ourissues/ElectricityGeneration/Pages/MasterContract.aspx>.

Energy in PJM, for which output is not scheduled to serve customer load, Direct Energy submits that such information is not in its possession, because it does not exist, given that Direct Energy has no generating facilities in PJM.

D. Request JA(Direct)-III-4

In Request JA(Direct)-III-4, Joint Applicants sought, “For January 2011 through December 31, 2014, . . . the amount (in MWh) and percentage of Direct Energy’s anticipated retail customer load in PJM, by utility service territory and customer class, that will be served by[:.]”

- (a) purchases of energy in the PJM real-time energy market;
- (b) purchases of energy in the PJM day-ahead market;
- (c) purchases of energy from generation owned or controlled by Direct Energy; and
- (d) purchases pursuant to bilateral contracts between Direct Energy and other parties.

Further, with regard to the answer to Request JA(Direct)-III-4(c), Joint Applicants sought information pertaining to whether “energy not explicitly scheduled to serve the customer load, but that is intended to act as a financial hedge, and with regard to the answer to Request JA(Direct)-III-4(d) and any existing contracts, the identity of “the counterparty . . . and the price paid for energy and capacity. . . .”

Direct Energy objected to Request JA(Direct)-III-4, on the basis that it falls outside the scope of permissible discovery and is not relevant to the subject matter involved in this proceeding nor is it reasonably calculated to lead to the discovery of admissible evidence. With respect to the request for information regarding contracts, Direct Energy objected on the basis that contracts may contain confidentiality and/or non-disclosure provisions that would preclude the production of such information. Direct Energy also objected on the basis that the question is overly broad and would cause unreasonable annoyance, embarrassment, oppression, burden or expense to Direct Energy. Finally, Direct Energy objected on the basis that this question seeks

information that is not within the control or possession of Direct Energy and would require Direct Energy to undertake an unreasonable investigation of publicly available information.

Direct Energy points out that, in all material respects, Request JA(Direct)-III-4 is identical to Request JA(Direct)-III-3, with the exception of the time periods at issue. Request JA(Direct)-III-3 pertains to “2010 to date” and Request JA(Direct)-III-4 pertains to “January 1, 2011 through December 31, 2014.” Accordingly, in effort to avoid unnecessary repetition, Direct Energy hereby incorporates by reference its arguments made above in relation to Request JA(Direct)-III-3 in support of its objections that Request JA(Direct)-III-4 is: (i) outside the scope of permissible discovery and not relevant to the subject matter involved in this proceeding nor reasonably calculated to lead to the discovery of admissible evidence; (ii) that information pertaining to contracts may contain confidentiality and/or non-disclosure provisions that would preclude the production of such information; and (iii) that the question is overly broad and would cause unreasonable annoyance, embarrassment, oppression, burden or expense to Direct Energy. In addition, the requested information does not even address Joint Applicants’ own pretextual inquiry into whether Direct Energy competes or intends to compete in the retail market.

Additionally, Request JA(Direct)-III-4 seeks information that is not within the control or possession of Direct Energy. In Request JA(Direct)-III-4, Joint Applicants seek a definitive answer that involves two layers of information. First, the answer sought would depend upon data pertaining to “anticipated retail customer load.” Second, Joint Applicants seek an analysis of how that forecast customer load “will be served” from four different sources. The source categories provided by Joint Applicants include the PJM day ahead and real time markets, Direct Energy’s own generation, and bilateral contracts. As Joint Applicants must know, competitive suppliers adjust the mix of resources over time in response to market conditions, and as load

varies. Accordingly, it is not possible for Direct Energy to state in advance from what resource mix customer classes in particular utility service territories “will be served” in any future period.

E. Request JA(Direct)-III-5

In Request JA(Direct)-III-5, Joint Applicants sought, “forecasts prepared by or for Direct Energy on the effects on retail markets generally and/or Direct Energy’s prices for retail customers in Pennsylvania following the enactment of any federal legislation or state legislation in Pennsylvania imposing any additional form of carbon regulation (*e.g.*, cap and trade, carbon tax, Pennsylvania membership in the Regional Greenhouse Gas Initiative). Direct Energy objected to Request JA(Direct)-III-5, on the basis that it falls outside the scope of permissible discovery and is not relevant to the subject matter involved in this proceeding nor is it reasonably calculated to lead to the discovery of admissible evidence. Direct Energy also objected on the basis that the question is overly broad and would cause unreasonable annoyance, embarrassment, oppression, burden or expense to Direct Energy.

In their Motion, Joint Applicants fail to explain how discovery of Direct Energy’s detailed confidential competitive information pertaining to Direct Energy’s analysis of the effects of carbon regulation relates to the issues before the Commission in this proceeding, or how a response to Request JA(Direct)-III-5 is reasonably calculated to lead to the discovery of admissible evidence. Direct Energy submits that Joint Applicants cannot possibly demonstrate how Direct Energy’s analysis of the effects of carbon regulation is in any way relevant to either the standards of review applicable to Joint Applicants’ proposed merger, or the mitigating proposal Direct Energy advances.

This information is clearly not relevant to whether the Joint Applicants’ merger meets the relevant standards of review, as it pertains to “retail markets generally and/or Direct Energy’s

prices for retail customers in Pennsylvania,” rather than to Joint Applicants’ merger. To the extent Joint Applicants attempted to argue that this material is relevant in relation to Direct Energy’s mitigating proposal, which they have not in any particular way, the Joint Applicants would have to argue that they seek information pertaining to Direct Energy’s wholesale market costs, such that Joint Applicants may predict the prices which Direct Energy might offer its retail customers, in order to determine whether or not Direct Energy may or may not be a successful participant in those retail markets, as some predictor of whether the mitigating proposal may be a success. Of course, as stated above, it is antithetical to the proper functioning of competitive markets that the Commission would sanction one competitor’s access to the detailed competitive pricing information of another. Therefore, the requested information is not relevant to Direct Energy’s mitigating proposal. Moreover, this material is akin to the competitive material Your Honors declined to compel production of in the August 20 Order.

Additionally, in support of its objection that Request JA(Direct)-III-5 seeks information that is overly broad, Direct Energy states the following. In Request JA(Direct)-III-5, Joint Applicants sought, “forecasts prepared by or for Direct Energy on the effects on retail markets generally and/or Direct Energy’s prices for retail customers in Pennsylvania following the enactment of any federal legislation or state legislation in Pennsylvania imposing any additional form of carbon regulation (*e.g.*, cap and trade, carbon tax, Pennsylvania membership in the Regional Greenhouse Gas Initiative).” By casting such an enormously wide net, Joint Applicants appear to seek any such analysis, no matter how long ago performed, and without regard to whether the proposed regulations are current, or have died on the vine. Direct Energy’s prior analysis of extinct regulatory proposals cannot be possibly be relevant to either Joint Applicants’ merger application or Direct Energy’s mitigating proposal. Further, Joint Applicants

seek information related to effects on retail markets both outside their own service territories, and outside of Pennsylvania. However, Joint Applicants have made no arguments why extra-territorial effects of carbon regulation are relevant.

F. Request JA(Direct)-III-6

In Request JA(Direct)-III-6, Joint Applicants sought whether, “Direct Energy is considering the purchase of or investment in any transmission assets in the PJM control area?” Further, Joint Applicants sought an explanation of “the relationship between [any] such purchases and investments, Direct Energy’s ability to serve retail market customers in PJM, and the effects on pricing to Direct Energy’s retail market customers.” Direct Energy objected to Request JA(Direct)-III-6, on the basis that it falls outside the scope of permissible discovery and is not relevant to the subject matter involved in this proceeding nor is it reasonably calculated to lead to the discovery of admissible evidence.

In their Motion, Joint Applicants fail to explain how discovery of any potential transmission asset investments by Direct Energy is relevant to the issues before the Commission in this proceeding, or how a response to Request JA(Direct)-III-6 is reasonably calculated to lead to the discovery of admissible evidence. Direct Energy submits that Joint Applicants cannot possibly demonstrate how Direct Energy’s potential transmission asset investments, if any, are in any way relevant to either the standards of review applicable to Joint Applicants’ proposed merger, or the mitigating proposal Direct Energy advances.

This information is clearly not relevant to whether the Joint Applicants’ merger meets the relevant standards of review, as it is pointed toward Direct Energy’s potential asset investments, Direct Energy’s ability to serve its own customers, and the effect on Direct Energy’s retail pricing, rather than to Joint Applicants’ merger. Joint Applicants cannot reasonably argue that

transmission investment by Direct Energy is any sort of prerequisite to Direct Energy having the physical ability to provide retail service to its customers. As Joint Applicants know, in Pennsylvania, the Electric Distribution Company is responsible for ensuring physical service, along with PJM, as the transmission system operator, and the individual transmission owners.

To the extent Joint Applicants attempted to argue that this material is relevant in relation to Direct Energy's mitigating proposal, which they have not in any particular way, the Joint Applicants would have to argue that they seek information pertaining to Direct Energy's wholesale market costs, such that Joint Applicants may predict the prices which Direct Energy might offer its retail customers, in order to determine whether or not Direct Energy may or may not be a successful participant in those retail markets, as some predictor of whether the mitigating proposal may be a success. Of course, as stated above, it is antithetical to the proper functioning of competitive markets that the Commission would sanction one competitor's access to the detailed competitive pricing information of another. Therefore, the requested information is not relevant to Direct Energy's mitigating proposal. Moreover, this material is akin to the competitive material Your Honors declined to compel production of in the August 20 Order.

G. Request JA(Direct)-III-7

In Request JA(Direct)-III-7, Joint Applicants sought, "forecasts prepared by or for Direct Energy on the effects on the effects on its pricing to retail customers if it is able to achieve its goal of sourcing 35-40% of its North American generation market from assets owned by Direct Energy." Direct Energy objected to Request JA(Direct)-III-7, on the basis that it falls outside the scope of permissible discovery and is not relevant to the subject matter involved in this proceeding nor is it reasonably calculated to lead to the discovery of admissible evidence.

In their Motion, Joint Applicants fail to explain how discovery of Direct Energy's confidential competitive information pertaining to Direct Energy's wholesale power sourcing strategies relates to the issues before the Commission in this proceeding, or how a response to Request JA(Direct)-III-7 is reasonably calculated to lead to the discovery of admissible evidence. Direct Energy submits that Joint Applicants cannot possibly demonstrate how Direct Energy's analysis of its wholesale power sourcing strategies is in any way relevant to either the standards of review applicable to Joint Applicants' proposed merger, or the mitigating proposal Direct Energy advances.

This information is clearly not relevant to whether the Joint Applicants' merger meets the relevant standards of review, as it pertains to Direct Energy's wholesale power sourcing strategy, rather than to Joint Applicants merger. To the extent Joint Applicants attempted to argue that this material is relevant in relation to Direct Energy's mitigating proposal, which they have not in any particular way, the Joint Applicants would have to argue that they seek information pertaining to Direct Energy's wholesale market costs, such that Joint Applicants may predict the prices which Direct Energy might offer its retail customers, in order to determine whether or not Direct Energy may or may not be a successful participant in those retail markets, as some predictor of whether the mitigating proposal may be a success. Of course, as stated above, it is antithetical to the proper functioning of competitive markets that the Commission would sanction one competitor's access to the detailed competitive pricing information of another. Therefore, the requested information is not relevant to Direct Energy's mitigating proposal.

H. Request JA(Direct)-III-8

In Request JA(Direct)-III-8, Joint Applicants sought, “the number of customers and total load served by Direct Energy by customer class (residential, commercial, industrial) for each of the utility service territories served by West Penn Power Company, Metropolitan Edison Company, Pennsylvania Electric Company, and Pennsylvania Power Company for each of 2009 and 2010 to date.” Direct Energy objected to Request JA(Direct)-III-8, on the basis that it falls outside the scope of permissible discovery and is not relevant to the subject matter involved in this proceeding nor is it reasonably calculated to lead to the discovery of admissible evidence. Nevertheless, while preserving its objection, Direct Energy provided a Highly Sensitive Confidential Response, answering this interrogatory in full. Based on the foregoing, the Joint Applicants’ Motion should be dismissed as moot with respect to Request JA(Direct)-III-8.

In their Motion, Joint Applicants fail to explain how discovery of Direct Energy’s confidential competitive information pertaining to Direct Energy’s customer load data relates to the issues before the Commission in this proceeding, or how a response to Request JA(Direct)-III-8 is reasonably calculated to lead to the discovery of admissible evidence. Direct Energy submits that Joint Applicants cannot possibly demonstrate how Direct Energy’s customer load data is in any way relevant to either the standards of review applicable to Joint Applicants’ proposed merger, or the mitigating proposal Direct Energy advances. Moreover, this material is akin to the competitive material Your Honors declined to compel production of in the August 20 Order.

This information is clearly not relevant to whether the Joint Applicants’ merger meets the relevant standards of review, as it pertains to Direct Energy’s customer load data, rather than to Joint Applicants’ proposed merger. To the extent Joint Applicants attempted to argue that this

material is relevant in relation to Direct Energy’s mitigating proposal, which they have not in any particular way, the Joint Applicants might argue that it somehow bears on the aggregate number of switching customers in their own territories, and hence existing progress toward a workable competitive market. However, in this regard, this information is incomplete because it relates to only one market participant—Direct Energy, and is therefore irrelevant. Moreover, Joint Applicants should already know the aggregate number of switching customers in their own service territories.

I. Request JA(Direct)-III-9

In Request JA(Direct)-III-9, Joint Applicants sought, “any forecasts prepared by or for Direct Energy with respect to its retail market share by customer class (residential, commercial, industrial) for each of the utility service territories served by West Penn Power Company, Metropolitan Edison Company, Pennsylvania Electric Company, and Pennsylvania Power Company for the years 2011-2014.” Direct Energy objected to Request JA(Direct)-III-9, on the basis that it falls outside the scope of permissible discovery and is not relevant to the subject matter involved in this proceeding nor is it reasonably calculated to lead to the discovery of admissible evidence. Nevertheless, while preserving its objection, Direct Energy provided a Highly Sensitive Confidential Response, answering this interrogatory in full. Based on the foregoing, the Joint Applicants’ Motion should be dismissed as moot with respect to Request JA(Direct)-III-9.

Direct Energy points out that, in all material respects, Request JA(Direct)-III-9 is identical to Request JA(Direct)-III-8, with the exception of the time periods at issue. Request JA(Direct)-III-8 pertains to “2009 and 2010 to date” and Request JA(Direct)-III-9 pertains to “January 1, 2011 through December 31, 2014.” Accordingly, in effort to

avoid unnecessary repetition, Direct Energy hereby incorporates by reference its arguments made above in relation to Request JA(Direct)-III-8 in support of its objection that Request JA(Direct)-III-9 is outside the scope of permissible discovery and not relevant to the subject matter involved in this proceeding nor reasonably calculated to lead to the discovery of admissible evidence.

J. Request JA(Direct)-III-10

In Request JA(Direct)-III-10, Joint Applicants sought whether Direct Energy has “any contracts for alternative energy credits (“AECs”) as defined under Pennsylvania’s Alternative Energy Portfolio Standard (“AEPS”) (or renewable energy credits (“RECs”) that would qualify as AECs for AEPS compliance purposes) with delivery scheduled on or after January 1, 2011?” Direct Energy objected to Request JA(Direct)-III-10, on the basis that it falls outside the scope of permissible discovery and is not relevant to the subject matter involved in this proceeding nor is it reasonably calculated to lead to the discovery of admissible evidence. With respect to the request for information regarding contracts, Direct Energy objected on the basis that contracts may contain confidentiality and/or non-disclosure provisions that would preclude the production of such information.

In their Motion, Joint Applicants fail to explain how discovery of Direct Energy’s confidential competitive information pertaining to Direct Energy’s alternative and renewable energy credit procurements relate to the issues before the Commission in this proceeding, or how a response to Request JA(Direct)-III-10 is reasonably calculated to lead to the discovery of admissible evidence. Direct Energy submits that Joint Applicants cannot possibly demonstrate how Direct Energy’s alternative and renewable energy credit procurements are in any way

relevant to either the standards of review applicable to Joint Applicants' proposed merger, or the mitigating proposal Direct Energy advances.

This information is clearly not relevant to whether the Joint Applicants' merger meets the relevant standards of review, as it pertains to Direct Energy's alternative and renewable energy credit procurements, rather than to Joint Applicants merger. To the extent Joint Applicants attempted to argue that this material is relevant in relation to Direct Energy's mitigating proposal, which they have not in any particular way, the Joint Applicants would have to argue that they seek information pertaining to Direct Energy's alternative and renewable energy credit procurements is related to Direct Energy's ability to participate in retail markets in the future. However, Direct Energy's individual ability to participate in future markets is not at issue. Moreover, Request JA(Direct)-III-10 seeks information regarding delivery of credits beginning January 1, 2011. Direct Energy has not proposed beginning its proposal as early as January 1, 2011. Therefore, the requested information is not relevant to Direct Energy's mitigating proposal.

K. Request JA(Direct)-III-11

In Request JA(Direct)-III-11, Joint Applicants presented five sub-interrogatories seeking confidential competitive information pertaining to Direct Energy's alternative and renewable energy credit procurements. Joint Applicants posed these five sub-interrogatories "If the answer to Interrogatory No. III-10 is yes" Direct Energy objected to Request JA(Direct)-III-11, on the basis that it falls outside the scope of permissible discovery and is not relevant to the subject matter involved in this proceeding nor is it reasonably calculated to lead to the discovery of admissible evidence. With respect to the request for information regarding contracts, Direct Energy objected on the basis that contracts may contain confidentiality and/or non-disclosure

provisions that would preclude the production of such information. Direct Energy also objected on the basis that the question is overly broad and would cause unreasonable annoyance, embarrassment, oppression, burden or expense to Direct Energy.

Because Request JA(Direct)-III-11 is based on Request JA(Direct)-III-10, Direct Energy reiterates that, in its Motion, Joint Applicants fail to explain how Direct Energy's alternative and renewable energy credit procurements relate to the issues before the Commission in this proceeding, or how a response to Request JA(Direct)-III-10 is reasonably calculated to lead to the discovery of admissible evidence. Joint Applicants cannot possibly demonstrate how Direct Energy's alternative and renewable energy credit procurements is in any way relevant to either the standards of review applicable to Joint Applicants' proposed merger, or the mitigating proposal Direct Energy advances. Accordingly, Request JA(Direct)-III-11 is irrelevant as well.

Further, even assuming *arguendo*, that Direct Energy's alternative and renewable energy credit procurements is relevant, the five sub-interrogatories contained in Request JA(Direct)-III-11 are yet another example of the "fishing expedition" precluded in *City of York*. For example, Request JA(Direct)-III-11(a) seeks "the of AECs or RECs to be delivered annually under each contract." Request JA(Direct)-III-11(d) seeks "the price of each AEC or REC." Request JA(Direct)-III-11(e) seeks "whether the AECs or RECs are sourced from a specific electric generating facility" If the answer to Request JA(Direct)-III-11(e) is affirmative, then Joint Applicants seek answers to four tertiary level interrogatories, with regard to that generating facility. Joint Applicants have utterly failed in even attempting to justify these sub-interrogatories, because they cannot.

Again, assuming *arguendo*, that information pertaining to Direct Energy's alternative and renewable energy credit procurements is relevant to this proceeding, which it obviously is not,

the five sub-interrogatories and four tertiary-level interrogatories contained in Request JA(Direct)-III-11 are overly broad and would cause unreasonable annoyance, embarrassment, oppression, burden or expense to Direct Energy. The information sought is not maintained in the comprehensive report format sought by Joint Applicants. Providing it in that manner would place a substantial burden on Direct Energy, by requiring an unreasonable investigation, in contravention of Rule 5.361(a)(4).

IV. CONCLUSION

Based on the foregoing, the Joint Applicants' Motion to Dismiss Objections and Compel Responses to Set III should be denied.

Respectfully submitted,



Daniel Clearfield, Esq.
Deanne M. O'Dell, Esq.
Carl Shultz, Esq.
Eckert Seamans Cherin & Mellott, LLC
213 Market St., 8th Floor
Harrisburg, PA 17101
717.237.7173

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