



GOVERNOR'S OFFICE OF GENERAL COUNSEL

October 12, 2010

717-787-7060

Fax: 717-783-7911

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

PA PUC
SECRETARY'S BUREAU

2010 OCT 12 PM 1:22

RECEIVED

Dear Secretary Chiavetta:

Enclosed for filing is an original and three copies of the Petition of the Pennsylvania Department of Environmental Protection for interlocutory Commission review and answer to the material question presented regarding the Order Granting the Motion to Strike the Department's Statement Numbers 1 and 2 ("Order"). The motion to strike was filed by Joint Applicants and granted by the presiding Administrative Law Judges ("ALJs") Long and Weisman on October 12, 2010.

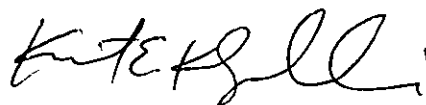
The Department requests the ALJs to stay the proceedings and certify to the Commission to conduct interlocutory review of the Order. If the ALJs choose not to stay the proceedings and certify to the Commission, the Department requests the Commission to conduct interlocutory review and answer the material question presented regarding the Order.



Per the attached Certificate of Service, copies of the Petition are being served on the Administrative Law Judges and the other parties to the proceeding.

Thank you for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Kurt E. Klapkowski". The signature is fluid and cursive, with the first name "Kurt" being the most prominent.

Kurt E. Klapkowski
Assistant Counsel

cc: Judge Wayne Weismandel
Judge Mary Long
Certificate of Service

COMMONWEALTH OF PENNSYLVANIA
BEFORE THE PUBLIC UTILITY COMMISSION

RECEIVED
2010 OCT 12 PM 1:22
PA. PUC
SECRETARY'S BUREAU

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 : Docket No. A-2010-2176520
PUBLIC UTILITY CODE APPROVING A : A-2010-2176732
CHANGE OF CONTROL OF WEST PENN :
POWER COMPANY AND TRANS- :
ALLEGHENY INTERSTATE LINE :
COMPANY :

PETITION BY THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL
PROTECTION FOR AN INTERLOCUTORY COMMISSION REVIEW
AND ANSWER TO THE MATERIAL QUESTION PRESENTED

The Department of Environmental Protection (“Department”), by its undersigned counsel, pursuant to 66 Pa. C.S. § 331(e) and 52 Pa. Code § 5.302(a), hereby moves the presiding Administrative Law Judges (“ALJs”) Long and Weismandel to certify to the Commission and/or moves The Public Utility Commission (“Commission”) to conduct interlocutory Commission review and answer the material question presented regarding the ALJs’ Order Granting the Motion to Strike (“ALJs Order”) the Department’s Statement Numbers 1 and 2 (“Department Testimony”) filed by the Joint Applicants in the above captioned matter, and in support thereof states as follows:

1. The Department requests in this petition the interlocutory Commission review and answer of the following material question:

- a. **Material Question:** Did the ALJs commit error in granting the Joint Applicant’s motion to strike the Department Testimony?
- b. **Proposed Answer:** Yes. The Department Testimony is subject to the Commission’s jurisdiction and within the scope of this hearing, so the ALJs’ Order must be reversed on interlocutory Commission review.

2. Substantial prejudice occurs when “the alleged error, and any prejudice flowing from that issue, could not be satisfactorily cured during the normal Commission review process.” *Re Knights Limousine Serv., Inc.*, 59 Pa. PUC 538 (1985). Exclusion of the Department’s testimony in this case could *not be satisfactorily cured* during the normal Commission review process.

3. In *City of York v. Pa. Public Utility Comm’n*, 449 Pa. 136, 141, 295 A.2d 825, 828 (1972), the Supreme Court established that “the proponents of a merger [must] demonstrate that the merger will affirmatively promote the ‘service, accommodation, convenience, or safety of the public’ in some substantial way.” The Commonwealth Court made clear that the PUC has “the power to deny a certificate of public convenience that was inconsistent with the public interest, including environmental concerns.” *ARIPPA v. Pa. Public Utility Comm’n*, 792 A.2d 636, 657 (Pa. Cmwlth. 2002). In *ARIPPA*, parties presented environmental testimony and the ALJ made a specific determination that the merger neither benefited nor harmed the environment. *See id.*

4. Joint Applicants have submitted testimony and evidence pertaining to environmental compliance that is on the record of this proceeding. (*See* Department’s Answer to Joint Applicants’ Motion to Strike pages 3-4). Fairness requires that the scope of the proceeding be identical for both the Department and Joint Applicants.

5. To determine the impact of the merger on the public safety, the Commission should include environmental compliance issues in the scope of this proceeding.

6. The Commission has agreed to interlocutory review in a similar instance, where the scope of the hearing required resolution before the hearing to avoid substantial prejudice to a party. *Re Structural Separation of Bell Atlantic-Pennsylvania, Inc. Retail*

and Wholesale Operations, Docket No. M-00001353 2000 Pa. PUC LEXIS 49 (July 20, 2000).

7. Interlocutory Commission review of the material question presented will ultimately expedite the conduct of the proceedings. At issue is the testimony of two Department witnesses. For the Commission to review now and answer the material question in the Department's favor is certainly more efficient than for each of the numerous parties in this case to go through time consuming appeals regarding the material question that should, ultimately, result in a remand for the Commission to hear the Department's testimony. The Commission has previously found "that the material question should be answered now rather than later so as to ensure the development of a complete record that will enable the Commission to make an informed decision...." *Re Structural Separation of Bell Atlantic-Pennsylvania, Inc. Retail and Wholesale Operations*, Docket No. M-00001353 2000 Pa. PUC LEXIS 59 (September 28, 2000).

WHEREFORE, the Department of Environmental Protection requests that:

- (1) the ALJs stay the proceeding and certify to the Commission to conduct interlocutory commission review of the ALJs' Order; AND/OR
- (2) the Commission stay the proceeding and conduct interlocutory Commission review of the ALJs' Order; AND
- (3) the Commission answer the material question in the affirmative; AND
- (4) the Commission reverse the ALJs' Order.

Respectfully submitted,



Kurt E. Klapkowski (PA No. 70281)
Assistant Counsel, Commonwealth of Pennsylvania
Department of Environmental Protection
RCSOB, 9th Floor, 400 Market Street
Harrisburg, PA 17101-2301
(717) 787-7060

Dated: October 12, 2010

COMMONWEALTH OF PENNSYLVANIA
BEFORE THE PUBLIC UTILITY COMMISSION

RECEIVED
2010 OCT 12 PM 1:22
PA PUC BUREAU
SECRETARY'S BUREAU

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

I hereby certify that this day I served a copy of the attached Petition of the Pennsylvania Department of Environmental Protection for interlocutory Commission review of the Order regarding the Joint Applicants' Motion to Strike Testimony of the Pennsylvania Department of Protection upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code § 1.54.

VIA HAND DELIVERY, ELECTRONIC AND OVERNIGHT MAIL

Honorable Wayne J. Weismandel
Office of Administrative Law Judge
Pennsylvania Public Utility Commission
Keystone Building, 2nd Floor
400 North Street
Harrisburg, PA 17120

Honorable Mary D. Long
Office of Administrative Law Judge
Pennsylvania Public Utility Commission
Piatt Place, Room 220
301 Fifth Avenue
Pittsburgh, PA 15222

VIA ELECTRONIC AND 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

Darryl Lawrence, Esq.
Tanya J. McCloskey, Esq.
Aron J. Beatty, Esq.
Office of Consumer Advocate
5th Floor, Forum Place
555 Walnut St.
Harrisburg, PA 17101-1923
dlawrence@paoca.org
tmccloskey@paoca.org
abeatty@paoca.org
jhorner@paoca.org

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

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

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

Allison C. Kaster, Esq.
Carrie B. Wright, Esq.
Office of Trial Staff
P.O. Box 3265
Harrisburg, PA 17105-3265
akaster@state.pa.us
carwright@state.pa.us

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

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

Scott Rubin, Esq.
333 Oak Lane
Bloomsburg, PA 17815
scott_j_rubin@gmail.com
Counsel for IBEW

Susan E. Bruce, Esq.
Vasiliki Karandrikas, Esq.
Carl J. Zwick, Esq.
McNees Wallace & Nurick LLC
100 Pine Street
PO Box 1166
Harrisburg, PA 17108-1166
sbruce@mwn.com
vkandrikas@mwn.com
czwick@mwn.com
Counsel for WPPH, MEUIG/PICA

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

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

Derrick Price Williamson, Esq.
Spilman Thomas & Battle
1100 Bent Creek Blvd., Suite 101
Mechanicsburg, PA 17050
dwilliamson@spilmanlaw.com
*Counsel for Pennsylvania Mountains
Healthcare Alliance*

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

Thomas J. Sniscak, Esq.
Todd S. Stewart
William E. Lehman
Hawke McKeon & Sniscak, LLP
100 N. Tenth St.
PO Box 1778
Harrisburg, PA 17105
tjsniscak@hmslegal.com
tsstewart@hmslegal.com
welehman@hmslegal.com
*Counsel for the Pennsylvania State
University*

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

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

Regina L. Matz, Esq.
Thomas, Long, Niesen & Kennard
PO Box 9500
212 Locust St., Suite 500
Harrisburg, PA 17108-9500
rmatz@thomaslonglaw.com
Counsel for ARIPPA

Scott H. Strauss, Esq.
Katherine M. Mapes, Esq.
Spiegel & McDiarmid LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
scott.strauss@spiegelmc.com
katherine.mapes@spiegelmc.com
*Counsel for UWUA, AFL-CIO and
UWUA System Local 102*

Stephen H. Jordan
Rothman Gordon, P.C.
Third Floor, Grant Building
310 Grant Street
Pittsburgh, PA 15219
shjordan@rothmangordon.com
*Counsel for UWUA, AFL-CIO and
UWUA System Local 102*

Daniel Clearfield, Esq.
Deanne M. O'Dell, Esq.
Carl R. Shultz, Esq.
Eckert Seamans Cherin & Mellott, LLC
P.O. Box 1248
213 Market Street, 8th Floor
Harrisburg, PA 17101
dclearfield@eckertseamans.com
dodell@eckertseamans.com
cshultz@eckertseamans.com
Counsel for Direct Energy Services & RESA

Eric P. Cheung, Esq.
Joseph Minott, Esq.
Clean Air Council
135 South 19th Street, Suite 300
Philadelphia, PA 19103
echueng@cleanair.org
joe_minott@cleanair.org

Charles E. Thomas, Jr., Esq.
Jennifer M. Sultzaberger, Esq.
Thomas, Long, Niesen & Kennard
P.O. Box 9500
212 Locust Street, Suite 500
Harrisburg, PA 17108-9500
cthomasjr@thomaslonglaw.com
jms@thomaslonglaw.com
Counsel for PREA

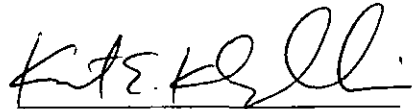
David J. Dulick, Esq.
General Counsel
Pennsylvania Rural Electric Association
P.O. Box 1266
212 Locust Street
Harrisburg, PA 17108-1266
david_dulick@prea.com

Barry A. Naum, Esq.
1100 Bent Creek
Boulevard Suite 101
Mechanicsburg, PA 17050
bnaum@spilmanlaw.com
Counsel for PHMA

Michael D. Fiorentino, Esq.
42 E. 2nd St.
Ste. 200
Media, PA 19070
mdfiorentino@gmail.com
Counsel for Clean Air Council

Robert M. Strickler, Esq.
Griffith Strickler Lerman Solymos & Calkin
110 South Northern Way
York, PA 17402-3737
rstrickler@gslsc.com
Counsel for YCSWA

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



Kurt E. Klapkowski (Pa. No 70281)
Assistant Counsel
kklapkowski@state.pa.us
Jason E. Oyler (PA No. 84473)
Assistant Counsel
joyler@state.pa.us
Commonwealth of Pennsylvania
Department of Environmental
Protection
RCSOB, 9th Floor
400 Market Street
Harrisburg, PA 17101-2301
717-787-7060
717-783-7911 (Fax)

Dated: October 12, 2010