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August 16, 2010

VIA FEDERAL EXPRESS

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: 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

Dear Secretary Chiavetta:

Enclosed for filing in the above-referenced proceeding are an original and three copies of: (1) the Answer of West Penn Power Company, Trans-Allegheny Interstate Line Company, and FirstEnergy Corp. In Opposition To The Pennsylvania Department of Environmental Protection's Motion To Dismiss Objections And Compel Response To Its Set I Interrogatories; and (2) the Answer of West Penn Power Company, Trans-Allegheny Interstate Line Company, and FirstEnergy Corp. In Opposition To The Pennsylvania Department of Environmental Protection's Motion For Leave To Include An Additional Witness. Pursuant to 52 Pa. Code § 1.11(a)(2), the enclosed Answers shall be deemed filed on August 16, 2010, which is the date they were deposited with Federal Express as shown on the Federal Express delivery receipt.

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Rosemary Chiavetta, Secretary
August 16, 2010
Page 2

As evidenced by the attached Certificate of Service, copies of the Answers are being served on the Administrative Law Judges and all parties of record. Also enclosed is an additional copy of this letter and of the Answers, which we request be date-stamped as evidence of filing and returned to us in the stamped, pre-addressed envelope provided.

Very truly yours,



Kenneth M. Kulak

KMK/tp
Enclosures

c: Per Certificate of Service (w/encls.)

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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AUG 17 2010

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

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

**ANSWER OF WEST PENN POWER COMPANY, TRANS-ALLEGHENY INTERSTATE
LINE COMPANY, AND FIRSTENERGY CORP. IN OPPOSITION TO
THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION'S
MOTION FOR LEAVE TO INCLUDE AN ADDITIONAL WITNESS**

Pursuant to 52 Pa. Code §§ 5.103(c) and 5.61(a)(1), West Penn Power Company, Trans-Allegheny Interstate Line Company, and FirstEnergy Corp. (collectively, the Companies) hereby oppose the Pennsylvania Department of Environmental Protection's (DEP) Motion Requesting Leave To Amend Prehearing Memorandum To Include An Additional Witness (Motion). In support of their Answer in opposition, the Companies state as follows:

1. On May 24, 2010, Administrative Law Judge Wayne L. Weismandel issued a Prehearing Conference Order requiring, among other things, that the parties to this proceeding file prehearing conference memoranda. Pursuant to the Order, each memorandum had to list the issues that the party intended to address and identify potential witnesses and the subject matter of each witness' testimony. *See* Prehearing Conference Order, p. 2.

2. On June 15, 2010, DEP filed a prehearing memorandum identifying a variety of issues that it intended to address through written testimony, including alternative energy, energy

efficiency and conservation, and smart meters. *See* DEP Prehearing Memorandum, pp. 5-6.

However, the DEP failed to provide the names of any witnesses that would address those issues or any other issues identified in its prehearing memo.

3. On June 23, 2010, Administrative Law Judges Wayne L. Weisman and Mary D. Long issued a Scheduling and Briefing Order extending the time for witness identification to July 30, 2010. *See* Order, p.2. Persons identified after July 30, 2010, the Order stated, would “not be allowed to appear as witnesses except for good cause.” *Id.*

4. On July 29, 2010, DEP identified Dan M. Haney and Kevin A. Halloran as witnesses that it intended to sponsor written testimony on its behalf. Both Mr. Haney and Mr. Halloran are DEP employees.

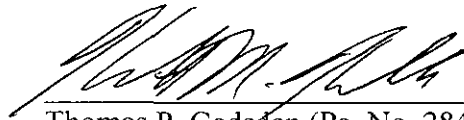
5. On August 6, 2010, DEP filed its Motion for leave to identify a third witness, Daniel W. Griffiths, after the deadline set in the Scheduling and Briefing Order. Mr. Griffiths is also a DEP employee. According to DEP, Mr. Griffiths would present direct testimony on matters that encompass alternative energy issues, energy efficiency and conservation, and smart meters, i.e., precisely the same issues DEP identified in its prehearing memorandum filed June 15, 2010. *See* Motion, p. 3. DEP contends that it has a reasonable excuse for missing the deadline because Mr. Griffiths had “recently” announced his intention to leave employment at DEP and, therefore, DEP needed additional time to confirm his availability to participate in this proceeding. *Id.*

6. DEP has not demonstrated good cause for missing the witness identification deadline established in the Scheduling and Briefing Order. On June 15, *over six weeks* before the deadline, DEP identified the three issues that it is requesting Mr. Griffiths be allowed to

address. On June 23, *over five weeks* before the deadline, the ALJs set a clear deadline of July 30, 2010, for witness identification. DEP has not explained why it was unable to use the significant time provided to identify a witness to present testimony on alternative energy issues, energy efficiency and conservation, and smart meters. It is not clear why another individual, whether a DEP employee or other witness, could not have been retained to address these issues if Mr. Griffiths' status and availability were uncertain.

WHEREFORE, the Motion of the Pennsylvania Department of Environmental Protection requesting leave to include an additional witness should be denied.

Respectfully submitted,



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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

JOINT APPLICATION OF WEST PENN :
POWER COMPANY doing business as :
ALLEGHENY POWER, TRANS- :
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FOR A CERTIFICATE OF PUBLIC : **DOCKET NOS. A-2010-2176520**
CONVENIENCE UNDER SECTION : **A-2010-2176732**
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TRANS-ALLEGHENY INTERSTATE LINE :
COMPANY :

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PA PUBLIC UTILITY COMMISS
SECRETARY'S BUREAU

CERTIFICATE OF SERVICE

I hereby certify and affirm that I have this day served a copy of: (1) **the Answer of West Penn Power Company, Trans-Allegheny Interstate Line Company and FirstEnergy Corp. In Opposition To The Pennsylvania Department of Environmental Protection's Motion To Dismiss Objections And Compel Response To Its Set I Interrogatories; and (2) the Answer of West Penn Power Company, Trans-Allegheny Interstate Line Company, and FirstEnergy Corp. In Opposition To The Pennsylvania Department of Environmental Protection's Motion For Leave To Include An Additional Witness** on the following persons in the matter specified in accordance with the requirements of 52 Pa. Code § 1.54:

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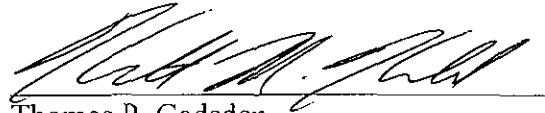
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Counsel for FirstEnergy Corp.

Date: August 16, 2010

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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**JOINT APPLICATION OF WEST PENN
POWER COMPANY doing business as
ALLEGHENY POWER, TRANS-
ALLEGHENY INTERSTATE LINE
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FOR A CERTIFICATE OF PUBLIC
CONVENIENCE UNDER SECTION
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APPROVING A CHANGE OF CONTROL OF
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**PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU**

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

**ANSWER OF WEST PENN POWER COMPANY, TRANS-ALLEGHENY INTERSTATE
LINE COMPANY, AND FIRSTENERGY CORP. IN OPPOSITION TO THE
PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION'S MOTION
TO DISMISS OBJECTIONS AND COMPEL RESPONSE TO ITS SET I
INTERROGATORIES**

Pursuant to 52 Pa. Code § 5.342(g)(1), West Penn Power Company ("West Penn"), Trans-Allegheny Interstate Line Company ("TrAILCo"), and FirstEnergy Corp. ("FirstEnergy"); collectively, the "Companies" or "Joint Applicants") hereby submit this Answer opposing the Pennsylvania Department of Environmental Protection's ("DEP") Motion to Dismiss Objections and Compel Response to its Set I Interrogatories, Questions 1-16 and 46-51 ("Motion"). A copy of the Interrogatories at issue is appended to DEP's Motion.

I. INTRODUCTION AND OVERVIEW

The DEP's Motion should be denied for three primary reasons. First, DEP is improperly using this merger proceeding to investigate environmental matters clearly outside the jurisdiction of the Pennsylvania Public Utility Commission ("Commission"). DEP may exercise its own statutory authority and utilize its own administrative procedures if it believes that particular environmental compliance matters require investigation. Second, DEP is improperly seeking

information about nuclear operations and nuclear waste management that are outside the jurisdiction of both the Commission and the DEP. Finally, the universe of information sought by Interrogatories 1-16 and 46-51 simply has no relevance to the approvals sought by the Joint Applicants in this proceeding, and the DEP has failed to provide any concrete relationship between the information sought and the issues before the Commission in this case. The requests are generally targeted at electricity generation, which, as a general matter, the Commission no longer regulates. *See* 66 Pa.C.S. § 2802(14). Further, the Companies' Pennsylvania-regulated utilities do not own any generation facilities.

II. RESPONSE TO DEP'S CONTENTIONS REGARDING SET I INTERROGATORIES 1-11

Interrogatories 1-11 seek information about compliance with federal and state environmental laws, including corrective action plans and existing or planned analysis of compliance status and the cost of possible corrective action. In its Motion, DEP defends these requests by emphasizing the "broad scope of discovery" and that "[w]hether or not the Commission will eventually rule in the Department's favor on the substantive issues raised by the discovery request" is immaterial to whether the request is properly scoped. *See* DEP Motion, p. 3. The basis of the Companies' objection is not *how* the Commission might rule on a substantive environmental issue, but rather that the Commission has no jurisdiction to even *issue* orders on substantive environmental issues. The Commission's rules provide that a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. 52 Pa. Code § 5.321(c). In the pending action, the Joint Petitioners have requested that the Commission approve a change in control and revisions to certain affiliated interest agreements. The Companies' environmental compliance is not relevant

to those approvals, and, in any event, the Commission does not have the authority to address any compliance issues related to environmental statutes.

DEP next contends that environmental matters are within the Commission's purview in analyzing whether a certificate of public convenience is in the public interest, relying on a Commission Order and Commonwealth Court decision regarding the GPU, Inc. and FirstEnergy Corp. merger proceeding. *See Joint Application for Approval of the Merger of GPU, Inc. and FirstEnergy Corp.*, 2001 Pa. PUC LEXIS 23 (2001) ("GPU Order"); *ARIPPA v. Pa. P.U.C.*, 792 A.2d 636 (2002) ("*ARIPPA Decision*"). Both decisions, however, recognize that environmental compliance issues are properly addressed to the appropriate environmental agency, **and not the Commission**. In the *GPU Order*, the Commission considered environmental concerns raised by Citizen Power, Clean Air Council and Penn Future, including air quality impacts and the possibility for protracted litigation with the United States Environmental Protection Agency ("EPA"). *GPU Order*, *101-*102. The Administrative Law Judge had recommended rejection of proposed merger conditions related to the EPA suit, finding the financial risk to be "speculative." *Id.* at *102. The Commission ultimately declined to adopt the environmental merger conditions, stating "[t]he federal EPA and Pennsylvania's Department of Environmental Protection are the agencies that are vested with the authority to establish emission regulations and to police their enforcement. Therefore, it would be inappropriate for the Commission to attempt to perform those functions." *Id.* at *103-*104.

In the *ARIPPA Decision*, the Commonwealth Court found that the Commission did not err in approving the merger without considering the environmental factors presented. *ARIPPA Decision*, p. 657. It reasoned that "any issues regarding emission regulations" were for EPA and DEP to determine, and, "[e]very Commission case should not be used to decide . . . a case within

a case.” *Id.* This reasoning has been applied in other merger proceedings before the Commission. See *Joint Application of Pennsylvania-American Water Company and Thames Water Aqua Holdings GmbH for all approvals required under the Public Utility Code in connection with a change in control of Pennsylvania-American Water Company*, 2002 Pa. PUC LEXIS 32, *47-*52 (Initial Decision) (Environmental protection, including protection of water resources, is within the jurisdiction of the DEP, not the Commission and any Commission duties under the Environmental Rights Amendment relate to regulated public utility companies only); 221 P.U.R. 4th 487, 2002 Pa. PUC LEXIS 31, *31-*37 (2002) (concurring with the ALJ that the Commission cannot impose environmental conditions beyond its jurisdiction and that entities like the DEP have jurisdiction to prevent or punish environmental harms).

Further, as the DEP acknowledges, the Commonwealth Court has found that the Commission does not have jurisdiction regarding environmental compliance matters in other types of proceedings as well. Motion, p. 5 (*citing Country Place Waste Treatment Company, Inc. v. Pa. P.U.C.*, 654 A.2d 72 (Pa. Commw. 1995) and *Rovin, D.D.S. v. Pa. P.U.C.*, 502 A.2d 785 (Pa. Commw. 1986)). In *Country Place*, the Commonwealth Court considered a formal complaint filed with the Commission alleging that offensive odors emanated from Country’s sewage treatment plant. The Court reviewed the Commission’s grant of authority regarding the “service” and “facilities” of public utilities and concluded that the grant did not include the regulation of odors produced by a public utility. *Id.* at 75-76. It also noted that the legislature had placed jurisdiction of the matter at issue with the DEP and not the Commission. *Id.* at 76. DEP argues that this case is “distinguishable from the instant case,” because it involved claims “that would have amounted to collateral attacks” on the DEP’s decisions. But there was no discussion by the Court in *Country Place* of any existing DEP determination for this treatment

plant, let alone the possibility that Commission action would disturb an existing determination. *Cf. Rovin* (affirming dismissal without reference to any other DEP decision). Notably, in these cases, a private party was seeking to introduce environmental issues into a Commission proceeding. In this case, the state agency tasked with the enforcement of state environmental laws is seeking to compel discovery of environmental matters through the administrative process of another state agency. Surely if private litigants, with no special environmental investigative powers or administrative authority, have been prevented from expanding the scope of Commission proceedings to include environmental compliance, then the DEP should be similarly limited.

Finally, the DEP cites two merger settlements approved by the Commission where “environmental benefits” were purportedly considered in determining that the mergers were in the public interest. *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 Creation of a Holding Company and (2) the Merger of the Newly Formed Holding Company and Unicom Corporation*, 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 Corp.*, Docket No. A-110550F0160 (2006) (“*PECO-PSEG Merger*”). To the extent that the terms of either settlement included environmental benefits, such settlements – which the Commission has recognized embody compromises by settling parties that may not have otherwise been attained through litigation – do not provide a basis for expanding Commission jurisdiction. Indeed, in the *PECO-PSEG Merger* settlement to which DEP was a party, DEP expressly agreed not to cite the

settlement as controlling precedent in any other proceeding. *See* Initial Decision, *PECO-PSEG Merger*, App. A. ¶ 61 (November 22, 2005).¹

III. RESPONSE TO DEP'S CONTENTIONS REGARDING SET I INTERROGATORIES 12-16

Interrogatories 12-16 seek information about nuclear power stations subject to the Appalachian States Low-Level Radioactive Waste Compact, any plans for managing low-level radioactive waste that is generated at such stations, and the schedules and funding for nuclear decontamination and decommissioning associated with that waste. To defend these requests, DEP incorporates its arguments concerning the broad scope of discovery and consideration of public interest factors, which the Companies have addressed in Section II. It also states that nuclear issues raised can involve significant expenses and are therefore relevant to the merger proceeding.

Neither West Penn nor any of the Pennsylvania regulated utilities of FirstEnergy own any operating nuclear generation that is generating any nuclear waste, and as the Companies stated in their Objections, the Compact and the laws governing radioactive waste are not within the jurisdiction of the Commission or relevant to the approvals sought in this proceeding. The Commission has long recognized that it lacks jurisdiction in the area of nuclear operations and safety. *See, e.g., In re: Petition of Metropolitan Edison Company for an Order Authorizing Use of Saxton Nuclear Decommissioning Trust Funds*, 65 Pa. P.U.C. 190, 197 (1987) (explaining that “[t]he federal government has occupied the field of nuclear safety via the Atomic Energy Act, thus preempting state regulation of the same subject matter”). Significantly, in the *PECO-PSEG*

¹ DEP suggests that its interrogatories are not specifically limited to electric generation units. *See* Motion, p. 6. However, DEP's interrogatories repeatedly refer to “units” and “facilities” without any such clear limitation. In any event, restricting DEP's interrogatories only to distribution and transmission equipment does not expand the Commission's jurisdiction to include environmental compliance issues associated with those utility assets.

Merger proceeding, a petition to intervene was filed by an individual seeking to address issues concerning the operation and safety of nuclear generation facilities, and the presiding Administrative Law Judge ruled that such issues were “either outside the scope of this proceeding or not within the Commission’s jurisdiction.” *PECO-PSEG Merger*, Recommended Decision (April 25, 2005), pp. 8-9.

DEP’s suggestion that future unspecified costs of environmental compliance could reduce the benefits of the merger to customers and therefore justifies its discovery is similarly misplaced. The proposed merger does not change the environmental obligations of the Companies, and the general possibility of future environmental expenses provides no basis for DEP’s wide-ranging discovery.

IV. RESPONSE TO DEP’S CONTENTIONS REGARDING SET I INTERROGATORIES 46-51

Interrogatories 46-49 seek information about existing or planned analysis of an undefined “price suppression” impact of new generation and/or new renewable generation entering the electricity market, while Interrogatories 50-51 request that the Companies’ conduct additional price suppression analysis regarding impacts to the Companies’ distribution revenues. To defend these requests, DEP incorporates its arguments concerning the broad scope of discovery and consideration of public interest factors, which the Companies have responded to in Section II. It also argues that these requests are relevant because they are “directly related to the rates paid by Pennsylvania customers in the Joint Applicants’ distribution service territories.” DEP Motion, p. 10. Finally, it argues that it is not capable of performing its own price suppression analysis because it lacks “the necessary company-specific data.” *Id.* pp. 10-11.

As the Companies stated in their Objections, because such generation facilities are not regulated by the Commission (and the Companies’ Pennsylvania-regulated utilities do not own

any such facilities), such information is irrelevant to the approvals sought in this proceeding and outside the Commission's jurisdiction. In addition, the Companies' disagree that DEP is unable to perform its own price suppression analyses for lack of Company-specific data. The tariffs for the Companies' regulated utilities are publicly available and can provide a starting point for studying distribution revenues. Any price suppression analysis would involve a host of assumptions about generation development and economic conditions. DEP has provided no evidence of its inability to make those assumptions.

V. CONCLUSION

WHEREFORE, for the reasons set forth above, the Commission should deny the Department of Environmental Protection's Motion and grant the Companies' Objections to the Department of Environmental Protection's Set I Interrogatories.

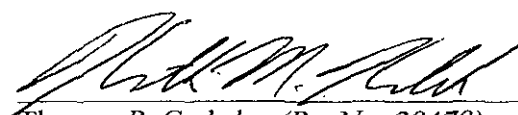
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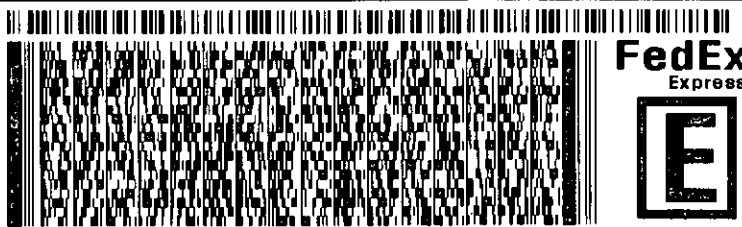
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