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June 25, 2010

VIA ELECTRONIC MAIL

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Dear Judges Weismandel and Long:

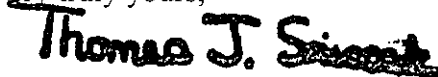
RE: Joint Application of West Penn Power Company d/b/a Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy Corp. for a Certificate of Public Convenience under Section 1102(a)(3) of the Public Utility Code approving a change of control of West Penn Power Company and Trans-Allegheny Interstate Line Company; Docket Nos. A-2010-2176520 and A-2010-2176732;
MEMORANDUM IN SUPPORT OF PROTEST OF THE PENNSYLVANIA STATE UNIVERSITY

Dear Judges Weismandel and Long:

Enclosed please find the requested Memorandum in Support of the Protest filed by The Pennsylvania State University in the above-captioned matter. A copy of this document has been served on each party to the proceeding, in accordance with the attached Certificate of Service.

If you have any questions with regard to this filing, please direct them to me. Thank you for your attention to this matter.

Very truly yours,



Thomas J. Sniscak
Counsel for
The Pennsylvania State University

TJS/bes

Enclosures

cc: Rosemary Chiavetta, PUC Secretary (via hand delivery)
Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Administrative Law Judge Wayne L. Weismandel
Administrative Law Judge Mary D. Long

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

**MEMORANDUM OF THE PENNSYLVANIA STATE UNIVERSITY
IN SUPPORT OF ITS PROTEST**

NOW COMES The Pennsylvania State University ("PSU"), by and through its attorneys, Hawke McKeon & Sniscak LLP, and files this Memorandum in Support of its Protest in this proceeding.

I. BACKGROUND¹

On February 10, 2010, FirstEnergy Corp. ("FirstEnergy"), Element Merger Sub, Inc, ("Merger Sub"), a direct wholly-owned subsidiary of FirstEnergy, and Allegheny Energy, Inc. ("Allegheny Energy") entered into an agreement whereby Merger Sub, will be merged with and into Allegheny Energy with Allegheny Energy surviving the Merger as a wholly-owned subsidiary of FirstEnergy.

On or about May 14, 2010, West Penn Power Company ("West Penn"), d/b/a Allegheny Power ("Allegheny"), Trans-Allegheny Interstate Line Company ("TrAILCo") and FirstEnergy

¹ While much of the background has been stated in PSU's Protest and Petition to Intervene filed with the Pennsylvania Public Utility Commission ("Commission") on June 14, 2010, it is repeated here for convenience.

(collectively the "Joint Applicants"), filed the above-captioned Application ("Application") with the Pennsylvania Public Utility Commission ("Commission") seeking the Commission's approval under Chapters 11 and 28 of the Public Utility Code for a change of control of West Penn and TrAILCo to be effected by the merger of Allegheny with Merger Sub, a wholly-owned subsidiary of FirstEnergy ("Merger"). In addition, the Joint Applicants request that the Commission approve, under Chapter 21 of the Public Utility Code, certain revisions to affiliated interest arrangements. Notice of the Joint Applicants' Application was published on May 29, 2010, in the *Pennsylvania Bulletin*. A deadline of June 14, 2010, was established by the Commission for the filing of Protests and Petitions to Intervene. Concurrently with the filing of its Protest on June 14, 2010, PSU also filed a Petition to Intervene.

PSU is a major generation, transmission and distribution service customer of Allegheny at its University Park campus receiving service through Allegheny PA Retail Tariff 37. PSU is the only customer taking service under Tariff 37. In 2009, PSU received 280,625,102 kWh of electric energy from Allegheny at the University Park campus and paid Allegheny Energy \$22,451,129 for generation, transmission and distribution service. PSU also receives generation, transmission, and distribution service from Allegheny under rate schedules other than PA Retail 37 for approximately 100 additional accounts at the University Park campus and campuses at New Kingston, Fayette and Mont Alto. In 2009, PSU received 36,572,334 kWh of electric energy from Allegheny and paid Allegheny \$2,612,943 for generation, transmission and distribution service through these other accounts.

In addition to its status as a large customer of Allegheny taking service under different rate schedules, PSU set forth further reasons establishing its interest in this proceeding, the grounds of its Protest, its standing and position on various issues.² In short, PSU asserted that the Merger

² Protest, ¶¶8-10.

may hinder its ability to participate in the competitive marketplace, the Merger Application does not demonstrate that there will be affirmative public benefits that are sufficiently substantial as required by law, and the Applicants did not give the Commission enough information to determine whether the estimation of Merger savings to regulated businesses is reasonable (as well as whether the methodology used to allocate Merger savings among regulated and non-regulated businesses was correct).

The Protest requested, among other things, that the Commission reject the Application, unless it is found that the Merger is in the public interest, provides substantial affirmative benefits to West Penn's customers, including PSU, does not present countervailing detriments, does not affect retail competition, and otherwise complies with the Public Utility Code. In its Petition to Intervene, PSU set forth facts showing its interest, the grounds for participation, and incorporated the Protest, which contains PSU's position on the issues raised.

At the Prehearing Conference held on June 22, 2010, Administrative Law Judge ("ALJ") Wayne L. Weismandel granted PSU's unopposed Petition to Intervene. In view of this grant of the Petition to Intervene, ALJ Weismandel *sua sponte* questioned PSU's counsel whether he planned to withdraw PSU's Protest. PSU's counsel declined to withdraw the Protest, asserting that such a withdrawal could have an adverse impact on PSU both in further proceedings before the Commission, and possibly in appellate proceedings should PSU elect to file a Petition for Review (In the Nature of and Appeal) to the Commonwealth Court of Pennsylvania from the Commission's Final Order in this proceeding. In response to PSU's counsel's refusal to withdraw the Protest, ALJ Weismandel directed that a Memorandum be prepared and submitted within three (3) days, or by June 25, 2010.

This Memorandum responds to ALJ Weismandel's request.

II. ARGUMENT

A. The Commission's Regulations Are Clear That Protests And Petitions To Intervene Are Not Mutually Exclusive Procedural Documents That Allow For Persons³ To Participate In Commission Proceedings.

An "intervenor" is a person who has had a petition to intervene in a "proceeding" granted by a presiding officer or the Commission.⁴ A "Protest" is a specific "pleading,"⁵ in that it is an objection to the approval of "an application;" that is, a person filing a protest is "objecting to the approval of an application filed with the Commission. . . ."⁶ The provisions of Section 5.52 of the Code provide for the content of a "protest to an application," and Section 5.53 specifies the time of filing. Further, the Commission's regulation that sets forth the "Pleadings Allowed" in Commission proceedings expressly provides for an "Application and Protest."⁷ Unlike participation in a proceeding as an intervenor, which requires an order of the presiding officer or the Commission, the filing of a protest requires no further action by the Commission.

The regulations do not prohibit a party from filing both a protest and a petition to intervene to preserve its status in this type of proceeding. Indeed, the Commission could have, in its regulations required a party to file one or the other, but it did not. It is respectfully submitted that such regulations cannot be amended or rights denied by decision by Your Honors.

In addition to no prohibition on filing both in the regulations, there are clear reasons that support such lack of prohibition as demonstrated by PSU's case here. While a protest addresses specific points contesting or challenging an application, a petition to intervene (as some intervenors did here) may not challenge the application but rather was submitted to protect interests the

³ "Person" is defined broadly to include individuals, corporations, partnerships, associations, etc., under the provisions of 52 Pa. Code § 1.8, Person.

⁴ 52 Pa. Code § 5.71(a)(2). See generally, 52 Pa. Code §§ 5.71-5.76 (relating to intervention).

⁵ 52 Pa. Code § 1.8, Pleading.

⁶ 52 Pa. Code § 5.51(a).

⁷ 52 Pa. Code § 5.1(a)(1).

intervenor has, should other parties make or accept⁸ proposals or conditions that are contrary to the intervenor's interests. PSU is in both of these positions as a Protestant and an Intervenor. It is challenging the application as a protestant and also as an intervenor it has substantial interests to protect when or if other parties take positions or propose conditions that may be contrary to PSU's interests.

Recently, an ALJ granted a petition to intervene by a party who had also filed a protest in an application proceeding. In *Application of Laser Marcellus Gathering Company, LLC for Approval to Begin to Offer, Render, Furnish, or Supply Natural Gas Gathering and Transporting or Conveying Service by Pipeline to the Public in Certain Townships of Susquehanna County, Pennsylvania*, Docket No. A-2010-2153371, ETC NE's Petition to Intervene was granted by Judge Susan D. Colwell by post-prehearing Order entered April 29, 2010. ETC NE had also filed a Protest.

In summary, a Protest and a Petition to Intervene clearly are available in the Commission's regulations, and there is no provision that prohibits the filing of both documents in an Application proceeding. In fact, the regulations expressly permit and suggest that a Protest may be filed in an Application proceeding where a party such as PSU opposes the application absent the points in its protest being satisfied.⁹

B. There are Significant Substantive Differences Attendant to a Protest that Could Have an Adverse Impact on PSU if the Protest is Not Allowed to Stand.¹⁰

At the threshold, it is noted that the Commission has been keenly aware of the affect of filing Petitions to Intervene for at least 25 years. For example, in promulgating new Comprehensive

⁸ For instance, an intervenor may not have a problem with the application but may have or develop one should the utility applicant(s) agree to a condition proposed by another party that is contrary to the intervenor's interest.

⁹ 52 Pa. Code § 5.1(a)(1) and (a)(4).

¹⁰ As noted at p. 4 previously in this Memorandum, a Protest is a distinct pleading that does not need to be granted, whereas 52 Pa. Code § 5.71(a)(2) provides that participation in a proceeding as an intervenor may only be had by order of the presiding officer or the Commission upon grant of the Petition.

Rules of Practice and Procedure in 1984,¹¹ the Commission transferred the definition of an "Intervenor" to Section 5.75(b) dealing with the effect of filing petitions to intervene.¹² In particular, 52 Pa. Code § 5.75(b) in 1984 provided in pertinent part:

(b) *Action on petitions.* ... [T]he Commission or presiding officer will grant or deny the petition in whole or in part or may, if found to be appropriate, authorize limited participation. *Admission as an intervenor will not be construed as recognition by the Commission that the intervenor has a direct interest in the proceeding or might be aggrieved by an order of the Commission in the proceeding.*

Pa. Bulletin, Vol. 14, No. 41, October 13, 1984 at 3833 (emphasis added).

In 2006, 52 Pa. Code § 5.75 was amended again in pertinent part to provide as follows:

(b) *Action on petition.* ... [T]he Commission or presiding officer will grant or deny the petition in whole or in part or may, if found to be appropriate, authorize limited participation.

(c) *Rights upon grant of petition.* Admission as an intervenor will not be construed as recognition by the Commission that the intervenor has a direct interest in the proceeding or might be aggrieved by an order of the Commission in the proceeding. Intervenor are granted no rights which survive discontinuance of a case.

Pa. Bulletin, Vol. 36, No. 17, April 29, 2006, at 2140. These 2006 amendments to 52 Pa. Code § 5.75 remain unchanged today. Further, the rules that admission as an intervenor is not a recognition by the Commission that the intervenor has a direct interest in the proceeding or might be aggrieved, and intervenors are granted no rights which survive discontinuance of a case, is cited at 38 Standard Pennsylvania Practice 2d § 166:1440.

The Commission has applied this intervention rule regarding the rights of an intervenor in its cases. For example, where the Commission found that an intervenor had a limited interest in a proceeding, the Commission also found that the grant of permission to intervene does not automatically confer standing on the intervenor, relying upon 52 Pa. Code § 5.75(b) (now

¹¹ *Pa. Bulletin*, Vol. No. 14, No. 41, October 13, 1984, p. 3833.

¹² *Id.*

subsection (c)).¹³ In contrast, a Protestant does have standing.¹⁴ The Commission also has found that a marketer intervenor, which was desirous of pursuing asserted issues of affiliate preference and subsidization in a gas cost rate proceeding,¹⁵ was limited as its interest was not equivalent to a party and it could not raise such issues.¹⁶ In so finding, the Commission relied upon 52 Pa. Code § 5.75(b) (now subsection (c)).

There is another significant difference between that of a Protestant and that of an Intervenor; namely, the Commission's regulation regarding intervention provides as follows:

Section 5.76. Limitation of participation in hearings.

(a) Where there are two or more intervenors having substantially like interests and position, the Commission or presiding officer may, in order to expedite the hearing, arrange appropriate limitations on the number of attorneys who will be permitted to cross-examine and make and argue motions and objections on behalf of the intervenors.

There is no similar limitation regarding the rights of Protestants, and PSU desires to have the ability to engage in its own cross-examination and to argue its own motions.

Thus, the Commission, for many years, has recognized that the rights of intervenors are (or may be) limited with regard to their direct interest in a proceeding and their aggrievement by a final Commission order, both of which subjects may affect an intervenor's right to appeal. On the other hand, a Protestant clearly has full standing in Commission proceedings. Further, an intervenor may be limited by not having its attorney being permitted to cross-examine a witness, and argue objections, motions, and objections. If other parties are content to intervene only, that is their prerogative and certainly is supported by their positions or objectives in intervening. That does not,

¹³ *Application of PECO Energy*, 2000 WL at 33963146 (2000).

¹⁴ 52 Pa. Code § 5.52(a)(2). For a full discussion of "standing," see *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (1975) (to have standing to appeal, a person must have a direct interest in the matter, which interest must be immediate, pecuniary, and substantial).

¹⁵ 66 Pa.C.S. § 1307(f).

¹⁶ *Pa. Pub. Util. Comm'n v. PG Energy, Inc.*, 1998 WL 835592 (1998).

however, provide any support for re-writing the regulations to prohibit filing a protest as it is not mutually exclusive under the regulations with the filing of a petition to intervene.

IV. Conclusion.

The allowance of the Protest to remain creates no burden on any party to this proceeding in terms of additional work or duplication of effort. PSU will not be two parties due to the petition and protest; it will, of course, be one party. There is no harm to be remedied. Moreover, there is no requirement that the presiding officer rule on a protest. There is no question that PSU's Protest meets the requirements for a valid protest. In sum, PSU seeks only to have full party status with all rights attendant to its Protest and its Petition to Intervene.

Respectfully submitted,



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*Counsel for
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Dated: June 25, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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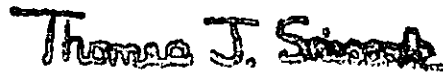
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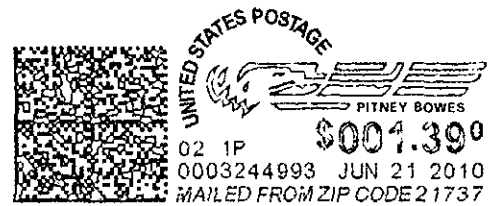
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