**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

Public Meeting held February 24, 2011

Commissioners Present:

 James H. Cawley, Chairman, Partial Dissent, Dissenting Statement

 Tyrone J. Christy, Vice Chairman, Dissenting Statement

 John F. Coleman, Jr., Statement

 Wayne E. Gardner

 Robert F. Powelson

Joint Application of West Penn Power Company A-2010-2176520

d/b/a Allegheny Power, Trans-Allegheny Interstate A-2010-2176732

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

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**OPINION AND ORDER**

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**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Initial Decision (I.D.), issued on December 20, 2010, of Administrative Law Judges (ALJs) Wayne L. Weismandel and Mary D. Long, and the Exceptions and Reply Exceptions filed thereto, in the above-captioned case.

On January 10, 2011, the following Parties filed Exceptions to the Initial Decision: Citizen Power, Inc. (Citizen Power); Retail Energy Supply Association (RESA); Direct Energy Services, LLC (Direct Energy) (both a “public” version and a “highly confidential” version); and the Office of Small Business Advocate (OSBA) (both propriety and non-proprietary versions). By Letters dated January 10, 2011, the following Parties notified the Commission that they would not be filing Exceptions to the Initial Decision: Pennsylvania Mountains Healthcare Alliance (PMHA); York County Solid Waste and Refuse Authority (YCSWA); the Office of Consumer Advocate (OCA); and the Clean Air Council (CAC).

On January 20, 2011, the following Parties filed Reply Exceptions: the OCA; West Penn Power Company d/b/a Allegheny Power (West Penn), Trans-Allegheny Interstate Line Company (TrAILCo) and FirstEnergy Corp. (FirstEnergy) (collectively, Joint Applicants); the OSBA; and Direct Energy. By Letters dated January 20, 2011, the following Parties notified the Commission that they would not be filing Reply Exceptions: ARIPPA; Citizen Power; PMHA; Pennsylvania Rural Electric Association (PREA); and YCSWA.

# History of the Proceedings[[1]](#footnote-1)

On May 14, 2010, the Joint Applicants filed with the Commission a Joint Application (Joint Application) to obtain approval for a change of control of West Penn and TrAILCo under Chapters 11 and 28 of the Public Utility Code (Code), 66 Pa. C.S.
§§ 101 *et seq.*, to be effected by the merger of Allegheny Energy, Inc. (Allegheny) with Element Merger Sub., Inc. (Merger Sub), a wholly-owned subsidiary of FirstEnergy. The Joint Application also requested that the Commission approve, under Chapter 21 of the Code, certain revisions to affiliated interest agreements designed to facilitate the sharing of services between Allegheny and FirstEnergy. The Joint Application included written direct testimony marked for identification purposes as Joint Applicants’ Statement
Nos. 1, 2, 3, 4 and 5.

By Notice dated May 18, 2010, an Initial Prehearing Conference was scheduled for June 22, 2010, and the case was assigned to ALJs Weismandel and Long. By letter from the Commission’s Secretary dated May 19, 2010, the Joint Applicants were instructed to publish a notice once in a newspaper of general circulation in the area involved.

On May 24, 2010, counsel filed an entry of their appearance on behalf of the Commission’s Office of Trial Staff (OTS). Also on May 24, 2010, the ALJs issued a Prehearing Conference Order that, among other things, required the filing and service of Initial Prehearing Conference memoranda not later than June 15, 2010.

On May 29, 2010, notice of the Joint Application’s filing was published in the *Pennsylvania Bulletin*. On June 1, 2010, the Joint Applicants filed a proof of publication that notice of the Joint Application’s filing had been published in the *Pittsburgh Post-Gazette* on May 28, 2010.

On June 2, 2010, the International Brotherhood of Electrical Workers (IBEW) filed a Petition to Intervene, as did YCSWA on June 9, 2010. On June 11, 2010, Duquesne Light Company (Duquesne), PREA, and the West Penn Power Sustainable Energy Fund (WPPSEF) each filed their respective Petition to Intervene.

By Secretarial Letter dated June 3, 2010 (June 2010 Secretarial Letter), the Commission directed all Parties to address twelve specific questions. The twelve questions and a summary of the corresponding information developed in this proceeding were attached to the Initial Decision as the Appendix.

On June 14, 2010, the OCA filed its Protest and Public Statement; the OSBA filed its Notice of Intervention and Protest and its Public Statement; IBEW filed its Prehearing Memorandum; YCSWA filed its Prehearing Memorandum; The Pennsylvania State University (PSU) filed both a Protest and a Petition to Intervene; Citizen Power filed its Petition to Intervene; ARIPPA filed its Petition to Intervene; the West Penn Power Industrial Intervenors (WPPII) filed its Petition to Intervene; the Met-Ed Industrial Users Group (MEIUG) and the Penelec Industrial Customer Alliance (PICA) (collectively, MEIUG/PICA) filed their Joint Petition to Intervene; the Commonwealth of Pennsylvania, Department of Environmental Protection (DEP) filed its Petition to Intervene; Direct Energy filed its Petition to Intervene and its Prehearing Memorandum; RESA filed its Petition to Intervene and its Prehearing Memorandum; PMHA filed its Petition to Intervene; the Utility Workers Union of America, AFL-CIO (UWUA) and UWUA System Local No. 102 (Local 102) (collectively, UWUA Intervenors) filed their Petition to Intervene; CAC filed a Protest, a Petition to Intervene and its Prehearing Memorandum; Constellation NewEnergy, Inc. (CNE) and Constellation Energy Commodities Group, Inc. (CCG) (collectively, Constellation) filed their Petition to Intervene and their Prehearing Memorandum; and Citizens for Pennsylvania’s Future (PennFuture) filed its Petition to Intervene.

On June 15, 2010, the Joint Applicants, the OTS, the OCA, the OSBA, Duquesne, PREA, WPPSEF, PSU, Citizen Power, ARIPPA, WPPII, MEIUG/PICA, DEP, PMHA, UWUA Intervenors, and PennFuture each filed their respective Prehearing Memorandum.

The Initial Prehearing Conference was held as scheduled on June 22, 2010. Representatives on behalf of the Joint Applicants, the OTS, the OCA, the OSBA, IBEW, YCSWA, Duquesne, PREA, WPPSEF, PSU, Citizen Power, ARIPPA, WPPII, MEIUG/PICA, DEP, Direct Energy, RESA, PMHA, UWUA Intervenors, CAC, Constellation, and PennFuture participated. Various procedural matters were agreed to and a litigation schedule was developed. Parties who had filed both a Petition to Intervene and a Protest were directed to provide written support for their position.

By Order Granting Petitions to Intervene dated June 23, 2010, the ALJs granted intervention to the following Parties: IBEW, YCSWA, Duquesne, PREA, WPPSEF, PSU, Citizen Power, ARIPPA, WPPII, MEIUG/PICA, DEP, Direct Energy, RESA, PMHA, UWUA Intervenors, CAC, Constellation, and PennFuture, all of whose petitions to intervene were unopposed. By Scheduling and Briefing Order dated June 23, 2010, the ALJs established a litigation schedule and a briefing schedule for the case.

On June 23, 2010, CAC withdrew its filed Protest. By Hearing Notice dated June 24, 2010, an Initial and further Hearing was scheduled for October 12, 13, 14, and 15, 2010.

On June 25, 2010, PSU filed its Memorandum In Support Of Protest. On June 29, 2010, the ALJs issued a Protective Order in the form that had been agreed upon by the Parties. They also issued an Order dated June 29, 2010, holding that a Party cannot maintain two roles in the same cause of action and, consequently, dismissing PSU’s Petition to Intervene, but leaving its Protest intact.

On August 3, 2010, the Public Input Hearing, in two sessions, was held in Greensburg. Eleven individuals presented sworn testimony during the session beginning at 1:00 p.m. and twelve individuals presented sworn testimony during the session beginning at 6:00 p.m. No exhibits were received into evidence.

On August 16, 2010, counsel entered his appearance on behalf of PMHA. Under cover letter dated August 16, 2010, PennFuture served its written direct testimony. Under cover letters dated August 17, 2010, the OTS, the OCA, the OSBA, WPPSEF, PSU, DEP, Direct Energy, RESA, PMHA, CAC, and Constellation each served its respective written direct testimony. Under cover letters dated August 17, 2010, YCSWA, PREA, Citizen Power, and ARIPPA each advised that they would not be filing written direct testimony.

Also on August 17, 2010, Duquesne filed its Petition for Leave to Withdraw Its Petition to Intervene, which the ALJs subsequently granted. Under cover letters dated August 19, 2010, both WPPII and MEIUG/PICA each advised that they would not be serving written direct testimony.

By Witness Identification and Scheduling Order dated September 27, 2010, the ALJs ordered that the Parties submit a final list of witnesses which it proposed to present at the Initial and further Hearing.

Under cover letter dated September 30, 2010, the OTS served its written Surrebuttal testimony. Under cover letters dated October 1, 2010, the Joint Applicants, the OCA, the OSBA, WPPSEF, PSU, DEP, Direct Energy, RESA, CAC, Constellation, and PennFuture each served their respective written Surrebuttal testimony. The following Parties advised that they would not be serving written Surrebuttal testimony: YCSWA; PREA; ARIPPA; WPPII; MEIUG/PICA; PMHA; and Citizen Power.

By letters dated October 5, 2010, the OCA, WPPSEF, Direct Energy, RESA, and PennFuture each identified the respective witnesses they would be presenting at the Initial and further Hearing. By letters dated October 5, 2010, YCSWA, PREA, and ARIPPA each advised that it would not be presenting any witnesses at the Initial and further Hearing.

By letters dated October 6, 2010, the Joint Applicants, the OTS, the OSBA, PSU, DEP, CAC, and Constellation each identified the respective witnesses it would be presenting at the Initial and further Hearing. By letters dated October 6, 2010, Citizen Power, WPPII, and MEIUG/PICA each advised that it would not be presenting any witnesses at the Initial and further Hearing.

The Initial and further Hearing convened as scheduled at 1:00 p.m. on October 12, 2010. Representatives of the Joint Applicants, the OTS, the OCA, the OSBA, YCSWA, PREA, WPPSEF, Citizen Power, ARIPPA, WPPII, MEIUG/PICA, DEP, Direct Energy, RESA, PMHA, CAC, Constellation, and PennFuture all participated during the Initial and further Hearing. IBEW, PSU, and the UWUA Intervenors did not participate in the Initial and further Hearing. Outstanding motions that had not hitherto been ruled upon were decided at the Initial and further Hearing. A transcript of the proceeding containing 900 pages (numbered 171 through 1070) was produced.

On October 25, 2010, the Joint Applicants, the OTS, the OCA, IBEW, YCSWA, PREA, WPPSEF, PSU, ARIPPA, WPPII, MEIUG/PICA, DEP, PMHA, the UWUA Intervenors, CAC, Constellation, and PennFuture (collectively, Joint Petitioners or Settling Parties) filed their Joint Petition For Partial Settlement (Joint Petition or Settlement). The only Parties not joining in the Joint Petition were the OSBA, Citizen Power, Direct Energy, and RESA. The Joint Petition is a comprehensive settlement among the Joint Petitioners and resolves all issues pertaining to the Joint Application in a manner satisfactory to each of the Joint Petitioners.

On October 26, 2010, IBEW filed its Statement in Support of the Joint Petition. On October 28, 2010, the OCA, YCSWA, PREA, WPPSEF, ARIPPA, WPPII, MEIUG/PICA, DEP, PMHA, CAC, and Constellation each filed their respective Statement in Support of the Joint Petition. On October 29, 2010, the Joint Applicants, the OTS and PSU each filed their respective Statement in Support of the Joint Petition.

By letters dated November 2, 2010, YCSWA, PMHA, and CAC each advised that they would not be filing a Main Brief, but reserved their respective right to file a Reply Brief.

On November 3, 2010, the Joint Applicants, the OCA, the OSBA, Citizen Power, Direct Energy, and RESA each filed a Main Brief. Also on November 3, 2010, the Energy Association of Pennsylvania (EAP) filed an *Amicus Curiae* Brief in accordance with the provisions of 52 Pa. Code § 5.502(e).

By letters dated November 3, 2010, the OTS, PREA, WPPSEF, PSU, ARIPPA, WPPII, MEIUG/PICA, and Constellation each advised that they would not be filing a Main Brief. PREA, WPPSEF, PSU, ARIPPA, and Constellation each reserved their respective right to file a Reply Brief.

On November 15, 2010, the Joint Applicants, the OCA, the OSBA, Citizen Power, Direct Energy, and RESA each filed a Reply Brief.

By letters dated November 15, 2010, YCSWA, PREA, WPPSEF, PSU, ARIPPA, WPPII, MEIUG/PICA, PMHA, and CAC each advised that they would not be filing a Reply Brief. Also on November 15, 2010, DEP and PennFuture advised by e-mail that they would not be filing a Reply Brief. The record in this case closed at 4:00 p.m. on November 15, 2010.

On or about November 22, 2010, Eric Joseph Epstein (Epstein) filed what he styled a “Letter of Information.” The ALJs noted that this post-close of the record filing, by a person who is not a party to the case, is improper. *See* 52 Pa. Code
§ 5.431(b). Consequently, the ALJs noted that this filing is not a part of the official record in this case, and that they did not consider it in reaching their decision. The ALJs included an ordering paragraph striking the Epstein filing so that there would be no question that it is not a part of the record herein.

In their Initial Decision, issued on December 20, 2010, the ALJs recommended, *inter alia*, that all of the terms and conditions of the Joint Petition filed in this case be adopted and that the Joint Application to obtain approval for a change of control of West Penn and TrAILCo, to be effected by the merger, as supplemented by the Joint Petition for Partial Settlement, be approved. I.D. at 80-81. Exceptions and Reply Exceptions to the Initial Decision were filed as noted, *supra*.

On February 24, 2011, State Senator Kim Ward filed correspondence in this matter. This document was not timely filed as an Exception or Reply Exception and was not considered in reaching our decision.

# Background

##  The Transaction

FirstEnergy, Allegheny and Merger Sub are parties to an Agreement and Plan of Merger (the Merger Agreement). FirstEnergy owns, directly or indirectly, all of the outstanding common stock of seven electric utility operating subsidiaries in four states: Metropolitan Edison Company (Met-Ed), Pennsylvania Electric Company (Penelec), and Pennsylvania Power Company (Penn Power), in Pennsylvania and, in the case of Penelec, The Waverly Electric Light and Power Company, in New York; Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company, in Ohio; and Jersey Central Power & Light Company (JCP&L), in New Jersey (collectively, the FirstEnergy Utilities). FirstEnergy subsidiaries and affiliates are involved in the generation and transmission of electricity, energy management and other energy-related services. Through its subsidiaries, FirstEnergy owns electric generation totaling more than 14,000 MW of capacity. I.D. at 32; Jt. App. Ex. 1, at 2-3; Exh. E to Jt. App. Ex. 1.

Allegheny is a public utility holding company and has three direct public utility subsidiaries that conduct business as Allegheny Power: West Penn, in Pennsylvania; Monongahela Power Company (“Mon Power”), in West Virginia; and The Potomac Edison Company (“Potomac Edison”), in Maryland, West Virginia, and Virginia (collectively, the “Allegheny Power Utilities”). The Allegheny Power Utilities serve 1.6 million customers in four states. In addition, TrAILCo is an indirect public utility subsidiary of Allegheny. I.D. at 32-33; Jt. App. Ex. 1, at 2-3.

Merger Sub is a wholly-owned subsidiary of FirstEnergy that was formed for the sole purpose of effecting the Merger. When the Merger is completed, Merger Sub will be subsumed, by operation of law, into Allegheny and cease to exist as a separate corporate entity. I.D. at 33.

Under the terms of the Merger Agreement, Allegheny will merge with Merger Sub and, as the surviving corporation, Allegheny will become a wholly-owned subsidiary of FirstEnergy. When the Merger is completed, each Allegheny shareholder will be entitled to receive 0.667 shares of FirstEnergy common stock for each share of Allegheny common stock that he or she holds. Each issued and outstanding share of FirstEnergy common stock will remain outstanding following the Merger, and each FirstEnergy shareholder will hold the same number of shares of FirstEnergy common stock that the shareholder held immediately prior to the Merger. Following the Merger, the existing shareholders of FirstEnergy will own approximately 73%, and the former shareholders of Allegheny will own approximately 27%, of the stock of the combined company. I.D. at 32-33.

FirstEnergy will remain the ultimate corporate parent of Met-Ed, Penelec and Penn Power (the FirstEnergy Pennsylvania Utilities) and all other FirstEnergy subsidiaries and will become the ultimate corporate parent of Allegheny and all of the Allegheny subsidiaries, including West Penn and TrAILCo. The Joint Applicants may elect to adopt an alternative corporate structure under which the Allegheny Power Utilities would be first tier subsidiaries of FirstEnergy. To avoid the time and expense of a second “change-in-control” filing to recognize what would simply amount to an internal reorganization (and no change in ultimate control), the Joint Applicants have requested that the Commission approve this alternative corporate structure as well. I.D. at 33; Exh. F-1 to Jt. App. Ex. 1; Jt. App. Ex. 1, at 4-5.

The combined company’s corporate headquarters will be in Akron, Ohio. The corporate headquarters of Allegheny, located in Greensburg, Pennsylvania, will become the regional headquarters of West Penn. Immediately following the Merger, FirstEnergy will increase its Board of Directors from eleven to thirteen members and will fill the two new positions by appointing two members of the Allegheny Board of Directors to the FirstEnergy Board of Directors. Mr. Anthony J. Alexander, the current Chief Executive Officer and President of FirstEnergy, will serve as Chief Executive Officer and President of FirstEnergy following the Merger. Mr. Paul J. Evanson, the current Chief Executive Officer of Allegheny, will become the Executive Vice Chairman of FirstEnergy and will report to Mr. Alexander. I.D. at 33-34.

After the Merger, Met-Ed, Penelec, Penn Power, West Penn and TrAILCo will continue to operate as Pennsylvania electric public utilities and will remain subject to the continuing jurisdiction of the Commission without any reduction of the Commission’s existing oversight or any diminishment in the Commission’s authority over these public utilities. Thus, the Merger will not adversely affect the day-to-day operations of these utilities. I.D. at 34.

##  Regulatory Approvals Sought

### Change in Control

The Joint Applicants request that the Commission issue certificates of public convenience evidencing its approval, under Section 1102(a) of the Code, 66 Pa. C.S. § 1102(a) as interpreted by the Commission’s Statement of Policy at 52 Pa. Code
§ 69.901, for a change in control of West Penn and TrAILCo. Additionally, pursuant to Section 2811(e) of the Code, 66 Pa. C.S. § 2811(e), the Joint Applicants request that the Commission find, as part of its approval granted under Section 1102, that the Merger will not result in anti-competitive or discriminatory conduct, including the unlawful exercise of market power, which will prevent retail electricity customers in the Commonwealth from obtaining the benefits of a properly functioning and workable competitive retail electricity market. I.D. at 34.

###  Affiliated Interest Agreements

The Joint Applicants also request that the Commission approve, under Chapter 21 of the Code, certain modifications in affiliated interest agreements to become effective upon consummation of the Merger. The proposed modifications add the Allegheny operating companies to existing affiliated interest agreements to which Met-Ed, Penelec and Penn Power are parties. I.D. at 34.

Allegheny and FirstEnergy have service company subsidiaries that provide a range of accounting, financial, legal and other services to their respective operating companies. At Allegheny, all employees are employed by Allegheny Energy Service Company (AESC) and are assigned to provide services to Allegheny and its affiliates, including the Allegheny Power Utilities. At FirstEnergy, certain employees are employed by the FirstEnergy Utilities while other employees who provide administrative and technical support services are employed by FirstEnergy Service Company (FESC). I.D. at 35; Jt. App. Ex. 1, at 9.

Met-Ed, Penelec and Penn Power are parties to a Service Agreement with FESC that was approved by the Commission’s Order entered February 4, 2003, at Docket No. G‑00020987. In addition, the three FirstEnergy Pennsylvania Utilities are parties to a Mutual Assistance Agreement, which allows them to share services among themselves and with other FirstEnergy Utilities. The FirstEnergy Pennsylvania Utilities are also parties to an Intercompany Income Tax Allocation Agreement, which established the terms under which the utilities participate in FirstEnergy’s filing of a consolidated federal income tax return. I.D. at 35; Jt. App. Ex. 1, at 9.

The merging companies have established transition teams to determine how AESC’s employees, the Allegheny Power Utilities and other Allegheny entities will be integrated into the FirstEnergy organizational model. Although this process is still ongoing, the Joint Applicants believe that substantial benefits can be derived by enabling FESC and the FirstEnergy Utilities to provide services to West Penn and TrAILCo and for West Penn and TrAILCo to share services with the FirstEnergy Utilities. The Joint Applicants, therefore, request that the Commission approve the following modifications to the FirstEnergy Service Agreement, Mutual Assistance Agreement, and Intercompany Income Tax Allocation Agreement to become effective upon the close of the Merger:

* + The addition of certain Allegheny operating companies, including West Penn and TrAILCo, each as a “Client Company”, to the FirstEnergy Service Agreement. Ex. G-1 to Jt. App. Ex. 1;
	+ The addition of certain Allegheny operating companies, including West Penn and TrAILCo as parties to the Mutual Assistance Agreement. Ex. G-2 to Jt. App. Ex. 1; and
	+ The addition of certain Allegheny operating companies, including West Penn and TrAILCo as parties to the Intercompany Income Tax Allocation Agreement. Ex. G-3 to Jt. App. Ex. 1.

The proposed modifications, which have not been opposed, will give the combined company the operational flexibility to share best practices and to make the most productive use of all available resources as soon as possible after the Merger. If any additional changes to the scope, manner, terms or conditions of the existing affiliated interest agreements are necessary or desired in the future, further Commission approvals will be sought under Section 2102 of the Code, 66 Pa. C.S. § 2102. I.D. at 35-36.

# Discussion

## Legal Standards

Initially, we are reminded that we are not required to consider expressly or at great length each and every contention raised by a party to our proceedings. *University of Pennsylvania, et al. v. Pa. PUC*, 485 A.2d 1217, 1222 (Pa. Cmwlth. 1984). Any exception or argument that is not specifically addressed herein shall be deemed to have been duly considered and denied without further discussion.

The ALJs made ninety Findings of Fact and reached twenty-six Conclusions of Law. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

Section 332(a) of the Code, 66 Pa. C.S. § 332(a), provides that the party seeking affirmative relief from the Commission bears the burden of proof. As the parties seeking approval of their proposed transaction, the Joint Applicants here bear that burden of proof. The term “burden of proof” means a duty to establish a fact by a preponderance of the evidence. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1954); *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990); and *Feinstein v. Philadelphia Suburban Water Company*, 50 Pa. P.U.C. 300 (1976). The term “preponderance of the evidence” means one party must present evidence which is more convincing, by even the smallest amount, than the evidence presented by the other party. *Lansberry, supra.* Accordingly, we must review the record in this proceeding to determine whether the Joint Applicants have satisfied their burden of proof.

Furthermore, the Merger Agreement requires the approval of the Commission, as evidenced by its issuance of a Certificate of Public Convenience (Certificate). Section 1102 of the Code, 66 Pa. C.S. § 1102, provides, in pertinent part:

Upon the application of any public utility and the approval of such application by the commission, evidenced by its certificate of public convenience first had and obtained, and upon compliance with existing laws, it shall be lawful:

\* \* \*

(3) For any public utility or an affiliated interest of a public utility as defined in section 2101 . . . to acquire from, or transfer to, any person or corporation . . . by any method or device whatsoever, including the sale or transfer of stock and including a consolidation, merger, sale or lease, the title to, or the possession or use of, any tangible or intangible property used or useful in the public service.

In *City of York v. Pa. PUC*, 449 Pa. 136, 295 A.2d 825 (1972), the Pennsylvania Supreme Court explained in the context of a utility merger that, before it may issue a certificate of public convenience, the Commission must find that an affirmative public benefit will result from the transaction:

[A] certificate of public convenience approving a merger is not to be granted unless the Commission is able to find affirmatively that a public benefit will result from the merger . . . . [T]hose seeking approval of a utility merger [are required to] demonstrate more than the mere absence of any adverse effect upon the public . . . . [T]he proponents of a merger [are required to] demonstrate that the merger will affirmatively promote the “service, accommodation, convenience, or safety of the public” in some substantial way.

*Id.*

When the Commission considers the public interest, it is contemplated that the benefits and detriments of the acquisition will be measured as they impact on all affected parties, and not merely on one particular group or geographic subdivision. *Middletown Twp. v. Pa. PUC*, 482 A.2d 674 (Pa. Cmwlth. 1984). Competitive impact is a substantial component of a rational net public benefits evaluation in a merger context. *Popowsky v. Pa. PUC*, 937 A.2d 1040 (Pa. 2007).

To ensure that a transaction is in the public interest, the Commission may impose conditions on granting a certificate of public convenience. *Joint Application for Approval of the Merger of GPU, Inc. with FirstEnergy Corp.*, Docket No. A-110300F0095, *et al*., 2001 Pa. PUC LEXIS 23 (Order entered June 20, 2001). Section 1103(a) of the Code, 66 Pa. C.S. § 1103(a), provides in part:

. . . A certificate of public convenience shall be granted by order of the commission, only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public. The commission, in granting such certificate, may impose such conditions as it may deem to be just and reasonable.

Moreover, when evaluating the consolidation of two electric utilities or electric suppliers, the Electricity Generation Customer Choice and Competition Act (Competition Act), 66 Pa. C.S. § 2811(e)(1), requires the Commission to consider:

. . . whether the proposed merger, consolidation, acquisition or disposition is likely to result in anticompetitive or discriminatory conduct, including the unlawful exercise of market power, which will prevent retail electricity customers in this Commonwealth from obtaining the benefits of a properly functioning and workable competitive retail electricity market.

If the Commission finds that a proposed transaction is likely to result in anticompetitive or discriminatory conduct, including the unlawful exercise of market power, which will prevent retail electricity customers from obtaining the benefits of a properly functioning and workable competitive retail electricity market, the Commission shall not approve the proposed transaction, except upon such terms and conditions as it finds necessary to preserve the benefits of a properly functioning and workable competitive retail electricity market. 66 Pa. C.S. § 2811(e)(2).

Finally, we note that the Commission’s standards for reviewing a non-unanimous settlement, as proposed here, are the same as those for deciding a fully contested case. *Application of* *PECO Energy Company for Approval of its Restructuring Plan Under Section 2806 of the Public Utility Code and Joint Petition for Partial Settlement*, Docket Nos. R-00973953 and P-00971265, 1997 Pa. PUC LEXIS 51, \*17-\*18 (Order entered December 23, 1997). Accordingly, substantial evidence consistent with statutory requirements must support the proposed settlement. *Popowsky v. Pa. PUC*, 805 A.2d 637 (Pa. Cmwlth. 2002); and *ARIPPA v. Pa. PUC*, 792 A.2d 636 (Pa. Cmwlth. 2002).

## Merits of the Transaction

The Applicants, as part of the original application in support of the Merger Agreement, enumerated benefits derived from the proposed merger as follows:

***Increased Scale and Scope; Diversification.*** There are many benefits that should be derived from the increased scale, scope and diversification of the combined company . . ., including improved service, reliability and operational flexibility, and increased financial stability for West Penn, TrAILCo, Met-Ed, Penelec, Penn Power, and all other FirstEnergy and Allegheny public utility subsidiaries. . . .

***Increased Financial Strength and Flexibility.*** The increased scale and scope is ultimately expected to strengthen the balance sheet of the combined company, creating a larger, financially stronger parent company that is better positioned to compete for and attract capital on reasonable terms for its public utility subsidiaries. In addition, the diversification of the energy delivery and generation portfolios of the combined company should result in a more stable cash flow. The all-stock transaction is expected to improve financial metrics of the combined company. . . .

***Enhanced Expertise in Competitive Energy Markets, Energy Technologies, and Regional Issues.*** The combined company is expected to be able to draw upon the intellectual capital, technical expertise and experience of a deeper and more diverse workforce, with particular skills in managing distribution companies in competitive energy markets. The Merger is a natural alliance of companies with adjoining service territories and interconnected transmission systems, which should be beneficial in the integration and management of the combined company. The combined company should also be better able to invest in and deploy new processes and technologies, including innovations anticipated as part of the Act 129 Energy Efficiency and Conservation plans being implemented by West Penn, Met-Ed, Penelec, and Penn Power. . . .

***Enhanced Customer Service and Reliability.*** FirstEnergy and Allegheny share a strong commitment to enhancing customer service and reliability. The Merger will facilitate and build upon the combined companies’ areas of expertise, allowing the deployment of “best practices” derived from ten electric utilities and additional, experienced resources when needed to meet emergencies, storm outages or other similar circumstances. As part of the Merger integration process, FirstEnergy and Allegheny intend to conduct a review of their existing procedures and policies to determine “best practices” and how to implement them. The combined company will work to maintain the current levels of reliability of West Penn, as measured and determined using West Penn’s current methodology for measuring reliability, and will conduct a study to determine if opportunities exist to improve reliability. The combined company’s commitment to streamlining operations, reducing overall complexity and reliance upon a regional focus will ensure a continued high level of management attention on distribution system reliability and overall customer service . . . .

***Synergies, Efficiencies and Cost Savings.*** The Applicants are confident that the Merger will generate synergies and result in overall aggregate cost saving opportunities for the combined company. The synergies that will accrue to the Pennsylvania utilities over time should, at least in part, offset the increasing cost of providing regulated retail utility service and, thereby, may reduce the size of future rate increase requests . . .

Jt. App. St. 1 at 8-12.

In addition, the Merger will provide expanded opportunities for career advancement and professional growth for Allegheny employees who remain with the Company. For a period of three years, FirstEnergy will maintain at least Allegheny’s current levels of charitable support in local communities. Thereafter, FirstEnergy will continue to support local charities at levels consistent with its commitments to other communities it serves. I.D. 39-41.

## The Joint Petition for Partial Settlement

On October 25, 2010, the Joint Applicants filed with the Commission and served on the ALJs and all active parties a Joint Petition for Partial Settlement. The Settlement was executed by all of the active parties except the OSBA, Citizen Power, RESA and Direct Energy. The Settlement resolves all issues among the Joint Petitioners. The Joint Petitioners are in full agreement that the Merger, as described in the Joint Application and as supplemented by the Settlement, will provide substantial affirmative public benefits. Additionally, the Joint Petitioners agree that consummating the Merger on the terms set forth in the Joint Application as supplemented by the Joint Petition is in the public interest, as explained in Paragraph 59 thereof, and express their full support for the Settlement, as evidenced by the Statements in Support each filed on or before October 29, 2010. As discussed, *infra,* the terms of the Settlement include commitments regarding employment levels, rate stay-out provisions, rate credits, and enhancements in a variety of areas including customer service and reliability, universal service, alternative and sustainable energy, financial governance, and retail competition, as discussed below. I.D. at 36-37. The Settling Parties include representatives of consumers, industrial customers, non-utility generators, environmental and sustainable groups, an electricity supplier, the Department of Environmental Protection, and labor organizations. Further, although the OSBA is not a signatory to the petition for settlement, it represented in its Reply Brief that many of the conditions of the agreement resolved some of the concerns it had to the merger proposal.

The following discussion of the terms and conditions of the Settlement do not contain every detail set forth in the Settlement and any summarization or omission should not be interpreted as a modification of the provisions of the Settlement.

### Regional Headquarters and Employment[[2]](#footnote-2)

The corporate headquarters of Allegheny Energy, located in Greensburg, Pennsylvania, currently has approximately 910 employees assigned to the Greensburg area, with 65 of those employees scheduled to be relocated to West Virginia in the near future (a move that has nothing to do with this merger). Tr. at 303-304. The Joint Applicants made no commitments in the Joint Application as to the continued employment of the remaining 845 employees of Allegheny Energy located in the Greensburg, Westmoreland County area. Tr. at 290, 294-297.

As part of the Settlement, the Joint Applicants agreed to more specific commitments to regional employment in addition to those made in their original filings. Jt. App. St. 1 at 14. The corporate headquarters of Allegheny Energy in Greensburg, Pennsylvania will become West Penn’s regional headquarters. In addition, the Joint Applicants commit that the net employment levels in Greensburg, Pennsylvania and Westmoreland County for FirstEnergy employees and its affiliates will be as follows for the five years following consummation of the merger:

* + During the 12-month period following consummation of the merger, an average number of no less than 800 employees.
	+ During the subsequent 12-month period, an average number of no less than 675 employees.
	+ During the subsequent 12-month period, an average number of no less than 650 employees.
	+ During the subsequent 24-month period, an average number of no less than 600 employees.

Settlement ¶ 14 at 7-8.

The Joint Applicants further commit that career transition services will be provided for employees in Greensburg, Pennsylvania whose jobs are impacted by the merger. In addition, the current regional headquarters of Met-Ed and Penelec are guaranteed to remain in Pennsylvania for at least the next five years. Settlement
¶¶ 14 and 15 at 8-9.

### Application of Merger Savings: Rate Stay-Out

The Joint Applicants have agreed to certain specific applications of merger savings for the direct benefit of ratepayers. Specifically, the settlement provisions provide that there will be no base rate increase for Met-Ed, Penelec and Penn Power customers prior to October 1, 2012. In addition to the rate case stay-out for these utilities, if at any time during this period either Met-Ed, Penelec or Penn Power earn in excess of a 10.1% return on equity, those excess amounts will be returned to the customers of those utilities as a bill credit. This use of merger savings will ensure rate stability for the customers of these utilities and also ensures that any excess earnings will be returned to customers. I.D. at 44; OCA St. 1 at 16, Public Version.

With regard to West Penn’s customers, in the three years following consummation of the merger, residential customers will receive distribution rate credits equaling approximately $11 million, and Tariff 37 customers (PSU) will receive credits of $45,000 over three years. Settlement at ¶ 17 at 10. These affirmative merger savings provide some immediate benefits to West Penn customers without any uncertainties as to what may or may not happen in future base rate cases. West Penn’s commercial customers will receive a credit of approximately $6 million to offset potential increases in Energy Efficiency and Conservation costs. I.D. at 44-45; Settlement ¶ 18 at 10.

In addition, acquisition and certain transaction costs will be excluded from recovery in rates for all of the post-merger FirstEnergy electric distribution companies, Met-Ed, Penelec, Penn Power and West Penn Power (FirstEnergy EDCs). These credits will be provided to customers as merger savings will be provided to all such customers, regardless of whether they take Default Service or receive service from a competitive electric generation supplier (EGS). The OCA, OTS, PSU, Constellation and PHMA specifically support these provisions which, in their view, provide substantial affirmative benefits and are in the public interest. The OSBA also supports these provisions as adequately addressing its concerns on this issue. I.D. at 44-45; Settlement ¶¶ 17and 19 at 10; OSBA R.B. at 14; OCA St. 1 at 26-27 - Public.

### Financial Governance and Ring Fencing[[3]](#footnote-3)

The OCA recommended that specific ring-fencing provisions be established in order to protect and insulate the regulated utilities from the new parent company and also the unregulated affiliates of the utilities. The OCA stated that such measures are necessary in order to protect Pennsylvania ratepayers from any adverse and unintended consequences of the merger. OCA St. 1 – Public at 26-27. The Joint Applicants had made no firm commitments in their originally-filed materials to put these ring fencing measures in place as part of the proposed merger. I.D. at 45.

The Settlement addresses many of these concerns. In particular, the Settlement provides that the Joint Applicants will: (1) to the extent there are money pools, maintain separate money pools for its regulated and unregulated operations; (2) ensure that each Pennsylvania operating company issues its own debt after obtaining regulatory approval; (3) ensure that each FirstEnergy Pennsylvania utility maintains its own credit rating as long as it has debt outstanding and credit rating agencies are willing to provide such rating; (4) ensure that no FirstEnergy utility will assume debt issued by the holding company without Commission approval; (5) maintain separate financial statements that reflect each utility’s own assets and liabilities; and, (6) ensure that each utility has its own capital structure that is comprised of its own debt and equity. I.D. at 45-46; Settlement ¶ 35 at 15.

The Settlement also provides that no FirstEnergy Pennsylvania utility operating company will do the following unless expressly authorized by the Commission: (1) transfer, merge, sell, lease or dispose of utility property that has a net book value greater than $10 million and is included in rate base and recovered through rates; or (2) issue debt secured by utility assets for purposes other than as approved by the Commission. Moreover, the Settlement further requires that, for a period of five years, if any post merger FirstEnergy Pennsylvania utility’s equity-to-cap ratio falls below 40%, that company will provide the commission with a 12-month plan to bring its equity-to-cap ratio to 40%. If the ratio remains below 40% after the 12-month period, the company will not pay a dividend to its parent until the ratio is 40% or greater. By providing for Commission approval in advance of certain transfers of funds, interested parties can monitor any changes and such protections provide accounting and pricing protocols that allow the Commission to perform its regulatory oversight functions. I.D. at 46; Settlement ¶ 36 at 15.

The OCA, the OTS, PSU and PHMA specifically supported these provisions which, in their view, provide substantial affirmative benefits and are in the public interest. Further, the OSBA did not propose any additional ring-fencing conditions because these provisions generally satisfy its concerns related to the financial governance of the merged companies. I.D. at 46-47; OSBA R.B. at 15.

The OTS stated that these safeguards, negotiated as part of the Settlement, are above and beyond the protections that otherwise may have been put in place had this proceeding been full litigated. The OTS averred that such measures are in the public interest as they aid in insulating FirstEnergy’s regulated utilities and customers from non-jurisdictional operations. OTS Statement in Support of the Settlement at 8.

### Service, Quality and Reliability

The Settlement includes a provision that FirstEnergy will improve West Penn’s Customer Average Interruption Duration Index (CAIDI), which is the average duration of sustained interruptions for those customers who experience interruptions during the analysis period, by 5% over the next seven years with a target of 172 minutes. The Settlement also requires that FirstEnergy improve West Penn’s System Average Interruption Duration Index (SAIDI), which is the average duration of sustained customer interruptions per customer occurring during the analysis period, by 5% over the next seven years with a target of 198 minutes. In addition, Commission regulations require EDCs to report the percentage of calls answered within 30 seconds with the representative ready to render assistance and process the call. As shown in OTS direct testimony, in 2008, 81% of FirstEnergy’s calls were answered within 30 seconds while only 58% of West Penn’s calls were answered in 30 seconds. The Joint Petition requires a 30 second answer rate of 70% for West Penn within five years of approval of the merger. In total, these metrics represent specific reliability improvements that FirstEnergy and West Penn will work to achieve. These agreed upon performance levels are clearly an improvement over West Penn’s current performance and are important to ensure that the utility is accessible to its customers. I.D. at 47-48; Settlement at ¶¶ 49a-c, at 21-22. OTS St. 1 at 7.

Furthermore, for the years 2011 through 2017, West Penn will provide an annual report to the Commission analyzing its progress in achieving the CAIDI and SAIDI thresholds set forth above. Within 60 days of filing the annual report, OTS, OCA and OSBA can convene a meeting to discuss the performance levels and steps for future compliance. Mutually agreed upon steps can be implemented. If the Parties fail to reach an agreement, a Party can seek Commission review of the contested point. These settlement terms ensure that the Parties and Commission have ongoing review over West Penn’s progress and will have the opportunity to recommend measures to ensure ongoing compliance with the agreed upon standards. These provisions will ensure that customers of West Penn will see measurable improvements in reliability and customer service as a result of the merger. I.D. at 48; Settlement ¶¶ 49c-d, and 50 at 22-23.

In addition, while FirstEnergy has agreed to review existing practices and procedures to determine “best practices” and ways to implement them, it has also agreed to conduct a study to determine if there are additional areas where West Penn’s reliability and service quality can be improved. The study will be submitted to the Commission’s Bureau of Conservation, Economics and Energy Planning and to the Parties upon request. These measures will assist FirstEnergy in improving West Penn’s overall performance. I.D. at 48; Settlement ¶ 50 at 23.

For the specific benefit of industrial ratepayers, the Settlement establishes a joint technical committee to identify, discuss and address local power and service quality issues impacting industrial customers served by West Penn and, specifically, service issues that can be addressed through technical, operational or equipment changes that can be made on equipment used directly in furnishing service to the impacted customer or on the customer's side of the interface. I.D. at 49.

The Settlement also addresses concerns of rural electric reliability raised primarily by PREA. PREA’s member cooperatives receive retail electric service from FirstEnergy at eighteen locations in the Commonwealth. The Settlement extends what is known as the Joint Planning Process (JPP) from Docket Nos. R-00974008 and
R-00974009, as amended by subsequent proceedings, for five (5) years with an investment level of $4 million for 2013 through 2018. However, if the Interruption Duration Index (IDI) and Interruption Frequency Index (IFI) standards of at least 85% are achieved for all PREA delivery points, the annual investment level will be reduced to
$3 million. In addition, 50% of the amounts per year are to be spent on tree trimming, and breaker and battery maintenance on circuits serving the PREA delivery points, all of which will improve service reliability. I.D. at 49.

The Settlement permits PREA to elect to have the annual funding investment be used for other than the 25% worst performing delivery points, thereby permitting PREA to participate in the service investment process and improve the cooperation of both the regulated electric utilities and rural electric cooperatives for the benefit of the customers of each. Further, the Settlement also allows PREA to participate in the redesign of the auto dialer system for specific delivery points served by either FirstEnergy or Allegheny. FirstEnergy has committed to the repair or replacement of failed meters or components within ninety days, barring extenuating circumstances. This further assures that there will be no diminution of service following the Merger. The Settlement modifies the standards for delivery points with five or fewer customers and modifies the calculation of outage time in cases where backfeeding by PREA member cooperatives can restore service to consumers. This should shorten the duration of outages for the benefit of all customers. The Settlement clarifies Allegheny's post-merger obligations and binds Allegheny to perform the requirements of the JPP on Allegheny's former system after the Merger is consummated. The Settlement makes certain that unless specifically modified in the settlement, the JPP terms and conditions will remain in force and requires the Parties to restate the operative terms, conditions and agreements into one document within one year. The Settlement thus assures that there will be no misunderstandings with respect to the JPP. I.D. at 49-50.

In its testimony, the OCA expressed a concern that, in seeking to generate merger savings, the new owners of West Penn may not invest the necessary capital for improvements in reliability and customer service metrics. The OCA stated that the provisions of the Settlement provide substantial affirmative benefits and enhance the reliability commitments that were the focus of the OCA’s concerns. OCA Statement in Support of Settlement at 9.

PREA stated that these provisions provide significant affirmative benefits and satisfactorily resolve the concerns that caused PREA to file a Petition to Intervene and become a party. PREA explained that service reliability in rural areas served by PREA members is critical to quality of life and economic development in these areas. PREA averred that the provisions of the Settlement will ensure that these critical service reliability issues will be adequately addressed well into the future. PREA Statement in Support of Settlement at 6.

### Universal Service

In its direct testimony, the OCA expressed its concerns regarding the lack of any commitments by the Joint Applicants to improve the universal service programs offered by West Penn. The OCA also noted that the current Low Income Usage Reduction Program (LIURP) for West Penn was far below that of other FirstEnergy Pennsylvania utilities. OCA Statement in Support of Settlement at 7.

The Settlement provides enhanced funding and commitments for West Penn’s customer assistance program (CAP). The Joint Applicants have committed to increasing the penetration rates for West Penn’s CAP program in order to reach the current penetration levels of the other FirstEnergy utilities. This five-year commitment with expenditures of up to $750,000 per year will not be recovered from ratepayers in any future rate proceedings. The Joint Applicants have committed to using best practices obtained from the West Penn fundraising activities in order to benefit the Hardship Funds for the remaining FirstEnergy utilities. In addition, over the next five years, FirstEnergy will provide additional funding for West Penn’s LIURP of $4 million. As with the CAP commitment, these significant expenditures will not be recoverable from ratepayers in future rate proceedings. I.D. at 50; Settlement ¶¶ 20-22 at 10-11.

### Act 129, Solar Procurements and Alternative Energy Funding

In paragraphs 25 through 29, the Settling Parties have agreed to programs and substantial financial commitments to the continued growth of solar power in the Commonwealth, the continued growth of all forms of renewable energy, and the growth of funding to assist consumers with implementing energy efficiency measures. Included are a total of $2 million in funding for the Keystone HELP Program and the PA Sunshine Program, and continued funding for the West Penn Power Sustainable Energy Fund, which promotes the growth and retention of renewable energy businesses in the West Penn service territory. These programs promote environmental quality as well as economic development and jobs in the Commonwealth. They also have the additional benefit of avoiding significant pollution through development of renewable energy sources and reduced demand for electricity through energy efficiency programs.
I.D. at 51.

Additionally, the Joint Applicants have also agreed to procure 40% of West Penn's solar requirements for the period 2011 through 2021 using long-term contracts and contracts with credit-worthy industrial customers to purchase Solar Photovoltaic Alternative Energy Credits (SPAECs) from those customers producing SPAECs within the Commonwealth of Pennsylvania. I.D. at 51-52.

### Smart Meters and Time of Day Usage

Paragraphs 23 and 24 of the Joint Petition address deployment of smart meters in the electric distribution companies’ territory:

As part of the implementation and deployment plans for the Smart Meter Implementation Plan (“SMIP”), in addition to any other deployment schedule Met-Ed, Penelec, Penn Power and West Penn (the “post-merger FirstEnergy EDCs”) may submit, the implementation and deployment plan shall include a cost/benefit analysis for deployment of smart meters to at least 90% of the EDCs’ customers no later than December 31, 2018.

Consistent with Act 129 of 2008, the post-merger FirstEnergy EDCs will have voluntary time of use rates available to residential customers who have smart meters installed, and voluntary real time rates available for any commercial or industrial customers that have smart meters installed so long as the EDCs remain the default service suppliers.

Settlement ¶¶ 23-24 at 11-12.

The Settlement gives a firm target for substantially complete deployment in all four electric distribution companies’ territories by the end of 2018. This is a substantial acceleration over the current approved plan for the FirstEnergy companies and is in line with the recent settlement filed in the West Penn smart meter proceeding (October 20, 2010; Docket No. M-2009-2123951). I.D. at 52-53. As a result of the accelerated deployment of smart meters, FirstEnergy EDC customers will be able to take advantage of the potential savings from utilizing smart meter technology.

### Non-Utility Generation Contract Issues

ARIPPA is a trade association comprising operating non-utility generation (NUG) power plants across Pennsylvania, most of which use waste coal as a source of fuel. Most of ARIPPA’s members have long-term, Commission-approved power contracts with Met-Ed and Penelec, and have invested over $2 billion in Pennsylvania over the last two decades in the development of non-utility generation power plants under authority and in furtherance of state and federal legislative goals. ARIPPA’s members are providers of substantial amounts of energy and capacity to current FirstEnergy subsidiaries pursuant to these long-term, Commission-approved contracts that further state and federal statutory goals and objectives intended to foster independent and alternative power production. I.D. at 53.

ARPPA actively participated in this proceeding to ensure that neither the proposals by the Joint Applicants nor any other party negatively impact the interests of ARIPPA’s members in their continued sales of energy and capacity to FirstEnergy and their receipt of payments in compliance with state and federal law regarding NUG contracts and future compliance with NUG stranded cost recovery. ARIPPA states that it is satisfied that through the Settlement, the interests of its members will not be negatively impacted. ARIPPA Statement in Support of Settlement at 3-6.

### Distribution Rate and Tariffs

 In the Settlement, the Joint Applicants agreed that any consolidation of the distribution rates of the post-merger FirstEnergy EDCs may occur only after the issuance by the Commission of a certificate of public convenience permitting the merger/consolidation of any of those corporations into a single EDC. Further, West Penn will maintain the availability section and the distribution rate design of Schedules 44 and 46 of the currently existing West Penn retail tariff and any conjunctive billing agreement in effect for distribution rates on the effective date of this agreement for five (5) years from the date of the Merger's consummation. The OSBA proposed a condition “requiring that any consolidation of the distribution rates of the four EDCs [Met-Ed, Penelec, Penn Power, and West Penn] occur only after the issuance of a certificate of public convenience under Section 1102 to merge the individual EDCs into a single EDC.” The Settlement includes OSBA’s proposed condition, which satisfies the OSBA’s concerns. PSU, WPPII, and PHMA also explicitly support these provisions and indicated that this constitutes a requisite benefit under the *City of York, supra,* and is in the public interest. I.D. at 54-55; Settlement at ¶¶ 30 and 31 at 14; Joint Applicant M.B. at 70 and OSBA St. 1 at 34-35.

### Default Service and Other Retail Enhancements[[4]](#footnote-4)

The Joint Applicants have agreed not to oppose in subsequent Default Service plan proceedings any proposal to provide to large commercial and industrial customers only an hourly-priced Default Service structure. Specifically, the Joint Applicants also agreed to harmonize their Price-to-Compare (PTC) structures as a part of their Default Service plan filings for the period beginning June 1, 2013. I.D. at 55; Settlement ¶¶ 34and 38 at 14 and 16; Constellation St. 1 at 18, 21.

The Settlement also includes a provision by which the Joint Applicants agree to hold EGS training sessions to address (a) the conditions under which customers may be “dropped” from EGS service, (b) the process by which EGSs can obtain specific settlement load information reported to PJM Interconnection, L.L.C. (PJM), and (c) the process for after-the-fact adjustments with PJM. I.D. at 55; Settlement at ¶ 46; Constellation St. 1 at 19-22.

While the Settlement includes only the PTC and EGS training session provisions as future retail market enhancements affecting all of the Joint Applicants’ territories, the Settlement also seeks to encourage further retail market development in the Allegheny-West Penn service territory, in particular, through the Joint Applicants’ commitment to (a) file a purchase-of-receivables plan, (b) engage in certain customer education programs, (c) offer a variety of customer billing options, and (d) provide necessary retail supplier access to important customer information and other data. I.D. at 55-56; Settlement ¶¶ 39-45 and 47-48 at 16-21; Constellation St. 1 at 21.

The Joint Applicants have further agreed, as a condition of the Settlement, to forego harmonization of default service procurements for West Penn and the FirstEnergy EDCs through May 31, 2013, thereby preserving the current default service plans and procurements already approved by the Commission and currently in place for default service customers. In addition, the Settlement preserves the right of the Parties to propose modifications to the design of each of the FirstEnergy’s EDCs` provision of default service for the period beginning on June 1, 2013. The OSBA also supports this agreement. Settlement ¶¶ 32-33 at 14; OSBA R.B. at 12.

### Competition in the Wholesale and Retail Marketplace

The Joint Applicants contend that the proposed merger will not adversely affect either wholesale or retail electricity markets. The Settlement also addresses market power concerns. The Settling Parties agreed to address these concerns in Paragraphs 53, 54 and 55. These provisions will allow the Commission, the OTS, the OSBA and the OCA to receive timely and accurate information as to the state of the markets in the post-merger service territories and will enable corrective actions to be taken if the need arises. The OCA, the OTS and the OSBA support these provisions.

### Right to Withdraw

The Settlement is conditioned upon the Commission’s approval of the terms and conditions set forth in the Settlement without modification. If the Commission disapproves or modifies the Settlement, any Party may withdraw from the Settlement upon written notice within five business days following the entry of this Opinion and Order and the Joint Petitioners reserve their right to fully litigate this case. Settlement ¶ 62 at 34.

##  Contested Issues and Settlement Modifications

### Approval of the Joint Application as Modified by Non-Unanimous Settlement

In their Initial Decision, the ALJs concluded that the Joint Applicants sufficiently demonstrated that the proposed merger, as modified by the settlement petition, provides sufficient benefits to a sufficient spectrum of stakeholders as to be in the public interest. They also concluded that, while the Joint Applicants will clearly be aggressive players in retail energy markets, the Joint Applicants are not likely to engage in anticompetitive or discriminatory conduct which will prevent retail customers from obtaining the benefits of a properly functioning retail market. I.D. at 37-39, 75.

Direct Energy excepts to the ALJs’ conclusions on the basis that the Commission does not have the legal authority to issue an order approving a non-unanimous settlement. Direct Energy points out that the Initial Decision does not actually adjudicate whether the Joint Applicants’ original Application for a Certificate under Section 1102 of the Code should be granted. Instead, it determines that the non-unanimous Settlement submitted by the Joint Applicants and many (but not all) of the other active Parties to the proceeding is in the public interest and, for that reason, concludes that the Joint Application, as modified by the Settlement, should be approved. Direct Energy contends that this was error on the part of the ALJs. Direct Energy Exc.
 at 7-8.

Direct Energy points out that the Commission has stated on numerous occasions that the standards for reviewing a non-unanimous settlement are the same as those for deciding a fully contested case. In other words, the Commission is required to adjudicate the claims of the remaining active Parties exactly as if no settlement had been submitted. This, Direct Energy argues, the ALJs did not do. Direct Energy also complains that the principal focus of the Initial Decision is whether the Joint Application and Merger Agreement, as modified by the non-unanimous Settlement, as a whole, is in the “public interest.” Direct Energy submits that at pages 74-75 of the Initial Decision, the ALJs state that, consistent with the Commission’s encouragement of settlements, they are recommending approval of the Settlement because “in its totality, the benefits of the proposed merger, as modified by the settlement agreement, outweigh the negative impacts.” *Id*. at 8-9.

In its Reply Exceptions, the OCA concludes that, on this point, the Initial Decision was well-reasoned and correct. The Initial Decision correctly found that the Commission is being asked to approve the Joint Application, as modified by the additional promises and binding commitments made by Joint Applicants in the Settlement. The OCA avers that the ALJs were correct in finding that the Joint Application, as modified by the Settlement, provides substantial affirmative public benefits and thus meets the requisite legal standard for its approval. OCA R. Exc. at 3-4.

The OCA also argues that Direct Energy’s argument that the ALJs relied on a lesser public interest standard to assess the Settlement, rather than adjudicating the facts of this case, are without merit. The OCA avers that the Initial Decision clearly sets out the applicable standards for merger approval under Sections 1102, 1103, and 2811 of the Code, and the standards enunciated in the cases of *City of York* and *Popowsky*, *supra*. The OCA notes that at page 38 of the Initial Decision, the ALJs also stated the correct legal standard for Commission review of the Settlement here, as follows:

Finally, the Commission’s standards for reviewing a non-unanimous settlement, as proposed here, are the same as those for deciding a fully contested case. Accordingly, substantial evidence consistent with the statutory requirements must support the proposed settlement.

*Id*. at 4.

The OCA notes that, after setting out the legal standards, the ALJs devote the next thirty-five pages of the Initial Decision to detailing the provisions of the Joint Settlement, to how the Joint Application has been modified by the Settlement, and to an analysis and discussion of the opposing positions of Parties like Direct Energy. *Id*.

The Joint Applicants also filed a Reply Exception on this point. The Joint Applicants first address Direct Energy’s argument that the ALJs “did not actually adjudicate” whether the Joint Application, as supplemented by the Joint Petition, satisfies the statutory criteria for issuance of a Certificate, but, rather “focused on the overall benefits” that would flow from the Settlement. The Joint Applicants aver that this criticism is unwarranted and wrong. The Joint Applicants further assert that, instead of addressing the substance of the Initial Decision, Direct Energy “parses” isolated phrases in an attempt to prove that the ALJs meant something different than what they actually found. The Joint Applicants aver that Direct Energy’s argument is pure semantics. Applicant’s R. Exc. at 5-9.

Initially, Direct Energy contends that the Commission does not have the authority to approve a non-unanimous settlement. In support, Direct Energy describes the manner in which the Commission must decide cases: a neutral fact finder is to make a decision on every contested issue, based on the record, and the decision is to include findings of fact and conclusions of law. Direct Energy Exc. at 10-11. We are not persuaded that Direct Energy’s reasoning leads to the conclusion proffered. Whether the Commission has authority to issue a decision approving a non-unanimous settlement is a different question from the manner in which that authority is to be exercised. Moreover, as discussed in more detail below, in this case, we find that neutral fact finders made a decision on every contested issue, based on the record evidence, and reached a decision that included ninety findings of fact and twenty-six conclusions of law.

Direct Energy further argues that the transaction was not reviewed under the appropriate legal standards for a proposed merger. We find that this argument is meritless. We note that, as pointed out by the OCA, the ALJs, after setting out the appropriate legal standards, devote the next thirty-five pages of the Initial Decision to detailing the different provisions of the Joint Settlement, to how the Joint Application has been modified by the Settlement, and to an analysis and discussion of the opposing positions of Parties like Direct Energy.

Specifically, the ALJs applied the correct statutory standard, which, at points in the Initial Decision, they referenced in short-hand fashion with the phrase “public interest.” The ALJs stated as follows:

As the parties bearing the burden of proof, the Joint Applicants must prove by a preponderance of the evidence that the Commission’s issuance of a certificate of public convenience approving the Merger Agreement as modified by the Joint Petition [for Settlement] is in the public interest because it will affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way.

Finally, the Commission’s standards for reviewing a non-unanimous settlement, as proposed here, are the same as those for deciding a fully contested case. Accordingly, substantial evidence consistent with the statutory requirements must support the proposed settlement.

I.D. at 38 (citations omitted). *See also*, Conclusion of Law No. 7 at 76-77.

Next, we address Direct Energy’s argument that the ALJs “did not adjudicate” the Joint Application, either as filed or as augmented by the Partial Settlement, because they reviewed the positives and negatives of the transaction “in their totality.” Direct Energy Exc. at 8-9. We find Direct Energy’s criticism to be unwarranted. The ALJs applied Section 1103 precisely the way the Commonwealth Court has directed that it be applied, as follows:

In *Middletown Township v. Pa. P.U.C.*, [cited *supra*] the Commonwealth Court stated that “when the ‘public interest’ is considered, it is contemplated that the benefits and detriments of the acquisition be measured as they impact on all affected parties, and not merely on one particular group or geographic subdivision as might have occurred in this case.” Accordingly, we conclude that in its totality, the benefits of the proposed merger, as modified by the settlement agreement, outweigh the negative impacts and we will approve the requested certificate of public convenience.

I.D. at 75.

Accordingly, we conclude that the ALJs properly looked at the “totality” of benefits and possible negative effects as they may impact “all affected parties.” I.D. at 78. This is exactly what we, consistent with appellate court precedent, have held must be done in assessing whether a proposed transaction meets the “affirmative public benefit” standard of *City of York, supra*. Additionally, we note the following:

The Commission has interpreted the *York* standard in *Application of UGI Utilities, Inc., UGI Utilities Newco, Inc. and Southern Union Company*, Docket Nos. A-120011F2000, *et al.* (August 18, 2006), 2006 PUC LEXIS 62. In *UGI*, the Commission ruled that, after looking at the positives and negatives, the net effect of the merger or acquisition on all affected parties should benefit the public interest.

*Application of Pennsylvania-American Water Company for approval of a Change in Control to be Effected through a Public Offering of the Common Stock of American Water Works Co., Inc.,* Docket No. A-212285F0136 at 10 (Tentative Opinion and Order adopted as Final by the Commission’s Order entered September 27, 2007). For the above reasons, Direct Energy’s Exception on this point is denied.

### ALJs’ Bias toward Settlement

In its Exceptions, Direct Energy avers that the ALJs gave the Settlement “special and unwarranted significance” and weighed whether the positions of the non-settling Parties were significant enough to derail the Settlement. Direct Energy argues the fact that the Initial Decision does not make a single modification to the terms of the Settlement, nor accept any of the “contentions” of any of the non-settling Parties, “is powerful circumstantial evidence that the ALJs felt constrained not to seriously consider any of Direct Energy’s evidence of the anticompetitive and discriminatory effect of the merger.” Direct Energy states that the ALJs must have been aware that the Settlement contains a provision stating that if any provision were altered or modified by the Commission, the Settlement could be withdrawn and be “of no force and effect.” Direct Energy Exc. at 12-15.

The OCA submits that Direct Energy is incorrect that any change to the terms of the Settlement would automatically nullify it in its entirety. The OCA states that the Settlement allows the Parties to withdraw from the Settlement if it is not approved without modification. OCA R. Exc. at 6.

We disagree with Direct Energy that the ALJs have demonstrated a bias toward preserving the Settlement at the expense of adequately addressing the concerns of the Parties that have not joined the Settlement. We find that the ALJs have carefully considered and weighed the merits of all of the arguments on the pertinent issues raised in this proceeding. As stated, *supra*, the Commission’s standards for reviewing a non-unanimous settlement are the same as those for deciding a fully contested case. Accordingly, as reflected by this Opinion and Order, we have addressed the arguments and positions of all of the active Parties in this proceeding, particularly the issues raised by the Parties not joining in the Settlement. Direct Energy’s Exception is denied.

### Section 2811(e) of the Code – Anticompetitive and Discriminatory Conduct

In the Initial Decision, the ALJs state that 66 Pa. C.S. § 2811(e) supports the view that the relevant inquiry is whether the merger will have an adverse impact upon retail markets. The ALJs observe that Section 2811(e)(1) requires the Commission to consider whether the merger or consolidation “is likely to result in” anticompetitive conduct which would prevent customers from obtaining the benefit of a properly functioning retail market. They also observe that Subsection (e)(2) requires the Commission to preserve the competitive nature of the markets *after* it concludes that the merger will result in anticompetitive or discriminatory conduct. The ALJs conclude that Section 2811 clearly does *not* require merger applicants to *improve* competitive markets or affirmatively demonstrate benefits to competitors. I.D. at 65-66.

Direct Energy argues that the Initial Decision fundamentally misinterprets 66 Pa. C.S. § 2811(e) as requiring proof that retail markets will be adversely affected. Direct Energy states that the ALJs dismissed the requirements of Section 2811 by insisting that these requirements only come into play when there is evidence that the post-merger market will be worse off than before the merger. Direct Energy avers that the plain language of the statute also invalidates a merger that perpetuates circumstances that are likely to prevent retail electric customers from obtaining the benefits of a properly functioning and workable competitive retail market. Direct Energy submits that the statutory language does not require the result to be caused by the merger and the ALJs’ “do no harm” test would always allow pre-merger conditions to continue. Direct Energy opines that a completely non-competitive market cannot possibly be what the General Assembly had in mind when it added this special standard for electric utility mergers. Direct Energy Exc. at 16-17.

Section 2811(e)(1) (emphasis supplied) provides:

(1) In the exercise of authority the commission otherwise may have to approve the mergers or consolidations by electric utilities or electricity suppliers, or the acquisition or disposition of assets or securities of other public utilities or electricity suppliers, the commission shall consider *whether the proposed merger, consolidation, acquisition or disposition is likely to result in anticompetitive or discriminatory conduct*, including the unlawful exercise of market power, which will prevent retail electricity customers in this Commonwealth from obtaining the benefits of a properly functioning and workable competitive retail electricity market.

Based on our review of the record in this proceeding, we are not persuaded the ALJs erred in their interpretation of Section 2811(e). The ALJs engaged in an extensive analysis in which they considered and applied prior appellate court decisions as well as Commission Orders. In our view, the Exceptions of Direct Energy re-state arguments that were properly rejected by the ALJ.

RESA states that, pursuant to the ALJs’ interpretation of Section 2811(e), consumers would first have to be harmed by anticompetitive and discriminatory behavior before the Commission could address it. RESA argues that clearly Section 2811(e) is intended to permit the Commission to prevent the harm before it occurs. RESA Exc. at 7. While we do not share RESA’s interpretation of the Initial Decision, we do concur that the standards for reviewing a merger pursuant to Section 2811(e) is to assess if any anticompetitive or discriminatory conduct is likely to occur and, and if so, to either deny a proposed merger or adopt appropriate terms and conditions that will ensure “a properly functioning and workable retail electricity market.” 66 Pa. C.S. § 2811(e).

We now address those factors and remedies that that the Parties aver are related to the merger, *infra*.

####  Direct Energy’s Proposals

Direct Energy argued that the evidence developed in this proceeding establishes that the post-merger retail market will not be “workably competitive.” Direct Energy explained that the lack of workable competition will be attributable to two factors: (1) the nature and structure of the post-merger retail market, including the way in which default service will be provided; and (2) FirstEnergy’s retail marketing strategy that will enable FirstEnergy to transfer a majority of those customers, that do switch to EGS service, to switch to an affiliate, FirstEnergy Supply (FES). Direct Energy M.B.
at 19. Direct Energy cited evidence from the record that presently a workably competitive market does not exist in either the FirstEnergy or Allegheny service territories. Direct Energy stated that the “first important reason” why the post-Merger FirstEnergy service territories is that the nature and structure of default service create an enormous bias of small customers staying on default service. *Id*. at 22.

Direct Energy avers that there are three components to First Energy’s marketing strategy to enable it to achieve its goal of dominating the market. Direct Energy states that the first part of the marketing strategy is to provide generation service to default customers by being a winning bidder in the FirstEnergy-affiliated default service auctions. Direct Energy states that the second component of the marketing strategy is municipal aggregation which also depends on customers being served by default service. Direct Energy submits that “most importantly” FirstEnergy municipal aggregation strategy benefits from its “brand identification” and its relationship as the customers’ present service provider. Direct Energy argues that when one entity is likely to have such a dominant share of the retail market, the result will be higher prices than would occur from a workable competitive market. Direct Energy Exc. at 21-22.

RESA states that the record makes clear that the proposed merger is likely to result in anticompetitive or discriminatory conduct based on three undisputed facts. First, the loss of Allegheny as an individual supplier will reduce the number of competitors. Second, the transition of Allegheny’s billing and customer information system to the FirstEnergy platform almost a year and a half after generation rate caps expire will disrupt the ability to competitive suppliers to provide service. Finally, the Joint Applicants’ combined market power coupled with the marketing strategy, discussed *supra*, will present greater opportunity and greater incentive for the post-merger FirstEnergy companies to pursue actions to maximize profit to shareholders, at the risk of consumer welfare and competitive market development. RESA avers that the ALJs either did not address or give proper weight to these factors. RESA Exc. at 9-15.

In response to the alleged evidence of likely anti-competitive and discriminatory post-merger conduct by FirstEnergy and FES, Direct Energy has proposed a plan that would revise the retail market structure in the FE service territory. The plan includes the following three steps:

* Establish a process to select an alternative default service provider, not affiliated with the Applicants, that will provide default service to customers choosing not to participate in a retail customer auction, with default service priced on a quarterly adjusted, spot market basis.
* Conduct a retail auction in which residential and small commercial customers would be assigned to EGSs in return for an acquisition payment to participating customers.
* Require FirstEnergy to create a separate, affiliated billing subsidiary to perform all billing and customer care with the specific duty to provide EGS-specific to those participating in the retail auction.

Direct Energy Exc. at 28-29.

In addressing Direct Energy’s arguments and proposals, the ALJs stated, *inter alia*, that while it is clear that FES intends to be an aggressive marketer of retail electricity products, such intent does not translate into discriminatory conduct. The ALJs observed that Direct Energy, RESA and the OSBA rely heavily on FirstEnergy’s desire to pursue municipal aggregation as evidence of threatened unlawful market power. The ALJs concluded that the legality and policy implications of municipal aggregation is far from settled in Pennsylvania, therefore any concerns relative to FirstEnergy’s intent are both speculative and not related to whether the merger should be permitted or not.[[5]](#footnote-5) The ALJs stated, “Moreover, we cannot say FirstEnergy’s marketing strategies are *per se* anticompetitive.” The ALJs also concluded that there is no question that these factors create challenges to rival suppliers, but these challenges do not necessarily rise to the level of discrimination or unlawful market power. I.D. at 67.

The ALJs also found that Direct Energy’s arguments regarding the flaws in the default service regime has no real nexus to the merger of the Applicants. The ALJs state that Direct Energy’s allegations exist completely independent of the Merger and would remain unchanged even if the Merger was abandoned tomorrow. The ALJs observed that Direct Energy wants to use the instant Merger proceeding as a vehicle to put in place an unprecedented departure from default service which would apply only to the FirstEnergy EDCs, but offers no implications of treating these EDCs differently from other Pennsylvania EDCs. The ALJs concluded that these proceedings are not the appropriate venue for Direct Energy’s proposal for a radical departure from the current default service regime. *Id*. at 68-69.

Although the ALJs concluded that these proceedings are not the appropriate venue for Direct Energy’s proposals, they presented the following Findings of Fact and Conclusions of Law:

74. Direct Energy’s proposal is likely to increase costs to customers, reduce customers’ competitive options, generate needless customer confusion, and, generally, harm efforts to promote retail competition in the Commonwealth.

Finding of Fact No. 74, *id*. at 29.

17. The Direct Energy Proposal is inconsistent with the mandates of Act 129 as to the procurement of electric generation for default service customers.

18. The Direct Energy Proposal is inconsistent with the Code at Section 2807(d)(1) that requires a customer’s affirmative consent in order to switch that customer’s electric provider.

Conclusion of Law Nos. 17 and 18, *id.* at 78.

Similarly, the ALJs presented the following Finding of Fact regarding RESA’s proposal to develop a process to inform customers about available competitive EGS offers when customers contact a FirstEnergy EDC’s customer service call center:

84. Imposing a supplier referral function on EDC call centers will compromise the primary function of those call centers.

Finding of Fact No. 78, *id*. at 31.

Consistent with the ALJs’ conclusion that these proceedings are not the appropriate venue for Direct Energy’s proposals, we decline to adopt these findings of fact and conclusions of law. Furthermore, as discussed, *infra*, we will open a statewide investigation into Pennsylvania’s retail electricity market wherein Direct Energy’s and RESA’s concerns and proposals can be addressed more appropriately.

While we are sympathetic to the issues raised by Direct and RESA, we note that those concerns are largely speculative, and so we decline to adopt their proposed conditions in their entirety. Nonetheless, we are mindful of our obligation to ensure a properly functioning and workable competitive retail electricity market pursuant to Section 2811(e). Rather than attempting to make changes piecemeal as a result of a litigated proceeding, we believe that any issues related to the structure of the retail electricity market in Pennsylvania should be addressed on a statewide level. To that end, by a separate Commission action, we will open a statewide investigation into Pennsylvania’s retail electricity market, with the goal of making recommendations for improvements to ensure that a properly functioning and workable competitive retail electricity market exists in the state. This investigation will examine both the legislative and the regulatory framework behind Pennsylvania’s competitive retail electricity markets. This investigation will include an analysis of the current default service model and whether, as currently structured, that model is hindering competition. Additionally, the investigation will include a process to identify interested alternative suppliers of electric generation services qualified to provide default service throughout the state and should result in recommendations for legislative changes, as well as changes the Commission can initiate on its own, to improve competition in Pennsylvania’s retail markets.

We will also address any affiliate transaction concerns by directing the Bureau of Audits or its contractors, in its next regularly scheduled audit, to examine the merged entity’s business activities and specifically affiliate transactions on a confidential basis to ensure that none of the FirstEnergy EDCs are discriminating in favor of its affiliated EGS. The Bureau of Audits shall audit the companies’ cost allocation practices and affiliate relationships to identify and remove any direct or indirect cross subsidies that provide a benefit to either default service or an affiliated retail or wholesale supplier.

In addition to the statewide investigation company audits discussed *supra*, Paragraphs 53, 54 and 55 of the Settlement will allow the Commission, the OTS, the OSBA and the OCA to receive timely and accurate information on the state of the markets in the post-Merger FirstEnergy EDC service territories. Settlement at ¶ 53-55
at 27-28. These provisions will facilitate any interim corrective actions by the Commission if the need arises.

####  RESA’s Proposals

RESA argues that the Settlement is “woefully inadequate” in addressing the competitive retail market concerns resulting from this merger. RESA submits that even if the Commission were to approve this merger, there are seven recommendations that must be adopted to prevent discriminatory behavior. As discussed, *infra*, the ALJs have rejected these recommendations and RESA has excepted. RESA Exc. at 18-30. We will briefly discuss each proposal in turn.

RESA suggested that the Commission establish an enhanced code of conduct for FirstEnergy to address the potential for anticompetitive and discriminatory conduct. RESA Exc. at 18. The ALJs did not specifically address this proposal. We concur with RESA to the extent that certain actions should be taken immediately with regard to the relationships between EDCs and their affiliate EGSs in order to ensure a properly functioning competitive retail market in Pennsylvania. We have initiated a proposed rulemaking at Docket No. L-2010-2160942 to address the need to update our regulations regarding Competitive Safeguards at 52 Pa. Code §§ 54.121 – 123. We shall add the following provisions to that rulemaking currently underway:

* + - Protections so that EDC-affiliated EGSs do not inappropriately benefit from the use of resources shared with its affiliate EDC.
		- Prohibitions on joint EDC/EGS marketing, sales, and promotional activities.
		- Provisions to prevent direct or indirect cross-subsidies, such as the use of the affiliate EDC for credit support for affiliated EGS sales.
		- An examination of whether the Commission should require EDC-affiliated EGSs to change their trade names so as to be dissimilar from both the EDC affiliate and corporate parent.

RESA recommended that FirstEnergy’s EDCs create an expanded education program to provide customers with information on specific and available retail offers through a variety of communication channels and to facilitate customer enrollment with these offers. RESA Exc. at 19-23. The ALJs noted that ratepayers are already paying for approved education programs to coincide with the end of rate caps in the service areas of those affected utilities. I.D. at 57. Clearly, customer awareness and customer acceptance of EGSs is a critical component of a successful competitive electric supply market. However, in light of the Commission’s integral participation in ratepayer education on the availability of competitive suppliers, we do not find it necessary to direct FirstEnergy to expand its education programs as a condition of the merger.

RESA proposed six specific enhancements to the Purchase of Receivables (POR) programs for the Joint Applicants. RESA Reply Exc. at 23. The ALJs rejected RESA’s proposals finding that the Settlement already provides for a properly structured and comprehensive POR program consistent with that of other utilities. I.D. at 58. In its Exceptions, RESA submits that, on November 1, 2010, Allegheny filed its proposed supplier tariff that makes its POR program available to all customers. RESA argues that the terms of the proposed Settlement that limit Allegheny’s POR program to just residential and small commercial customers is actually less attractive than would be implemented without the merger. RESA Exc. at 23-24. In light of the extensive shopping already being undertaken by large commercial and industrial (C&I) customers and the contractual nature of their arrangements with EGSs, we are not going to require that the FirstEnergy EDCs expand their POR programs to large C&I customers as a condition of our approval of the merger.

RESA recommended that the Commission prohibit FirstEnergy from implementing its municipal aggregation program until the Commission issues a final adjudication regarding the legality of this program. RESA Exc. at 18. RESA’s and the OSBA’s positions on municipal aggregation are addressed in our discussion of “Municipal Aggregation,” *infra*.

RESA proposed that the post-merger FirstEnergy EDCs be required to pursue two specific changes to their next default service plans submitted to the Commission for review. The first change is that the EDCs should be required to implement hourly priced service for all customers with peak demand greater than 100 kW as a condition for approving the merger. Second, the limit on the amount of supply that can be served by any single wholesale supplier should be lowered to 33 1/3 percent. RESA argues, *inter alia*, that these proposed changes in its default service plans will provide some reassurance that FirstEnergy will not use its default service to provide an advantage to its affiliated wholesale supplier. RESA Exc. at 26.

In its Reply Exceptions, the OCA presents a number of arguments that RESA’s proposals are inconsistent with the statutory default service provisions of Act 129 set forth in 66 Pa. C.S. § 2807. OCA R. Exc. at 15- 20. The ALJs found the OCA’s arguments persuasive and rejected RESA’s proposal in this proceeding. I.D. at 58-59. We find that this is not the appropriate proceeding to address RESA’s arguments and we reject them without prejudice.   RESA can address the merits of its proposals and the OCA’s concerns in FirstEnergy’s next default service proceeding.

RESA raised a number of operational concerns and recommended that the FirstEnergy EDCs update and revise their operational rules. RESA acknowledges that the Settlement offers some changes, but there are important operational recommendations made by RESA that were not addressed. RESA Exc. at 31-33.

The ALJs declined to adopt RESA’s recommendations because many of the proposals were adequately addressed by the Settlement and the Settlement “provides an opportunity for EGSs to sit down with FirstEnergy’s operational personnel to discuss many of the issues that RESA proposes to have incorporated as conditions.” I.D. at 59.

Paragraph 46 of the Settlement provides that, within thirty days of the merger, FirstEnergy EDCs will hold an EGS training session to address three specific issues. Settlement ¶ 46 at 21. RESA states that, while one EDC-sponsored training session is better than nothing, this proposal has no concrete commitments on how to address the specific operational concerns raised by RESA. RESA Exc. at 33. We agree and will direct the FirstEnergy EDCs to coordinate a meeting with all interested EGSs, within thirty days of the entry of this Opinion and Order, to address the operational issues set forth in the record of this proceeding. The issues should include, but not be limited to:

* Not implying a right of rescission in customer enrollment confirmation letters.
* Implementing an EDI Advance Notice of Drop.

* Providing PLC factors.
* Developing procedures for seamless moves.
* Addressing account attribute changes for shopping customers by eliminating any operational or other rules that provide a disincentive for customers to either switch to a competitive electricity provider, or once switched, to remain a customer of an EGS, when a person initiates service or when a customer moves or his or her customer information changes (this should include prohibitions against any rule that requires an applicant to take default service for any period of time before being able to obtain service from an EGS).

FirstEnergy shall hold these operational calls with suppliers on a monthly basis for twenty-four months after consummation of the Merger and thereafter as may be necessary. The purpose of these meetings is to assist suppliers with technical and operational issues and to reach mutually satisfactory resolutions for the operational problems as they may arise. FirstEnergy shall commit to working cooperatively with the EGSs on addressing these issues.

RESA avers that the FirstEnergy EDCs may not be properly allocating to default service companies and FES their share of costs and such misallocation is against Commission policy and may be used to gain an improper advantage. RESA recommends that the Commission order an independent cost allocation and affiliate relationship audit to mitigate concerns regarding the ability and incentive of the combined entity to misallocate costs between and among the affiliated companies, or to bundle default service costs with distribution rates to advantage the EDCs (through default service) or the affiliated-EGS. RESA Exc. at 29.

The ALJs presented the following three Findings of Fact regarding RESA’s proposal:

88. RESA did not undertake a cost allocation analysis in support of its audit proposal.

89. Many of the costs incurred for services to unregulated subsidiaries are directly billed to those subsidiaries and not allocated among regulated subsidiaries and unregulated subsidiaries. FirstEnergy directly bills its subsidiaries for costs and performs cost allocations consistent with the requirements of the Commission and the Federal Energy Regulatory Commission.

90. The FirstEnergy Pennsylvania Utilities and West Penn are regularly audited by the Commission’s Bureau of Audits and the Commission has broad statutory powers to conduct audits, request information, and supervise affiliate relations (including disallowance of unreasonable expenses charged to regulated utilities by their affiliates).

I.D. at 22.

 In response to these Findings, RESA argues that the Initial Decision does not address how indirect costs are billed to various company affiliates nor does it address the “undisputed” fact that FES does not get an indirect cost assignment of company-wide costs. RESA also avers that restating the undisputed authority of the Commission does not address the competitive concerns raised in this proceeding. RESA Exc. at 30.

The Joint Applicants state that RESA’s request for an audit is based on “unjustified suspicions” that FirstEnergy may not be properly allocating costs and that its “phantom misallocation” may be used to gain an improper advantage. The Joint Applicants aver that the ALJs correctly found that RESA’s suspicions are not supported by any evidence, that RESA had not conducted any cost allocation study, and that FirstEnergy performs cost allocations consistent with the requirements of the Commission and the FERC. Applicant’s R. Exc. at 23.

While proper cost allocation is essential to ensure that there is a level playing field for both affiliated and non-affiliated EGSs, we concur that there is not sufficient evidence at this juncture to initiate an audit of FirstEnergy’s cost allocation procedures. However, as discussed, *supra*, by this Opinion and Order, we have directed the Bureau of Audits to audit the companies’ cost allocation practices and affiliate relationships to identify and remove any direct or indirect cross subsidies that provide a benefit to either default service or an affiliated retail supplier.

### Municipal Aggregation

As explained by the ALJs, municipal aggregation allows a municipality to buy electricity for its residential and small commercial and industrial (Small C&I) customers from a single EGS. A municipality could provide aggregation for its residents and businesses on either an “opt-in” or an “opt-out” basis. The ALJs pointed out that the record in this proceeding indicates that FirstEnergy and its affiliates support the adoption of “Municipal Opt-Out Aggregation,” which would automatically enroll residential and Small C&I customers with a single EGS unless the customers affirmatively opt-out of such service. I.D. at 72.

The OSBA argues that opt-out municipal aggregation violates the meaning of “default service” as set forth in 66 Pa. C.S. §§ 2803 and 2807(e)(3.1) and violates the anti-slamming-rule under 66 Pa. C.S. § 2807(d)(1). The OSBA recognizes that the General Assembly considered language to amend the Code to allow opt-out municipal aggregation. The OSBA avers that since the legislation was not enacted, opt-out aggregation is unlawful. The OSBA recommends that, as a condition of the approval of the Merger, the Commission should forbid FirstEnergy and its affiliates from engaging in municipal aggregation until authorizing legislation is enacted. OSBA Exc. at 10.

The ALJs provided the following summary of recent Commission action addressing the issue of municipal aggregation:

 Clearly, the concept of municipal aggregation is nascent in Pennsylvania and subject to considerable debate before both the Commission and in the General Assembly. Indeed, in the aftermath of the announcement of FirstEnergy’s municipal aggregation agreement with Meadville, on October 28, 2010, RESA sought to initiate such a generic proceeding by filing its *Petition of the Retail Energy Supply Association for Investigation and Issuance of Declaratory Order Regarding the Propriety of the Implementation of Municipal Electric Aggregation Programs Absent Statutory Authority*, at Docket No. P-2010-2207062. On October 29, 2010, Dominion Retail, Inc., joined in the effort to initiate a generic proceeding by filing its *Petition of Dominion Retail, Inc. for Order Declaring that Opt-out Municipal Aggregation Programs are Illegal for Home Rule and Other Municipalities in the Absence of Legislation Authorizing Such Programs*, at Docket No. P-2010-2207953. FirstEnergy joined the effort to initiate a generic proceeding on November 9, 2010, when its affiliate, FirstEnergy Solutions Corporation, filed its *Petition of FirstEnergy Solutions Corp. for Approval to Participate in Opt-Out Municipal Energy Aggregation Programs of the Optional Third Class Charter City of Meadville, the Home Rule Borough of Edinboro, the Home Rule City of Warren and the Home Rule City of Farrell*, at Docket No. P-2010-2209253. By Secretarial Letter issued on November 10, 2010, the Commission consolidated the three aforementioned petitions and set a deadline for interested parties to file answers. The Commission directs each EDC not to switch any customer to an EGS pursuant to an “opt-out” municipal aggregation contract and each EGS not to switch any customer from default service (or the customer’s existing EGS) pursuant to an “opt-out” municipal aggregation contract until these legal issues are addressed and resolved by the Commission.

*Id.* at 73-74.

The ALJs conclude, *inter alia*, that while the OSBA raises legitimate concerns which should be thoroughly investigated by the Commission and the General Assembly, any threat posed by municipal aggregation is too speculative and not sufficiently related to the proposed merger. *Id.* at 74.

In its Exceptions, the OSBA states that the ALJs erred by not delaying the implementation of FirstEnergy’s municipal aggregation plan until the enactment of authorizing legislation or until May 31, 2013, when the default service periods of Met-Ed, Penelec, Penn Power and West Penn expire. The OSBA argues that by waiting to implement municipal opt-out aggregation until the default service periods beginning June 1, 2013, the FirstEnergy EDCs will be better able to give wholesale bidders advance notice of what the default service load will be, thereby mitigating the risk premiums that will otherwise increase default service rates. The OSBA also argues, *inter alia*, that if FirstEnergy dedicates a significant portion of Allegheny’s low-cost generation to retail competition, including municipal aggregation, rather than default service, the result could be higher default service rates. OSBA Exc. 9-26.

In response to the OSBA’s Exceptions, FirstEnergy makes three arguments. First, in light of the Commission’s pending proceeding to address municipal aggregation, there is no valid basis for the Commission to pre-judge issues already before it on another docket. Second, there is no meaningful connection between municipal aggregation and the statutory standards for approving the merger. Third, the generating subsidies of FirstEnergy and Allegheny are not public utilities and furnish service within the exclusive jurisdiction of the FERC. FirstEnergy avers that the Commission cannot mandate or prohibit structural changes in those companies or cannot overcome a lack of jurisdiction by imposing a condition on the approval of a certificate of public convenience. FirstEnergy Reply Exc. at 18-20.

RESA recognizes that the Commission is currently addressing this issue in another proceeding, but argues that the ALJs erred in concluding that issues concerning FirstEnergy’s opt-out municipal aggregation strategy are “outside” the scope of this proceeding. RESA recommends that the ALJs’ determination be reversed because it is an integral part of FirstEnergy’s “market dominance” business strategy. RESA Exc. at 25.

We concur with the ALJs and FirstEnergy that the Commission, and possibly the General Assembly, need to address a number of issues before it is appropriate to address the implementation of municipal aggregation by an EDC in its service area. As reflected in the Initial Decision, *supra*, we have imposed a stay until these issues are addressed. Also as discussed, *supra*, FirstEnergy’s potential utilization of municipal aggregation *per se* as a marketing strategy does not rise to the level of discrimination or unlawful market power in our review of the proposed Merger. Like all Pennsylvania EDCs, the FirstEnergy EDCs will have to comply with any forthcoming statewide requirements established by statute and or the Commission. We are not inclined to put a condition on the merger regarding municipal aggregation when it is unclear what the future standards for municipal aggregation will be. Accordingly, the OSBA’s and RESA’s Exceptions are denied.

### Regional Headquarters and Employment

As discussed, *supra*, the corporate headquarters of Allegheny Energy is located in Greensburg, Pennsylvania. There are approximately 910 employees currently assigned to the Greensburg area, with 65 of those employees scheduled to be relocated to West Virginia in the near future which is not related to the merger. The ALJs pointed out that the Joint Applicants made no commitments in their filings as to the continued employment of the remaining 845 employees of Allegheny Energy located in the Greensburg, Westmoreland County area. I.D. at 4-42; Tr. at 290, 294-297.

In our June 2010 Secretarial Letter, the first issue we asked the Parties to address in this proceeding was related to the impact of employment levels. Specifically we asked the parties to address:

How will the merger impact employment levels in Pennsylvania, particularly, but not limited to, those employees not covered by collective bargaining agreements? What will the impact be on Allegheny Energy’s corporate headquarters in Greensburg, PA, as well as the operating companies’ offices?

June 2010 Secretarial Letter, I.D. Appendix at A-1.

Two public input hearings were scheduled in Greensburg. Among those participating in the hearing, Pennsylvania State Senator Kim Ward testified as to the high rate of unemployment in Westmoreland County, and how the potential loss of jobs in Greensburg due to the merger would be “devastating.” Senator Ward urged the Commission to adopt some type of work force protection if the merger was approved. Tr. at 58-63.

Amanda Gordon, an OTS witness, described the effect of the possible loss of jobs at the Greensburg, Pennsylvania headquarters of Allegheny Energy as a result of the merger. Ms. Gordon testified that the Joint Applicants’ on-the-record commitments to jobs were insufficient. Ms. Gordon recommended that Joint Applicants agree to a five-year jobs commitment for the Greensburg area. Accordingly, as part of the Settlement agreed to more specific commitments to regional employment in addition to those made in their original filings. OTS St. No. 1 at 2-5.

As outlined, *supra*, Paragraph 14 of the Settlement established minimum employment levels in Greensburg during the first five years following the merger. Paragraph 14 also provides for annual reporting to the Commission on actual employment levels and outplacement services for those employees that are affected by the merger. Paragraph 15 states that the regional headquarters of FirstEnergy’s other Pennsylvania utilities, Met-Ed and Penelec will remain in Reading and Erie, respectively, for a minimum of five years. Settlement at 7-9.

We also note that in its Statement of Support, the UWUA supports the Settlement and reports that the Applicant will assume the obligations of a recent contract extension with Allegheny that runs through April 2013. UWUA Statement of Support
at 1-3.

In its Exceptions, Citizen Power submits that there is no guarantee that any jobs will remain in Greensburg after five years. Citizen Power states that the “income” impact of Greensburg losing over 800 jobs in a “short” five years could be millions of dollars. Citizen Power argues that this likely negative impact resulting from the merger was not accounted for in the determination of whether there were net public benefits. Citizen Power avers that the Joint Applicants did not meet their burden by a preponderance of the evidence that the merger will result in substantial public benefit. Citizen Power excepts to the ALJs’ finding that the Joint Applicants met this burden. Citizen Power Exc. at 3-5.

As discussed, *supra*, the impact on employment in the Allegheny service area was one of our primary concerns in reviewing the proposed merger. Given the unusually high unemployment rates in Southwestern Pennsylvania and the rest of the Commonwealth, the loss of jobs resulting from the merger is extremely difficult to accept. However, in order to achieve the efficiencies that will result from this merger, some job loss is inevitable. We believe that the minimum employment thresholds and the outplacement provisions of the Settlement should minimize the impact on the merger on the Greensburg area. Moreover, the Joint Applicants state that they have committed to maintain West Penn’s regional headquarters in Greensburg after the merger, which “assures that it will continue to be a meaningful source of high quality jobs after the five-year commitments expire.” Joint Applicants R. Exc. at 24.

While we fully appreciate Citizen Power’ concerns and wish that the operational efficiencies could be achieved without any job loss, there is no evidence on the record that the commitments set forth in the Settlement are unreasonable. Accordingly, Citizen Power’ Exception is denied.

### Additional Ring Fencing and Reporting Requirements

As discussed *supra*, the Settlement established specific financial governance and ring fencing provisions. While we concur with the Parties that the provisions of the Settlement represent a solid foundation, they are not adequate to fully protect FirstEnergy’s regulated Pennsylvania utilities. It is vital that our regulated utilities maintain financial stability and enjoy high credit ratings. A high credit rating equates into lower borrowing costs which in turn helps to keep rates for utility customers low and stable. As indicated in the record in this proceeding, S&P downgraded the credit rating of FirstEnergy and all of its subsidiaries after the proposed Merger was announced. OCA St. No. 1 – Public at 9. If ring-fencing controls had been in place, the credit ratings of the regulated entities would likely not have been affected. Furthermore, of all of Pennsylvania’s large EDCs, FirstEnergy is the only company that lacks a ring-fencing policy. Ring-fencing measures are crucial in order to insulate our regulated companies from the potentially riskier activities of their unregulated parents and affiliates. In order to protect the financial stability of the FirstEnergy EDCs, our approval of the Merger is predicated upon the following additional conditions:

* The regulated and unregulated functions must remain organized as separate corporate structures. In addition, employees of the regulated entities cannot also be direct employees of FirstEnergy.
* FirstEnergy’s Pennsylvania EDCs must maintain separate debt ratings and separate financial records from those of the parent company. Although the Partial Settlement requires that the regulated utilities maintain their own credit ratings, this is qualified by a willingness of rating agencies to provide separate ratings. Separate credit ratings are often provided when subsidiaries are effectively insulated from their parent companies. FirstEnergy is directed to ensure effective separation so that credit rating agencies are in the best possible position to provide separate ratings.
* FirstEnergy’s four Pennsylvania EDCs are to provide the Commission all written information provided to credit rating agencies upon request. FirstEnergy is also to provide this information upon request when it directly or indirectly pertains to any of its four EDCs. Such information includes, but is not limited to, reports provided to and presentations made to common stock analysts and bond rating analysts. Written information includes electronically transmitted or stored information as well as printed materials.
* The Partial Settlement provides that if, for a period of five years, any utility’s equity-to-cap ratio falls below 40%, that company will provide the Commission with a 12-month plan to bring its equity-to-cap ratio to 40%. This requirement should not be limited to five years but shall be in place indefinitely.
* The Partial Settlement also provides that if any utility’s equity-to-cap ratio remains below 40% over the 12-month period, the company will not pay a dividend to its parent until the ratio is 40% or greater. This condition shall take effect immediately if the ratio falls below 40% instead of permitting a 12-month grace period. In addition, the utilities may not pay any dividend or cash distribution to the unregulated parent that will cause the utilities equity-to-cap ratio to decline below 40% of the total capital.

# Conclusion

Upon review of the record before us, we will approve the Joint Application as supplemented by the Settlement, and as amended by this Opinion and Order, subject to the condition stated below. Consistent with the foregoing discussion, we find that the Joint Application, as supplemented by the Settlement, and as amended by this Opinion and Order, produces several affirmative public benefits and meets the standard set forth in *City of York*. These public benefits, when viewed as a whole and in light of the dictates of *Middleton,* which require that all Parties’ interests must be examined and not just a select few, amply support our approval of the proposed transfer of control. Unless any Party to the Settlement notifies the Commission, within seven days of the date that this Opinion and Order is entered, that it is withdrawing from the Settlement, the Joint Application, as supplemented by the Settlement, and as amended by this Opinion and Order, shall be approved; **THEREFORE,**

**IT IS ORDERED:**

## That the Exceptions filed by Citizen Power, Inc. are denied.

## That the Exceptions filed by Retail Energy Supply Association are granted in part, and denied in part, as set forth herein.

## That the Exceptions filed by Direct Energy Services, LLC are granted in part, and denied in part, as set forth herein.

## That the Exceptions filed by the Office of Small Business Advocate are denied.

## That the Initial Decision issued by Administrative Law Judges Wayne L. Weismandel and Mary D. Long, on December 20, 2010, is modified, consistent with this Opinion and Order.

## That the approvals set forth in Ordering Paragraph Nos. 7 through 10, and the certificates of public convenience set forth in Ordering Paragraph No. 11, are all subject to the following conditions: (a) that the Joint Applicants file with this Commission a statement indicating their acceptance of each and every modification stated herein to the Joint Petition for Settlement, and (b) that none of the Parties to the Joint Petition for Partial Settlement, as delineated in Ordering Paragraph No. 8, shall file with the Commission within five (5) business days of the entry of this Opinion and Order, a written notice that said Party is withdrawing from the Partial Settlement as a result of modifications to the Joint Petition for Partial Settlement that were directed by this Opinion and Order.

## That the Joint Application to obtain approval for a change of control of West Penn Power Company d/b/a Allegheny Power and Trans-Allegheny Interstate Line Company under Chapters 11 and 28 of the Public Utility Code, 66 Pa. C.S. §§ 101 *et. seq*., to be effected by the merger of Allegheny Energy, Inc. with Element Merger Sub., Inc., a wholly-owned subsidiary of FirstEnergy Corp., filed May 14, 2010, as supplemented by the Joint Petition For Partial Settlement filed October 25, 2010, by West Penn Power Company d/b/a Allegheny Power, Trans-Allegheny Interstate Line Company, FirstEnergy Corp., the Office of Trial Staff, the Office of Consumer Advocate, the International Brotherhood of Electrical Workers, the York County Solid Waste and Refuse Authority, the Pennsylvania Rural Electric Association, the West Penn Power Sustainable Energy Fund, The Pennsylvania State University, ARIPPA, the West Penn Power Industrial Intervenors, the Met-Ed Industrial Users Group, the Penelec Industrial Customer Alliance, the Department of Environmental Protection, the Pennsylvania Mountains Healthcare Alliance, the Utility Workers Union of America, AFL-CIO, UWUA System Local No. 102, the Clean Air Council, Constellation NewEnergy, Inc., Constellation Energy Commodities Group, Inc. and Citizens for Pennsylvania’s Future, is approved, as amended by this Opinion and Order.

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## That the Joint Petition For Partial Settlement, filed October 25, 2010, by West Penn Power Company d/b/a Allegheny Power, Trans-Allegheny Interstate Line Company, FirstEnergy Corp., the Office of Trial Staff, the Office of Consumer Advocate, the International Brotherhood of Electrical Workers, the York County Solid Waste and Refuse Authority, the Pennsylvania Rural Electric Association, the West Penn Power Sustainable Energy Fund, The Pennsylvania State University, ARIPPA, the West Penn Power Industrial Intervenors, the Met-Ed Industrial Users Group, the Penelec Industrial Customer Alliance, the Department of Environmental Protection, the Pennsylvania Mountains Healthcare Alliance, the Utility Workers Union of America, AFL-CIO and UWUA System Local No. 102, the Clean Air Council, Constellation NewEnergy, Inc., Constellation Energy Commodities Group, Inc. and Citizens for Pennsylvania’s Future, is approved, consistent with this Opinion and Order.

## That the proposed revisions to the FirstEnergy Service Agreement, the Mutual Assistance Agreement, and the Intercompany Tax Allocation Agreement, set forth in the Joint Application to obtain approval for a change of control of West Penn Power Company d/b/a Allegheny Power and Trans-Allegheny Interstate Line Company under Chapters 11 and 28 of the Public Utility Code, 66 Pa. C.S. §§ 101 et. seq., to be effected by the merger of Allegheny Energy, Inc. with Element Merger Sub., Inc., a wholly-owned subsidiary of FirstEnergy Corp., filed May 14, 2010, as supplemented by the Joint Petition For Partial Settlement filed October 25, 2010, by West Penn Power Company d/b/a Allegheny Power, Trans-Allegheny Interstate Line Company, FirstEnergy Corp., the Office of Trial Staff, the Office of Consumer Advocate, the International Brotherhood of Electrical Workers, the York County Solid Waste and Refuse Authority, the Pennsylvania Rural Electric Association, the West Penn Power Sustainable Energy Fund, The Pennsylvania State University, ARIPPA, the West Penn Power Industrial Intervenors, the Met-Ed Industrial Users Group, the Penelec Industrial Customer Alliance, the Department of Environmental Protection, the Pennsylvania Mountains Healthcare Alliance, the Utility Workers Union of America, AFL-CIO, UWUA System Local No. 102, the Clean Air Council, Constellation NewEnergy, Inc., Constellation Energy Commodities Group, Inc. and Citizens for Pennsylvania’s Future, are approved.

## That the alternative post-Merger corporate structures depicted on Exhibits F-1 and F-2 to the Joint Application to obtain approval for a change of control of West Penn Power Company d/b/a Allegheny Power and Trans-Allegheny Interstate Line Company under Chapters 11 and 28 of the Public Utility Code, 66 Pa. C.S. §§ 101 et. seq., to be effected by the merger of Allegheny Energy, Inc. with Element Merger Sub., Inc., a wholly-owned subsidiary of FirstEnergy Corp., filed May 14, 2010, as supplemented by the Joint Petition For Partial Settlement filed October 25, 2010, by West Penn Power Company d/b/a Allegheny Power, Trans-Allegheny Interstate Line Company, FirstEnergy Corp., the Office of Trial Staff, the Office of Consumer Advocate, the International Brotherhood of Electrical Workers, the York County Solid Waste and Refuse Authority, the Pennsylvania Rural Electric Association, the West Penn Power Sustainable Energy Fund, The Pennsylvania State University, ARIPPA, the West Penn Power Industrial Intervenors, the Met-Ed Industrial Users Group, the Penelec Industrial Customer Alliance, the Department of Environmental Protection, the Pennsylvania Mountains Healthcare Alliance, the Utility Workers Union of America, AFL-CIO, UWUA System Local No. 102, the Clean Air Council, Constellation NewEnergy, Inc., Constellation Energy Commodities Group, Inc. and Citizens for Pennsylvania’s Future, are hereby approved, consistent with this Opinion and Order.

## That all required certificates of public convenience be issued evidencing the Pennsylvania Public Utility Commission’s approval of the Joint Application to obtain approval for a change of control of West Penn Power Company d/b/a Allegheny Power and Trans-Allegheny Interstate Line Company under Chapters 11 and 28 of the Public Utility Code, 66 Pa. C.S. §§ 101 et. seq., to be effected by the merger of Allegheny Energy, Inc. with Element Merger Sub., Inc., a wholly-owned subsidiary of FirstEnergy Corp., filed May 14, 2010, as supplemented by the Joint Petition For Partial Settlement filed October 25, 2010, by West Penn Power Company d/b/a Allegheny Power, Trans-Allegheny Interstate Line Company, FirstEnergy Corp., the Office of Trial Staff, the Office of Consumer Advocate, the International Brotherhood of Electrical Workers, the York County Solid Waste and Refuse Authority, the Pennsylvania Rural Electric Association, the West Penn Power Sustainable Energy Fund, The Pennsylvania State University, ARIPPA, the West Penn Power Industrial Intervenors, the Met-Ed Industrial Users Group, the Penelec Industrial Customer Alliance, the Department of Environmental Protection, the Pennsylvania Mountains Healthcare Alliance, the Utility Workers Union of America, AFL-CIO, UWUA System Local No. 102, the Clean Air Council, Constellation NewEnergy, Inc., Constellation Energy Commodities Group, Inc. and Citizens for Pennsylvania’s Future, and as amended by this Opinion and Order.

## That West Penn Power Company d/b/a Allegheny Power, Trans-Allegheny Interstate Line Company, and FirstEnergy Corp. shall file with the Pennsylvania Public Utility Commission written notice of the consummation of the merger approved herein within 30 days after such consummation occurs.

## That, in addition to the terms of the Joint Petition for Partial Settlement adopted in Ordering Paragraph No. 8, *supra*, FirstEnergy Corp. Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company shall comply with the additional financial governance, ring fencing, and reporting requirements set forth in this Opinion and Order.

1. That the Bureau of Audits, or its contractors, in its next regularly scheduled audit, shall examine the merged entity’s business activities and, specifically, affiliate transactions on a confidential basis to ensure that Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company are not discriminating in favor of an affiliated energy generation supplier. The Bureau of Audits shall audit the companies’ cost allocation practices and affiliate relationships to identify and remove any direct or indirect cross subsidies that provide a benefit to either default service or an affiliated retail supplier.

## That, in addition to the training sessions set forth in the Joint Petition for Partial Settlement, adopted in Ordering Paragraph No. 8, *supra*, FirstEnergy Corporation, Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company shall coordinate meetings with energy generation suppliers to address, *inter alia*, the operational issues delineated in this Opinion and Order. The first meeting shall be held within thirty (30) days of the entry of this Opinion and Order and shall be held monthly for a minimum period of twenty-four (24) months following the consummation of the merger of Allegheny Energy, Inc. with Element Merger Sub., Inc.

## That the Law Bureau is directed to take all necessary actions to modify the proposed rulemaking at Docket No. L-2010-2160942, consistent with this Opinion and Order.

## That any directive, requirement, disposition or the like contained in the body of this Opinion and Order that is not the subject of an individual Ordering Paragraph, shall have the full force and effect as if fully contained in this part.

## That upon the issuance of the Certificates of Public Convenience referenced in Ordering Paragraph No. 11, *supra*, and the notice of consummation of the merger referenced in Ordering Paragraph No. 12, *supra*, the proceedings at Docket Nos. A-2010-2176520 and A-2010-2176732 shall be marked closed.

**BY THE COMMISSION**,



Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: February 24, 2011

ORDER ENTERED: March 8, 2011

1. For a complete history of the proceedings, please refer to the Initial Decision at pages 1-18. [↑](#footnote-ref-1)
2. Our discussion regarding the impact of the Merger on the employment levels at the current corporate headquarters of Allegheny Energy in Greensburg is presented as part of our consideration of the Exceptions of Citizen Power, *infra*. [↑](#footnote-ref-2)
3. As discussed, *infra*, by this Opinion and Order we are strengthening the financial governance and ring fencing provisions of the Settlement. [↑](#footnote-ref-3)
4. As discussed, *infra*, by this Opinion and Order, we are directing the Joint Applicants to expand the scope of the meetings between the FirstEnergy EDCs and EGSs required by the Settlement. [↑](#footnote-ref-4)
5. The issue of municipal aggregation is also addressed, *infra*, in response to the Exception filed by the OSBA. [↑](#footnote-ref-5)