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VIA ELECTRONIC DELIVERY

June 14, 2010

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RE: Joint Application of West Penn Power Company d/b/a Allegheny Power, Trans-Allegheny Interstate Line Company and First Energy Corp. for a Certificate of Public Convenience Under Section 1102(A)(3) of the Public Utility Code Approving a Change of Control of West Penn Power Company and Trans-Allegheny Interstate Line Company; Docket Nos. A-2010-2176520 and A-2010-2176732

Dear Secretary Chiavetta:

Enclosed for filing with the Commission on behalf of the Clean Air Council ("CAC") is the Protest and Petition to Intervene in the above referenced proceeding. The document was filed electronically with the Commission on this date.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph G. Minott".

Joseph G. Minott, Esq.

Enclosure

Cc: Wayne Weismandel, Administrative Law Judge
Mary D. Long, Administrative Law Judge

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Joint Application of West Penn Power	:	
Company d/b/a Allegheny Power,	:	
Trans-Allegheny Interstate Line Company	:	Docket No. A-2010-2176520
and FirstEnergy Corporation for approval	:	and
of a Change of Control of West Penn	:	A-2010-2176732
Power Company and Trans-Allegheny	:	
Interstate Line Company.	:	

**PROTEST AND PETITION TO INTERVENE
OF CLEAN AIR COUNCIL**

Clean Air Council (CAC) hereby files this Protest in the above-captioned Joint Application proceeding pursuant to the Rules of Practice and Procedure of the Pennsylvania Public Utility Commission (Commission or PUC), 52 Pa. Code §§ 5.51 and 5.71, and sections 1102 and 1103 of the Public Utility Code, 62 Pa.C.S. §§ 1102 and 1103, and requests permission to Intervene in proceedings relating to the Application, and in support hereof states as follows:

1. The Clean Air Council (CAC), founded in 1967, is a member-supported, non-profit environmental organization dedicated to protecting everyone's right to breathe clean air. The CAC has approximately 8000 members throughout Pennsylvania, some of which are current customers of the Joint Applicants. The CAC works through public education, community advocacy, and government oversight to ensure enforcement of environmental laws.
2. On May 14, 2010, the FirstEnergy Corporation (First Energy), West Penn Power Company (West Penn) d/b/a Allegheny Power (Allegheny), and Trans-Allegheny Interstate Line Company (TrAILCo) (collectively, the "Joint Applicants") filed a Joint Application

seeking such approvals of and registrations by the Commission as are necessary in connection with the proposed transfer of control of the Joint Applicants to FirstEnergy Corporation. *Joint Application* at ¶1. The Applicants seek all necessary approvals as required under Chapters 11 and 28 of the Public Utility Code. 66 Pa.C.S. § 1101, *et seq.*

3. West Penn d/b/a Allegheny Power is a “public utility” and an “electric distribution company” (EDC) as those terms are defined, respectively, in Sections 102 and 2803 of the Public Utility Code (66 Pa. C.S. §§ 102 and 2803) and, therefore is subject to regulation by the Commission. West Penn is engaged in the business of distributing and supplying electricity in Pennsylvania. *Joint Application* at ¶5. West Penn serves approximately 715,000 retail customers in a 10,400 square mile area of western and central Pennsylvania. *Id.*
4. TrAILCo is a Maryland and Virginia corporation that is engaged in the business of transmitting electricity in interstate commerce. *Id.* at ¶6. TrAILCo is a “public utility” under Section 102 of the Public Utility Code (66 Pa. C.S. § 102) and is subject to regulation by the Commission. TrAILCo is an indirect public utility subsidiary of Allegheny Power. *Joint Application* at ¶8.
5. FirstEnergy is an Ohio corporation, qualified to do business in Pennsylvania, and is a diversified energy services holding company. FirstEnergy is a “public utility” and an “electric distribution company” (EDC) as those terms are defined, respectively, in Sections 102 and 2803 of the Public Utility Code (66 Pa. C.S. §§ 102 and 2803) and, therefore is subject to regulation by the Commission. FirstEnergy owns seven electric utility companies,

including three subsidiaries in Pennsylvania: Metropolitan Edison Company (Met-Ed), Pennsylvania Electric Company (Penelec), and Pennsylvania Power Company (Penn Power). *Id.* at ¶7. FirstEnergy serves 4.5 million customers within 36,100 square miles of Ohio, Pennsylvania, and New Jersey. *Id.*

6.. The name and home office address of the Protestant and Petitioner is:

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7. The names, address and telephone number of Counsel for Protestant and Petitioner is:

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CLEAN AIR COUNCIL'S INTERESTS

8. Members of the CAC live and/or work in FirstEnergy and Allegheny service territories and are customers of these EDCs for transmission and distribution services, and therefore have a direct, substantial, and immediate interest in the Application.

9. The CAC advocates for a level of air quality which protects human health. The CAC avers that the ability to achieve a protective level of air quality depends in substantial part upon the profile of a region's electric generation supply. A competitive market for electric power promotes opportunities for renewable energy generation to grow in the FirstEnergy and Allegheny service territories and other areas of the Commonwealth which would serve to reduce degradation of air quality from electric power. It is averred that the FirstEnergy/Allegheny Joint Application may adversely affect the competitive market so described.

10. The CAC previously participated in PUC proceedings generated by GPU, Inc. and First Energy's Joint Application for Approval of the Merger, at Docket No. A-110300F0095, as protestant and petitioner for intervention. Additionally, the CAC participated in PUC proceedings generated by Met-Ed and Penelec's Electric Restructuring Plans, at Docket Nos. R-00974008 and R-00974009, as part of a coalition of organizations known as "The Environmentalists," and thus was a party to the Full Settlement of that proceeding approved by the Commission on October 20, 1998. The CAC therefore has a direct, immediate, and substantial interest in the instant Joint Application by First Energy/Allegheny because the CAC has an ongoing responsibility to represent its member's interests in regards to the future operation of FirstEnergy in Pennsylvania.

11. In addition, the proposed actions of the Joint Applicants are likely to affect the safety, reliability, and affordability of their services and result in an impact on the environmental profile of clean power available to the Joint Applicant's service territories, which affects CAC's interests.

LEGAL STANDARDS

12. The Joint Application is brought pursuant to §1102(a)(3) of the Public Utility Code, 66 Pa. C.S. §1102(a)(3), requiring a public utility to obtain a certificate of public convenience from the Commission prior to acquiring or transferring title to or possession of property used and useful in public service. Such transfer or acquisition through merger is subject to the requirement. The statute provides, in pertinent part, as follows:

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 affiliated interest of a public utility as defined in section 2101 . . . to acquire from, or to 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. . . .

66 Pa.C.S. §1102(a)(3)

13. A certificate of public convenience should only be issued if the proposed merger is “necessary and proper for the service, accommodation, convenience, and safety of the public.”

66 Pa. C.S. §1102(a)(3)

14. The Pennsylvania Supreme Court has interpreted the “necessary and proper” clause of §1102(a)(3) to mean more than an absence of an adverse effect on the public. To meet the standard, an Applicant would have to “demonstrate that the merger will affirmatively promote the ‘service, accommodation, convenience or safety of the public’ in some substantial way.” *City*

of York v. Pa. PUC, 449 Pa. 136, 295 A.2d 825 (1972), *Popowsky v. Pa. PUC*, 594 Pa. 583, 937 A.2d 1040 (Pa. 2007).

15. Section 1103 explicitly allows the Commission to impose conditions upon the issuance of a Certificate of Public Convenience. Section 1103 of the Code provides:

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.

66 Pa.C.S. §1103(a).

16. In determining whether the Pennsylvania public is benefited in some substantial way, "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." *Middletown Township v. Pennsylvania Public Utility Commission*, 85 Pa. Commw. 191, 482 A.2d 674, 682 (Pa. Cmwlth. 1984).

POSITIONS

Based on a review of the Joint Application, the CAC would raise a number of issues that the Commission should address before granting its approval. The CAC submits that the Joint Application, as filed, does not support the conclusion that the acquisition of Allegheny and TrAILCo by FirstEnergy will provide substantial, affirmative public benefits, or that it will affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way—as required for Commission approval under Pennsylvania law. The Joint

Application provides that the acquisition “will affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way.” *Joint Application* at ¶21. Yet, upon initial review, it does not appear that substantial affirmative benefits will arise as a result of the merger.

Therefore, the Commission should examine this Joint Application to ensure that Pennsylvania electricity consumers receive substantial affirmative benefits. In that regard, the CAC will seek to ensure that the Joint Applicants demonstrate that the proposed transaction provides substantial affirmative public benefits. The CAC will also seek to ensure that the parties to this transaction support the service, accommodation, convenience, and safety of the public now and into the future.

For example, the CAC has concerns regarding a number of issues regarding these matters, including the following preliminary issues:

17. The Joint Applicants contend that the proposed merger “positions Allegheny and FirstEnergy to better adapt to possible future environmental regulation,” while failing to provide details of how this will be accomplished, any commitment to maintain the current level of environmental regulatory compliance, or to explain what measures will be taken to address the current violations of environmental law by their generation plants in Pennsylvania, such as violations of the federal Clear Air Act and the Clean Water Act, *Joint Application* at ¶27(a);

18. The Joint Application does not provide an explanation for how First Energy will comply with the respective subsidiaries’ existing commitments to Pennsylvania’s Act 129, which sets efficiency goals and mandates a reduction in electric consumption of 1 percent by 2010, of 3 percent by 2013, and a 4.5 percent peak demand reduction by 2013. There is no mention of a

proposed solution for decreasing energy use or increasing energy efficiency, only that “the combined company should also be better able to invest in and deploy new processes and technologies, including innovations anticipated as part of Act 129 Energy Efficiency and Conservation and Smart Meter plans being implemented by West Penn, Pennelec, Met-Ed, and Penn Power.” *Joint Application*. at ¶27(c). The filed Act 129 Energy Efficiency and Conservation Plans address how the individual companies planned to comply with the requirements before the merger was to take place, and mention nothing of the post-merger plans of the combined company;

19. Despite the projected savings of the merger, the Joint Applicants have not made a commitment to improve environmental performance at FirstEnergy or Allegheny generation facilities. First Energy and Allegheny plants account for massive air emissions of pollutants such as sulfur dioxide, nitrogen oxides, and heavy metals such as mercury. These emissions contribute to Pennsylvania non-attainment of ozone health standards and to acid rain damage to Pennsylvania forests and waterways. Further, First Energy and Allegheny plants emit millions of tons of carbon dioxide into the atmosphere every year. Thus the merger as presented is adverse to the public interest absent reductions of emissions at company generating facilities;

20. The Joint Application also has not made a commitment to develop further alternative energy sources or provided information about future compliance with the 52 Pa. Code §75.61 Alternative Energy Portfolio Requirements. The requirements are that EDCs and EGSs shall acquire alternative energy credits in quantities equal to a percentage of their total retail sales of electricity to all retail electric customers for that reporting period, as measured in MWh.” 52 Pa.

Code §75.61(b). The current requirements, which extend through May 31, 2011 require that 3% of all retail sales are from Tier I sources, and of which at least 0.0203% of all retail sales are to come from solar photovoltaic sources and the remaining from nonsolar photovoltaic Tier I sources, and the Tier II requirement is 6.2% of all retail sales. 52 Pa. Code §75.61(b)(5);

21. The Joint Application does not meet the legal standard for approval because the proposed merger's benefits are primarily geared toward business and shareholder concerns and not to the residential or business customers of either company. The Joint Application claims that the merger will create one of the largest investor-owned utilities in the nation and the combined company will possess the management, employee experience, technical expertise, retail customer base, energy and related services platform and financial resources to grow and succeed in the rapidly changing energy market. Yet, the Joint Application fails to describe how the proposed merger will affirmatively benefit the public beyond the corporation's own growth, fiduciary gain, cost savings, and operational efficiency, as required by *City of York* and *Popowsky*;

22. The Joint Application states that "economies of scale or scope would result in lower costs and could give rise to lower rates in the future than would otherwise be the case..." but does not make any commitment to lower rates or offer other benefits for consumers or explain how the "lower costs" would benefit the public. Further the Joint Application makes no commitment to control and/or limit rate increases when the current rate caps expire on December 31, 2010;

23. The Joint Application does not meet the legal standard of "affirmatively promoting" the public interest because it contains no rate reductions for customers. FirstEnergy/Allegheny

claim, without benefit of a detailed study, that the merger will result in a savings that could top \$530 million by the fifth year company-wide. The Joint Application does not propose passing merger savings on to FirstEnergy/Allegheny customers in Pennsylvania, and in fact, the Joint Application cites the interpretation that *Popowsky* and *City of York* do not require them to demonstrate “that merger savings will lower prices to consumers.” *Joint Application* at ¶21. Further, the Joint Applicants state that “the Merger will have no immediate effect on customer rates...” *Id.* at ¶27(f). As a result, the merger does not “affirmatively promote the service, accommodation, convenience or safety of the public in some substantial way,” as required by *City of York* and *Popowsky* because the merger must do more than show an absence of an adverse effect. The Joint Applicants do not show that the merger savings would flow through to the customers; therefore, those savings do not constitute a basis to find that the merger is in the public interest;

24. The Joint Application fails to discuss how Allegheny employment levels may be affected by this transaction beyond an initial period of two years and how benefits, as well as other employee relations, may be affected by this transaction beyond an initial period of one year. The Joint Applicants state that employees “who are assigned to positions in the Allegheny Power utilities comparable to their counterparts at the FirstEnergy utilities” are protected by the above two-year agreement. *Joint Application* at ¶27(e). However, the Joint Applicants fail to describe the effect of this transaction on those employees not protected, such as existing Allegheny corporate employees, or to estimate eventual job losses in Pennsylvania, a concern considering the 340 Berks County-based jobs eliminated by First Energy in 2002 following its merger with GPU, Inc.;

25. The Joint Application indicates that current levels of charitable giving will be maintained only for three years. After which, FirstEnergy will “continue to support local charities at levels consistent with its commitments to other communities it serves.” *Joint Application* at ¶27(g). This statement provides no commitment to ensure funding and support for Pennsylvania charities and institutions beyond the initial three-year period, and therefore cannot be considered an affirmative public benefit because West Penn/Allegheny would presumably have continued funding at current or increased levels for these initiatives beyond a three year period;

26. The Joint Application states that the combined companies “will work to maintain current levels of reliability of West Penn.” This proposed action does not qualify as an affirmative public benefit, as it does nothing to improve the benefit received by current consumers beyond maintaining the current level of service. *Joint Application* at ¶27(d);

27. The merger risks a scenario in which poor performance or accidents at FirstEnergy plants or services would adversely affect the ability of FirstEnergy to obtain capital on reasonable terms, inferior to current and projected ratings for West Penn/Allegheny on its own, thereby running counter to the public interest;

28. The proposed merger may raise barriers to entry for small, cleaner suppliers to the extent that the new, larger entity will be financially stronger and wield greater market power, with the resulting adverse impact on competition, and on growth of clean energy competitors in particular;

29. The merger may result in anti-competitive or discriminatory conduct in contravention of 66 P.S. §2811(e), in light of the fact that the newly expanded FirstEnergy will control nearly 20,000 miles of transmission lines across major expanses of Ohio, Pennsylvania, Maryland, New York, Virginia, West Virginia, and New Jersey, and therefore may be in a position to provide unequal access to these lines for capacity from FirstEnergy generation facilities;

30. The Joint Application does not detail to what extent FirstEnergy will address the specific needs of its low-income customers as a result of this transaction or to ensure that programs benefiting low income customers, such as the Pennsylvania Low Income Home Energy Assistance Program (LIHEAP), continue to receive appropriate funding, as required by 52 Pa. C.S. §58.3 Residential Low Income Usage Reduction Programs (LIURP);

31. The Joint Application makes no commitment nor provides any guarantee that substantial affirmative public benefits will arise as a result of this transaction, as is required by law;

32. The CAC reserves the right to raise additional issues as may be necessary.

Remedies

Wherefore, Protestant and Petitioner requests that the Commission:

33. Receive for filing and docket this Protest and Petition to Intervene.

34. Consolidate this Protest and Petition to Intervene with FirstEnergy/Allegheny's Joint Application and all other Complaints, Protests and Interventions which are made part of Docket Numbers A-2010-2176520 and A-2010-2176732.

35. Order that Clean Air Council be named a party to this proceeding, and placed on the service list.

36. It is believed and therefore averred that FirstEnergy/Allegheny has not met their burden for demonstrating that the proposed Merger affirmatively promotes the public interest. Clean Air Council requests that the Commission hold extensive evidentiary hearings to determine whether issues raised herein, as well as by other interested parties, should preclude the granting of FirstEnergy/Allegheny's Joint Application. Furthermore, the public should be afforded an opportunity to comment on the Joint Application as well, and therefore public hearings should be held in Pennsylvania communities throughout the service territories of FirstEnergy and Allegheny.

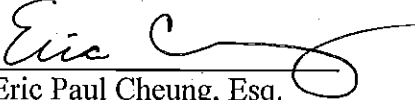
37. If the Commission is inclined to grant the Joint Application, it should condition the approval upon assurances that savings achieved through the merger will be used to provide FirstEnergy and Allegheny customers with:


- a) T&D or CTC/ITC rate cuts;
- b) substantial increases to the LIURP, LIHEAP, and Sustainable Energy Funds (SEF) loan programs;
- c) commitments to lower air emissions at FirstEnergy-affiliate fossil-fuel generating stations;

- d) a commitment to develop new renewable energy capacity;
- e) development of a program for the combined company to facilitate energy efficiency gains across the residential customer base;
- f) enhanced customer information initiatives which would provide environmental characteristics of electric power products available from suppliers

Dated: June 14, 2010

Respectfully submitted,


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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Joint Application of West Penn Power :
Company d/b/a Allegheny Power, :
Trans-Allegheny Interstate Line Company : Docket No. A-2010-2176520
and FirstEnergy Corporation for approval : and
of a Change of Control of West Penn : A-2010-2176732
Power Company and Trans-Allegheny :
Interstate Line Company. :

CERTIFICATE OF SERVICE

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

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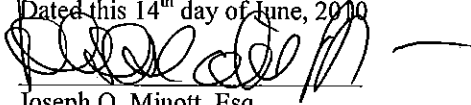
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Dated this 14th day of June, 2010



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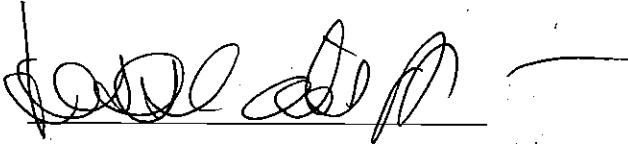
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VERIFICATION

I, Joseph O. Minótt, hereby state that the facts above set forth are true and correct to the best of my knowledge, information and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

Date: June 14, 2010

A handwritten signature in black ink, appearing to read "Joseph O. Minótt", is written over a horizontal line. The signature is stylized and cursive.