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July 15, 2010

Via Electronic FilingRosemary Chiavetta, Secretary
PA Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

Re: Joint Application of West Penn Power Company d/b/a Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy 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:

On behalf of Direct Energy Services, Inc., enclosed for filing is the original Motion to Dismiss Objections and Compel Response to its Set II Interrogatories to West Penn Power Company d/b/a/ Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy Corp., along with the electronic filing confirmation page. Copies have been served in accordance with the attached Certificate of Service.

Very truly yours,



Carl R. Shultz, Esq.

CRS/lww
Enclosurecc: Hon. Wayne Weismandel, w/enc.
Hon. Mary Long, w/enc.
Cert. of Service w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy Direct Energy's Motion to Dismiss Objections and Compel Response to its Set II Interrogatories Addressed to West Penn Power Company d/b/a Allegheny Power, TrAILCo and FirstEnergy upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

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Dated: August 5, 2010



Carl Shultz, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**DIRECT ENERGY SERVICES, LLC'S
MOTION TO DISMISS OBJECTIONS AND COMPEL RESPONSE
TO ITS SET II INTERROGATORIES AND
REQUESTS FOR DOCUMENT PRODUCTION TO WEST PENN POWER COMPANY
d/b/a ALLEGHENY POWER, TRANS-ALLEGHENY INTERSTATE LINE COMPANY**

Pursuant to 52 Pa. Code § 5.342 and the Scheduling and Briefing Order of June 23, 2010, Direct Energy Services (“Direct Energy”) hereby requests that Your Honors dismiss the objections of West Penn Power Company d/b/a Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy Corp (“Joint Applicants”)¹ and compel them to answer the Direct Energy Set II Interrogatories and Requests for Document Production (collectively, “Interrogatories”) Nos. 1(c) and 1(d).²

Interrogatories 1(c) and 1(d) request Pennsylvania-specific information as a follow-up to the information already provided (on a PJM-basis) by the Joint Applicants to FERC. These Interrogatories do not request separate information for either competitive affiliate or for either of the Joint Applicants. Rather, they seek aggregated totals. Given that the aggregated totals being requested cannot be practically separated, there is no basis for the Joint Applicants’ refusal to answer based on the existence of “sensitive commercial and competitive information.”

¹ A copy of said Objections is attached as “Exhibit A”.

² See Appendix A to “Exhibit A”.

Moreover, Pennsylvania-specific information about existing market shares of the merging companies (including the portions served by the Companies' affiliated EGSs) is clearly relevant if the PUC is to apply the applicable statutory standard to determine whether the merger may be approved. Indeed, the Joint Applicants themselves referred to the market penetration of these affiliated EGSs in seeking to claim that the merger did not raise competitive issues.³ Therefore, as explained in greater detail herein, the Joint Applicants should be compelled to answer said Interrogatories.

Grounds to Dismiss Objections and Compel Response to Interrogatories Nos. 1(c) and 1(d)

1. Interrogatories 1(c) and 1(d) are reasonably calculated to lead to the discovery of relevant and admissible evidence.

The Commission must examine the impacts of the proposed merger on the retail electricity market in Pennsylvania. A key issue in this proceeding is whether the post-merger retail electricity markets in the Joint Applicants' combined territories will be "properly functioning and workable" from a competitive standpoint. *See* 66 Pa. C.S. § 2811(e)(1) and 2811(e)(2). Examination of this issue requires information on the pre-merger and post-merger state of the electricity markets in the Joint Applicants' territories in Pennsylvania, considering both default service customers as well as customers served by EGSs affiliated with the Joint Applicants.

The aggregated information requested is a follow-up on information already provided by the Joint Applicants. The Confidential Response to "FERC Interrogatory #8, June 10, 2010" provides data on the portion of the retail market within PJM served by affiliates of First Energy and Allegheny. In that response, the Joint Applicants provided aggregate numbers for PJM load. The subject Interrogatories seek the Pennsylvania-specific information that was part of the basis

³ *See*, Jt. Applicants St. No. 4 at 12-15.

of the Joint Applicants' Confidential Response to FERC. Hope was expressed during the argument on the prior motion to compel (which was related to Set 1 from Direct Energy) that the parties could agree to the disclosure of similar Pennsylvania-specific information. This did not occur. Given the fact that FE has already provided similar information not only to FERC but to all the parties to the Pennsylvania proceeding (including Direct Energy) there is not a reasonable basis on which the Applicants can claim that the information is not relevant, is burdensome to produce or is so highly sensitive that it cannot be revealed to a "competitor."

Here, Interrogatory 1(c) seeks the Pennsylvania "total numbers" comparable to the last column on the Response to FERC Interrogatory #8 for residential, small commercial (up to 300 kw) and large commercial and industrial customers in Pennsylvania. The last column in FERC Interrogatory #8 provides the "Percentage of total FirstEnergy and Allegheny Retail to PJM Footprint with ATSI." The Commission has long recognized that a special relationship exists between an EDC and an affiliated EGS. In fact, the Commission has created a Code of Conduct to regulate these relationships.⁴ Given the nature of this relationship and the fact that Section 2811 covers "consolidations" by energy suppliers,⁵ it is reasonable for the Joint Applicants to provide aggregated information on the consolidated (or post-merger) portion of the Pennsylvania market served by affiliates of First Energy and Allegheny. The Commission has even expressed interest in these relationships. *See* Items 4, 10 and 11 of the Commission's Secretarial Letter of June 3, 2010 in this proceeding.

Similarly, Interrogatory 1(d) seeks (if not already included in response to FERC Interrogatory #8) the total Pennsylvania load being served by FE/AP (including DS load) in the combined Pennsylvania service territories at the present time. The provision of default service

⁴ 52 Pa. Code § 54.122.

⁵ 66 Pa. C.S. § 2811(e).

(DS) by EDCs is an important back-stop to the electricity market in Pennsylvania. This makes inclusion of the DS load in the load totals for First Energy and Allegheny an important factual consideration.

2. The data requested is highly relevant.

As noted, one of the important issues in this proceeding is how the merger will affect the retail electricity markets in the post-merger service territories of FE. An examination of that issue necessarily must include an investigation of the market share and level of participation of the EGS affiliates of FE and West Penn Power. This review is not only specifically referenced in the merger review section of the Choice Act⁶ but it is also discussed by the Company witnesses in their direct testimony describing the likely effect of the merger on “competitive retail market.”⁷

Simply put, there can be no reasonable claim that the market shares of these entities is somehow not relevant or not part of this proceeding. The aggregate numbers requested by Interrogatories 1(c) and 1(d) will reveal information on the consolidated (or post-merger) portion of the market within Pennsylvania under the Choice Act standard. Without such Pennsylvania-specific information, the Commission will not be able to determine the impacts of the proposed merger on Pennsylvania. The Commission will also lack sufficient information to determine if the post-merger electricity markets in the Joint Applicants’ combined territories will be “properly functioning and workable” from a competitive standpoint.

⁶ 66 Pa. C.S. § 2811(e). Moreover, pursuant to 66 Pa. C.S. § 2811(a), the Commission has the responsibility for “monitor[ing] the market for the supply and distribution of electricity to retail customers and tak[ing] steps as set forth in this section to prevent anticompetitive or discriminatory conduct and the unlawful exercise of market power.”

⁷ Jt. Applicants St. 4 at 12-15 (discussing the relative market shares of Allegheny Energy Supply and FirstEnergy Solutions).

3. As requested, the data will not reveal confidential or sensitive information.

Importantly, it must be noted that, by their terms, Interrogatories 1(c) and 1(d) only request aggregated totals for Pennsylvania. These Interrogatories do not request separate information for either competitive affiliate or for either of the Joint Applicants. As an aggregated total, there is no basis for calculating (with any degree of precision) the exact percentage or market share to between specific affiliates or the Joint Applicants. It follows that aggregate totals being requested will not reveal any individual confidential or sensitive information. Nor will the aggregated totals reveal any competitive strategies or business activities. Thus, there is no practical basis for the Joint Applicants' refusal to answer based on the existence of "sensitive commercial and competitive information."⁸ Moreover, it should be noted that by requesting aggregated totals, the information being requested in Interrogatories 1(c) and 1(d) do not seek similar information as that requested in Direct Energy's Set I (which sought specific information related to each affiliate).

Conclusion

Based on the foregoing, there is no basis for the Joint Applicants' relevancy and confidentiality objections to Interrogatories 1(c) and 1(d) and the Joint Applicants should be compelled to answer said Interrogatories.

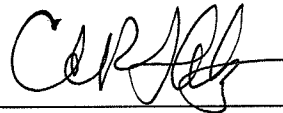
⁸ In their Objections, the Joint Applicants do explain how the aggregated Pennsylvania-specific information would reveal sensitive commercial and competitive information. Nevertheless, if such aggregate information is deemed to be sensitive commercial and competitive information, the terms and conditions of the existing Protective Order limit the disclosure and use of such sensitive and competitive information. Protective Order, at ¶ 2. Specifically, such information is made available "only for purposes of reviewing, preparing or presenting evidence, cross-examination or argument in this proceeding." Protective Order, at 6. Therefore, contrary to the Joint Applicants' objections, Direct Energy cannot use any of such information in its own marketing efforts to compete with the Joint Applicants' affiliates.

WHEREFORE, Direct Energy requests that Your Honors and the Pennsylvania Public

Utility Commission:

- (1) grant this motion;
- (2) dismiss the Joint Applicants' objections to the Set II Interrogatories Nos. 1(c) and 1(d) by Direct Energy;
- (3) compel the Joint Applicants to answer said Interrogatories; and
- (4) grant any other relief deemed appropriate.

Respectfully submitted,



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Dated: August 5, 2010