



GOVERNOR'S OFFICE OF GENERAL COUNSEL

October 6, 2010

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Honorable Rosemary Chiavetta, Secretary
Public Utility Commission
P.O. 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
Corporation 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
PUC Docket No. A-2010-2176520
A-2010-2176732

Dear Secretary Chiavetta:

Enclosed for filing is an original and three copies of the Answer of the Pennsylvania Department of Environmental Protection to Joint Applicants Motion to Strike Testimony of the Pennsylvania Department of Environmental Protection.

Per the attached Certificate of Service, copies of the Answer are being served on the Administrative Law Judges and the other parties to the proceeding.

Thank you for your assistance.

Sincerely,

Kurt E. Klapkowski
Assistant Counsel

cc: Certificate of Service



**COMMONWEALTH OF PENNSYLVANIA
BEFORE THE PUBLIC UTILITY COMMISSION**

JOINT APPLICATION OF WEST	:	
PENN POWER COMPANY, D/B/A	:	
ALLEGHENY POWER, TRANS-	:	
ALLEGHENY INTERSTATE LINE	:	
COMPANY AND FIRSTENERGY	:	
CORPORATION FOR A	:	
CERTIFICATE OF PUBLIC	:	Docket No. A-2010-2176520
CONVENIENCE UNDER SECTION	:	A-2010-2176732
1102(A)(3) OF THE PUBLIC UTILITY	:	
CODE APPROVING A CHANGE	:	
OF CONTROL OF WEST PENN	:	
POWER COMPANY AND TRANS-	:	
ALLEGHENY INTERSTATE	:	
LINE COMPANY	:	

**ANSWER OF THE PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION
TO JOINT APPLICANTS MOTION TO STRIKE TESTIMONY OF THE
PENNSYLVANIA DEPARTMENT OF PROTECTION**

Pursuant to 52 Pa. Code § 5.61, the Commonwealth of Pennsylvania, Department of Environmental Protection (“Department”) hereby requests that the Presiding Officers deny the motion to strike filed by West Penn Power Company, d/b/a/ Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy Corporation (collectively, “Joint Applicants”) on October 4, 2010.

I. Introduction and Background

On August 17, 2010, the Department filed the testimony of Dan M. Haney and Kevin A. Halloran regarding specific environmental compliance issues of entities owned or controlled by the Joint Applicants within the Commonwealth. Mr. Haney’s testimony centers on air quality issues, including the lack of Nitrogen Oxide controls on the plants of Allegheny Energy and serious air quality compliance issues at Allegheny Energy’s

coal-fired power plants. Mr. Halloran's testimony centers on water quality issues at several power stations owned by Allegheny Energy and FirstEnergy.

On July 30, 2010, the Department also served Interrogatories (Set I) on the Joint Applicants requesting among other things, discovery on environmental compliance issues. On August 9, 2010, the Joint Applicants served objections to certain of the Department's Interrogatories. On August 12, 2010, the Department filed a motion to dismiss the objections and compel answers to the Interrogatories. On August 16, 2010, the Joint Applicants filed an answer to the Department's Motion to Compel. And on August 25, 2010, the Presiding Officers issued an order upholding the objections with respect to environmental compliance matters. It is largely on the basis of that order on which the Joint Applicants preface their Motion to Strike.

II. Answer to Motion to Strike

Environmental Issues Are Not Outside the Scope of this Proceeding

The Pennsylvania Supreme Court established in *City of York v. Pennsylvania Public Utility Commission*, 449 Pa. 136, 141, 295 A.2d 825, 828 (1972), that "the proponents of a merger [must] demonstrate that the merger will affirmatively promote the 'service, accommodation, convenience, or safety of the public' in some substantial way." "Safety of the public" must necessarily include the environmental compliance and pollution record of the parties in a merger proceeding. Indeed, the Commonwealth Court, in rather unambiguous terms, held that the Public Utility Commission has "the power to deny a certificate of public convenience that was inconsistent with the public interest, **including environmental concerns.**" *ARIPPA v. Pennsylvania Public Utility Commission*, 792 A.2d 636, 657 (Pa. Cmwlth. 2002) (emphasis added). In *ARIPPA*, the

environmental parties were allowed to present the testimony of their witnesses and the ALJ made a specific determination that the merger neither benefited nor harmed the environment. *See id.*

With the instant motion, the Joint Applicants advance that testimony regarding environmental matters is irrelevant to this proceeding; however the Joint Application undermines this position. The Joint Application itself notes that one of the benefits of the merger is diversified generation, which “positions Allegheny and FirstEnergy to better adapt to possible future environmental regulation.” Joint Application of West Penn Power Company, Trans-Allegheny Interstate Line Company and First Energy Corp. (“Joint Application”) at ¶ 27a. It is ironic that the Joint Applicants can promote the merged company’s ability to better adapt to “possible future environmental regulation,” but the Joint Applicants seek to bar the Department from presenting testimony on the companies’ ability to comply with actual current environmental regulation as beyond the scope of this proceeding.

Further, environmental compliance matters are not beyond the scope of the companies’ Agreement and Plan of Merger contained at Exhibit E of the Joint Application. Sections 3.13 and 4.13 of that document outline environmental representations and warranties between the companies. Interestingly, neither company makes a representation or warranty “with respect to the Company’s or any of its Subsidiaries’ compliance with Environmental Law relating to federal or state new source review or prevention of significant deterioration air permit laws or regulations, except to the extent that the Company or a Subsidiary has, as of the date of this Agreement, received a written notice or been subject to a judicial or administrative proceeding

alleging non-compliance with such laws or regulations.” Joint Application, Exhibit E at § 3.13(b) (substantially similar provision at §4.13(b)). Indeed, Mr. Haney’s testimony details the company’s alleged non-compliance with state and federal air permitting requirements. *See* Testimony of Dan M. Haney, p.5-6 and Attachment.

The testimony of Anthony J. Alexander presented by the Joint Applicant raises environmental issues as a part of this merger proceeding. Mr. Alexander repeats the averment in the Joint Application that one of the benefits of the merger is that it “positions Allegheny and First Energy to better adapt to possible future environmental regulation.” Testimony of Anthony J. Alexander, p. 9. Mr. Alexander also testifies that the company after merger will have “24,000 megawatts of domestic capacity in multiple states, including more than 11,000 megawatts of coal-fired generation units that are equipped with environmental controls to minimize sulfur dioxide emissions or sulfur dioxide and nitrous oxide emissions....” *Id.* at 4-5. Of course, absent from this testimony is how much coal-fired generation the combined company will have that does not have these environmental controls and what that means for public safety. Mr. Haney’s testimony fills in that gap raised in Mr. Alexander’s direct testimony. *See* Testimony of Dan M. Haney, p. 2-3

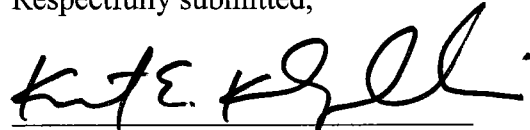
The testimony offered by the Department is not a case of proposing a collateral attack on issues that are properly before the Department or the U.S. Environmental Protection Agency that have been properly excluded in other cases. *See, e.g., Rovin, D.D.S. v. Pennsylvania Public Utility Commission*, 502 A.2d 785 (Pa. Cmwlth. 1986) and *Country Place Waste Treatment Company, Inc. v. Pennsylvania Public Utility Commission*, 654 A.2d 72 (Pa. Cmwlth. 1995). Indeed, these cases must be read in light

of the later decided Commonwealth Court case in ARIPPA, supra. The testimony offered is relevant to this proceeding for several reasons. First, environmental issues are squarely within the realm of public safety, which is implicated in the City of York standard. Indeed, even the Joint Applicants have touted the ability of the merged company to better comply with future environmental regulation. Second, environmental compliance issues can have a serious financial impact on the companies and potentially on the ratepayers that must be evaluated in any merger. This is also inherently recognized by the Joint Application as environmental compliance issues are squarely and directly dealt with in the Merger Agreement between the companies and put into the record in this case. Lastly, the testimony offered by the Department fills in the gaps left by the testimony presented on behalf of the Joint Applicants, as such it is directly relevant to this proceeding.

WHEREFORE, the Department of Environmental Protection requests that the Presiding Officers, Administrative Law Judges Wayne L. Weismandel and Mary D. Long,

- (1) deny the motion to strike filed by the Joint Applicants;
- (2) allow the testimony of Kevin A. Halloran and Dan M. Haney; and
- (3) grant any other relief deemed appropriate.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kurt E. Klapkowski". The signature is written in a cursive style with a horizontal line underneath.

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Dated: October 6, 2010

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OF CONTROL OF WEST PENN	:	
POWER COMPANY AND TRANS-	:	
ALLEGHENY INTERSTATE	:	
LINE COMPANY	:	

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of the attached Answer of the Pennsylvania Department of Environmental Protection to Joint Applicants Motion to Strike Testimony of the Pennsylvania Department of Protection upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code § 1.54.

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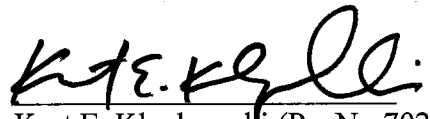
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Dated: October 6, 2010