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September 9, 2010

**Via Hand Delivery**

Rosemary 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:

Yesterday, we filed on behalf of Direct Energy Services, Inc. its Answer to the Joint Applicants' Motion to Dismiss Objections and Compel Response to Set I Interrogatories by the Joint Applicants. There was a typographical error on page 5 of the Answer. Accordingly, enclosed please find the original of Direct Energy's Amended Answer with a corrected page 5. Please note that Exhibit A to the Answer contains Highly Confidential information and will only be provided to the Joint Applicants. Copies have been served in accordance with the attached Certificate of Service.

Very truly yours,



Carl R. Shultz, Esq.

CRS/lww  
Enclosure

cc: Hon. Wayne Weisman, w/enc.  
Hon. Mary Long, w/enc.  
Cert. of Service w/enc.

**BEFORE THE  
PENNSYLVANIA 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 :

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**AMENDED ANSWER OF DIRECT ENERGY SERVICES  
TO THE JOINT APPLICANTS'  
MOTION TO DISMISS OBJECTIONS AND COMPEL RESPONSES  
TO THE SET I INTERROGATORIES  
BY THE JOINT APPLICANTS**

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Pursuant to 66 Pa. C.S. § 333(d) and 52 Pa. Code §§ 5.342(c) and (e), Direct Energy Services (“Direct Energy”) files this Answer in opposition to the Motion to Dismiss Objections and Compel Response to Set I Interrogatory Nos. I-26, I-28 and I-29 propounded by West Penn Power Company, Trans-Allegheny Interstate Line Company, and FirstEnergy Corp. (collectively, “Joint Applicants”) to Direct Energy.

**I. INTRODUCTION**

Despite the fact that Direct Energy has provided full responses to all three interrogatories -- Interrogatory Nos. I-26, I-28 and I-29 the Joint Applicants continue to press their motion to compel. Indeed, after further consideration, Direct Energy withdrew its objections to I-28 and I-29 and provided responses to those Interrogatories. Direct Energy also provided a highly confidential response to I-26, but that response was made without waiver of Direct Energy’s objections. Nonetheless, the Joint Applicants continue to “move to compel” presently. Thus, the motion should be denied without

prejudice as moot. If, prior to the close of the record, Direct Energy comes into possession of any information that would be responsive to Question 26, and Direct Energy continues to object to the release of the new information, Direct commits to alerting the Joint Applicants. If they wish to press their objection they can do so at that time, when the ALJs will have the benefit of an actual factual situation. Alternatively, if the ALJs wish to take up the substance of the Motion at this time, Direct Energy submits that its objections are well-founded as a general matter and the Motion should be denied.

**II. THE JOINT APPLICANTS IMPROPERLY SEEKS TO COMPEL INFORMATION THAT HAS ALREADY BEEN PROVIDED (WITHOUT WAIVER OF OBJECTION) BY DIRECT ENERGY. (JOINT APPLICANT, INTERROGATORY NO. 26)**

Notwithstanding and without waiver of its objections to Interrogatory No. 26, Direct Energy provided a full and complete response to Interrogatory No. 26 under the Protective Order. Direct Energy's "highly confidential" answer to I-26 is attached hereto as Exhibit "A." At this time, there is no need for Your Honors to consider Direct Energy's objections to Interrogatory No. I-26.

Interrogatory No. I-26 requests that Direct Energy list any generating plant "targets" it currently has in the PJM service territory. As noted above, a currently full and complete answer to this question was provided without waiver of Direct Energy's objections under the Protective Order. Direct Energy's response is without waiver of its objection on both a relevance ground as well as because such information typically would be subject to non-disclosure agreement that would bar its release without a court order. Moreover, Direct Energy is continuing its objections to Interrogatory No. I-26, to assure that it is not viewed as waiving or consenting to turning over such information if, as part of its obligation to supplement its answers information emerges that would be responsive

to this question. Direct Energy commits to informing the Joint Applicants if, at some point before the record in this proceeding closes, new information emerges that would be responsive to Interrogatory No. I-26. At that time the Joint Applicants can determine whether they wish to pursue their demand that the information should be produced. Until that time, there is no reason to rule on the motion to compel.

Based on the foregoing, the Joint Applicants' Motion to Dismiss Objections and Compel Responses to Interrogatory No. 26 should be denied.

### **III. THE MOTION TO COMPEL TO INTERROGATORY NO. 26 SHOULD BE DENIED ON THE MERITS**

Direct Energy continues to object to Interrogatory No. 26 because: 1) if, in the future it does have an additional substantive answer to the question posed, it will cause Direct Energy to violate the terms of nondisclosure agreements (or provisions) which are required as part of any such transaction; and 2) the information requested is irrelevant and is not reasonably calculated to lead to the discovery of admissible evidence.

First, Direct Energy would not be able to turn over information requested in I-26 because it would violate the terms of the standard non-disclosure agreement that accompanies any such transaction. A typical nondisclosure provision prevents the parties from disclosing information covered by the agreement, including the fact that a potential transaction is being discussed. Interrogatory No. 26 would require the disclosure of those possible transactions to others, and would cause Direct Energy to violate the related nondisclosure agreements (or provisions).

To illustrate, it may be helpful to review the terms of a standard nondisclosure provision. The American Bar Association promotes a form Confidentiality Agreement for proposed transactions, which contains the following nondisclosure provision:

#### 4. NONDISCLOSURE OF POSSIBLE ACQUISITION TRANSACTION

Except as permitted by the previous paragraph [Restricted Use of Confidential Information] and except as expressly permitted by a definitive acquisition agreement, if any, entered into by the Buyer for the acquisition of the Company, neither the Buyer nor the Buyer's Representatives will disclose to any person (including another prospective purchaser who has been provided Confidential Information) the fact that the Confidential Information has been made available to the Buyer or the Buyer's Representatives or that the Buyer or the Buyer's Representatives have inspected any portion of the Confidential Information. Except with the prior written consent of the other party and except as expressly permitted by a definitive acquisition agreement, if any, entered into by the Buyer for the acquisition of the Company, neither the Buyer nor the Buyer's Representatives will disclose the fact that any discussions or negotiations are taking place concerning a possible Acquisition Transaction, including the status of such discussions or negotiations.

Paragraph 4, Ancillary Document No. 1 (Confidentiality Agreement) in Model Stock Purchase Agreement, Section of Business Law, American Bar Association (1995).

The above-described nondisclosure provision would prohibit the disclosure of the fact that any discussions or negotiations are taking place concerning a possible transaction. This provision creates an expectation and relationship of trust concerning confidential, nonpublic information. Such provisions are important if either company does not want competitors, suppliers, and customers to be aware that it is for sale or that it is considering an acquisition.

It is expected that Direct Energy will have a similar nondisclosure provision in any upcoming discussions or negotiations concerning potential transactions (if any). Direct Energy has used similar nondisclosure provisions in the past. In fact, "Allegheny Energy, Inc., the parent company of West Penn and TrAILCo, entered into an agreement with Company A that expressly prohibits revealing the identity of Company A."<sup>1</sup> The

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<sup>1</sup> See Answer of July 19, 2010 by the Joint Applicants In Opposition To Direct Energy Services' Motion To Dismiss Objections And To Compel Response To Its Set I Interrogatories, p. 3.

Joint Applicants have indicated that under that agreement, the disclosure of the identity of Company A would violate the term of that separate business agreement.<sup>2</sup> While the exact scope of the contractual nondisclosure provision entered into by the Joint Applicants has not been provided to Direct Energy, it appears from these descriptions that the Joint Applicants have entered into, and relied upon, a similar nondisclosure provision to justify their inability to reveal the identity of Company A and the substance of their unsuccessful negotiations with Company A.

The Protective Order does not address the above-described disclosure concerns. The Protective Order only addresses the continued proprietary treatment of the disclosed information. It does not address the separate violations of nondisclosure provisions that would be caused by disclosure under the Protective Order. It offers no comfort to Direct Energy that the negotiations will be given proprietary treatment because the disclosure of those negotiations will cause Direct Energy to violate the terms of nondisclosure provision.

Second, the disclosure of any PJM generating purchase “targets” is irrelevant to this proceeding. Here, Direct Energy filed a Petition for Intervention in this proceeding. Possible transactions being discussed or negotiated by Direct Energy would not address any key questions facing the Commission concerning the merger proposed by the Joint Applicants and would not tend to prove or establish any fact related to the proposed merger of the Joint Applicants. Moreover, any potential benefits obtained by the forced disclosure of that fact that Direct Energy is engaged in discussions or negotiations is outweighed by the risk of discouraging participation of others before the Commission.

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<sup>2</sup> *Id.*

The forced disclosure of discussions or negotiations concerning transactions by a participant in a proceeding would have a chilling effect on those desiring to protect their interests in proceedings before the Commission. Disclosure would require a participant, such as Direct Energy, to reveal to others in the proceeding that it is engaged in discussions or negotiations concerning a potential transaction when (a) those discussions or negotiations may not result in an actual transaction and (b) the proposed transaction is entirely separate from the actual subject matter of the merger proposed by the Joint Applicants. Any person or entity facing such forced disclosure would be discouraged from participating in proceedings (or even filing complaints) before the Commission for “fear” of (i) having their unrelated discussions and negotiations revealed to others and (ii) violating a nondisclosure agreement (or provision).

Additionally, under these circumstances, it is clear that the harm caused to Direct Energy by the disclosure outweighs the benefits of disclosure to the Joint Applicants. Disclosure of the requested information would not lead to admissible and relevant evidence.

Based on the foregoing, the forced disclosure of discussions or negotiations by participants in a proceeding would (1) create prejudice, unreasonable annoyance and burden on the disclosing participant by causing said participant to violate the term of that separate business agreement; (2) confuse the issues by allowing the investigation (and potential use of), discussions or negotiations concerning transactions that may never materialize. Simply put, discovery requests should not be permitted to cause parties to violate contractual provisions or to discourage suppliers from participating in proceedings before this Commission.

**IV. THE OBJECTIONS TO INTERROGATORIES NO. 28 AND 29 WERE WITHDRAWN BY DIRECT ENERGY.**

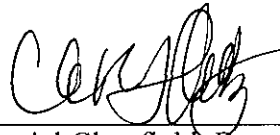
**(Joint Applicants' Interrogatory Nos. I-28 and I-29)**

On August 30, 2010, Direct Energy served a letter on the Joint Applicants (and the other parties) expressly indicating that Direct Energy was withdrawing its objections to Interrogatory Nos. I-28 and I-29, and would be providing responses. (A copy of this Letter is attached as Exhibit "B") Direct Energy served said responses to I-28 and I-29 on August 30, 2010. Simply put, there is nothing to compel under Interrogatory No. I-28 and I-29. Based on the foregoing, AT&T's Motion to Dismiss Objection and Compel Responses to Interrogatory Nos. I-28 and I-29 should be denied.

**V. CONCLUSION**

Based on the foregoing, the Joint Applicants' Motion to Dismiss Objections and Compel Responses to Interrogatories I-26, I-28 and I-29 should be denied.

Respectfully submitted,



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Daniel Clearfield, Esq.  
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Date: September 8, 2010




# EXHIBIT A

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\_\_\_\_\_  
Carl R. Shultz, Esq.

Dated: September 9, 2010

# EXHIBIT B



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August 30, 2010

**Via First Class Mail**

Rosemary Chiavetta  
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 August 25, 2010, Direct Energy Services, LLC served written objections to question numbers 26, 28-29 of the Interrogatories of West Penn Power Company, Trans-Allegheny Interstate Line Company and FirstEnergy Corp. Set I dated August 19, 2010. After further consideration, Direct Energy is withdrawing its objections to numbers 28 and 29 and has provided responses. While Direct Energy has also provided a highly confidential response to question number 26, it is not withdrawing its objection.

Very truly yours,

Deanne M. O'Dell, Esq.

DMO/lww

cc: Cert. of Service

**CERTIFICATE OF SERVICE**

I hereby certify that this day I served a copy of Amended Answer of Direct Energy Services to the Joint Applicants' Motion to Dismiss Objections and Compel Responses to the Set I Interrogatories by the Joint Applicants , 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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