

Carl R. Shultz
717.255.3742
cshultz@eckertseamans.com

September 14, 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:

On behalf of Direct Energy Services, Inc., enclosed for filing please the original and three copies of its Motion to Suspend Schedule to Allow the Commission to Consider the Issues Raised in Joint Applicants' Motion *in Limine*. Copies have been served in accordance with the attached Certificate of Service.

Very truly yours,



Carl R. Shultz, Esq.

CRS/jls
Enclosure

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

RECEIVED
2010 SEP 14 PM 3:07
SECRETARY'S BUREAU
PA PUC

**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 SUSPEND SCHEDULE
TO ALLOW THE COMMISSION
TO CONSIDER THE ISSUES RAISED IN
JOINT APPLICANTS' MOTION *IN LIMINE***

RECEIVED
2010 SEP 14 PM 3:01
PA PUC
SECRETARY'S BUREAU

Pursuant to 52 Pa. Code § 5.1(a)(6), Direct Energy Services, LLC (“Direct Energy”) submits this Motion to Suspend Schedule to Allow the Commission to Consider the Issues Raised in Joint Applicants’ Motion *in Limine* (“Motion to Suspend”). The Motion *in Limine* of West Penn Power Company, Trans-Allegheny Interstate Line Company and FirstEnergy Corp. (“Joint Applicants”) with Respect to the Testimony of Direct Energy Services, LLC (“Motion *in Limine*”), dated September 10, 2010, raises significant issues that justify suspending the procedural schedule in this proceeding to allow Your Honors and the Commission sufficient time to address the substantive issues raised by Joint Applicants and to rule on the Motion *in Limine*.

I. INTRODUCTION

The Joint Applicants initiated this proceeding to obtain Commission approval for a merger that, in their words, will produce the “largest” investor owned utility in the nation in terms of customers. Now, by their motion, Joint Applicants seek to preclude this Commission from fully addressing the anticompetitive effects of the proposed merger in the combined EDC retail electric service territories. Joint Applicants ask the ALJs to preclude from admission into

the record substantial portions of testimony presented by Direct Energy, even though that testimony sought to be stricken addresses the precise issue to be decided by the Commission: whether, if the merger is approved, anti-competitive and discriminatory conduct will occur, such that retail electricity customers in the merged service territory will be prevented from obtaining the benefits of a properly functioning and workable competitive market.¹ Direct Energy's testimony demonstrates that, indeed, the post-merger environment will discriminate in favor of the Joint Applicants' default service offering, making it very difficult for independent competitors to obtain market share, and making it easier for affiliates of the Joint Applicants to dominate the competitive retail markets in their service territories.²

The portions of testimony Joint Applicants seek to bar from admission contain Direct Energy's proposed remedies for the anticompetitive and discriminatory effects of this merger. It is meritless to argue that this testimony is not relevant in this case, but, to the extent Joint Applicants seek to debate its relevancy, that debate must take place prior to hearings, prior to filing of further testimony, and prior to close of the evidence. Otherwise, the record is in danger of being seriously deficient.

Indeed, the theory behind the Joint Applicants' main argument, that proposals to revise an aspect of the EDC's existing method of providing service – the existing default service procurement rules – is precluded here because the Commission has already decided the presently applicable rule – could well be applied to the various recommendations made by many of the parties in this case. Thus a resolution of the Joint Applicants' narrow view of the nature of the available remedies for anticompetitive and discriminatory conduct – or, indeed, other adverse effects of the merger, may well assist other parties as well as Direct.

¹ 66 Pa. C. S. § 2811(e).

² See Direct Energy St. 2 (Nora Brownell), at 12-20; Direct Energy St. 1 (Mathew Morey).

The Joint Applicants' Motion *in Limine* would eliminate a key issue to be decided by the Commission, and crucial portions of testimony of one of the few parties that directly addressed this issue. Given the lateness of the submission of the Motion *in Limine*, there does not appear to be any way that the Motion *in Limine* could be addressed by Your Honors, *as well as the full Commission*, prior to the close of the record. Without such resolution, and in light of the fact that many of the parties appear to be submitting testimony taking a position on Direct Energy's proposal, Direct Energy is understandably concerned about its ability to fully participate and develop a record to assist the Commission in ruling on the legality of this merger proposal if this motion is not finally resolved prior to hearings.

Joint Applicants have sat on their hands for nearly a month, since August 17, 2010, when Direct Energy filed its direct testimony. Now, on the very eve of the deadline for filing rebuttal testimony, and hours before unwillingly providing fair access to their HSR materials previously provided to other parties, the Joint Applicants have filed their Motion *in Limine*. As a result, Direct will now have to both respond to this spurious motion at the same time as it drafts surebuttal testimony and prepares for the hearings. Accordingly, to address the disruption Joint Applicants' Motion *in Limine* presents to the schedule in this proceeding, and thereby the due process rights of all participants in general (but Direct Energy in particular), Direct Energy hereby submits this Motion to Suspend the current procedural schedule until the merits of the Motion *in Limine* can be finally and fully resolved by the full Commission.³

II. MOTION TO SUSPEND

A. Procedural Background

³ Direct Energy will file a timely answer to the Motion *in Limine*, which answer will rebut the erroneous arguments Joint Applicants have made in support of their contention that portions of Direct Energy's testimony are irrelevant and therefore should be stricken.

1. In the Scheduling and Briefing Order, dated June 23, 2010, Your Honors adopted a schedule for this proceeding with the following relevant milestones:

- * August 17, 2010 – written Direct Testimony due
- * September 13, 2010 – written Rebuttal Testimony due
- * October 1, 2010 – written Surrebuttal Testimony due
- * October 4, 2010 – final discovery requests due
- * October 12 through October 15, 2010 – Initial and Further Hearing
- * November 3, 2010 – Main Briefs due
- * November 15, 2010 – Reply Briefs due
- * November 15, 2010 – Record Closes

Direct Energy filed its written Direct Testimony on August 17, 2010. On September 10, 2010 – the Friday and last business day before the due date for rebuttal testimony – Joint Applicants filed their Motion *in Limine*.

B. The Potential Disruption of the Proceeding Warrants Suspension

2. Joint Applicants' Motion *in Limine* seeks to preclude testimony regarding the remedy Direct Energy has requested for the potential anticompetitive effects the proposed merger may have on the retail electric markets in the Joint Applicants' service territories in Pennsylvania. Direct Energy has proposed that the Commission restructure the default service provider ("DSP") role in the Joint Applicants retail service territories, under the authority granted the Commission pursuant to 66 Pa. C.S. § 2811(e)(1) and 66 Pa. C.S. §1102(a)(3). Given that the Motion *in Limine* seeks to substantially circumscribe the issues to be addressed in further stages of this proceeding, neither efficiency nor due process will be promoted if the proceeding continues while this motion is pending before Your Honors and, potentially, before the Commission.

3. Once Your Honors rule on the Motion *in Limine*, any dissatisfied party will be inclined to seek to have the issues certified to the Commission.⁴ Respectfully, without a pause in the procedural schedule to account for the possibility of review by the Commission, and the further possibility that the Commission may modify Your Honors' decision, this matter may proceed prematurely, and may lead to material portions of the proceeding requiring a "do-over."

4. If this Motion to Suspend is not granted, the parties to this proceeding will devote time and effort to issues that may ultimately be deemed to be excluded. Surrebuttal is due October 1, in advance of the hearing scheduled for the following week. Given that the rules provide twenty days to respond to the Motion *in Limine*,⁵ answers should be due September 30. Accordingly, it seems highly unlikely that Your Honors would have ruled on the Motion *in Limine*, in time for the parties to take that ruling into account in preparation of their surrebuttal testimony.

5. Further, given the probability that the parties will seek Commission review of the matter, it seems improbable that the parties would have a conclusive determination of the scope of the matters at issue in advance of the hearing scheduled to commence on October 12, 2010. For example, in addressing a petition for interlocutory review in the Verizon/MCI merger proceedings, the Commission ruled over one month after the petition was filed.⁶ Indeed, it is possible that the Commission may not address the matter in advance of the November 3, 2010 deadline for main briefs.

⁴ See 52 Pa. Code § 5.302. Since a ruling in favor of the Joint Applicants would put Direct "out of court" with respect to its proposal to revise the default service structure in order to remedy the anti-competitive and discriminatory effect of the existing default structure that the merger will perpetuate and, indeed, exacerbate, it would undoubtedly file for interlocutory review by the full Commission. *See id.*

⁵ 52 Pa. Code § 5.103(c) ("A party has 20 days from the date of service within which to answer or object to a motion, unless the period of time is otherwise fixed by the Commission or the presiding officer.").

⁶ *Joint Application of Verizon Communications, Inc. and MCI, Inc. For Approval of Agreement and Plan of Merger*, 2006 Pa. PUC LEXIS 22, at *142 ("On July 13, 2005, Qwest filed a Petition for Interlocutory Review and Stay of the Procedural Schedule. By Order entered August 17, 2005, the Commission denied Qwest's petition.").

C. Granting this Motion to Suspend would be Consistent with Schedule Suspensions in other Commission Proceedings

6. As presiding officers, Your Honors naturally have the authority to “Regulate the course of the proceeding.”⁷ The Commission may modify the procedural schedule as necessary.⁸ In appropriate circumstances, the presiding officer has suspended the procedural schedule in other proceedings. As recently as July 2010, Judge Melillo rescinded an expedited procedural schedule to allow time for the Commission to address the consolidation of dockets to avoid duplicative litigation.⁹ In *In Re: Amended Petition of Bethlehem Steel Corporation and Hadson Development Corporation*,¹⁰ Judge Christianson amended the procedural schedule to allow time for the Commission to address a challenge brought to the Commission’s remand order.¹¹

7. Schedule suspensions have sometimes been employed to provide time for settlement discussions.¹² The rationale for suspending the schedule in this proceeding is similar. As in the case of pending settlement discussions, and the ALJ orders cited above, to the extent this proceeding continues on the current schedule, the parties may devote time and effort addressing issues that may ultimately be moot, or, alternatively, the parties will have been distracted from fully addressing the primary matters in issue, by the need to address the Motion *in Limine*.

⁷ 66 Pa.C.S. § 331(d)(4); 52 Pa. Code § 5.483(a); *Pa. PUC v. PPL Elec. Util. Corp.*, 2007 Pa. PUC LEXIS 57 (2007) (“In any proceeding, the ALJ is granted the authority to regulate the course of the hearing.”).

⁸ *Office of the Consumer Advocate v. Metropolitan Edison Co.*, 2002 Pa. LEXIS 29, at *48 (2002) (“Because the Secretarial Letter made no substantive modifications to our Material Question Order, we find that the provisions of Section 703(g) of the Code did not apply.”).

⁹ *Investigation Regarding Intrastate Access Charges*, 2010 Pa. PUC LEXIS 216, at *16 (2010) (“A new procedural schedule was to await issuance of the Commission Order implementing the July 23, 2009 Motion.”).

¹⁰ *In Re: Amended Petition of Bethlehem Steel Corporation and Hadson Development Corp.*, 1996 Pa. PUC LEXIS 20 (1996).

¹¹ *See id.* at *2-3 (“For various reasons, the procedural schedule was modified. One problem was a challenge by Penelec to the remand.”).

¹² *Eg., Joint Petition of Nextlink Pennsylvania, Inc.*, 1999 Pa. PUC LEXIS 63 (1999); *PECO Energy Co.*, 1997 Pa. PUC LEXIS 47 (1997).

D. Granting this Motion to Suspend will not Unfairly Prejudice any Party, Including the Joint Applicants, and will Prevent Direct Energy from Being Prejudiced.

8. The need to suspend the schedule to permit the Motion *in Limine* to be fully resolved prior to the hearings has arisen completely because of Joint Applicants' decision to employ this fairly unusual procedural device almost one month after it first received Direct Energy's testimony in the case. Thus, any delay in the resolution of the Joint Applicants' merger approval application is entirely of Joint Applicants' own doing. Moreover, failure to suspend the schedule will result in Direct Energy being prejudiced because it will be forced to respond to the Motion *in Limine* at the same time it is preparing surrebuttal testimony to what appears to be very substantial rebuttal testimony being filed by the Joint Applicants. Finally, a suspension of the schedule will merely delay the completion of the evidentiary portion of the proceeding and may not necessarily change the point at which the Commission fully considers the merger application. But even if it did, there is no legal or policy reason – indeed, no reason other than the Joint Applicants' own desires – that the merger application must be reviewed in early 2011. In any event, the Joint Applicants brought this issue upon themselves and should reasonably expect to bear the full consequences.

III. CONCLUSION

The interests of due process and the orderly conduct of this proceeding require a pause from the procedural schedule to allow full consideration and final disposition of the issues raised in the Motion *in Limine*.

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

(1) grant this Motion to Suspend;

(2) grant any other relief deemed appropriate.

Respectfully submitted,



Daniel Clearfield, Esq.

Deanne M. O'Dell, Esq.

Carl Shultz, Esq.

Eckert Seamans Cherin & Mellott, LLC

213 Market St., 8th Floor

Harrisburg, PA 17101

717.237.7173

Dated: September 14, 2010

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of Direct Energy Services, LLC's Motion to Suspend Schedule, upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via Email and/or First Class Mail

Randall B. Palmer, Esq.
Jennifer L. Petrisek, Esq.
Allegheny Energy, Inc.
800 Cabin Hill Dr.
Greensburg, PA 15601
rpalmer@alleghenyenergy.com
jpetrisek@alleghenyenergy.com

Wendy E. Stark, Esq.
Bradley A. Bingaman, Esq.
FirstEnergy Service Company
2800 Pottsville Pike
PO Box 16001
Reading, PA 19612-6001
starkw@firstenergycorp.com

Alan Michael Seltzer, Esq.
W. Edwin Ogden, Esq.
Ryan, Russell, Ogden & Seltzer, PC
1150 Berkshire Blvd., Suite 210
Wyomissing, PA 19610-1208
aseltzer@ryanrussell.com
wogden@ryanrussell.com

Thomas P. Gadsden, Esq.
Kenneth M. Kulak, Esq.
Morgan, Lewis & Bockius
1701 Market St.
Philadelphia, PA 19103-2921
tgadsden@morganlewis.com
kkulak@morganlewis.com

Scott Rubin, Esq.
333 Oak Lane
Bloomsburg, PA 17815
Scott.j.rubin@gmail.com

Darryl Lawrence, Esq.
Tanya J. McCloskey, Esq.
Office of Consumer Advocate
5th Floor, Forum Place
555 Walnut Street
Harrisburg, PA 17101-1923
Dlawrence@paoca.org
tmccloskey@paoca.org

Daniel Asmus, Esq.
Office of Small Business Advocate
1102 Commerce Building
300 N. Second St.
Harrisburg, PA 17101
dasmus@state.pa.us

Allison C. Kaster, Esq.
Carrie B. Wright, Esq.
Office of Trial Staff
PO Box 3265
Harrisburg, PA 17101-3265
akaster@state.pa.us
carwright@state.pa.us

Charis Mincavage, Esq.
McNees Wallace & Nurick LLC
100 Pine Street
PO Box 1166
Harrisburg, PA 17108-1166
cmincavage@mwn.com

Derrick Price Williamson, Esq.
Barry Naum, Esq. Spilman Thomas & Battle
1100 Bent Creek Blvd., Suite 101
Mechanicsburg, PA 17050
dwilliamson@spilmanlaw.com
bnaum@spilmanlaw.com

RECEIVED
2010 SEP 14 PM 3:07
PA PUC
SECRETARY'S BUREAU

Vasiliki Karandrikas, Esq.
McNees Wallace & Nurick LLC
100 Pine Street
PO Box 1166
Harrisburg, PA 17108-1166
vkandrikas@mwn.com

Thomas J. Sniscak, Esq.
Hawke McKeon & Sniscak LLP
100 N. Tenth St.
PO Box 1778
Harrisburg, PA 17105
tjsniscak@hmslegal.com

Benjamin L. Willey, Esq.
7272 Wisconsin Ave., Suite 300
Bethesda, MD 20814
blw@bwilleylaw.com

Kurt E. Klapkowski, Esq.
Department of Environmental Protection
RCSOB, 9th Floor
400 Market St.
Harrisburg, PA 17101-2301
kklapkowski@state.pa.us

Stephen H. Jordan, Esq.
Rothman Gordon, P.C.
Third Floor, Grant Building
310 Grant St.
Pittsburgh, PA 15219

Theodore Robinson, Esq.
Staff Attorney
Citizen Power
2121 Murray Ave.
Pittsburgh, PA 15217
robinson@citizenpower.com

Divesh Gupta, Esq.
Constellation Energy
111 Market Place, Suite 500
Baltimore, MD 21202
Divesh.gupta@constellation.com

Charles E. Thomas, Jr., Esq.
Thomas, Long, Niesen & Kennard
212 Locust St.
PO Box 9500
Harrisburg, PA 17108-9500
cthomas@thomaslonglaw.com

John K. Baillie, Esq.
Charles McPhedran, Esq.
Citizens for Pennsylvania's Future
425 Sixth Ave., Suite 2770
Pittsburgh, PA 15219
baillie@pennfuture.org
mcphehran@pennfuture.org

Gary A. Jack, Esq.
Kelly L. Geer, Esq.
Duquesne Light Company
411 Seventh Ave., 16-4
Pittsburgh, PA 15219
gjack@duqlight.com
kgeer@duqlight.com

Thomas T. Niesen, Esq.
Thomas, Long, Niesen & Kennard
212 Locust St.
PO Box 9500
Harrisburg, PA 17108-9500
tniesen@thomaslonglaw.com

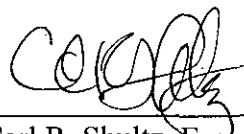
Regina L. Matz, Esq.
Thomas, Long, Niesen & Kennard
212 Locust St.
PO Box 9500
Harrisburg, PA 17108-9500
rmatz@thomaslonglaw.com

Susan E. Bruce, Esq.
McNees Wallace & Nurick LLC
100 Pine Street
PO Box 1166
Harrisburg, PA 17108-1166
sbruce@mwn.com

Scott H. Strauss, Esq.
Spiegel & McDiarmid LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

Eric P. Cheung, Esq.
Clean Air Council
135 S. 19th St., Suite 300
Philadelphia, PA 19103

Michael D. Fiorentino, Esq.
42 E. Second St., Suite 200
Media, PA 19063
mdfiorentino@gmail.com

A handwritten signature in black ink, appearing to read 'Carl R. Shultz', is written over a horizontal line.

Carl R. Shultz, Esq.

Dated: September 14, 2010