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August 31, 2010

VIA FEDERAL EXPRESS

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RECEIVED
2010 SEP -2 AM 11:08
PA PUBLIC
UTILITY
COMMISSION
SECRETARY'S BUREAU

Re: Joint Application of West Penn Power Company doing business as 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, A-2010-2176732

Dear Secretary Chiavetta:

Enclosed for filing in the above-referenced proceeding are an original and three copies of the Answer of West Penn Power Company, Trans-Allegheny Interstate Line Company, and FirstEnergy Corp. ("Joint Applicants") in Opposition to Direct Energy Services' Motion to Compel the Production of the Hart-Scott-Rodino Discovery Materials That Were Served on Three Other Parties (the "Answer"). Pursuant to 52 Pa. Code § 1.11(a)(2), the enclosed Answer shall be deemed filed on August 31, 2010, which is the date it was deposited with Federal Express as shown on the Federal Express delivery receipt.

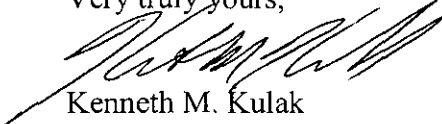
**REQUEST FOR CONFIDENTIAL
TREATMENT OF PROPRIETARY INFORMATION**

Also enclosed is an envelope containing an original and three copies of the Answer with a confidential appendix that includes documents which have been marked as "Highly Sensitive" in accordance with the Protective Order entered in these proceedings. Each page of this Answer is marked "Confidential" and each page of the appendix to the Answer is marked "Highly Sensitive Confidential Information – Do Not Copy or Distribute Except in Accordance with Protective Order." Consistent with Paragraph 5 of the Protective Order, a copy of the Protective Order is also enclosed. The Joint Applicants request confidential treatment of this version of the Answer and its appendix in accordance with the Protective Order.

Rosemary A. Chiavetta
August 31, 2010
Page 2

As evidenced by the attached Certificate of Service, copies of the Answer are being served on the Administrative Law Judges and all parties of record. Also enclosed is an additional copy of this letter and of the Answer, which we request be date-stamped as evidence of filing and returned to us in the stamped, pre-addressed envelope provided.

Very truly yours,



Kenneth M. Kulak

KMK/tp
Enclosures

c: Per Certificate of Service (w/encls.)

Justice (“DOJ”) in compliance with the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR Act”).

The HSR Act requires parties to certain transactions to make a pre-merger notification filing with the DOJ and the Federal Trade Commission (“FTC”).¹ The purpose of these filings is to provide the DOJ and FTC with the opportunity to determine whether the proposed merger is anticompetitive under Section 7A of the Clayton Act, 15 U.S.C. § 18a. A copy of the HSR Form that merger partners must complete and file is attached as Exhibit A to Direct Energy’s Motion. Of particular note is Item 4(c), which requires the submission of:

[A]ll studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets.

FirstEnergy’s HSR filing consisted of the completed HSR Form and 24 separately attached “4(c) documents.” Allegheny Energy’s (“Allegheny’s”) HSR filing was comprised of the completed HSR Form and 24 separately attached 4(c) documents.

In support of its Motion, Direct first contends that the requested documents are relevant to, or could lead to the discovery of data relevant to, issues that the Commission has been directed to consider under Section 2811(e) of the Public Utility Code (66 Pa.C.S. §2811(e)) (Motion, pp. 3-4). Direct further asserts that it is “entitled” to discovery of the HSR materials pursuant to the Protective Order previously entered in this proceeding (Motion, pp. 7-9). Finally, Direct claims that it is “the party most concerned with the anticompetitive prospects of the merger” and that if its outside counsel and outside expert witness are denied access to the HSR

¹ The DOJ has been assigned primary review responsibility for mergers involving electric companies. See *Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations*, available at <http://ftc.gov.ftc.gov/opa/2002/02/clearance/ftcdojagree.pdf>.

materials, “it is far more likely that legitimate concerns about the anticompetitive effects of the merger will not be raised.” (Motion, p. 10).

As to Direct’s first point, the Joint Applicants have never suggested that disclosure of the HSR materials should be denied or limited because the requested data were irrelevant. Rather, and as their June 30, 2010 Objections to the OCA’s discovery confirm (see Motion, Exhibit B), it has been the Joint Applicants’ consistent position that the OCA’s discovery, and in particular OCA Interrogatory No. 9, improperly sought the disclosure of information, documents and communications that are privileged, proprietary and/or commercially sensitive. In fact, the information is considered so sensitive that FirstEnergy and Allegheny make separate HSR filings and neither company has seen the confidential portions of the HSR filing of the other company. See 15 U.S.C. § 18a(a) (requiring each party to file separate notices).

The need to protect HSR materials from improper disclosure is well-recognized. See, e.g., *Lieberman et al v. Federal Trade Commission*, 771 F.2d 32 (2d Cir. 1985) (declining to compel the FTC to share HSR filings with state attorneys general because: “the structure and legislative history of section 7A show that Congress envisioned that only the Department of Justice and the FTC would use premerger information”); *In the Matter of the Joint Application of Qwest Communications Corp., et al. and U.S. West Communications, Inc., et al., for Approval of the Merger of Parent Corporations, U S WEST, Inc. and Qwest Communications International Inc.*, 1999 Mont. PUC LEXIS 120 (Mont. P.S.C. 1999) (limiting access to HSR information to public utility commission staff and consumer advocate and precluding access by competitors). The antitrust enforcement agencies have also imposed substantial penalties where there has been confidential, competitively-significant information shared among the parties before closing, illustrating the antitrust enforcement agencies concerns over the potential adverse competitive

impact of sharing of such information. *See, e.g., U.S. v. Smithfield Foods, Inc.*, Docket No. 1:10-cv-00120 (D.D.C. January 21, 2010) (imposing \$900,000 penalty where merging parties stopped exercising independent business judgment and improperly exchanged competitive information prior to closing).

With regard to Direct's second argument, Direct is not "entitled" to receive proprietary, commercially sensitive information simply because it chose to intervene in this proceeding. While the Protective Order entered in this case establishes procedures for the release of "highly sensitive" materials to a party's outside counsel and expert, it also specifically provides as follows:

9. The parties affected by the terms of this Order shall retain the right . . . to seek additional measures of protection of Confidential Information beyond those provided in this Order.

In short, it was fully understood and anticipated that, under appropriate circumstances, certain categories of information might require additional measures of protection.

Lastly, the Joint Applicants respectfully submit that Direct Energy does not need access to otherwise proprietary, commercially sensitive data to assure that "legitimate concerns" over the merger's "competitive effects" will be raised. The materials in question have been furnished to the United States Department of Justice, the Pennsylvania Attorney General, the OCA, the OTS and the OSBA. In addition, the "competitive effects," if any, of the proposed merger are being thoroughly evaluated by the Federal Energy Regulatory Commission.²

For these and the other reasons set forth below, the Joint Applicants believe that there are credible, indeed compelling, reasons that justify turning over certain information to entities

² Moreover, most of Direct Energy's testimony has very little to do with "legitimate" competitive concerns. Instead, its principal focus is to criticize the competitive model that was adopted by the Legislature and implemented by the Commission after years of careful review and analysis.

created by statute, whose mandate is to protect the public interest (the OCA, OTS and OSBA), but not to a party whose sole objective is to advance its individual competitive position (Direct). That said, in an attempt to narrow this dispute, the Joint Applicants are serving concurrently herewith copies of the HSR Notification and Report Forms (“HSR Forms”) which they filed with the DOJ’s Antitrust Division, as well as virtually all of the documents attached to them without redaction.³ In fact, as next described, the only documents that the Joint Applicants have not produced in their entirety are five attachments to the FirstEnergy HSR filing and one attachment to the Allegheny HSR filing that contain sensitive information regarding competitive retail and wholesale sales and generation strategies. Those documents are still being produced to all parties but with limited redactions of only sensitive competitive information; copies of the redacted portions of the documents are attached as Appendix A.⁴ In addition, consistent with resolution of previous discovery disputes, the name of “Company A” has been redacted from the Allegheny HSR materials in Attachments 4(c)(2), (3), (5), (7), and (12).⁵

³ The Joint Applicants are producing the documents pursuant to the Protective Order, with each document designated as “highly sensitive”. See Protective Order, ¶ 4. These are the same conditions under which the documents were previously produced to the OCA, OSBA, and OTS. A non-confidential version of this Answer (without the confidential redacted documents in Appendix A) has also been filed with the Commission.

⁴ Separately, the Joint Applicants are submitting unredacted copies of these documents to Administrative Law Judges (“ALJs”) Wayne L. Weismandel and Mary A. Long in a sealed envelope should they elect to review these documents *in camera*.

⁵ See Order on Motion to Dismiss Objections and Compel Answers to Interrogatories and Production of Documents (entered July 23, 2010) (noting resolution of Direct Set I Interrogatories 1 and 2(a), which sought the identity of an entity (“Company A”) that communicated with Allegheny regarding a potential business combination that was not consummated).

II. THE COMMISSION SHOULD DENY DIRECT'S MOTION TO COMPEL WITH RESPECT TO THE REDACTIONS OF FIRSTENERGY'S HSR 4(C) DOCUMENTS

The five documents included in Appendix A that the Joint Applicants have produced with redactions are identified on FirstEnergy's HSR Form as follows:

- 4(c)-2 Allegheny Energy, Inc., undated, prepared by Allegheny Energy
- 4(c)-8 Retail Sales, undated, prepared by Donald Schneider, President, FirstEnergy Solutions Corp.
- 4(c)-10 FirstEnergyCorp. Strategic Discussion Materials, prepared by Credit Suisse, September 18, 2009
- 4(c)-13 Generation Opportunities to Pursue, prepared by Charles Lasky, Vice President Generation, FirstEnergy Corp., January 12, 2010
- 4(c)-19 Synergies Overview, Steering Committee Review, prepared by Booz & Co., March 2010

The Allegheny HSR document included in Appendix A is identified in Allegheny's HSR filing as Attachment 4(c)(22).

As reflected in the documents themselves, the limited redacted material plainly relates to competitively sensitive information, including information on current and future pricing and forecasts, projected margins and expenses, and market opportunities. The redacted material in these documents falls squarely within the concerns already identified by the ALJs regarding access by competitors (such as Direct) in this proceeding to competitive information of the Joint Applicants and their affiliates. *See* Order on Motion to Dismiss Objections and Compel Answers to Interrogatories and Production of Documents (entered August 20, 2010) ("*Direct Set II Order*"). As set forth in the *Direct Set II Order*:

This Interrogatory seeks the total load data by customer class for the Joint Applicants. The Joint Applicants object to answering this interrogatory on the grounds that retail market share information is

highly confidential, especially in view of the fact that Direct Energy is a competitor in the retail market. We agree with the Joint Applicants that market share data in this context is confidential. Moreover, as we discussed when we denied Direct Energy's motion to compel answers to similar Set I interrogatories, there is a significant amount of publicly available information that is relevant to any argument that Direct might make concerning the dominance of the Joint Applicants in the retail marketplace and whether their merger will negatively impact the workability of the marketplace. Although Direct Energy's Set II interrogatories seek "aggregate" information rather than the company-specific information sought by the Set I interrogatories, we do not believe this cures our concerns about requiring the Joint Applicants to reveal sensitive information to a competitor, nor has Direct Energy satisfied us that the information it has already received in discovery or has available via public sources is insufficient.

Direct Set II Order, pp. 1-2. As with Direct's previous request for market share information, the limited material redacted by the Companies is irrelevant to "any argument that Direct might make concerning the dominance of the Applicants in the retail marketplace"; instead, production of the redacted material would provide Direct (and others) with an improper advantage in any future competition with the Joint Applicants' affiliates. Obtaining such an advantage through discovery of materials provided by the Joint Applicants only to federal and state public organizations is unjustified and contrary to both the purposes of this proceeding and the public interests underlying the HSR requirements.

III. CONCLUSION

WHEREFORE, for the reasons set forth above, the Motion to Compel of Direct Energy Services, LLC:

(1) Should be denied with respect to the (a) the redacted documents of FirstEnergy's HSR filing attached as Appendix A; and (b) all Allegheny HSR documents produced to the parties to the extent such documents redact the identity of "Company A"; and

(2) Dismissed as moot in light of the production of HSR material to all parties by the

Joint Applicants.

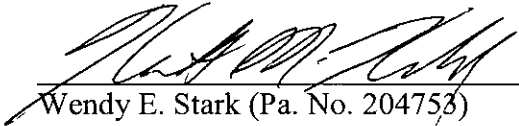
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APPENDIX A

**(Highly Sensitive Confidential Material Appended to Confidential
Version of Motion Filed with the Commission)**

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

RECEIVED
2010 SEP -2 AM 11:10
PA P.U.C. BUREAU
SECRETARY'S BUREAU

JOINT APPLICATION OF WEST PENN :
POWER COMPANY doing business as :
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
A-2010-2176732

CERTIFICATE OF SERVICE

I hereby certify and affirm that I have this day served a copy of the **Answer of West Penn Power Company, Trans-Allegheny Interstate Line Company, and FirstEnergy Corp. in Opposition to Direct Energy Services' Motion to Compel the Production of the Hart-Scott-Rodino Discovery Materials That Were Served on Three Other Parties** on the following persons in the matter specified in accordance with the requirements of 52 Pa. Code § 1.54:

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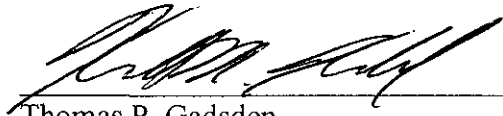
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Date: August 31, 2010

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