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OCT 22 2010

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

October 22, 2010

VIA FEDERAL EXPRESS

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
P.O. Box 3265
Harrisburg, PA 17105-3265

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 are an original and nine (9) copies of the **Brief of West Penn Power Company, Trans-Allegheny Interstate Line Company, and FirstEnergy Corp. Opposing The Pennsylvania Department of Environmental Protection's Petition for an Interlocutory Review and Answer to the Material Question Presented** in the above-captioned matter. Pursuant to 52 Pa. Code § 1.11(a)(2), the enclosed Brief shall be deemed filed on October 22, 2010, which is the date it was deposited with Federal Express as shown on the Federal Express delivery receipt.

As evidenced by the attached Certificate of Service, copies of the Brief are being served on the Administrative Law Judges and all parties of record. Also enclosed is an additional copy of this letter and the Brief, 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 cr.

Kenneth M. Kulak

KMK/tp

Enclosures

c: Per Certificate of Service

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Palo Alto Dallas Houston Harrisburg Irvine Boston Wilmington London Paris Brussels Frankfurt Beijing Tokyo

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

RECEIVED

OCT 22 2010

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 :

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

DOCKET NOS. A-2010-2176520
A-2010-2176732

BRIEF OF WEST PENN POWER COMPANY,
TRANS-ALLEGHENY INTERSTATE LINE COMPANY,
AND FIRSTENERGY CORP. OPPOSING
THE PENNSYLVANIA DEPARTMENT
OF ENVIRONMENTAL PROTECTION'S
PETITION FOR AN INTERLOCUTORY REVIEW
AND ANSWER TO THE MATERIAL QUESTION PRESENTED

October 22, 2010

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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	:	DOCKET NOS. A-2010-2176520
CONVENIENCE UNDER SECTION	:	A-2010-2176732
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APPROVING A CHANGE OF CONTROL OF	:	
WEST PENN POWER COMPANY AND	:	
TRANS-ALLEGHENY INTERSTATE LINE	:	
COMPANY	:	

**BRIEF OF WEST PENN POWER COMPANY, TRANS-ALLEGHENY INTERSTATE
LINE COMPANY, AND FIRSTENERGY CORP. OPPOSING
THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION'S
PETITION FOR AN INTERLOCUTORY REVIEW AND ANSWER TO THE
MATERIAL QUESTION PRESENTED**

Pursuant to 52 Pa. Code § 5.302(b), West Penn Power Company (“West Penn”), Trans-Allegheny Interstate Line Company (“TrAILCo”), and FirstEnergy Corp. (“FirstEnergy”) (collectively, the “Companies” or “Joint Applicants”) submit this Brief opposing the Pennsylvania Department of Environmental Protection’s (“DEP”) Petition for an Interlocutory Commission Review and Answer to the Material Question Presented (the “Petition”).

I. INTRODUCTION AND OVERVIEW

DEP’s Petition seeks review of an Order by Administrative Law Judges Long and Weismandel (“ALJs”) granting the Joint Applicants’ Motion to Strike DEP Statement Nos. 1 and 2 (the “DEP Testimony”), which focus exclusively on environmental compliance issues related to the Joint Applicants’ facilities. *See* October 12, 2010 Hearing Transcript, pp. 183-184.¹ The Petition should be denied for two primary reasons. First, the ALJs did not err in granting the

¹ An excerpt of the Hearing Transcript is attached as Appendix A to this Brief.

Motion to Strike because, through the testimony in question, DEP is attempting to improperly expand the scope of this proceeding to matters outside the jurisdiction of the Pennsylvania Public Utility Commission (the “Commission”). Second, the DEP has failed to demonstrate that extraordinary circumstances exist that warrant granting the Petition.

II. DEP STATEMENT NOS. 1 AND 2 WERE PROPERLY STRICKEN AS OUTSIDE THE SCOPE OF THIS PROCEEDING

A. The Administrative Law Judges Have The Authority To Deny Admission Of Testimony That Is Outside The Scope Of This Proceeding

The Commission’s regulations at 52 Pa. Code § 5.403(a) grant presiding officers “all necessary authority to control the receipt of evidence,” including “[r]uling on the admissibility of evidence” and “[c]onfining the evidence to the issues in the proceeding.” Administrative Law Judges have employed this power, with the Commission’s approval and affirmation, to exclude evidence that is outside the permissible scope of a proceeding and, in that way, to focus the evidence on the matters properly at issue. *See, e.g., Re Gas Cost Rate No. 5*, 57 Pa. P.U.C. 158 (1983) (“The testimony stricken by the ALJ addresses, in part, matters broader than the scope of the instant proceeding.”); *Pa. P.U.C. v. Pennsylvania-American Water Co.*, Docket Nos. R-00932670, et al., 1994 Pa. P.U.C. LEXIS 120 (July 26, 1994) at *158 (“The ALJ concluded as follows: ‘I agree with OTS that the issues raised by OCA are outside the scope of this investigation. . . .’ We conclude that the ALJ properly found the matters raised by the OCA to be better placed in the pending rulemaking proceeding.”) *See also Re Structural Separation Of Bell Atlantic-Pennsylvania, Inc. Retail And Wholesale Operations*, Docket No. M-00001353, 2000 Pa. P.U.C. LEXIS 59 (September 28, 2000) at *7-9 (affirming the Administrative Law Judge’s decision in that case to exclude certain evidence as “beyond the scope of the proceeding.”)

B. Environmental Compliance Issues Are Outside The Commission's Jurisdiction Under Both Commission And Commonwealth Court Authority

DEP contends that environmental matters are within the Commission's purview in analyzing whether a certificate of public convenience is in the public interest, relying on a Commonwealth Court decision regarding the GPU, Inc. and FirstEnergy Corp. merger proceeding. *See* Petition, ¶ 3 (citing *ARIPPA v. Pa. P.U.C.*, 792 A.2d 636 (2002)) ("*ARIPPA Decision*"); *see also* *Joint Application for Approval of the Merger of GPU, Inc. and FirstEnergy Corp.*, Docket Nos. A-110300F0095, A-110400F0040, 2001 Pa. P.U.C. LEXIS 23 (June 20, 2001) ("*GPU Order*"). Both the *ARIPPA Decision* and the underlying *GPU Order*, however, recognize that environmental **compliance** issues are properly addressed to the appropriate environmental agency, and not the Commission.

In the *GPU Order*, the Commission considered environmental concerns raised by Citizen Power, Clean Air Council and Penn Future, including air quality impacts and the possibility for protracted litigation with the United States Environmental Protection Agency ("EPA"). *GPU Order*, *101-*102. The Administrative Law Judge recommended rejecting proposed merger conditions related to the EPA suit, finding the alleged financial risk to be "speculative." *Id.* at *102. The Commission ultimately declined to adopt the environmental merger conditions, stating "[t]he federal EPA and Pennsylvania's Department of Environmental Protection are the agencies that are vested with the authority to establish emission regulations and to police their enforcement. Therefore, it would be inappropriate for the Commission to attempt to perform those functions." *Id.* at *103-*104.

In the *ARIPPA Decision*, the Commonwealth Court found that the Commission did not err in approving the merger without considering the environmental factors presented. *ARIPPA Decision*, p. 657. It reasoned that "any issues regarding emission regulations" were for EPA and

DEP to determine, and, “[e]very Commission case should not be used to decide . . . a case within a case.” *Id.* In citing the *ARIPPA Decision*, DEP emphasized in its Petition that the parties presented environmental testimony and that “the ALJ made a specific determination that the merger neither benefited nor harmed the environment.” Petition, ¶ 3. The *ARIPPA Decision* in fact states that the Commission adopted the “ALJ’s decision that the record did not support a finding that the merger would benefit or harm environment” and explains that the ALJ decision was made because the Commission “has no jurisdiction to assess the merits of the environmental claims.” *Id.* Accordingly, DEP seriously mischaracterized the Court’s holding.

In other merger proceedings, the Commission has also recognized that environmental compliance issues are properly addressed to the appropriate environmental agency and not to the Commission. *See Joint Application Of Pennsylvania-American Water Company And Thames Water Aqua Holdings GmbH For All Approvals Required Under The Public Utility Code In Connection With A Change In Control Of Pennsylvania-American Water Company*, Docket Nos. A-212285F0096, A-230073F0004, 2002 Pa. P.U.C. LEXIS 32, *47-*52 (June 19, 2002) (Initial Decision) (Environmental protection, including protection of water resources, is within the jurisdiction of the DEP, not the Commission); 221 P.U.R. 4th 487, 2002 Pa. P.U.C. LEXIS 31, *31-*37 (2002) (final Order) (concurring with the ALJ that the Commission cannot impose environmental conditions beyond its jurisdiction and that entities like the DEP have jurisdiction to prevent or punish environmental harms). Indeed, earlier in this proceeding, the ALJs confirmed that such matters are outside the Commission’s jurisdiction, as well as irrelevant to the subject matter of this case, in ruling upon the Joint Applicants’ objections to certain discovery promulgated by the DEP. *See Order Granting In Part And Denying In Part Motion To*

Compel (dated August 25, 2010) (“DEP Discovery Order”).² (“The Commission does not have jurisdiction over compliance with either Federal or Commonwealth environmental laws. Whether or not any of the Joint Applicants’ facilities are in compliance with laws over which the Commission does not have jurisdiction is not relevant to the subject matter of this case.”)

Finally, the Commonwealth Court has found that the Commission does not have jurisdiction regarding environmental compliance matters in other types of proceedings as well. *See, e.g., Country Place Waste Treatment Co., Inc. v. Pa. P.U.C.*, 654 A.2d 72, 75-76 (Pa. Commw. 1995) (finding that the Commission’s authority did not include the regulation of odors produced by a public utility facility and that the legislature had placed jurisdiction of the matter at issue with DEP and not the Commission).

Notably, in each of these cases, private parties were seeking to introduce environmental issues into a Commission proceeding. In this case, the state agency tasked with the enforcement of state environmental laws is seeking to address environmental compliance matters through the administrative process of another state agency. If private litigants, with no special environmental investigative powers or administrative authority, have been prevented from expanding the scope of Commission proceedings to include environmental compliance, then the DEP should be similarly limited.

C. The Sole Purpose Of DEP Statement Nos. 1 and 2 Is To Raise Environmental Compliance Matters

DEP Statement Nos. 1 and 2 focus **exclusively** on raising concerns about, and advocating for merger conditions related to, the Joint Applicants’ compliance with Federal and State environmental laws. Thus, DEP witness Kevin A. Halloran (DEP Statement No. 1) describes the purpose of his testimony as follows:

² A copy of the DEP Discovery Order is attached as Appendix B to this Brief.

The purpose of my testimony is to identify and examine the water quality considerations or concerns that arise as a consequence of the Joint Applicants' proposed merger. The Department is concerned that the proposed merger may adversely affect compliance with Clean Streams Law requirements thereby adversely affecting the health, safety and welfare of the citizens of the Commonwealth.

DEP St. No. 1, p. 2. Mr. Halloran then proceeds to identify alleged "known potential water quality issues" at the Joint Applicants' facilities, such as permitted discharges in excess of effluent limitations, unpermitted discharges and groundwater contamination. *See* DEP St. No. 1, pp. 2-7. He concludes that conditions should be imposed to "require the new company to comply with state law," including particular permit effluent limitations. *Id.* at 7.

Similarly, DEP witness Dan M. Haney (DEP Statement No. 2) describes the purpose of his testimony as follows:

The purpose of my testimony is to identify and examine the air quality environmental considerations or concerns that arise as a consequence of the Joint Applicants' proposed merger with regard to three power stations The federal Clean Air Act, the Pennsylvania Air Pollution Act and the regulations promulgated thereunder establish various requirements to prevent or reduce the emission of air contaminants from air contamination sources including facilities that generate electricity. DEP is concerned that design and emission issues for the Joint Applicants' electric generating units in Southwestern Pennsylvania are currently and will continue to affect the health, safety and welfare of the citizens of the Commonwealth, and that the proposed merger will allow these concerns to continue unless actions are taken to address them.

DEP St. No. 2, p. 2 (internal citations omitted). Mr. Haney proceeds to describe the alleged compliance history and design flaws of particular electric generating units owned by the Joint Applicants, including the absence of certain Nitrogen Oxide control equipment, improper use of scrubbers, and a currently-pending federal court proceeding related to alleged air permit violations. *See* DEP St. No. 2, pp. 2-7.

As discussed in Section II. B, *supra*, the Commission has no jurisdiction over compliance with either Federal or Commonwealth environmental laws. In addition, the ALJs have confirmed that environmental compliance matters are not relevant to this proceeding. *See* October 12, 2010 Hearing Transcript, p. 186, ALJ Long (“I read the direct testimony. It seems to be missing any kind of connection to the merger itself, so I am not seeing where the Commission’s jurisdiction is relevant to the testimony that your witnesses are providing.”); DEP Discovery Order, p. 8 (“Whether or not any of the Joint Applicants’ facilities are in compliance with laws over which the Commission does not have jurisdiction is not relevant to the subject matter of this case.”) Environmental compliance issues and conditions simply have no place in this proceeding, and because DEP Statement Nos. 1 and 2 address no other issue, the ALJs did not err in granting the Joint Applicants’ Motion to Strike the testimony.

III. DEP HAS NOT DEMONSTRATED EXTRAORDINARY CIRCUMSTANCES THAT WARRANT INTERLOCUTORY REVIEW

DEP contends that granting interlocutory review is appropriate in this case in order to develop a complete record, prevent substantial prejudice to DEP, and expedite the proceeding. *See* Petition, ¶¶ 6-7. DEP claims that interlocutory review has been granted “in a similar instance,” namely, a proceeding considering the structural separation of Bell Atlantic’s retail and wholesale operations in Pennsylvania. *See Re Structural Separation of Bell Atlantic-Pennsylvania, Inc. Retail and Wholesale Operations*, Docket No. M-00001353, 2000 Pa. P.U.C. LEXIS 49 (July 20, 2000) (“*Bell Atlantic I*”); *Re Structural Separation of Bell Atlantic-Pennsylvania, Inc. Retail and Wholesale Operations*, Docket No. M-00001353, 2000 Pa. P.U.C. LEXIS 59 (September 28, 2000) (“*Bell Atlantic II*”).

Bell Atlantic I and *II* both reinforce the high threshold for granting interlocutory review and are factually distinguishable from this proceeding. The Bell Atlantic proceeding was opened

by the Commission to focus solely on “the precise form, nature and details” of structural separation, which the Commission had already determined to be an appropriate remedy in a separate, earlier order. *Bell Atlantic I*, *2-*4. In *Bell Atlantic I*, Bell Atlantic sought interlocutory review of an order by the Administrative Law Judge that denied a motion to compel certain discovery because the Judge found that the information was not relevant to the subject matter of the proceeding. *Bell Atlantic I*, *5-*6. Bell Atlantic argued that the ALJ’s order was at odds with the Commission’s order instituting the structural separation proceeding and severely prejudiced Bell Atlantic by denying it a “full and fair opportunity” to present a case on the proper form of structural separation. *Id.* at *9-*10.

In considering Bell Atlantic’s request, the Commission first stated that it did “not routinely grant interlocutory review except upon a showing by the petitioner of extraordinary circumstances or ‘compelling reasons.’” *Id.* at *7 citing *In re Application of Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985). The Commission concluded that the situation presented was “exceptional” and that “compelling reasons” supported granting the request for interlocutory review. *Id.* at *11-*12. In particular, the Commission found that the language of the ALJ’s order “created some uncertainty as to the proper scope of [the] proceeding” and, therefore, to avoid the possibility of a subsequent remand, the material question should be answered. *Id.* at *12.

In *Bell Atlantic II*, Verizon Pennsylvania, Inc. (formerly Bell Atlantic) sought interlocutory review of an order striking various testimony and exhibits as outside the scope of the structural separation proceeding. *Bell Atlantic II*, pp. *4-*5. The Commission determined that interlocutory review was appropriate in order to “ensure that a complete record is developed which will allow the Commission to make an informed decision regarding the precise form,

nature and details of structural separation.” *Id.* at *6. The Commission ultimately found that certain portions of Verizon’s testimony and exhibits addressed the economic costs and benefits of full structural separation, and, therefore, should be admitted because they would inform the Commission’s consideration of the most effective structural remedy. *Id.* at *7-*8.

The issues in this case are readily distinguishable from those in *Bell Atlantic I and II*. First and foremost, the “remedy” in the Bell Atlantic matter, structural separation, had been previously ordered by the Commission and there was no question as to whether that remedy was within the Commission’s jurisdiction. Thus, the disputes about the scope of the proceeding, and the requests for interlocutory review, related to the Commission’s ability to craft the structural separation remedy it had already deemed appropriate. In this case, there has been no previous determination that remedies related to environmental compliance are either appropriate or even within the Commission’s jurisdiction. In fact, such a determination would be contrary to established Commission precedent. *See* Section II.B. *supra*. Second, in *Bell Atlantic I*, the Commission felt compelled to address an uncertainty created by the ALJ’s order in that it appeared, on its face, to conflict with the Commission’s order initiating the entire structural separation proceeding. In this case, the ALJs have acted consistently with their earlier DEP Discovery Order and with prior Commission precedent in granting the Joint Applicants’ Motion to Strike the DEP Testimony.

Finally, in both *Bell Atlantic* cases, the Commission granted interlocutory review to ensure that: (1) the Petitioner had an opportunity to present relevant information on the chosen remedy; and (2) the Commission would have the benefit of a full record when making its ultimate decision on the form the remedy should take. In this case, interlocutory review is sought regarding the exclusion of testimony which focuses exclusively on environmental

compliance. The Commission does not have jurisdiction or authority to enforce the environmental laws and, as a consequence, does not have the authority to impose any merger conditions related to environmental compliance. *See Western Pennsylvania Water Co. v. Pa. P.U.C.*, 471 Pa. 347, 370 A.2d 337 (1977) (If the Commission lacks authority to order a utility to extend its service territory involuntarily, then it cannot exercise equivalent authority by attaching a condition to a certificate of public convenience.) *Accord Rheems Water Co. v. Pa. P.U.C.*, 153 Pa. Cmwlth. 49, 55-56, 620 A.2d 609, 612 (1993). Moreover, exclusion of the DEP Testimony does not prejudice DEP³ or deprive the Commission of the benefit of a full record with respect to the issues that are properly before it in connection with Joint Applicants' request for change-of-control approval in this case. Granting the Petition will only serve to needlessly delay this proceeding.

³ DEP will have the same statutory authority – and legislative mandate – to enforce the environmental laws regardless of the ultimate outcome of this proceeding. As the ALJs correctly noted, consummation of the proposed merger will not, in any way, compromise DEP's statutory authority or power. *See* October 12, 2010 Hearing Transcript, pp. 186-87.

IV. CONCLUSION

WHEREFORE, for the reasons set forth above, the Commission should deny the Department of Environmental Protection's Petition for an Interlocutory Commission Review and Answer to the Material Question Presented.

Respectfully submitted,

 Kenneth M. Kulak *cv*

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Dated: October 22, 2010

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Counsel for FirstEnergy Corp.

APPENDIX A

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OCT 22 2010

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

COMMONWEALTH OF PENNSYLVANIA

171

PUBLIC UTILITY COMMISSION

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 :
Joint Application of West Penn Power :
Company d/b/a Allegheny Power, Trans- : Docket Nos.
Allegheny Interstate Line Company and : A-2010-2176520
FirstEnergy Corporation. : A-2010-2176732
 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. :
 :
 Initial Hearing. :
 :
 ----- X

Pages 171 through 334 Hearing Room 1
 Commonwealth Keystone Building
 Harrisburg, Pennsylvania
 Tuesday, October 12, 2010

Met, pursuant to notice, at 1:00 p.m.

BEFORE:

MARY D. LONG, Administrative Law Judge
 WAYNE L. WEISMANDEL, Administrative Law Judge

APPEARANCES:

ALAN MICHAEL SELTZER, Esquire
 Ryan Russell Ogden & Seltzer
 1150 Birkshire Boulevard, Suite 210
 Wyomissing Pennsylvania 19610
 (For West Penn Power Company and Trans-Allegheny
 Interstate Line Company)

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OCT 22 2010

PA PUBLIC UTILITY COMMISSION
 SECRETARY'S BUREAU

Commonwealth Reporting Company, Inc.
 700 Lisburn Road
 Camp Hill, Pennsylvania 17011

1 motion for admission pro hac vice of Clifford M. Naeve and
2 Matthew W.S. Estes, motion by the joint applicants. Is
3 there any objection to the admission of those two attorneys
4 pro hac vice in this proceeding?

5 (No response.)

6 JUDGE LONG: Hearing none, the motion is granted.
7 Clifford M. Naeve, N-A-E-V-E and Matthew W.S. Estes,
8 E-S-T-E-S, are deemed pro hac vice.

9 The motion of Direct Energy for leave to submit
10 surrebuttal testimony I believe has been resolved, providing
11 that the Joint Applicants are allowed to have some oral
12 rejoinder to that testimony. Is that correct? Do you have
13 any response to that, Mr. Clearfield?

14 MR. CLEARFIELD: We don't have objection to the
15 submission of otherwise proper oral rejoinder.

16 JUDGE LONG: All right. Well, then, we will grant
17 that motion. The motion of Direct Energy for leave to file
18 supplemental surrebuttal testimony is granted.

19 The motion of the joint applicants to strike
20 Statements Nos. 1 and 2 of Department of Environmental
21 Protection. Mr. Gadsden, do you have anything you would
22 like to add to that motion?

23 MR. GADSDEN: I don't believe so, Your Honor. I
24 think our arguments are set forth in the motion and we
25 believe it's consistent with Your Honor's earlier discovery

1 ruling.

2 JUDGE LONG: Very good.

3 Mr. Klapkowski, do you have anything you would like
4 to add to your response?

5 MR. KLAPKOWSKI: No, Your Honor. We feel that our
6 answer addressed the issues that were addressed by the
7 motion to strike.

8 JUDGE LONG: Very good. With that said, Judge
9 Weismandel and I have reviewed the motion and the response
10 and we've reviewed the testimony. We are going to grant the
11 motion to strike. So the motion to strike DEP Statements 1
12 and 2 is granted.

13 MR. KLAPKOWSKI: Your Honor, at this time I'd like to
14 make an offer of proof to the testimony if I may. I have a
15 summary of the testimony that would be entered into the
16 record if allowed and I also have copies of the testimony
17 marked as Department Statements 1 and 2.

18 JUDGE LONG: You may.

19 MR. KLAPKOWSKI: The evidence that would be offered
20 that was the subject of the motion to strike are for Mr.
21 Kevin A. Halloran and Dan Haney.

22 Mr. Halloran's testimony would be to identify and
23 examine water quality considerations or concerns that arise
24 as a consequence of the joint applicants' proposed merger.
25 We're concerned that the proposed merger may already affect

1 compliance, adversely affect compliance with the Clean
2 Streams Law requirements and thereby adversely affect the
3 health, safety and welfare of the citizens of the
4 Commonwealth.

5 We feel that it identifies environmental compliance
6 issues with regard to Allegheny Energy's and FirstEnergy's
7 facilities located within the Commonwealth and they raise
8 significant public safety concerns. So we feel that that is
9 relevant in the context of the merger.

10 For Mr. Haney's evidence or testimony, it would be to
11 examine and identify air quality environmental
12 considerations or concerns arising as a consequence of the
13 joint applicants' proposed merger as regard to three power
14 stations in the western part of the Commonwealth, concern
15 that design and emission issues for the joint applicants'
16 electric generation units in southwestern Pennsylvania are
17 currently and will continue to affect the health, safety and
18 welfare of the citizens of the Commonwealth and that the
19 proposed merger will allow those concerns to continue unless
20 actions are taken to address them.

21 We feel that these are material and relevant in the
22 context of the merger, this evidence, and therefore we would
23 ask that we be allowed to make this offer of proof at this
24 time.

25 JUDGE LONG: Can you identify page and testimony of

1 either statement which draws some sort of a nexus between
2 the compliance issues that you are identifying and the
3 effect that the merger may or may not have on those
4 compliance issues?

5 I mean, I understand that there are compliance issues
6 both in water quality and air quality. I read the direct
7 testimony. It seems to be missing any kind of connection to
8 the merger itself, so I am not seeing where the Commission's
9 jurisdiction is relevant to the testimony that your
10 witnesses are providing.

11 MR. KLAPKOWSKI: I understand, Your Honor. I think
12 the argument that we would make in that situation would be
13 that what happens after the merger with regard to those
14 issues, because there is current non-compliance with these
15 facilities, is relevant in the context of the merger because
16 we're examining the substantial affirmative public benefits
17 that the merger may provide, and safety of the citizens of
18 the Commonwealth is one of the prongs of the test that we're
19 looking at in terms of the merger being approved or not
20 being approved.

21 And we've come to the table and said we believe there
22 are problems that exist today, not even after the merger but
23 today, and we would like to see those problems addressed in
24 the context of the merger.

25 JUDGE WEISMANDEL: Is the Department of Environmental

1 Protection pursuing any action against any of the companies
2 involved?

3 MR. KLAPKOWSKI: In several cases, yes, Your Honor.

4 JUDGE WEISMANDEL: Then wouldn't it be in your
5 bailiwick to pursue those?

6 MR. KLAPKOWSKI: It certainly is appropriate for the
7 Department to pursue enforcement action in those venues, but
8 we feel it is also appropriate in the context of a merger to
9 discuss what will happen in the future with regard to these
10 issues of the combined company.

11 JUDGE LONG: Well, I don't see anything in the
12 testimony that talks about future compliance or the
13 compliance of the combined company. It's something you
14 identify as existing environmental compliance issues. And
15 while I am not insensitive to the degree of those compliance
16 issues, I remain convinced that it remains within the
17 Department of Environmental Protection's jurisdiction to
18 deal with that, not with the Commission. So those
19 statements --

20 MR. KLAPKOWSKI: I'd still like to make the offer of
21 proof if I may. I think that that's appropriate, isn't it,
22 under the Rules of the Commission, so that if in fact the
23 Commission decides differently on this issue, that the
24 testimony is at least in the record as regards to what we
25 would have offered if it had been allowed? I believe that's

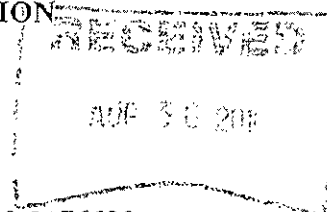
APPENDIX B

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OCT 22 2010

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**



Joint Application of West Penn Power Company :
d/b/a Allegheny Power, Trans-Allegheny Interstate :
Line Company and FirstEnergy Corp. for a : A-2010-2176520
Certificate of Public 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 :

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO COMPEL

On May 14, 2010, West Penn Power Company, doing business as Allegheny Power (West Penn), Trans-Allegheny Interstate Line Company (TrAILCo) and FirstEnergy Corp. (FirstEnergy), (collectively, Joint Applicants), filed a joint application to obtain the approval of the Pennsylvania Public Utility Commission (Commission) under Chapters 11 and 28 of the Public Utility Code (Code), 66 Pa.C.S.A. §§ 101 et seq., for a change of control of West Penn and TrAILCo to be accomplished by the merger of Allegheny Energy, Inc., the parent corporation of both West Penn and TrAILCo, with Element Merger Sub, Inc., a wholly-owned subsidiary of FirstEnergy. Allegheny Energy, Inc. would then become a wholly-owned subsidiary of FirstEnergy. The Joint Applicants also requested that the Commission approve certain revisions to affiliated interest agreements that are designed to facilitate the sharing of services between the Allegheny and FirstEnergy systems.

An Initial Prehearing Conference (Prehearing Conference) was held on June 22, 2010. Among other things, the Commission's Rules regarding discovery were modified to expedite the filing and disposition of Motions to Compel discovery. The modifications were included in our Scheduling and Briefing Order (Scheduling and Briefing Order) dated June 23, 2010.

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On July 30, 2010, the Pennsylvania Department of Environmental Protection (DEP) served the Joint Applicants with its Interrogatories, Set I, numbers 1 through 52.

On August 9, 2010, the Joint Applicants served objections to DEP Interrogatories, Set I, numbers 1 through 16 and 46 through 51.

On August 12, 2010, DEP filed and served a Motion To Dismiss Objections And Compel Answers To Interrogatories, Set I, Questions 1-16 And 46-51 (DEP Motion To Compel).

On August 16, 2010, Joint Applicants filed and served their Answer to the DEP Motion to Compel.

DEP's Interrogatories, Set I numbers 1-16 and 46-51 and Joint Applicants' objections thereto read, in their entirety, as follows:

DEP Set I, numbers 1-9:

1. Have the Companies prepared or directed to be prepared any studies, analyses, memos or other documents analyzing the current compliance status under the environmental acts at the Companies' facilities?
2. If the answer to Question 1 is yes, provide copies of any such studies, analyses, memos or other documents.
3. If the answer to question 1 is no, describe any plans the Companies have to conduct such studies, analyses, memos or other documents analyzing the current compliance status under the environmental acts at the Companies' facilities.
4. For units that are not currently in compliance with applicable state and federal environmental requirements, have the Companies developed remedial or corrective action proposals or plans?
5. If the answer to question 4 is yes, provide a copy of any such studies, analyses, memos or other documentation.
6. If the answer to question 4 is no, how does the Company plan to address the compliance issues at such units? Describe the

plans or arrangements that the Companies will develop to comply with the applicable environmental acts.

7. For units that are not currently in compliance with applicable state and federal environmental requirements, have the Companies developed any cost estimates for necessary remedial or corrective action?

8. If the answer to question 7 is yes, provide any studies, analyses, memos or other documentation analyzing or outlining such costs.

9. If the answer to question 7 is no, describe any plans the Companies have to develop such studies, analyses, memos or other documents analyzing any cost estimates for necessary remedial or corrective action.

OBJECTIONS TO DEP SET I INTERROGATORIES 1-9

The Companies object to Interrogatories 1-9 because they seek information that is not relevant and is outside the jurisdiction of the Pennsylvania Public Utility Commission (Commission). In particular, these interrogatories seek information about compliance with federal and state environmental laws, including corrective action plans and existing or planned analysis of compliance status and the cost of possible corrective action. These laws are not within the jurisdiction of the Commission or relevant to the approvals sought in this proceeding. In addition, to the extent the Interrogatories apply only to electric generation facilities, the Companies note that such facilities are not regulated by the Commission and the Companies' Pennsylvania-regulated utilities do not own any such facilities.

DEP Set I, number 10:

10. For the Companies' power stations that are coal-fired and located in the Commonwealth, proper management of coal ash is a critical issue. Describe the plans and arrangements that currently exist or are anticipated to manage the coal ash that is generated at such power stations.

OBJECTIONS TO DEP SET I INTERROGATORY 10

The Companies object to Interrogatory 10 because it seeks information that is not relevant and is outside the Commission's jurisdiction. In particular, this interrogatory seeks information

about current or anticipated plans of the Companies to manage coal ash generated by coal-fired power stations located in Pennsylvania. The management of coal ash under federal and state laws is not within the jurisdiction of the Commission or relevant to the approvals sought in this proceeding. In addition, the Companies note that any such generation facilities are not regulated by the Commission and the Companies' Pennsylvania-regulated utilities do not own any such facilities.

DEP Set I, number 11:

11. Will the proposed merger affect in any way the plans or arrangements described in response to question 10? If so, describe the effects of the merger on the plans or arrangements.

OBJECTIONS TO DEP SET I INTERROGATORY 11

Interrogatory 11 seeks information concerning whether the proposed merger will affect any plans described in response to Interrogatory 10. Consistent with the objections raised to Interrogatory 10, the Companies also object to Interrogatory 11 because it seeks information that is not relevant to the approvals sought in this proceeding and is outside the Commission's jurisdiction.

DEP Set I, numbers 12-14:

12. Identify the Companies' nuclear power stations that are located within the area covered by the Appalachian States Low-Level Radioactive Waste Compact.

13. Describe the plans and arrangements that currently exist or are anticipated to manage the low-level radioactive waste that is generated at the nuclear power stations identified in response to question 12.

14. Describe the current schedules and plans for decontaminating and decommissioning the nuclear power plants identified in question 12, the funds currently available and those projected to be needed to safely dispose for low-level radioactive waste generated during decontaminating and decommissioning.

OBJECTIONS TO DEP SET I INTERROGATORIES 12-14

The Companies object to Interrogatories 12-14 because they seek information that is not relevant and is outside the Commission's

jurisdiction. In particular, these interrogatories seek information about nuclear power stations subject to the Appalachian States Low-Level Radioactive Waste Compact and plans for managing low-level radioactive waste and funding for nuclear decontamination and decommissioning. The Compact and the laws governing radioactive waste and nuclear decontamination and decommissioning are not within the jurisdiction of the Commission or relevant to the approvals sought in this proceeding. In addition, the Companies note that such nuclear generation facilities are not regulated by the Commission and the Companies' Pennsylvania-regulated utilities do not own any such facilities.

DEP Set I, numbers 15-16:

15. Will the proposed merger affect in any way the plans or arrangements described in response to questions 12-14?

16. If the response to question 15 is yes, describe the effects of the merger on the plans or arrangements.

OBJECTIONS TO DEP SET I INTERROGATORIES 15-16

Interrogatories 15-16 seek information concerning whether the proposed merger will affect any plans described in response to Interrogatories 12-14. Consistent with the objections raised to Interrogatories 12-14, the Companies also object to Interrogatories 15-16 because they seek information that is not relevant to the approvals sought in this proceeding and is outside the Commission's jurisdiction.

DEP Set I, numbers 46-49:

46. Have the Companies conducted or directed to be conducted any studies, memos, analyses and recommendations related to the "price suppression" impact of new generation entering the electricity market?

47. If the answer to question 46 is yes, provide copies of any such studies, memos, analyses and recommendations prepared by or for the Companies related to the "price suppression" impact of new generation entering the electricity market.

48. Have the Companies conducted or directed to be conducted any studies, memos, analyses and recommendations related to the "price suppression" impact of only new renewable generation entering the electricity market?

49. If the answer to question 48 is yes, provide copies of any such studies, memos, analyses and recommendations related to the “price suppression” impact of only new renewable generation entering the electricity market.

OBJECTIONS TO DEP SET I INTERROGATORIES 46-49

The Companies object to Interrogatories 46-49 because they seek information that is not relevant and is outside the Commission’s jurisdiction. In particular, these interrogatories seek information about existing or planned analysis of an undefined “price suppression” impact of new generation and/or new renewable generation entering the electricity market. Because such generation facilities are not regulated by the Commission (and the Companies’ Pennsylvania-regulated utilities do not own any such facilities), such information is irrelevant to the approvals sought in this proceeding and outside the Commission’s jurisdiction.

DEP Set I, numbers 50-51:

50. For the years 2011 through 2015, and using currently operating, under construction and planned alternative energy projects within the PJM Interconnection area, calculate the impact of price suppression on the distribution revenues of each of the Companies’ Pennsylvania subsidiaries.

51. For the years 2011 through 2015, calculate the overall impact of the Pennsylvania Alternative Energy Portfolio Standards Act, including price suppression impacts, on the distribution revenues of each of the Companies’ Pennsylvania subsidiaries.

OBJECTIONS TO DEP SET I INTERROGATORIES 50-51

The Commission’s regulations at 52 Pa.Code § 5.361 provide that a party is permitted to seek discovery that requests another party to make a study or analysis “if the study or analysis cannot reasonably be conducted by the party making the request.” The Companies object to Interrogatories Nos. 50 and 51 because they request that the Companies conduct additional “price suppression” analyses related to alternative energy projects and state alternative energy requirements that could reasonably be conducted by DEP. In addition, demands that the Companies conduct analyses that can, and should, be prepared by the DEP’s own witness(es) represent an unreasonable burden and expense, which is a further grounds for objection, under 52 Pa.Code § 5.361(a)(2).

In addition, similar to Interrogatories 46-49, Interrogatory 50 seeks information concerning the “price suppression” impact of alternative energy projects within the PJM Interconnection area on distribution revenues of the Companies’ Pennsylvania subsidiaries. Consistent with the objections raised to Interrogatories 46-49, the Companies object to Interrogatory 50 because it seeks information that is not relevant to the approvals sought in this proceeding and is outside the Commission’s jurisdiction.

The Commission’s Regulations regarding permissible discovery by way of interrogatories provide as follows:

§5.321. Scope.

(a) *Applicability.* This subchapter applies to a proceeding in which:

(1) A complaint, protest or other adverse pleading has been filed.

(c) *Scope.* Subject to this subchapter, a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(f) *Purpose and methods.* A party may obtain discovery for the purpose of preparation of pleadings, or for preparation or trial of a case, or for use at a proceeding initiated by petition or motion, or for any combination of these purposes, by one or more of the following methods:

(2) Written interrogatories to a participant.

§5.361. Limitation of scope of discovery and deposition.

(a) No discovery or deposition is permitted which:

(1) Is sought in bad faith.

(2) Would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent, a person or party.

(3) Relates to matter which is privileged.

(4) Would require the making of an unreasonable investigation by the deponent, a party or witness.

With respect to DEP Set I, Interrogatories numbers 1-9, Joint Applicants contend that they do not seek information that is relevant to the subject matter in the case. These Interrogatories seek information about compliance with Federal and Commonwealth environmental laws and corrective action plans. We agree with the Joint Applicants that any information obtained in response to these Interrogatories would be irrelevant to the subject matter of this case: that the Commission's issuance of a certificate of public convenience approving the merger is in the public interest because it will affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way. *City Of York v. Pa. Public Utility Comm'n*, 449 Pa. 136, 295 A.2d 825 (1972). The Commission does not have jurisdiction over compliance with either Federal or Commonwealth environmental laws. Cf., *Rovin v. Pa. Public Utility Comm'n*, 94 Pa.Cmwth. 71, 502 A.2d. 785 (1986), *Country Place Waste Treatment Co. v. Pa. Public Utility Comm'n*, 654 A.2d 72 (Pa.Cmwth. 1995), *ARIPPA v. Pa. Public Utility Comm'n*, 792 A.2d 636 (Pa.Cmwth. 2002), app. denied, 572 Pa.736, 815 A.2d 634 (2003). Whether or not any of the Joint Applicants' facilities are in compliance with laws over which the Commission does not have jurisdiction is not relevant to the subject matter of this case.

As to DEP Set I, numbers 10 and 11, we find that Joint Applicants should answer these Interrogatories , even if the answers are "Joint Applicants have no coal-fired power stations in the Commonwealth of Pennsylvania" and "Not applicable – see answer to Interrogatory number 10." Including these averments in their Objections is improper and saves no time, money or effort on the part of the parties or the presiding officers. Interrogatories that can be truthfully answered either "Yes" or "No", such as DEP Interrogatory number 10 should almost

never be the subject of an objection. Consequently, we will order the Joint Applicants to fully and completely answer DEP Set I, Interrogatories numbers 10 and 11.

Regarding DEP Set I, Interrogatories numbers 12-16, for the same reasons as those set forth above with respect to DEP Set I, Interrogatories numbers 1-9, we find that the information sought is irrelevant to the subject matter of this case. Additionally, the interrogatories are much too broad and, therefore, would be unreasonably burdensome for the Joint Applicants to attempt to answer. The Appalachian States Low-Level Radioactive Waste Compact coverage area far exceeds the boundaries of the Commonwealth of Pennsylvania, and it is only this latter area with which this case is concerned.

The Joint Applicants' objections to DEP Set I, Interrogatories numbers 46-49 are misplaced. Interrogatories numbers 46 and 48 merely require a "Yes" or "No" answer. As stated above, such interrogatories should almost never be the subject of an objection. Interrogatories numbers 47 and 49 only require an answer if the answers to numbers 46 and 48 are "Yes." If the information sought by Interrogatories numbers 47 and 49 is available (because the answers to Interrogatories numbers 46 and 48 were "Yes"), that information is certainly relevant to the future state of a competitive electricity market in the Commonwealth of Pennsylvania. We will order the Joint Applicants to fully and completely answer these Interrogatories.

Finally, regarding DEP Set I, Interrogatories numbers 50 and 51, the Joint Applicants object that the calculations required would constitute an unreasonable burden and expense to perform. We agree. We note that the exception for discovery requiring the compilation of data or information which the Joint Applicants do not maintain found in 52 Pa.Code § 5.361(b) does not apply because this case is not a "rate proceeding[]." It would be unreasonably burdensome and unreasonably expensive to require the Joint Applicants to perform calculations which would have to be based on a myriad of assumptions about the future. Any information produced by such calculations would be mere surmise and conjecture. We decline to send the Joint Applicants on such a fool's errand.

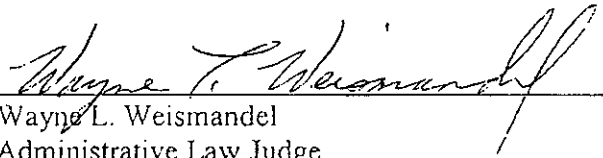
THEREFORE,

IT IS ORDERED:

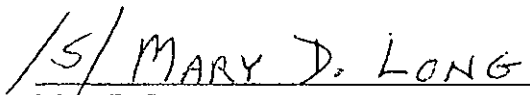
1. That the Motion To Dismiss Objections And Compel Answers To Interrogatories, Set I, Questions 1-16 And 46-51 filed by the Pennsylvania Department of Environmental Protection on August 12, 2010, in the above-captioned case is granted in part and denied in part.

2. That on or before Friday, September 10, 2010, West Penn Power Company, doing business as Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy Corp. shall provide to the Pennsylvania Department of Environmental Protection full and complete answers to the Pennsylvania Department of Environmental Protection's Set I Interrogatories numbers 10, 11, 46, 47, 48 and 49.

Date: August 25, 2010



Wayne L. Weismandel
Administrative Law Judge



Mary D. Long
Administrative Law Judge

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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OCT 22 2010

PA PUBLIC UTILITY COMMISSION
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 : DOCKET NOS. 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 :

CERTIFICATE OF SERVICE

I hereby certify and affirm that I have this day served a copy of the **Brief of West Penn Power Company, Trans-Allegheny Interstate Line Company, and FirstEnergy Corp. Opposing The Pennsylvania Department of Environmental Protection's Petition for an Interlocutory Review and Answer to the Material Question Presented** on the following persons in the matter specified in accordance with the requirements of 52 Pa. Code § 1.54:

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Date: October 22, 2010

KMK #13847 #042057-01-0006

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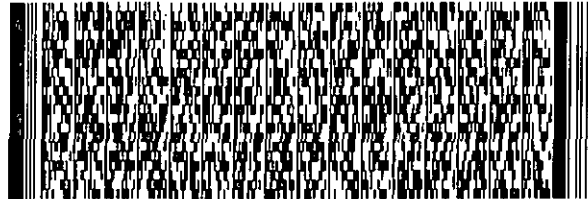
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