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June 14, 2010

**VIA HAND DELIVERY**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street – Filing Room  
Harrisburg, PA 17120

RECEIVED  
2010 JUN 14 PM 2:49  
PA PUC  
SECRETARY'S BUREAU

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; **PROTEST and PETITION TO INTERVENE OF THE PENNSYLVANIA STATE UNIVERSITY**

Dear Secretary Chiavetta:

Enclosed for filing are the originals and three (3) copies each of the Protest and Petition to Intervene of The Pennsylvania State University ("PSU") to the Application of West Penn Power in the above-captioned matter. This document has been served in accordance with the attached Certificate of Service.

If you have any questions with regard to this filing, please direct them to me. Thank you for your attention to this matter.

Very truly yours,



Thomas J. Sniscak

*Counsel for  
The Pennsylvania State University*

WEL/bes  
Enclosures

cc: Per Certificate of Service

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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Joint Application of West Penn Power :  
Company d/b/a Allegheny Power, :  
Trans-Allegheny Interstate Line Company :  
and FirstEnergy Corp. for a Certificate of : Docket Nos. A-2010-2176520  
Public Convenience under Section 1102(a)(3) : A-2010-2176732  
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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**PROTEST OF THE  
PENNSYLVANIA STATE UNIVERSITY**

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NOW COMES The Pennsylvania State University ("PSU"), by and through its attorneys, Hawke McKeon & Sniscak LLP, and files this Protest of the above-referenced Application, pursuant to 52 Pa. Code § 5.51-5.53. In support thereof, PSU avers as follows:

**I. BACKGROUND**

1. On February 10, 2010, FirstEnergy Corp. ("FirstEnergy"), Element Merger Sub, Inc, ("Merger Sub"), a direct wholly-owned subsidiary of FirstEnergy, and Allegheny Energy, Inc. ("Allegheny Energy") entered into an agreement whereby Merger Sub, will be merged with and into Allegheny Energy with Allegheny Energy surviving the merger as a wholly-owned subsidiary of FirstEnergy.

2. On or about May 14, 2010, West Penn Power Company ("West Penn"), d/b/a Allegheny Power ("Allegheny"), Trans-Allegheny Interstate Line Company ("TrAILCo") and FirstEnergy (collectively the "Joint Applicants"), filed the above-captioned Application ("Application") with the Pennsylvania Public Utility Commission ("Commission") seeking the Commission's approval under Chapters 11 and 28 of the Public Utility Code for a change of control of West Penn and TrAILCo to be effected by the merger of Allegheny with Merger Sub, a wholly-

owned subsidiary of FirstEnergy ("Merger"). In addition, the Joint Applicants request that the Commission approve, under Chapter 21 of the Public Utility Code, certain revisions to affiliated interest arrangements.

3. Notice of the Joint Applicants' Application was published on May 29, 2010, in the *Pennsylvania Bulletin*. A deadline of June 14, 2010, was established by the Commission for the filing of Protests and Petitions to Intervene.

4. Concurrently with this Protest, PSU is filing a Petition to Intervene, which is incorporated herein in its entirety.

## II. PROTESTANT

5. The full name and address of the Protestant is:

The Pennsylvania State University  
Room 208 Physical Plant Building  
University Park, PA 16802-1118  
Attn: Robert E. Cooper, P.E.  
Director, Energy and Engineering

The name(s), address and telephone numbers of the attorneys for PSU, upon whom it is requested that all documents be served, are:

Thomas J. Sniscak, Esquire  
Todd S. Stewart, Esquire  
William E. Lehman, Esquire  
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6. PSU is a major generation, transmission and distribution service customer of Allegheny at its University Park campus receiving service through Allegheny PA Retail Tariff 37. PSU is the only customer taking service under Tariff 37. In 2009, PSU received 280,625,102 kWh

of electric energy from Allegheny at the University Park campus and paid Allegheny Energy \$22,451,129 for generation, transmission and distribution service. PSU also receives generation, transmission, and distribution service from Allegheny under rate schedules other than PA Retail 37 for approximately 100 additional accounts at the University Park campus and campuses at New Kingston, Fayette and Mont Alto. In 2009, PSU received 36,572,334 kWh of electric energy from Allegheny and paid Allegheny \$2,612,943 for generation, transmission and distribution service through these other accounts.

### III. PROTEST GROUNDS

7. Section 1102(a) of the Public Utility Code, 66 Pa.C.S. § 1102(a), permits a public utility to undertake certain actions only upon Commission pre-approval, evidenced by a Certificate of Public Convenience. Among the activities that require Commission approval is the following:

(3) for any public utility or an affiliated interest of a public utility... to acquire from, or to transfer to, any person or corporation... by any method or devise whatsoever, including the sale or transfer of stock, including the sale or transfer of stock and including a consolidation, merger, sale or lease, the title to, or the possession or use of, any tangible or intangible property used or useful in the public service.

66 Pa.C.S. § 1102(a)(3). Our Supreme Court has construed this Section of the Code as requiring a finding that a proposed merger will affirmatively benefit the public. Specifically, it must "affirmatively promote the 'service, accommodation, convenience or safety of the public' in some substantial way." City of York v. Pa.P.U.C., 449 Pa. 136, 141, 295 A.2d 825, 828 (1973). In addition, Section 1103(a) allows the Commission to impose upon its issuance of a certificate of public convenience "such conditions as it may deem to be just and reasonable." The Commission is permitted to impose such conditions under Section 1103(a), even if the proposed acquisition would satisfy the City of York test without those conditions. Popowsky v. Pennsylvania Public Utility Commission, 594 Pa. 583, 937 A.2d 1040, 1057, fn. 21 (Pa. 2007).

8. The Commission also has authority over the proposed Merger under Section 2811 of the Public Utility Code, 66 Pa.C.S. § 2811, which is a provision of the Electricity Generation Customer Choice and Competition Act.<sup>1</sup> Specifically, Section 2811(e) requires the Commission to consider "[w]hether the proposed merger, consolidation, acquisition or disposition is likely to result in anti-competitive or discriminatory conduct, including the unlawful exercise of market power, which will prevent retail electricity customers in this Commonwealth from obtaining the benefits of a properly functioning and workable competitive retail electricity market."<sup>2</sup> Pursuant to Section 2811(e)(2), the Commission is permitted to impose upon an approved acquisition, "such terms and conditions as it finds necessary to preserve the benefits of a properly functioning and workable competitive retail electricity market."<sup>3</sup>

9. PSU submits that the Application raises several issues of concern that may require the Commission to reject the proposed Merger, or to approve it only after imposing conditions. These issues include:

- a. Whether the proposed Merger, if approved, would impede competition in the electric retail market, thereby negatively impacting the price ratepayers, specifically PSU, must pay for energy;<sup>4</sup> and
- b. Whether the proposed Merger provides affirmative public benefits that are substantial.

PSU's concerns are discussed in more detail below.

10. The Joint Applicants assert that the Merger will not result in the unlawful exercise of market power, or otherwise prevent retail electricity customers in Pennsylvania from obtaining the benefits of a properly functioning competitive retail electricity market and, in fact, may facilitate additional competition. PSU is a large customer of Allegheny Power and has concerns that the Merger

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<sup>1</sup> 66 Pa.C.S. § 2801, *et seq.*

<sup>2</sup> 66 Pa.C.S. § 2811(e)(1).

<sup>3</sup> 66 Pa.C.S. § 2811(e)(2).

<sup>4</sup> West Penn and FirstEnergy currently have neighboring service territories. (Application, p. 12).

will have adverse effects on competition in the electric generation marketplace and may hinder PSU's ability to participate in the competitive marketplace. The Commission has a statutory obligation to examine whether the Merger is likely to result in anti-competitive or discriminatory conduct.

11. The Application, as filed, does not demonstrate that the Merger would result in an affirmative public benefit that is sufficiently substantial, as required under Section 1103(a) of the Public Utility Code,<sup>5</sup> and under York.<sup>6</sup> Specifically, the Joint Applicants are vague and wholly speculative in their allegations and statements regarding benefits. (Application at 15). Consequently, they do not support a necessary finding of substantial, affirmative public benefits by the Commission under a York analysis.

12. As part of its investigation of the Merger, the Commission must determine whether the Joint Applicants' estimation of net merger savings to the Joint Applicants' regulated businesses is reasonable and whether the methodology by which the Joint Applicants allocated alleged generalized Merger savings among their regulated and unregulated businesses, and among the various states in which the Joint Applicants do business, is reasonable. Here Joint Applicants have not and the application must be rejected absent further proof.

13. Based upon the content of the Application, PSU submits that the Joint Applicants have failed to demonstrate that the Merger would result in an affirmative public benefit that is substantial, as required under Section 1103(a) of the Public Utility Code, and under York.<sup>7</sup> The Joint Applicants' claim that the Merger *might* result in lower rates several years in the future is simply insufficient to offset the substantial risk that the Merger would result in FirstEnergy gaining impermissible market power, thereby harming the competitive retail electric market and the wholesale electric market. Unless the Commission imposes conditions on the Merger that would be

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<sup>5</sup> 66 Pa.C.S. § 1103(a).

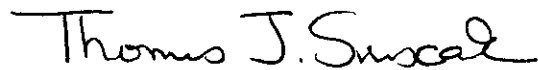
<sup>6</sup> 449 Pa. at 141, 295 A.2d at 828.

<sup>7</sup> *Id.*

sufficient to alleviate market power concerns and that would ensure that ratepayers share in Merger savings, PSU submits that the Application and Merger should not be approved.

WHEREFORE, for the reasons set forth above, The Pennsylvania State University respectfully requests that the Commission conduct and permit a full investigation or proceeding, including sufficient time for discovery, rounds of pre-filed testimony, followed by evidentiary hearings, regarding the Application. Upon completion of that process, PSU further requests that the Pennsylvania Public Utility Commission reject the Application unless the Commission finds that the Merger is in the public interest; provides a preponderance of substantial affirmative benefits to West Penn's customers including PSU; does not present countervailing detriments; does not adversely affect retail electric competition or wholesale electric competition in Pennsylvania; and complies with the Public Utility Code. Finally, PSU requests, in the alternative, that if the Commission approves the Merger, the Commission impose such terms and conditions upon its approval as are necessary to ensure that the Merger is in the public interest; provides substantial affirmative benefits to West Penn's customers, including PSU; does not adversely affect retail electric competition or wholesale electric competition in Pennsylvania; and, complies with the Public Utility Code.

Respectfully submitted,



Thomas J. Sniscak, Attorney I.D. # 33891

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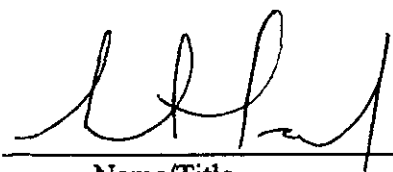
*The Pennsylvania State University*

Dated: June 14, 2010

VERIFICATION

I, ROBERT COOPER hereby state that I am authorized to make this Verification on behalf of The Pennsylvania State University, and that the facts set forth herein are true and correct to the best of my knowledge, information and belief. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

Date: June 14, 2010



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Name/Title

DIRECTOR, ENERGY & ENGINEERING

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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and Electronic Mail**

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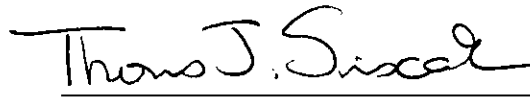
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Thomas J. Sniscak

Dated: June 14, 2010