COMMONWEALTH OF PENNSYLVANIA

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November 15, 2010

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

RE: Joint Application of West Penn Power Company doing business as Allegheny Power Company, Trans-Allegheny Interstate Line Company and FirstEnergy Corporation 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 is the Reply Brief on behalf of the Office of Consumer Advocate, in the above-referenced proceeding.

Copies have been served as indicated on the Certificate of Service.

Respectfully Submitted,

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Assistant Consumer Advocate
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Enclosures
cc: Honorable Wayne L. Weismandel
Honorable Mary D. Long
Office of Special Assistants (via e-mail and disk)

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Joint Application of West Penn Power Company doing business as Allegheny Power Company, Trans-Allegheny Interstate Line Company and FirstEnergy Corporation 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

REPLY BRIEF OF THE OFFICE OF CONSUMER ADVOCATE

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Dated: November 15, 2010

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I. INTRODUCTION

On November 3, 2010, the Office of Consumer Advocate (OCA) filed its Main Brief (M.B.) in opposition to the Direct Energy (DE) Proposal to: (1) create a new default service provider (DSP) in the post-merger FirstEnergy service territories and assign all existing default service customers to the new DSP; (2) to then auction off all of the existing default service customers to electric generation suppliers (EGS) unless the customers chose to opt-out and remain on default service; and, (3) to create a BillCo to handle all customer billing, collection and service functions for all ratepayers. The OCA submits that its Main Brief provides the Administrative Law Judges (ALJs) and the Pennsylvania Public Utility Commission (Commission) with a comprehensive discussion of the DE Proposal, and the numerous reasons of law and policy as to why the DE Proposal must be rejected.

The OCA provided a procedural history in its Main Brief at pages 1-5. The OCA also provided answers to the twelve questions posed by the Commission in the June 3, 2010 Secretarial Letter at pages 45-51. Main Briefs were also filed by FirstEnergy, the Office of Small Business Advocate (OSBA), Direct Energy (DE), Citizen Power and the Retail Energy Supply Association (RESA). The OCA would also note that on October 25, 2010, a Settlement was provided to the ALJs and the parties to this case. On October 28, 2010, the OCA submitted its Statement in Support of the Settlement. The Settlement covered a broad range of issues and contained numerous provisions that the OCA submits are in the public interest. Not all parties to this matter were signatories to that Settlement however.

The OCA's Main Brief addresses and responds to all of the arguments raised by DE as to its Proposal. Similarly, the OCA's Statement in Support details the reasons why the OCA supports the Settlement as providing substantial affirmative benefits to the public and the

reasons why the Application, as modified by the Settlement should be approved. It is not the purpose of this Reply Brief to replicate the OCA's arguments detailed in its Main Brief or in its Statement in Support.

Rather, the OCA will limit its reply to those issues requiring additional clarification and response, specifically the issues raised by DE and RESA in their respective Main Briefs. Thus, any failure of the OCA to address specific arguments contained in other parties' Main Briefs does not mean that the OCA agrees with those other parties' positions or that the OCA has revised its position in this matter in any way.[1]

II. SUMMARY OF REPLY ARGUMENT

As demonstrated in the OCA Main Brief and as further set forth in this Reply Brief, the DE Proposal is inconsistent with the law in Pennsylvania and must be rejected by the Commission. DE's legal theories as to what is required for merger approval in Pennsylvania are also contrary to the clear language of the relevant statutes and legal precedent from the Courts on this issue.

DE's recommendation that its Proposal be implemented as a condition of this merger finds no support in the law and the radical nature of the proposed revisions to the current default service model would be harmful to ratepayers. In addition, the results of its survey should not be relied upon as that survey contains significant leading biases. DE's proposed creation of a BillCo to handle all customer billing, collection and general customer service issues

[1] The OCA disagrees with one part of the Main Brief filed by FirstEnergy, as such portion of that Main Brief is, in the OCA's view, incorrect. FirstEnergy essentially states that reliance on the testimony of Mr. Hahn in regards to wholesale market power issues would be "misplaced." FirstEnergy M.B. at p. 27, fn 12. The Company then discusses its criticisms of Mr. Hahn's testimony. FirstEnergy M.B. at 27-31. The OCA disagrees with the Company's critiques of Mr. Hahn's testimony, but will not respond to those critiques nor seek to further litigate these issues in light of the Settlement. As explained in the OCA Statement in Support, Mr. Hahn testified on concerns he had over the potential post-merger impacts on the power markets in Western Pennsylvania. These concerns were identified, analyzed, and led to the ultimate resolution of those concerns in the Settlement. Settlement at ¶ ¶ 53-55; see also OCA Statement in Support at p. 10. Mr. Hahn's initial concerns were well placed, but were properly considered and resolved by the Settlement.

must be rejected, as it is inconsistent with the law and has the potential to create significant levels of confusion for ratepayers.

As to the issues raised by RESA in its Main Brief, a list of conditions is presented that RESA argues should be imposed as conditions for the approval of this merger. RESA has made no attempt to quantify the costs involved in implementing these conditions, or where the funding would come from. In addition, the conditions listed all touch on the same areas as provisions contained in the Settlement.

The OCA submits that for the reasons set out in the OCA's Main Brief, this Reply Brief and in its Statement in Support, the Application as modified by the Settlement is in the public interest and should be approved. The DE Proposal, being inconsistent with the law, contrary to sound public policy and representing substantial risks for ratepayers must be rejected. The additional conditions sought by RESA, as detailed herein, are largely duplicative and unnecessary in light of the Settlement, and therefore should be rejected.

III. RESPONSES TO DIRECT ENERGY AND RESA

In the Main Briefs of DE and RESA, certain issues were raised that require additional clarification and response from the OCA beyond what was provided in the OCA's Main Brief and its Statement in Support. The following sections will provide specific responses to those issues that are of concern to the OCA. These responses should be considered along with the discussions provided in the OCA Main Brief and the OCA Statement in Support on similar topics.

A. Responses To Direct Energy.

1. DE's Legal Theory As To Approval Of A Merger Is Incorrect.

On pages 16-17 of its Main Brief, Direct Energy (DE) sets out its legal theories as to what the Commission is legally required to find in order to approve this merger. DE Main Brief (M.B.) at 16-17. DE states the legal requirements, as follows:

> that the merger: (a) will not harm competition; (b) will affirmatively promote competition in some substantial way; and, (c) will result in a properly functioning and workable competitive retail electric market.

DE M.B. at 16. The OCA submits that sections (b) and (c) of DE's legal burden requirements find no support in the law and must be rejected.

DE's legal theories and analysis of the requirements necessary for the Commission to approve this merger are fundamentally flawed, largely based on DE's incorrect assumptions as to the meaning of the Public Utility Code, in general, and specifically as to the intent of Act 129 in regards to default service for customers. The legal standard for the Commission to approve a merger has been set forth by the Commission and the Courts on numerous occasions. The Courts have specifically held: "that the proponents of a merger demonstrate that the merger will affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way", City of York v. Pa. P.U.C., 295 A.2d 825, 828 (Pa. 1972) (City of York) and that the merger will not harm the competitive retail markets. ARIPPA v. Pa. P.U.C., 792 A.2d 636, 655 (Pa. Commw. Ct. 2002) (ARIPPA).

As to Act 129, default service was implemented in Pennsylvania by the General Assembly as a service for customers who do not choose an alternative retail provider to receive generation from the competitive wholesale markets at the least cost over time. These statutory default service provisions are mandated by law, and not subject to the type of radical

transformation that DE seeks in this proceeding. Where DE's legal analysis goes astray is in trying to intertwine the standards for merger approval and default service in a way not intended nor supported by the law.

a. Legal Requirements for Approval of a Merger.

Section 1102 of the Public Utility Code requires that the Commission issue a Certificate of Public Convenience as a legal prerequisite to offering service, abandoning service and certain property transfers by public utilities or their affiliated interests. 66 Pa. C.S. § 1102(a)(1)-(3). The Code requires that a certificate shall only be granted upon findings that the granting of such certificate is "necessary or proper for the service, accommodation, convenience or safety of the public." 66 Pa. C.S. § 1103(a). The Pennsylvania Supreme Court has held that this section of the Code requires a finding that a proposed merger or acquisition will affirmatively benefit the public and specifically will "affirmatively promote the 'service, accommodation, convenience or safety of the public' in some substantial way." ; Popowsky v. Pa. P.U.C., 937 A.2d 1040 (Pa. 2007) (Popowsky).

Additionally, Section 1103 explicitly allows the Commission to impose conditions upon the issuance of a Certificate of Public Convenience. 66 Pa. C.S. § 1103(a). Section 1103(a) of the Code provides: "The Commission, in granting such a certificate, may impose such conditions as it may deem to be just and reasonable." Id. These Sections of the Public Utility Code, and the Pennsylvania Supreme Court cases interpreting these Sections of the Code provide the requirements that must be met in order for the Commission to approve a merger. Notably, these cases do not support the DE view that approval of a merger must be based on a finding that the merger "will affirmatively promote competition in some substantial

way".[2] DE reaches its conclusion by improperly interpreting and inter-mingling a wholly different section of the Public Utility Code regarding competition. Specifically, DE tries to change the "do no harm" to competition requirements of Section 2811(e) into an affirmative obligation to increase competition under Section 1102.

Pursuant to Section 2811 of the Public Utility Code, enacted as a provision of the Electricity Generation Customer Choice and Competition Act (Competition Act) in 1996, the Commission is tasked with certain responsibilities for monitoring the competitive markets in Pennsylvania, specifically as to mergers in relevant part as follows:

> (e) Approval of proposed mergers, consolidations, acquisitions or dispositions.--
>
> (1) In the exercise of authority the commission otherwise may have to approve the mergers or consolidations by electric utilities or electricity suppliers, or the acquisition or disposition of assets or securities of other public utilities or electricity suppliers, the commission shall consider whether the proposed merger, consolidation, acquisition or disposition is likely to result in anticompetitive 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.

66 Pa. C.S. § 2811(e)(1) (emphasis added). Unlike the requirements set out by the Courts under Section 1102 regarding merger approval that require a finding of substantial affirmative benefits, the clear and unambiguous language of Section 2811(e)(1) provides that the Commission must ensure that no harm results to competition or retail markets. This no harm standard is further amplified by Section 2811(e)(2), as follows:

[2] This is not to say that enhancing and promoting competition in accord with the intent of the General Assembly could not be found as a substantial affirmative benefit to flow from a merger, but rather that DE's proposed construction of the law that would *require* such a finding for merger approval is in error.

> (2) Upon request for approval, the commission shall provide notice and an opportunity for open, public evidentiary hearings. If the commission finds, after hearing, that a proposed merger, consolidation, acquisition or disposition is likely to result in anticompetitive 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, the commission shall not approve such proposed merger, consolidation, acquisition or disposition, except upon such terms and conditions as it finds necessary to *preserve* the benefits of a properly functioning and workable competitive retail electricity market.

66 Pa. C.S. § 2811(e)(2) (emphasis added). The language of the Competition Act in this regard is clear – the Commission is tasked with the responsibility of *preventing* harm, and if the potential exists for harm, then the Commission can impose conditions in order to *preserve* the benefits in place. Nowhere in this language is the Commission tasked with using a merger to create a retail competitive market or to correct any perceived deficiencies in the Commonwealth's retail market structure. Simply put, there is nothing in the statutory language of the Competition Act to suggest that a merger can only be approved if it "will result in a properly functioning and workable competitive retail electric market", as DE argues here. The Commission and the Commonwealth Court have both interpreted this Section of the Competition Act consistent with a no harm standard.

In ARIPPA, several parties appealed to the Commonwealth Court over the Commission's approval of the proposed merger of GPU and FirstEnergy on the grounds that it was anti-competitive, and specifically cited and argued the provisions of Section 2811 (e) (1), (2). The ARIPPA Court held as follows:

> GPU Energy and FirstEnergy provided testimony that the proposed merger would not *prevent* retail customers from obtaining the benefits of a properly functioning and workable competitive retail electricity market because it would result in the loss of only one retail market participant among a field of over 50 electricity retailers licensed by the Commission. Relying on that evidence, the Commission did not find that any evidence was presented to indicate an *adverse impact* on either the wholesale or retail markets resulting from the merger. It found that there was no evidence regarding a *negative impact* on the retail markets because GPU Energy is not in the retail market now, and competition would come from other electric retailers without any *adverse effect*. Moreover, the FERC had found that the merger would not have any anti-competitive effects. *See* FERC Order Authorizing Merger, FERC Docket No. EC01-22-000, Order (Issued March 15, 2001). Because there is no evidence that retail competition *will suffer*, the Commission did not err in approving the merger, and the Commission's May 24, 2001 order approving the merger is affirmed.

ARIPPA at 658. It is clear from the Court's language in ARIPPA that the Commission and the Commonwealth Court both construe Sections 2811(e)(1) and (2) as containing a "do no harm" standard. DE's construction of the statutory language in Section 2811(e) that would require a merger to produce competitive benefits or to create a competitive market is in error, and must be rejected as an incorrect legal burden in this matter. Moreover, DE seriously misreads the Pennsylvania Supreme Court's decision in Popowsky, in an attempt to provide support for its "substantial competitive benefits" argument.

In its Main Brief, DE argued that the Popowsky Court held that mergers must be found to "affirmatively advance competitive markets, or competitive opportunities." DE M.B. at 16-17. In discussing the net benefits test, the Popowsky Court provided the following:

> In line with the DOJ and FCC assessments, competitive impact is a substantial component of a rational net public benefits evaluation in the merger context. That the ultimate determination may be that the impact is modest, minimal, or non-existent does not negate the necessity of undertaking the examination in the first instance or remove the factor from the weighing and balancing process.

> Significantly, in terms of the net public benefits arising out of corporate consolidation, anticompetitive effects may offset or negate advantages and result in a denial of regulatory approval. Indeed, it is for this very reason that large merger transactions are so highly regulated. Thus, in the present case, it is clear that the Commission's satisfaction that competition will not be impaired was a legitimate and significant factor in the overall certification inquiry.

Popowsky, 937 A.2d 1040, 1056-1057 (Pa. 2007) (internal citations omitted). The holding in Popowsky stands for the proposition that competitive impacts must be viewed as an integral part of the weighing of benefits against detriments. It is reasonable to assume that the Commission has engaged in an evaluation of positives and negatives, a weighing of benefits against detriments, or some version of a net benefits test in every merger that has come before it. The Popowsky Court's focus on the relevance of competitive impacts is not the revelation in the law that DE suggests, nor does it provide any support for the legal interpretation that DE proposes here. In addition, DE's view of default service is clearly at odds with what the General Assembly intended through the passage of Act 129.

As discussed in the OCA's Main Brief, DE clearly wishes to change the face of default service in Pennsylvania through its auctions of customers and the fact that under the DE Proposal a customer would have to affirmatively select to remain on default service, rather than to retain it as the default option as intended by the General Assembly.[3] Likewise, RESA provided the following statement on default service in its Main Brief: "Each of these proposals is intended to ensure that the default service programs serve the *appropriate function* of stimulating

[3] The OCA notes an apparent incorrect statement in DE's Main Brief at the top of page 45, wherein it is stated that "For purposes of the auction, customers would be divided into three categories. First, all residential customers choosing to remain on default service (via the previously conducted opt-out approval process) would be auctioned to EGSs." DE M.B. at 45. This statement is inconsistent with the OCA's understanding of the DE Proposal, wherein customers who opt-out of the EGS auction would stay with the new DSP. They do not get auctioned off to EGSs. A citation is provided to DE witness Lacey at page 9 of his Direct Testimony, where at lines 23-24 he does make a similar statement; however, continuing on to page 10 at lines 2-5 he clarifies that customers who opt out will not be auctioned. DE St. 3 at 9-10. The OCA notes this apparent error only for the sake of clarity of the record in this matter.

robust retail competition for a larger group of customers." RESA M.B. at 30 (emphasis added). DE and RESA are incorrect as to the purpose and goals of default service in Pennsylvania. Default service is not about forcing customers to choose an EGS or to leave their default supplier in order to stimulate retail competition. It is an essential service, specifically created by the General Assembly, for those customers who do not choose an EGS or for those customers whose chosen EGS fails to provide service. The OCA submits that if no customer in Pennsylvania chose to shop for retail generation service, but rather was served by the EDC at the lowest cost over time from the wholesale markets, the statutory mandates of Act 129 would be met. These customers would continue to receive the benefit of wholesale generation markets through the competitive least cost procurement process of Act 129, even if they do not chose to shop with an alternative retail supplier.

The General Assembly passed Act 129 in 2008, which amended Section 2807 of the Public Utility Code. The amended Section 2807(e) provides:

> (3.1) Following the expiration of an electric distribution company's obligation to provide electric generation supply service to retail customers at capped rates, **if a customer contracts for electric generation supply service and the chosen electric generation supplier does not provide the service or if a customer does not choose an alternative electric generation supplier**, the default service provider shall provide electric generation supply service to that customer pursuant to a commission-approved competitive procurement plan. The electric power acquired shall be procured through competitive procurement processes and shall include one or more of the following:
>
> (i) Auctions.
>
> (ii) Requests for proposal.
>
> (iii) Bilateral agreements entered into at the sole discretion of the default service provider which shall be at prices which are:
>
> (A) no greater than the cost of obtaining generation under comparable terms in the wholesale market, as determined by the commission at the time of execution of the contract; or

(B) consistent with a commission-approved competition procurement process. Any agreement between affiliated parties shall be subject to review and approval of the commission under Chapter 21 (relating to relations with affiliated interests). In no case shall the cost of obtaining generation from any affiliated interest be greater than the cost of obtaining generation under comparable terms in the wholesale market at the time of execution of the contract.

(3.2) The electric power procured pursuant to paragraph (3.1) **shall include a prudent mix of the following:**

(i) Spot market purchases.

(ii) Short-term contracts.

(iii) Long-term purchase contracts, entered into as a result of an auction, request for proposal or bilateral contract that is free of undue influence, duress or favoritism, of more than four and not more than 20 years. The default service provider shall have sole discretion to determine the source and fuel type. Long-term purchase contracts under this subparagraph may not constitute more than 25% of the default service provider's projected default service load unless the commission, after a hearing, determines for good cause that a greater portion of load is necessary to achieve least cost procurement. This subparagraph shall not apply to contracts executed under paragraph (5).

(3.3) The commission may determine that a contract is required to be extended for a longer term of up to 20 years, if the extension is necessary to ensure adequate and reliable service at least cost to customers over time.

(3.4) The prudent mix of contracts entered into pursuant to paragraphs (3.2) and (3.3) **shall be designed to ensure**:

(i) Adequate and reliable service.

(ii) **The least cost to customers over time.**

(iii) Compliance with the requirements of paragraph (3.1).

66 Pa. C.S.A. § 2807(e) (emphasis added). The requirements of Act 129 are clear, default service customers have specific protections: (1) the right not to choose an EGS and thus remain with the DSP; (2) the right to have the DSP supply power in the event of an EGS default; (3) the

right to be served by the DSP via a prudent mix of resources, and (4) the right to be served by the DSP at the least cost over time.[4]

As the Commonwealth Court has provided on many occasions, these clear and unambiguous requirements are not subject to alteration by the Commission:

> As has often been noted, "[a]s the administrative body charged with implementing the Competition Act, the PUC is entitled to substantial deference in the performance of its duties, and the PUC's interpretation of the Competition Act should not be overturned unless it is clear that such construction is erroneous." *George v. Pennsylvania Pub. Util. Comm'n,* 735 A.2d 1282, 1288 (Pa.Cmwlth.1999). Further, "[w]hen the statutory language is not explicit a court may defer to an administrative agency's interpretation in order to ascertain legislative intent." *Dominion Retail, Inc. v. Pennsylvania Pub. Util. Comm'n,* 831 A.2d 810, 814 (Pa.Cmwlth.2003). **However, where statutory language is clear, such interpretive discretion ends and the agency must abide by the statute.**

Pennsylvania Power Company v. PA PUC, 932 A.2d 300, 306 (Pa. Commw. Ct. 2007) (emphasis added). The language of Act 129 as embodied in Sections 2807 and 2811 of the Public Utility Code is clear and unambiguous as to the no competitive harm standard for merger approval, and equally clear as to the role of least-cost default service over time in Pennsylvania. DE's proposed legal burdens as set out in its Main Brief find no support in the law of Pennsylvania, and DE and RESA's views on the purpose of default service are equally flawed.

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[4] In addition, the Preamble to Act 129 provides:

> The General Assembly recognizes the following public policy findings and declares that the following objectives of the Commonwealth are served by this act:
>
> (I) The health, safety and prosperity of all citizens of this Commonwealth are inherently dependent upon the availability of adequate, reliable, affordable, efficient and environmentally sustainable electric service at the least cost, taking into account any benefits of price stability over time and the impact on the environment.

Preamble to Act 129, 2008 Pa. Laws 129.

The OCA submits that for all the reasons just discussed, and for the reasons set out in the OCA's Main Brief, the DE Proposal must be rejected.

2. DE's Survey Results Provide No Support For Adoption Of Its Proposal.

In its Main Brief, the OCA addressed the majority of DE's arguments for its Proposal. Specifically the OCA argued that: (1) the DE Proposal does not comport with the requirements of Act 129 for the provision of default service, as those customers taking default service from the new DSP would be subject to prices that would not reflect a prudent mix of spot, short and long-term contracts, nor would the prices reflect a purchasing plan, reviewed by the Commission, designed to provide the least cost service to customers over time, 66 Pa. C.S. § 807(e)(3); (2) the DE Proposal is also in conflict with the specific requirements of the Public Utility Code that prohibit a customer's electricity generation supplier from being switched without the customer's consent, 66 Pa. C.S. § 2807(d)(1); (3) the DE Proposal to create a "BillCo" is contrary to the provisions of Section 2804(5) of the Public Utility Code, which does not permit the Commission to mandate involuntary changes in an electric utility's corporate structure, 66 Pa. C.S. § 2804(5); (4) the DE Proposal to assign the DSP functions to an entity other than FirstEnergy is not supported by the evidence in this proceeding, as required by the Commission's regulations on that issue; and (5) the DE Proposal fails to meet the Commission's requirements regarding default service, as contained in the Commission's regulations and Policy Statement on this issue. In the following sections, the OCA will respond to additional issues as raised by DE in its Main Brief.

DE cites in its Main Brief to a survey it submitted in this proceeding that purported to show that customers viewed the DE Proposal favorably. DE M.B. at 25. The OCA submits that the survey in question provides no support for the DE Proposal, as it is unlikely that

customers responding to the survey fully understood and appreciated what they were being asked to support. Joint Applicants' (JA) witness Graves addressed the DE survey in some detail. JA witness Graves' criticisms of the survey are well founded. As Mr. Graves testified:

> In the first instance, the survey seems to assume implicitly that customers who are participating in responding have a good understanding of the current terms and conditions of default service and their opportunities for retail service in Pennsylvania, and those are pretty complicated services and complicated processes whereby those services are provided. And I doubt that it's true that customers have adequate general understanding of those terms to respond to the questions as posed, so that's one kind of concern.

Tr. at 881-882. As Mr. Graves noted, the potential for customers to answer survey questions in a manner that would be reasonably acceptable as evidence is directly correlated to the customers' overall understanding of the default service protections and provisions currently in place in Pennsylvania. The survey provides no reasonable basis upon which a conclusion can be reached as to this key point. As Mr. Graves testified:

> But the customers aren't told what those terms and conditions are or protections are, and they're not surveyed to find out if they have a good understanding of those, so when they say, "Sure," or "Yes," we don't really know whether they're agreeing to the same thing as the questioner thinks they're asking. And that's one, and there's other even more leading biases that I think come in some of the later questions.

Tr. at 883. Further, as Mr. Graves noted, the survey questions contain a significant level of leading bias,[5] as the following sampling of survey questions shows:

> 9. If you knew that you would receive a rebate check ranging from $150 to $500 from the electricity supplier who selected you as a customer, would that make you more or less likely to support the Direct Energy proposal or would it make no difference to you?

[5] Tr. at 883.

> 10. In this current economic climate, do you agree or disagree that a $150-$500 rebate check would make a difference to you/your family?
>
> 12. If you received a $150-$500 rebate check from the electricity supplier that selected you, and you were able to spend it on anything, which of the following things would you choose?

JA Cross Exh. 15. Frankly, it is surprising that the positive response rate to these questions was only 85% to 90%, as DE reported, considering the language used. As stated by JA witness Graves:

> and of course they get 85, 90 percent favorable responses, which is not particularly surprising in light of having sort of hung a carrot in front of the respondents before asking them the substantive question about their support for the proposal.

Tr. at 883-884. In the OCA's view, the survey results are of little to no value in this proceeding, especially considering that customers may not understand the whole picture.[6]

If DE believes the predictive value of its survey then it would seem that the DE Proposal in this matter is really a moot point. DE could simply offer to write checks of between $150 to $500 for every post-merger FirstEnergy default service customer that agrees to sign up for DE service. According to the DE survey, customers would view this favorably. In the OCA's view, it seems obvious that, if true, the survey results would lead DE and other EGSs to actively solicit these customers with some type of cash inducement, coupled with the necessary contracts and disclaimers required by general law for such solicitations.

[6] Consider a survey question posed to registered automobile owners in Pennsylvania that is framed as "would you agree that saving $500 a year on your car insurance would be a benefit to you/your family?" It is reasonable to assume that a fairly high positive response could be expected. But, what would the response be if we informed the survey participants that in order to save the $500, they had to give up collision and comprehensive coverage, and just maintain the bare liability insurance required by law? It is doubtful that many people would agree that this is a reasonable way to save $500 – and this is the crux of the problem with the DE survey results. Customers are being asked to provide responses based on only part of the story. The OCA submits that the survey results here are biased and should not be accepted as reasonable evidence of customers' potential behavior.

With or without this merger, the point is that nothing is stopping DE and other EGSs from going out and competing for customers under the competitive market provisions currently in place in Pennsylvania. DE's survey, with its leading biases, should not be accepted as a reliable indicator of how customers view the DE Proposal, especially considering that the survey participants were not provided with the "rest of the story." The OCA submits that the survey results are invalid and should be rejected along with the entire DE Proposal.

3. DE's Proposal To Create A BillCo is Unsound As A Matter Of Law And Policy.

In its Main Brief, DE discusses the creation of a BillCo to handle all of the billing, collection and customers service issues currently being done by the FirstEnergy EDCs. DE M.B. at 49-52. The OCA has argued in its Main Brief that this proposal is contrary to the law and unsound as a matter of policy. OCA M.B. at 27-29. The creation of a BillCo, as with the DE Proposal in general, has the potential to create significant confusion and risks for ratepayers that do not currently exist.

As OCA witness Alexander testified:

> Direct Energy's proposal would retain the regulated ratepayer obligation to absorb the cost of billing and collecting the bill for both distribution and generation supply service. These costs are not likely to be insignificant because, as recommended by Direct Energy, the BillCo would have to issue "branded" bills for each EGS and implement the terms of service for each EGS contract in its negotiations or communications with all customers. As a result, the EGS that obtains the DS customers would be subsidized through regulated distribution rates for these services. There would be costs associated with establishing this new structurally separate entity that Direct Energy does not identify or recognize.

OCA St. 2-R at 18. As Ms. Alexander testified, costs to create the BillCo could be significant, and these ongoing costs after the initial implementation would be borne by ratepayers. There is no evidence of record in this proceeding to quantify what the costs of start-up and

implementation of a new BillCo would be, what the ongoing costs for this BillCo would be, or whether the BillCo is even a cost-effective alternative to the EDCs current handling of these customer service functions.[7] This latter factor relates to the just and reasonable requirement for rates, and the OCA submits that no showing has been made that the BillCo would be more cost-effective for ratepayers than the processes already in place.

OCA witness Alexander also noted the lack of justification in this proceeding to support the creation of a BillCo, as follows:

> Nor does Direct Energy justify why such a separate entity should be created based on facts or evidence that supports this recommendation. Direct Energy does not offer any evidence to suggest that either FirstEnergy or West Penn Power has implemented its statutory and regulatory obligations to provide billing and collection services to EGSs in a manner that is detrimental to an EGS or that result in undue favoritism to any FirstEnergy affiliate. Finally, if there are reforms that should be adopted by FirstEnergy or West Penn to more efficiently provide needed services to EGSs, those reforms should be identified and evaluated. This approach is a far cry from the suggestion that an entirely separate entity should be created to do the bidding of EGSs in their billing and collection of essential electricity service.

OCA St. 2-R at 18. Moreover, moving essential services away from the EDC may pose more than just financial risks for customers.

As to what a customer bill would look like from the BillCo, DE witness Lacey testified during cross examination:

> I would envision that the BillCo would generate a bill that says, in our case, Direct Energy, have the Direct Energy logo, and would have the BillCo phone number to call for billing questions because they will have all the billing data. If a customer has a different type of question, a contract question, product question or something like that, those calls would come directly to us, to the EGS.

[7] DE witness Lacey verified that DE has not attempted to quantify the implementation costs of its Proposal. Tr. at 1005-1006.

Tr. at 1049. Under further cross examination, Mr. Lacey provided that the new billing format may have to include several different phone numbers for items such as service outages. Tr. at 1050.

From the Proposal as outlined, the OCA has serious concerns as to the level of customer confusion that a new BillCo could create. As Mr. Lacey testified, the new bill format would only include the name of the EGS serving that account, in one instance, Direct Energy. As Mr. Lacey also testified, DE has its own call center. Thus, if a customer had an outage they could call the BillCo, who would then relay the message to the EDC. Tr. at 1050. Or, presumably, looking at the heading on the bill, a customer could choose to call Direct Energy or whatever other EGS' name might be on the bill. If the customer had a billing question, they would call the BillCo, but if a customer had a contract question they would call the EGS? Tr. at 1049. DE's explanation of their Proposal tends to show the undeveloped nature of the plan, and also indicates the potential for serious customer confusion around a vitally important service. The OCA submits that the potential risks and confusion presented by the BillCo Proposal provide further evidence as to why such a mechanism should not be adopted.

4. Conclusion.

The Commission must reject the DE Proposal. As discussed herein, DE's construction of the legal burdens placed on Joint Applicants in this proceeding are incorrect as a matter of law. Contrary to the DE view of the law, the Commission is required to find that the proposed merger provides substantial affirmative benefits to the public, and that the proposed merger will not harm competition. The OCA submits that the Application, as modified by the conditions in the Settlement satisfy the substantial affirmative public benefits test. Moreover, the Application, as modified by the conditions in the Settlement provide no evidence of harm to the

markets or competition, as required by Section 2811(e). DE's construction of the law in this area, along with its entire Proposal must be rejected by the Commission in favor of the clear and unambiguous language of the Public Utility Code.

In addition, the DE and RESA view that default service is merely a whistle stop along the way to full retail competition must not be entertained. The General Assembly created the default service provisions found in the Public Utility Code, as recently amended by Act 129 of 2008, to provide that:

> Following the expiration of an electric distribution company's obligation to provide electric generation supply service to retail customers at capped rates, if a customer contracts for electric generation supply service and the chosen electric generation supplier does not provide the service or if a customer does not choose an alternative electric generation supplier, the default service provider shall provide electric generation supply service to that customer pursuant to a commission-approved competitive procurement plan.

66 Pa. C.S. § 2807(e). The DE Proposal would stand this statutory intent on its head by assigning customers who made no choice at all to an EGS. As stated in the OCA's Main Brief, this switching of customers from default service to an EGS without their prior consent is not only a violation of the Public Utility Code, but also poor public policy. OCA M.B. at 22-26, 29-38.

Moreover, the DE survey results should not be accepted in this proceeding as a reliable indicator of customers' support for the DE Proposal, as the survey questions contain significant leading bias. The BillCo proposal, as discussed, also provides for significant levels of customer confusion and has not been shown to be a cost-effective alternative, for ratepayers, to the systems already in place. For these, and all of the reasons found in the OCA's Main Brief, the DE Proposal must be rejected in its entirety.

B. Responses To RESA.

1. Education Program.

In its Main Brief, RESA recommends that a comprehensive customer education program be implemented as a condition of the merger, in order to address "competitive market concerns." RESA M.B. at 23, 25. Given the extensive consumer education campaign on-going by the Commission and the EDCs, the OCA recommends that the Commission not adopt such an additional condition in this proceeding. See Policies to Mitigate Potential Electricity Price Increases, Docket No. M-00061957 (Order entered May 17, 2007). Moreover, there is a complete lack of any discussion from RESA as to who is to bear the costs of the multi-faceted program that RESA sets out in its Main Brief. RESA M.B. at 25-26.

As OCA witness Alexander testified about the proposed RESA initiatives put forth by their witness:

> The Commission has a number of initiatives underway concerning consumer education about the end of the rate cap era and the need to inform customers about their right to choose an EGS. The funding for these educational initiatives varies among the EDCs, but in general the Commission has approved education plans for each EDC that require distribution ratepayers to pay for approved education plans. I do not object to the suggestion that the EDC websites should contain prominent materials on customer choice, how to select an EGS, and how to obtain information on EGS offers. Nor do I object to the suggestion that the EDC customer service center alert customers who call to initiate or move service about their option to select an EGS. Finally, I note that the settlement that resolved Met-Ed's and Penelec's Default Service proceeding included an agreement in which beginning in 2011 FirstEnergy would issue two mailings per year to customers that would include information on specific EGS offers for those EGSs that agreed to pay for such mailings.

OCA St. 2-R at 25-26. As Ms. Alexander explained, ratepayers are already paying for approved education programs to coincide with the end of rate caps in the service territories of those

affected utilities. As stated above, it is unclear from the RESA proposal where the funding for its suggested education programs should come from, or even how much additional spending would be needed to implement its program,[8] but it would seem unreasonable to ask ratepayers to pay for additional educational spending at this time.

The RESA proposal also presents additional concerns with the level of involvement for the EDC in educating customers on specifics of EGS' offers. As OCA witness Alexander testified, however:

> several of Mr. Hudson's proposals would impose obligations on the EDC to discuss specific EGS offers with customers who call the EDC. These recommendations that seek to require the EDC's customer call center to identify and inform customers about specific EGS offers may not be appropriate. Putting the EDC into the position of obtaining accurate and up-to-date lists of supplier offers and various components of their pricing offers would be burdensome and cause the EDC to be the subject of complaints or accusations should an error be made or a supplier offer be inadvertently not included. Supplier offers can change rapidly and any list of offers and prices could easily be out-of-date within days of its issuance. It would be more efficient for the EDC to refer customers to a central website, such as those that exist in New York and Connecticut, which allow individual customers to see supplier offers in their service area, with specific prices and accompanying terms and conditions. In Pennsylvania, the Commission-sponsored website, PaPowerSwitch.com, is a recently developed resource for all customers. I note that the OCA already has voluntarily taken the responsibility for publishing regularly updated supplier and pricing information for each EDC for residential customers. Many EDCs already refer customers to the PUC website and the OCA Residential Shopping Guide for this type of information. Finally, the issue of the proper design of customer referral programs is the subject of discussion with the ongoing Retail Markets Working Group.

OCA St. 2-R at 26-27. As Ms. Alexander testified, having the EDCs become surrogate salespersons for the EGSs is both cumbersome and problematic on a practical basis. RESA's

[8] RESA witness Hudson admitted during cross examination that the cost of the customer referral program recommended by RESA was an unknown. Tr. at 630.

recommendations for the implementation of a comprehensive customer education program should be rejected. RESA M.B. at 25-27.

Moreover, the proposed Settlement in this matter already provides a substantial list of Retail Market Enhancements; eleven separate paragraphs encompassing five pages of the Settlement document, which at many places addresses the same areas of concern that RESA raises in its proposed education program. Settlement at ¶ ¶ 38-48. The RESA education program lacks any estimated costs for its implementation, lacks any direction as to the bearer of those costs, is impractical as it recommends that EDC personnel market EGS products, and is unnecessary based on the fact that the Settlement effectively addresses many of the same concerns that RESA now raises. Accordingly, the OCA submits that the RESA education program as outlined in its Main Brief be rejected.

2. Purchase Of Receivables Program.

RESA proposes that a "properly structured Purchase of Receivables program" be implemented as a condition of merger approval in this proceeding. RESA M.B. at 27-30. The OCA submits that the Settlement already provides for a properly structured purchase of receivables (POR) program consistent with that implemented by other utilities. RESA, however, proposes that an all in/all out provision not be included in the POR program. RESA M.B. at 28. The OCA supports an "all in/all out" provision as a reasonable means of keeping the billing functions for EDCs within manageable limits and for providing similar treatment to all customers. An all in/all out provisions tends to keep EGSs from "cherry-picking" customers and ensures that customers are not treated differently in the termination process.

The OCA, however, is supportive of POR programs with appropriate consumer protections, as OCA witness Alexander testified:

> I do not object to the recommendation that FirstEnergy should develop a POR program for West Penn Power. I recommend that the POR program reflect the consumer protections and policies that were included in FirstEnergy's agreement to implement a POR program in the settlement of the Default Service programs for Met-Ed and Penelec in 2009 and in subsequent implementation proceedings.

OCA St. 2-R at 27. As Ms. Alexander testified, the creation of a POR program for West Penn is a reasonable part of the resolution of this matter and could provide certain enhancements to the competitive atmosphere in the West Penn service territory. The Settlement provides for a comprehensive POR program that is consistent with the programs in place for Met-Ed and Penelec. Settlement at ¶ 45. The OCA submits that RESA's proposed modifications to this program are unnecessary and must be rejected.

The Settlement provides that within three months following the integration of West Penn and FirstEnergy's billing systems, a comprehensive POR program will be instituted in the West Penn service territory. Settlement at ¶ 45. The OCA submits that the POR provisions contained within the Settlement are reasonable, and reflective of other POR programs that have been instituted and approved by the Commission. In addition, Paragraphs 46 through 48 of the Settlement offer additional training opportunities for EGSs and additional value-added services for EGSs that do not currently exist. Settlement at ¶ ¶ 46-48. Accordingly, the OCA submits that the Settlement provisions have thoroughly addressed the POR issue in this proceeding and that RESA's additional POR terms should be rejected.

3. Changes To Future Default Service Procurements.

RESA proposes that certain changes be made to the future default service plans of all FirstEnergy EDCs as a condition of approval for this merger. RESA M.B. at 30-31. Specifically, RESA recommends changes to C & I customers' kWh thresholds for hourly

service, more spot market and short-term contract procurements and load caps for default service suppliers. RESA M.B. at 30. The OCA is opposed to these RESA conditions and submits that they should be rejected by the Commission.

OCA witness Richard Hahn addressed the RESA proposal for the use of more spot purchases and short-term contracts and how such a proposal is inconsistent with Act 129, as follows:

> RESA's suggestion to shorten the length of default service contracts and increase the reliance on spot market purchases is not consistent with the requirement that default service be provided using a prudent, least cost mix of spot purchases, short term contracts and long term contracts. The RESA proposal would eliminate long term contracts from the mix. Additionally, RESA has provided no evidence that such a purchasing strategy will provide the least cost service to customers over time.

OCA St. 1-R at 8. As Mr. Hahn testified, the RESA proposal is contrary to the Act 129 requirements that default service customers be provided service at the lowest cost over time by using a prudent mix of spot, short and long-term contracts.

OCA witness Hahn also testified on the RESA proposal to implement load caps, as follows:

> The determination of whether there should be load caps, and if so, the appropriate cap, can be very fact and condition specific. Circumstances exist where a load cap, either improperly set or existing at all, can drive up the price of power. Under the load cap, the EDC may not be allowed to meet all of its requirements with the lowest bid if the load cap is reached. By requiring the EDC to also buy power at the next (higher) price, and perhaps even the next (higher) price after that, the overall blended rate charged to customers can increase. Questions regarding the need for, or reasonableness of a load cap should not be made outside of the specific context of the expected procurements. Again, I would note that the RESA proposal has not been shown to be a benefit to customers and may actually introduce harm to customers.

OCA St. 1-R at 8-9. Mr. Hahn went on to explain how implementing load caps could harm ratepayers, as follows:

> Consider an example where a large portion of the low-cost generation in an area is owned by one supplier. If there is a limit as to how much of an EDC's load can be supplied by one supplier, the large low-cost provider could only bid amounts up to that limit or cap. Other suppliers, who have higher costs, would likely bid higher prices, which would drive up the total cost of power supplies. Thus, imposing a load cap in the absence of robust competition can harm consumers. This is why I recommend that decisions on the imposition of load caps, as well as other changes in default service procurement practices should not be made in this merger proceeding.

OCA St. 1-R at 9. As Mr. Hahn testified, the RESA proposals, if implemented within the context of this merger proceeding could be harmful to ratepayers and could very well run afoul of the Act 129 requirements for default service procurement plans.

The OCA submits that RESA is free to participate in the next round of default service procurement plans for the FirstEnergy EDCs, as it has done in the past, and to make whatever recommendations it sees fit at that point in time. As RESA noted, nothing contained in the Settlement would bar such future recommendations or proposals in those default service plan proceedings. RESA M.B. at 30. Accordingly, the OCA submits that the RESA proposal on changes to future default service procurement plans should be rejected.

4. Updates And Revisions To Operational Rules.

RESA recommends that certain changes be made to all of the FirstEnergy EDCs' operational rules as a condition for approval of this merger. RESA M.B. at 31-36. The OCA is opposed to the adoption of RESA's list of proposals, as many of the proposals it lists are adequately addressed by the Settlement. RESA M.B. at 32-33; see Settlement at ¶ ¶ 38-48. As RESA acknowledges, the Settlement provides the opportunity for EGSs to sit down with

FirstEnergy's operational personnel to discuss many of the issues that RESA proposes to have incorporated as conditions. RESA M.B. at 33.

In fact, RESA spends approximately five pages in its Main Brief recounting all of the various provisions of the Settlement that touch on areas consistent with its own concerns. RESA M.B. at 31-36. As previously discussed herein, and in the OCA Statement in Support of the Settlement, the Retail Market Enhancements provided in the Settlement are expansive and are in the public interest. See infra, Section III. C. 1.; see also OCA Statement in Support at 10-11. Accordingly, the OCA submits that RESA's list of proposed enhancements to the operational rules of the FirstEnergy EDCs is largely duplicative of the Settlement provisions, unnecessary and should be rejected.

C. Conclusion.

The OCA submits that for the reasons set out in the OCA's Main Brief, this Reply Brief and in its Statement in Support, the Application as modified by the Settlement is in the public interest and should be approved. The DE Proposal, being inconsistent with the law, contrary to sound public policy and representing substantial risks for ratepayers must be rejected. The additional conditions sought by RESA as a condition of merger approval, as detailed herein, are largely duplicative and unnecessary in light of the Settlement. The RESA proposed conditions are not quantified as to costs and RESA has provided no discussion as to who should bear such costs. Accordingly, the OCA submits that the additional conditions sought by RESA as merger conditions should be rejected.

IV. CONCLUSION

WHEREFORE, the Office of Consumer Advocate respectfully requests the Public Utility Commission to approve the Joint Application, as modified by the Settlement, and to reject the Direct Energy Proposal to reassign the default service provider function and to auction off current default service customers to electric generation suppliers. The OCA also requests that the Commission reject the conditions proposed by RESA for all the reasons contained herein and contained in the OCA's Statement in Support.

Respectfully Submitted,

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November 15, 2010
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CERTIFICATE OF SERVICE

Joint Application of West Penn Power Company doing business as Allegheny Power Company, Trans-Allegheny Interstate Line Company and FirstEnergy Corporation 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

I hereby certify that I have this day served a true copy of the foregoing document, the Reply Brief on behalf of the Office of Consumer Advocate, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

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