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January 20, 2011

Via Electronic Filing
Rosemary Chiavetta, Secretary
PA Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

Re: Joint Application of West Penn Power Company d/b/a Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy Corp. for a Certificate of Public Convenience under Section 1102(a)(3) of the Public Utility Code approving a change of control of West Penn Power Company and Trans-Allegheny Interstate Line Company, Docket Nos. A-2010-2176520 and A-2010-2176732

Dear Secretary Chiavetta:

On behalf of Direct Energy Services, LLC, enclosed for filing please find the original of its Reply Exceptions along with the electronic filing confirmation page with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Very truly yours,

Carl R. Shultz, Esq.

CRS/lww
Enclosure

cc: Hon. Wayne Weismandel w/enc.
Hon. Mary Long w/enc.
Cheryl Walker Davis w/enc (CD only)
Cert. of Service w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of Direct Energy's Reply Exceptions upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

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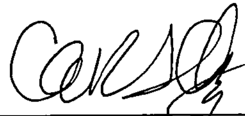

Carl Shultz, Esq.

Dated: January 20, 2011

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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 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 No. A-2010-2176520 Docket No. A-2010-2176732

REPLY EXCEPTIONS OF DIRECT ENERGY SERVICES, LLC

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I. INTRODUCTION

Direct Energy files these Reply Exceptions in response to a portion of the Office of Small Business Advocate's ("OSBA") Exception No. 1[1] asserting that one reason the Initial Decision is in error with respect to its conclusions about municipal aggregation is the failure to recognize that "opt-out" mechanisms (such as that proposed by FirstEnergy's municipal aggregation plan[2] and Direct Energy's retail auction proposal[3]) are illegal in Pennsylvania.[4] Based on this alleged illegality, the OSBA argues that FirstEnergy's municipal aggregation plan may not go forward unless the Pennsylvania General Assembly enacts legislation authorizing the use of an "opt-out" mechanism to switch customers from default service to a municipal aggregation.

Direct Energy wholeheartedly agrees that First Energy Solutions cannot attempt to implement municipal aggregation programs in Pennsylvania without specific legislative authorization. Therefore Direct supports OSBA's call that the merger be made conditional upon First Energy agreeing not to engage in municipal aggregation prior to the enactment of enabling legislation.[5] But, as reflected in the petition for declaratory judgment filed by RESA,[6] as well as Direct Energy's Petition to Intervene in that consolidated proceeding, FirstEnergy's present municipal aggregation efforts are illegal because municipalities presently do not have the legal authority to enter into such contracts or to implement such plans in a manner that is inconsistent

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1 OSBA Exceptions at 9-18.

2 FES's aggressive marketing efforts to sign up municipalities to opt-out aggregation deals before the legality of such contracts has been established by the PUC was stopped – for the time being – by the PUC. *See*, Secretarial Letter of November 10, 2010 concerning "Consolidation of Three Petitions Regarding Municipal Aggregation And Directive re: Customer Switching Pursuant to 'Opt-out' Municipal Aggregation Programs", Docket Nos. P-2010-2207062; P-2010-2207953; P-2010-2209253.

3 Direct Energy proposed a customer account auction which would move the accounts of customers (except for those that chose not to be moved via an opt-out mechanism) from default service to the competitive retail market service of EGSs participating in the retail auction. *See* Direct Energy M.B. at 43-49.

4 *Id.* at 9-13.

5 OSBA limits its requested condition to the service territories of the merged companies. See, OSBA Exceptions at 36. There is no reason that any condition directed at municipal aggregation activities by FES should be so limited.

6 *Petition of the Retail Energy Supply Association for Investigation and Issuance of Declaratory Order Regarding the Propriety of the Implementation of Municipal Electric Aggregation Programs Absent Statutory Authority*, P-2010-2207062 ("*RESA Petition*").

with the Public Utility Code and without PUC approval – NOT because opt-out mechanisms are illegal in all instances.[7] Direct Energy submits, as it did in its own Exceptions[8] and its Reply Brief,[9] that opt-out mechanisms to switch customers from default service to competitive service are perfectly consistent with the Public Utility Code and PUC regulations, so long as they are approved by the PUC and contain sufficient disclosures and consumer protections to assure that customers are fully informed of their choices.

Thus, the OSBA's request that opt-out mechanisms be declared illegal under any circumstance is unsupported by reason or the law. The Commission should continue to follow its existing precedent, which allows the use of a properly noticed and structured opt-out mechanism, accompanied by necessary consumer protections.. Accordingly, this portion of the OSBA's first Exception should be denied.

II. REPLY EXCEPTIONS OF DIRECT ENERGY

A. Reply To Exception No. 1 Of The OSBA: The OSBA's Exception On The Legality of the Opt-Out Mechanism Should Be Denied Because The Commission Has Already Found That Opt-Out Proposals Are Valid and Legal.

In its first Exception, the OSBA asserts that opt-out mechanisms (such as that proposed by FirstEnergy's municipal aggregation plan and in Direct Energy's retail auction proposal) are always illegal in Pennsylvania under existing law.[10] Based on this alleged illegality, the OSBA argues that FirstEnergy's municipal aggregation plan may not go forward until the enactment of legislation that authorizes the use of an "opt-out" mechanism to switch customers from default service.

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7 *See, RESA Petition* ¶¶ 19-31; p. 13 (Relief Requested) (RESA requests a Commission order declaring that "any EGS engaged in opt-out municipal aggregation activities must cease and desist from pursuing or entering into such aggregation contracts in Pennsylvania pending any Commission investigation or until such time as these aggregation arrangements are authorized by statute or Commission rule.").

8 *See* Direct Energy's Exceptions at 21, n. 55.

9 Commission cases approving opt-out mechanisms are reviewed in Direct Energy's R.B. at 31-35.

10 OSBA Exceptions at 9-13.

This is not the case. OSBA's continued criticism of any and all opt-out mechanisms is misplaced and simply wrong. The OSBA reads Sections 2803[11] and 2807(d)(1)[12] and (e)(3.1)[13] of the Public Utility Code as precluding the use of an "opt-out" mechanism.[14] OSBA reads the existence of the words "choice," "choose" or "consent" in those provisions as requiring a customer to "opt-in" or "affirmatively" choose an EGS or consent to a switch.[15] But, contrary to the OSBA's argument, the plain language of these provisions does not require an explicit "affirmative" choice by the customer. These provisions merely address a customer receiving default service if the customer "does not choose" an EGS.

So long as the customer is fully informed of his or her right and obligations via a Commission-approved process that allows adequate time to make the decision and adequate notice of the customer's options, the customer can knowingly "choose" an EGS by voluntarily acquiescing to the switch rather than taking an affirmative action to "opt-in" to indicate that he or she does not want to switch. In other words, not responding to a properly noticed and structured opt-out mechanism (which provides open and clear information to customers) is a knowing and lawful choice by a customer and constitutes "written evidence of the customer's consent" [16] to the switch. As such, PUC-approved opt-out mechanisms fully satisfy the requirements of the

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11 Section 2803 defines the Default Service Provider ("DSP") as an "electric distribution company within its certified service territory or an alternative supplier approved by the commission that provides generation service to retail electric customers who: (l) contract for electric power, including energy and capacity, and the chosen electric generation supplier does not supply the service; or (2) do not choose an alternative electric generation supplier." 66 Pa. C.S. § 2803.

12 Section 2807(d)(1) provides that the Commission should establish rules to assure that an electric customer's electricity supplier shall not be changed "without direct oral confirmation from the customer of record or written evidence of the customer's consent to a change of supplier."

13 Section 2807(e)(3.1) provides 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 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)(3.1).

14 OSBA Exceptions at 9-13. *See also* OSBA M.B. at 48-49.

15 *Id.* OSBA further contends that opt-out mechanisms automatically violate the anti-slamming rule under Section 2807(d)(l) of the Public Utility Code, 66 Pa. C.S. §2807(d)(l).

16 As required by Section 2807(d)(1).

Code and do not constitute "slamming."[17] The mere repetition of these criticisms by OSBA does not change these facts or the legal result of the Commission's prior determinations.[18]

Moreover, flying in the face of OSBA's unequivocal declarations of illegality is the fact that the Commission, and even the Commonwealth Court, has approved opt-out approval processes. For example, in *Pike County*,[19] customers of Pike County Light & Power Company ("PCL&P") were offered an "opt-out" aggregation opportunity in which, absent an action to remove themselves from the aggregation group, the customers were included and received a materially lower rate than the customers who remained on default service. The mechanism in *Pike County* was indeed the solution to a unique problem involving default service, but the legal effect of the Commission's action cannot lawfully be limited to that unique situation. The Commission's conclusion was that a properly noticed and structured opt-out approval process <u>is legal</u> under the Public Utility Code, and is not slamming. The unique circumstances at play in *Pike County* could not have transformed an illegal process into a legal one.

Even before *Pike County*, the Commission had approved at least two other aggregation programs in which customers participated unless they opted out of the aggregation group.[20] The OSBA contended in its Brief before the ALJs that the parties cannot place any reliance on these

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17 FE's CEO, Tony Alexander, acknowledged that participation by "not opting out" of the municipal aggregation pools represents a voluntary choice and could not be called "slamming." Tr. 272.

18 As noted above, opt-out mechanisms do not require specific legislative authorization. But, it should be noted that, in Pennsylvania, legislation is needed for municipal aggregation programs to give municipalities the legal authority to enter into such contracts and to set the consumer protection and other rules needed to make the program consistent with the Public Utility Code. *See, RESA Petition* (filed October 29, 2010); *Petition of Dominion Retail, Inc. for Order Declaring that Opt-Out Municipal Aggregation Programs are Illegal for Home Rule and Other Municipalities in the Absence of Legislation Authorizing Such Programs*, P-2010-2207953 (filed November 3, 2010). Even if it were to be found that municipalities presently have the authority to enter into such municipal aggregation arrangements, they would still have to obtain approval of the program elements, and especially the opt-out consent provisions, to be complaint with the Public Utility Code.

19 *See, e.g., Petition of Direct Energy Services, LLC for Issuance of an Emergency Order*, Docket No. P-00062205, Final Opinion and Order entered April 20, 2006 ("*Pike County*").

20 *Petition for Approval of PECO Energy Company's Market Share Threshold Bidding/Assignment Process; Petition for Approval of "The Better Choice" Plan to Meet PECO Energy Company's Market Share Threshold Requirements*, P-00021992 (Order entered February 6, 2003) ("*PECO MST*"); *George v. Pa. PUC*, 735 A.2d 1282 (Pa.Cmwlth. 1999), *appeal denied*, 758 A.2d 1202 (Pa. 2000).

earlier Commission-approved programs because they were enacted while generation rate caps were still in effect.[21] But the existence of rate caps when these prior Market Share Threshold ("MST") programs took place has nothing whatsoever to do with the legality of an "opt-out" mechanism. In no case did the Commission ever suggest that the opt-out mechanisms passed muster because default service rates were capped.[22]

Finally, *Pike County* and these earlier cases are consistent with the Commonwealth Court's holding in *George*. In *George*, the aggregation program used a random lottery to select customers for the program and relied upon an opt-out mechanism for the selected customers to remove themselves from the program. This process was characterized as "slamming," which violated the Choice Act. The PUC disagreed, and approved the program. On appeal, the Commonwealth Court held that the implementation of the aggregation program, under this Commission's oversight and according to the approved terms and conditions, did not constitute slamming or violate the prohibitions of the Choice Act.[23]

The OSBA's characterization of these opt-out programs as illegal in the face of these cases strains credibility. In reality, the Commission has long held that a properly noticed and structured opt-out mechanism does <u>not</u> represent unauthorized switching, but rather the lawful exercise of the Commission's express authority to define what "choosing" and "written evidence of the customer's consent" means in the context of switching one's electric service.[24] In fact, the Commission has authorized opt-out mechanisms in other, related contexts, such as the release of customer information.[25]

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21 OSBA M.B. at 50-51.

22 *See* OSBA M.B. at 51.

23 *George*, 735 A.2d at 1288.

24 *See* Direct Energy R.B. at 32-35.

25 52 Pa. Code § 54.8(a). This was recently reaffirmed by the Commission in its "Eligible Customer List Policy Statement" issued November 12, 2010. In that Order, the Commission stated:

Factual considerations may be relevant in determining if an opt-out proposal is reasonable from a policy perspective. But, such considerations do not warrant a different legal conclusion under the Choice Act. Stated otherwise, the OSBA's first Exception fails to recognize that the factual circumstances in those prior cases could not have made an illegal process into a legal one. The Initial Decision makes the same error, and Direct Energy excepted to the Initial Decision's conclusions of law which imply, without any actual discussion of actual Commission precedent, that opt-out mechanisms are illegal.[26]

As explained above, the OSBA's requested declaration of illegality on opt-out mechanisms is unsupported by reason or precedent. The Commission should continue to follow its existing precedent, which would allow the use of a properly noticed and structured opt-out mechanism. Accordingly, the OSBA's first Exception should be denied.

III. CONCLUSION

For the reasons set forth above, Direct Energy respectfully requests that the Commission:

1) accept OSBA's request that the merger should not be approved unless First Energy agrees not to engage in aggregation unless and until enabling legislation is enacted; and

2) specifically refuse to find that opt-out mechanisms are illegal under the Public Utility Code.

Direct Energy also requests that the Commission reverse the Initial Decision regarding the issues set forth in Direct Energy's Exceptions. More specifically, the Commission should

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In addressing this issue in both the PPL Order and the Duquesne Order, we continued our policy that restriction of information would occur through affirmative customer action, such as through a postal card check-off which clearly identified the information a customer wished to have restricted. We find that the same result set forth in the Duquesne Order should prevail for ECLs maintained by the other EDCs. *Interim Guidelines For Eligible Customer Lists*, M-2010-2183412, Opinion and Order entered November 12, 2010 at 8.

[26] *See* Direct Energy's Exceptions at 21, n. 55. The ALJs should have felt constrained to follow Commission precedent. To avoid this constraint, the Initial Decision fails to acknowledge the existence of the precedent discussed herein and in Direct Energy's R.B.

adopt Direct Energy's proposed solutions as conditions to merger approval, to mitigate the anticompetitive and discriminatory effects of the proposed merger.

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