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January 20, 2011

VIA HAND DELIVERY

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
P.O. Box 3265
400 North Street
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:

On behalf of the Joint Applicants in the above-referenced matter, enclosed for filing please find the unbound original and nine copies of their **Replies to Exceptions to the Initial Decision of Administrative Law Judges Weismandel and Long**.

As evidenced by the enclosed Certificate of Service, copies of this letter and the Joint Applicants' Replies to Exceptions have been served upon the Administrative Law Judges, the Office of Special Assistants (OSA) and all active parties to the proceeding. In addition, as requested, a CD has been provided to the OSA, which contains the Joint Applicants' Replies to Exceptions in MS Word 2003.

Sincerely,

TPGadsden

Thomas P. Gadsden

TPG/ap
Enclosures
c: Per Certificate of Service
Cheryl Walker Davis

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 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

REPLIES OF JOINT APPLICANTS WEST PENN POWER COMPANY, TRANS-ALLEGHENY INTERSTATE LINE COMPANY AND FIRSTENERGY CORP. TO EXCEPTIONS

To The Initial Decision Of Administrative Law Judges Wayne L. Weismandel And Mary D. Long

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I. INTRODUCTION

This proceeding was initiated by the filing of a Joint Application for the Pennsylvania Public Utility Commission's ("PUC" or the "Commission") approval of a change of control to be effected by a merger of Allegheny Energy, Inc. ("Allegheny"), the parent of West Penn Power Company d/b/a Allegheny Power ("West Penn) and Trans-Allegheny Interstate Line Company ("TrAILCo"), into a subsidiary of FirstEnergy Corp (the "Merger").

On October 25, 2010, after the submission of extensive testimony and four days of evidentiary hearings, a Joint Petition For Partial Settlement ("Joint Petition" or "Partial Settlement"), executed by all active parties except Direct Energy Services, LLC ("Direct"), the Retail Energy Supply Association ("RESA"), the Office of Small Business Advocate ("OSBA") and Citizen Power, Inc. ("Citizen Power") was filed with the presiding Administrative Law Judges, Wayne L. Weismandel and Mary D. Long ("ALJs"). On December 20, 2010, the ALJs issued their Initial Decision ("Initial Decision" or "I.D."), finding that consummating the Merger on the terms set forth in the Joint Application, as supplemented by the Partial Settlement, would satisfy the requirements of 66 Pa. C.S. §§ 1103 and 2811(e) and that the proposed change in control should, therefore, be approved.[1]

On January 10, 2011, Direct, RESA, the OSBA and Citizen Power filed Exceptions to the Initial Decision. These Replies will discuss the principal flaws in the opposing parties' Exceptions. To better understand the errors in the opposing parties' positions, the Commission is urged to also review the Joint Applicants' Initial and Reply Briefs.

II. REPLIES TO EXCEPTIONS

A. Direct Energy Exceptions

In recent years, change of control proceedings before this Commission have become a prized venue for litigants who have been unable to obtain what they want elsewhere or who are unwilling to follow prescribed Commission procedures. These parties invariably contrive

---

[1] The ALJs also approved (1) the alternative corporate structure the Joint Applicants asked permission to implement; and (2) modifications to certain affiliated interest agreements. *See* I.D., pp. 81-82.

"issues" that they insist are implicated by a proposed transaction and then, without missing a beat, unveil a "wish list" of demands which, if satisfied, will bring them on board. This is such a case.

In a transparent end-run around years of Commission rulemakings, stakeholder collaboratives and individual company investigations (in which it actively participated), Direct has recommended that approval of the proposed Merger be conditioned on the wholesale dismantling of Pennsylvania's default service provider ("DSP") model. Specifically, Direct would eliminate the FirstEnergy utilities and West Penn from the DSP business; would auction off their residential and small business ("Mass Market") default service customers to EGSs (including Direct), unless such customers affirmatively "opt out"; and would mandate that the only DSP product to be offered to "opt out" customers be a completely unhedged, highly volatile, hourly spot-priced service. As explained by Joint Applicants' witness Michael Schnitzer, the implications of Direct's Plan are dire (Jt. App. St. 9-R, p. 8):

> Mass Market customers who today choose not to choose default to a largely fixed price service, which is competitively procured in the wholesale market under the oversight of this Commission. Under Direct Energy's proposal, the actual default service is involuntary assignment. Those same choose not to choose customers would be involuntarily assigned to an EGS whose pricing, after an initial one year period, would not be subject to Commission oversight. Customers wishing to avoid such involuntary assignment and receive a Commission sanctioned default service would have to affirmatively elect such service, but they would not be able to obtain the stable pricing to which they are accustomed. The only service offering under the Commission's jurisdiction would be a completely unhedged and volatile spot price offering.

Direct's testimony below left little doubt that its Plan had absolutely nothing to do with the proposed Merger, but rather was designed to address what Direct apparently perceives as generic flaws in the structure of Pennsylvania's retail markets. This point was made abundantly clear by Direct's expert witness, Matthew J. Morey, who stated (Direct St. 1, p. 12) (emphasis added): "I am not suggesting that the utility is behaving in a discriminatory or anticompetitive manner. What I am saying is that *the model for DSP [default service provider] service itself, which is the product of well-intentioned public policies, results in an anticompetitive and*

discriminatory market structure." Indeed, Direct's testimony paid little more than lip service to the transaction the Joint Applicants ask the Commission to approve.[2]

Direct asserts repeatedly, notwithstanding compelling evidence to the contrary, that its Plan was "crafted" and "tailored carefully" to address specific alleged concerns with the Merger (*see, e.g.*, Direct Exc., pp. 5-6). The problem with this claim is two-fold. First, Direct, through RESA, made a virtually identical proposal (i.e., alternative DSP, auction of customers) in West Penn's last default service proceeding. That proposal was dismissed, in large part, because Direct/RESA, like here, failed to comply with Section 54.183(b) of the Commission's regulations (52 Pa. Code § 54.183(b)), which specifically sets forth the process to be followed before a DSP may be replaced.[3] In other words, Direct has simply recycled a package of requests that was rejected two years ago.

Second, Direct has not shown -- or even alleged -- that Met-Ed, Penelec, Penn Power and West Penn lack the "operational and financial fitness" to continue to serve as DSPs or that they have lost the "ability to provide default service under reasonable rates and conditions," prerequisite findings under 52 Pa. Code § 54.183(c) to stripping an existing DSP of its responsibilities. While Direct belatedly struggled to make out a case of potential anticompetitive impact, its "proof" consisted almost entirely of warnings that FirstEnergy, post-Merger, would be an "aggressive competitor" (which presumably would be a good thing for customers) and observations regarding FirstEnergy's success in attracting customers in Ohio. Yet, at the same

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[2] Throughout his testimony, Mr. Morey contended that Direct's proposals to "unbundle" both default service and certain billing functions should be adopted **not** because anything inherently "discriminatory" or "anticompetitive" will arise from the proposed Merger, but, instead, because of alleged structural flaws that, in his opinion, already plague the retail market in Pennsylvania:

- "The DSP model in use in Pennsylvania . . . is not consistent with the concept of a competitive retail electricity sector." (Direct St. 1, p. 11)
- "Default service is an anachronism that inhibits market efficiency . . . ." (Direct St. 1, p. 32)
- "[T]he notion of default service can be interpreted as a vestige of history under the traditional cost of service monopoly." (Direct St. 1, p. 33)

[3] *Petition Of West Penn Power Co. d/b/a Allegheny Power For Approval Of Its Retailed Elec. Default Serv. Program & Competitive Procurement Plan For Serv. At The Conclusion Of The Restructuring Transition Period*, Docket No. P-00072342, (Rec'd Dec.) 2008 Pa. PUC LEXIS 44*274-278 (May 21, 2008); 2008 Pa. PUC LEXIS 30 (July 25, 2008).

time that Direct's witnesses were denigrating the state of retail competition in Pennsylvania before the ALJs, a senior Direct official, in announcing his company's entry into the Duquesne Light market, commented as follows: "We think there's a great opportunity there and Pennsylvania has done a great job to make sure that the markets are open and competitive." (Jt. App. Cross-Exam. Ex. 16).

The ALJs did not reject Direct's Plan because they were predisposed to approve the Partial Settlement. This contention, at pages 12-14 of Direct's Exceptions, demeans both the process and ALJs Long and Weismandel. Nor, for that matter, did they reject it solely because it had nothing to do with the proposed Merger, although it is in fact not related to the Merger. Instead, Direct's Plan was rejected because it violated various provisions of the Public Utility Code and the Commission's regulations and because it was not in customers' best interests. As the ALJs concluded (I.D., p. 30):

> 74. **Direct Energy's proposal is likely to increase costs to customers, reduce customers' competitive options, generate needless customer confusion, and, generally, harm efforts to promote retail competition in the Commonwealth.** (Emphasis added)

If Direct's presentation established anything, it was that Direct does not believe in customer choice or wish to compete for business with EDCs or other EGSs. Rather, Direct hopes to buy customers on its own terms, with the PUC's blessing, and then deny them the stable fixed price option that default service customers currently enjoy so they will not leave. If Direct truly believes that customers will switch electric suppliers in return for a $150 check, there is nothing preventing Direct from making such offers and signing up customers today. Alternatively, if Direct is convinced that fundamental changes in Pennsylvania's default service model are needed, it is free to file a petition under 52 Pa. Code § 54.183 and ask the Commission to substitute it as DSP in one or more service territories in the Commonwealth.[4]

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[4] Notably, Direct has acknowledged that the changes it seeks could not be implemented until June 1, 2013, i.e., the conclusion of the current default service planning period. (*See, e.g.*, Direct St. 3-SR, p. 30: "Direct Energy's proposal would not be implemented for another three years.") Consequently, if Direct chose to pursue its cause in the manner prescribed by the Commission's regulations and filed a petition under 52 Pa.

(continued)

1. Authority To Approve Non-Unanimous Settlement (Direct Exception 1)

Before jumping into its argument that the PUC lacks authority to approve non-unanimous settlements, Direct contends that the ALJs "did not actually adjudicate" whether the Joint Application, supplemented by the Joint Petition, satisfies the statutory criteria for issuing a certificate of public convenience, but rather "focused on the overall benefits" that would flow from the Partial Settlement (Direct Exc., pp. 7-9). Direct's criticism is unwarranted and wrong.

Instead of addressing the substance of the Initial Decision, Direct parses isolated phrases to try to prove that the ALJs meant something different from what they actually found. In so doing, Direct takes the ALJs to task because they determined that approving the Joint Application, as augmented by the Partial Settlement, is "in the public interest," which, Direct contends, evinces the ALJs' departure from the legal standard imposed by Section 1103. This argument is pure semantics. The ALJs applied the correct statutory standard, which, at points in the Initial Decision, they referenced in short-hand fashion with the phrase "public interest:"[5]

> As the parties with the burden of proof, the Joint Applicants must prove by a preponderance of the evidence that the Commission's issuance of a certificate of public convenience approving the Merger Agreement as modified by the Joint Petition [for Settlement] *is in the public interest because it will affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way* [citing *York v. Pa. P.U.C.*, 449 Pa. 136, 295 A.2d 825 (1972)]. . . .
>
> Finally, *the Commission's standards for reviewing a non-unanimous settlement, as proposed here, are the same as those for deciding a fully contested case*. Accordingly, substantial evidence consistent with the statutory requirements must support the proposed settlement.

I.D., p. 38 (emphasis added). *See also* Conclusion of Law No. 7 at pp. 76-77.

Code § 54.183, there would be ample time to consider Direct's proposal, if the Commission were so inclined, and to do so in a post-rate cap environment with the benefit of additional competitive experience.

[5] The Commission itself has treated the phrase "in the public interest" as synonymous with a finding that a proposed merger satisfies the statutory standard of Section 1103. For example, in *Joint Application of Equitable Resources, Inc. and The Peoples Natural Gas Co., d/b/a Dominion Peoples*, Docket No. A-122250F5000, 2007 Pa. PUC LEXIS 32 at *137 (April 13, 2007), the Commission couched its approval of the merger transaction in the following language: "Upon review of the record before us, we find that the Joint Application as modified by the Settlement to be *in the public interest*." (emphasis added.)

Direct also contends that the ALJs "did not adjudicate" the Joint Application, either as filed or as augmented by the Partial Settlement, because they reviewed the positives and negatives of the transaction in their "totality" (Direct Exc., pp. 8-9). Direct's criticism is unwarranted. The ALJs applied Section 1103 precisely the way the Commonwealth Court has directed (I.D., p. 75):

> In *Middletown Township v. Pa. P.U.C.*, the Commonwealth Court stated that "when the 'public interest' is considered, it is contemplated that the benefits and detriments of the acquisition be measured as they impact on all affected parties, and not merely on one particular group or geographic subdivision as might have occurred in this case." Accordingly, we conclude that in its totality, the benefits of the proposed merger, as modified by the settlement agreement, outweigh the negative impacts and we will approve the requested certificate of public convenience.

The ALJs properly looked at the "totality" of benefits and possible negative effects as they may impact "all affected parties" (I.D., p. 78), which is exactly what this Commission – consistent with appellate court precedent – has held must be done in assessing whether a proposed transaction meets the "affirmative public benefit" standard of *York v. Pa. P.U.C.*, 449 Pa. 136, 295 A.2d 825 (1972):

> The Commission has interpreted the *York* standard in *Application of UGI Utilities, Inc., UGI Utilities Newco, Inc. and Southern Union Company,* Docket Nos. A-120011F2000, *et al.* (August 18, 2006), 2006 PUC LEXIS 62. In *UGI*, the Commission ruled that, after looking at the positives and negatives, the net effect of the merger or acquisition on all affected parties should benefit the public interest. (I.D. at 8).

Application of Pennsylvania-American Water Co. For Approval Of A Change In Control To Be Effected Through A Public Offering Of The Common Stock Of American Water Works Co., Inc., Docket No. A-212285F0135 (August 22, 2007) (Tentative Order and Opinion adopted as Final by the Commission's Order entered September 27, 2007).

Finally, Direct questions the Commission's authority to approve a non-unanimous settlement based on *dicta* in the Commonwealth Court's decision in *ARIPPA v. Pa. P.U.C.*, 792 A.2d 636, 658-661 (Pa. Cmwlth. 2002), which, in turn, discussed S.H. Krieger's law review article titled *Problems For Captive Ratepayers In Nonunanimous Settlements Of Public Utility*

Rate Cases, 12 Yale J. on Reg. 257 (1995). Direct's reliance on Professor Krieger's article is misplaced for at least three reasons. First, Direct never presented this argument in its briefs to the ALJs, and it must be disregarded for that reason alone.[6] Second, the Commission's alleged lack of authority to approve non-unanimous settlements was apparently an epiphany to Direct in this case since Direct has had no qualms about joining in – and vigorously supporting – non-unanimous settlements in which it got what it wanted.[7] Apparently, as Direct sees it, the Commission's legal authority waxes and wanes in proportion to Direct's satisfaction with the extent to which a non-unanimous settlement serves its interests.

Third, Direct misconstrues both the fundamental proposition of Mr. Krieger's law review article and the Commonwealth Court's comments on it. Indeed, Mr. Krieger's article expressed concerns about the use of non-unanimous settlements **only** in the context of utility "rate cases," as its title indicates and as Mr. Krieger emphasized: "The Article also limits discussion to rate-related cases." *Id.* at n. 36.[8] The focus of Mr. Krieger's critique was non-unanimous settlements that produced an agreed-upon revenue increase from a "black box," which regulatory commissions were expected to adopt without providing the non-settling parties the opportunity to examine the components of the utility's revenue requirement to determine if the settlement rates were "just and reasonable." Obviously, this is not a rate case; the Commission is not being asked to approve a "black box" revenue increase; and, therefore, even if the Commission were inclined to give credence to Mr. Krieger's theory, that theory was not meant to apply to partial settlements like the one in this case.

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6 *See Pa. P.U.C. v. Columbia Gas of Pa., Inc.*, 245 P.U.R. 4th 1 (2005) ("IOGA first raised its opposition . . . on Exception. . . . As such, we will deny IOGA's Exceptions on this issue."); *Pa. P.U.C. v. Pennsylvania Gas and Water Co.*, Docket No. R-922169, 1993 Pa. PUC LEXIS 36 (March 2, 1993) ("P&G's proposed alternative . . . was inappropriately introduced on exception.")

7 *See e.g., Joint Petition Of Metropolitan Edison Co. And Pennsylvania Elec. Co. For Approval Of Their Default Service Programs*, Docket Nos. P-2009-2093054 and P-2009-2093054 (Final Order Entered November 6, 2009); *Petition Of PECO Energy Co. For Approval Of Its Revised Electric Purchase Of Receivables Program* Docket No. M-2009-2143607 (Final Order Entered June 18, 2010); *Petition Of PECO Energy Co. For Approval Of Its Natural Gas Supplier Purchase Of Receivables Program* Docket No. M-2009-2143588 (Final Order Entered November 8, 2010).

8 In *ARIPPA, supra*, the Commonwealth Court expressed concerns about a non-unanimous settlement of a rate case. The Commission's Order approving the merger of FirstEnergy and GPU was affirmed by the Court. 792 A.2d at 658.

Mr. Krieger's criticism of non-unanimous settlements does not apply here for the additional reason that, unlike the processes he condemns, this case was fully litigated and all parties, including the non-settling parties, were given a full and fair opportunity to present evidence, cross-examine witnesses and submit briefs on all contested issues. Direct availed itself fully of these opportunities. As to the issues that Direct and other non-settling parties contested, the ALJs conducted an independent adjudication without any hint of the "pre-ordained outcome" that troubled the Commonwealth Court in *ARIPPA*, where the entire settlement process took place under the aegis of a "Commission-facilitated 'collaborative'." *See* 792 A.2d at 650. In other words, the non-settling parties have been afforded due process rights that are precisely the same as if the Settlement did not exist.

In short, Direct is simply bemoaning the fact that the common sense approach to handling non-unanimous settlements that this Commission has historically employed does not empower non-settling parties to threaten to scuttle an agreement reached by a majority of the parties unless they cave-in to the obstructionists' demands. The unfairness – and adverse consequences for the public interest – of rigging the system in favor of non-settling parties as Direct advocates was cogently explained by Messrs. Buchmann and Tongren in their bipartisan[9] critique of Mr. Krieger's theories:

> When Professor Krieger demands "unanimity," he opens the door to hostage-taking. For example, if a non-signatory really is interested only in a limited issue (use of conservation measures, life-line rates, etc.), under normal procedures *that issue is fully litigated.* No plausible reason justifies granting such a party, or an industrial intervenor seeking a particularized tariff design to enhance its own (but not others') interests, the power to hold up and control the whole process.

Alan P. Buchmann and Robert S. Tongren, *Non-Unanimous Settlements Of Public Utility Rate Case: A Response*, 13 Yale J. on Reg. 337, 343 (1996) (emphasis added).

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[9] The late Alan P. Buchmann was in private practice and represented a number of public utilities in regulatory proceedings in several states including Ohio and Pennsylvania. At the time he co-authored the response to Professor Krieger, Robert S. Tongren was the Consumers' Counsel for the State of Ohio.

2. Alleged ALJ Bias (Direct Exception 2)

Direct next accuses the ALJs of harboring a bias in favor of the settling parties. According to Direct, this bias motivated the ALJs to totally ignore evidence of possible detriments that allegedly outweigh all of the benefits that the diverse array of settling parties acknowledge will be produced if the Merger is implemented on the terms set forth in the Joint Application and Joint Petition. Specifically, Direct contends that the ALJs were reluctant to reject, add to or modify any term of the Settlement "for fear of nullifying the entire agreement" (Direct Exc., p. 13). To this point, Direct notes that the ALJs "did not make a single modification" to the Partial Settlement and did not "accept any part of the contentions of any of the non-settling parties." Apparently, Direct presumes that unless some aspect of its position is adopted,[10] the entire adjudicatory process is tainted by "bias." Obviously, that is not the case. The ALJs rejected the positions of Direct and the other non-settling parties based on a careful examination of the substance of their positions, as evidenced by the thorough, well-reasoned analysis set forth in the Initial Decision.

Furthermore, Direct's claims that its plan would "generate acquisition payments to customers of up to $500 per customers" and that "FE/Allegheny customers overwhelmingly endorsed Direct Energy's plan" (Direct Exc. p. 14, n. 22) were thoroughly refuted. The contention that EGSs would pay between $150 and $500 for the opportunity to serve a customer was based on "empirical research" that, as Direct's own witness conceded (Tr. 793-800), consisted of nothing more than reviewing a few internet articles and dividing a reported purchase price by a reported customer count.[11] *See* Jt. App. Initial Br., p. 53. The claim that customers "endorsed" Direct's plan was based on the so-called "Zogby survey," which was so riddled with methodological errors, sampling defects and transparent biases favoring Direct's desired answers

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[10] Although Direct couched its argument in terms of the objections of all non-settling parties, RESA is simply the alter ego of Direct – RESA took no position that deviated from Direct's playbook for this case. Moreover, the OSBA, while not joining the Settlement, strenuously objected to Direct's proposal to remake the way default service is provided – a fact Direct ignores.

[11] Additionally, the reported purchase prices were not for the "right" to serve customers, as Mr. Morey erroneously assumed, but also included "distributable cash," branding and naming rights, power supply agreements, customer billing systems, a risk management system, accounts receivable and gas inventories (Jt. App. Cross-Exam. Ex. 10).

as to be less than worthless.[12] *See* Jt. App. Initial Br., pp. 57-59.

Direct also asserts that the Joint Applicants should have to submit a "revised" Joint Application embodying the terms of the Partial Settlement so that, in effect, the entire litigation process could begin anew (Direct Exc., p. 15). There is no conceivable point in requiring such redundancy. As noted, direct, rebuttal, surrebuttal and rejoinder testimony was presented; evidentiary hearings were held at which extensive cross-examination was conducted; and Direct presented its case fully. Moreover, neither at the conclusion of the scheduled hearings, after the submission of the Joint Petition, or in its Main or Reply Briefs to the ALJs did Direct suggest that additional hearings were necessary to address the Partial Settlement. Stated simply, Direct is seeking a second bite at the apple in contravention of other parties' due process rights and in derogation of sound administrative procedure.

3. Satisfaction Of Section 2811(e) (Direct Exception 3)

3.1. The ALJs' Alleged Errors In Interpreting Section 2811(e). Before the ALJs, Direct contended that Section 2811(e) of the Code bars the Commission from approving a merger unless it finds that the transaction will produce affirmative "competitive" benefits. In rejecting that argument, the ALJs observed that Direct had misconstrued all of the authority on which it purported to rely, including the Pennsylvania Supreme Court's opinion in *Popowsky v. Pa. P.U.C.*, 937 A.2d 1040, 1056-57 (2007). *See* I.D., pp. 65-66. As the ALJs explained: "Indeed, the relevant statutory provisions support the view that the relevant inquiry is whether the merger will have an adverse impact upon retail markets. . . . Section 2811 clearly does *not* require merger applicants to *improve* competitive markets or affirmatively demonstrate benefits to competitors." *Id.*

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[12] Although not discussed by Direct in the surrebuttal testimony accompanying the "Zogby survey" results, interviewees were asked:

- "Have you or anyone in your immediate family lost a job to corporate downsizing within the past year?"
- "Are you or anyone in your immediate family afraid of losing a job within the next year?"
- "Have you or anyone in your immediate family gone without food for 24 hours in the past month due to a lack of food or money?" *See* Jt. Cross-Exam. Ex. 15.

After exploiting fears about potential job loss and hunger, Direct could then ask whether the interviewee would react favorably to a $150-$500 rebate check and be confident in the response it would receive.

In an implicit admission that the Merger will not adversely impact competitive retail markets, Direct now asserts that Section 2811(e) should be interpreted to "invalidate" a merger that would "perpetuate" existing market conditions (Direct Exc., p. 17). However, whether expressed in its original or repackaged form, Direct's argument that Section 2811(e) imposes a legal obligation to improve existing competitive conditions as a prerequisite to the Commission's approval has no basis in the plain language of Section 2811(e) or in any prior Commission or appellate court interpretation of that section. *See* Jt. App. Reply Br., pp, 4-6.

3.2 "Likely" Anticompetitive Conduct. At pages 18-26 of its Exceptions, Direct criticizes the ALJs for purportedly "ignoring evidence of anti-competitive and discriminatory conduct likely to result from the merger." In particular, Direct, citing to "highly confidential" documents, contends that FirstEnergy plans to use the Merger to launch a three-pronged strategy to achieve market "dominance" through direct retail sales, participation in wholesale default service auctions and municipal aggregation. To that end, much is made of FirstEnergy's success in attracting customers in Ohio; of Mr. Alexander's acknowledgement that it is FirstEnergy's goal to achieve a "significant market share" in Pennsylvania; and of FirstEnergy's intention to use Allegheny's generation assets, in concert with its own, to implement its sales strategy. Direct then makes the quantum – and entirely unsupported – leap to conclude that the Merger will allow FirstEnergy to "exploit" its EDCs' status as DSPs to block the development of a "workable competitive market".

Direct's frantic attempt to cobble together a case of "likely" anticompetitive conduct -- and thereby manufacture a nexus to the proposed Merger -- should be renounced for several reasons. First, Direct did not submit one shred of evidence suggesting that FirstEnergy or its affiliates had ever engaged in or were "likely" to engage in any anticompetitive or discriminatory behavior. To the contrary, Direct's own witness, Mr. Morey, went out of his way to make it clear that was **not** his testimony: "No, I am not suggesting that the [anticompetitive] conduct I have described above has happened or necessarily will happen in FirstEnergy's territory" (Direct Energy St. 1, p. 17; *see also* Tr. 781-782).

Second, Direct's alleged concerns over entry barriers (Direct Exc., pp. 23-24) were

similarly repudiated by its own witness. Again, Mr. Morey observed (Direct Energy St. 1, pp. 37-38) (emphasis added):

> To a large extent, the key resources of successful merchants within energy markets is human capital and know how in key dimensions, such as management, operational skills in energy marketing, power supply contracting, technical analysis of loads and energy costs, information systems geared to customer contact, and the internal coordination of information flow. The presence of these capabilities is necessary. *However, the merchant function is not confronted with overarching institutional or market barriers that inhibit the organization of and integration of these capabilities to support viable merchant activities by entrants.*

Indeed, market entry has not been a problem for those entities that were willing to compete for customers. As noted by Joint Applicants' witness Frank Graves (Tr. 886), one of Direct's competitors, Dominion Resources, has been able to accumulate over 300,000 residential customers in Pennsylvania.[13] In addition, recent default service auctions for block energy and full requirements service have attracted numerous wholesale bidders (Jt. App. St. 10-R, p. 11).

Third, Direct's criticisms of FirstEnergy's retail sales strategy are disingenuous and cannot be given serious consideration. For example, Direct contends that FirstEnergy will enjoy an unfair "branding advantage." (Direct Exc., pp. 21-22). However, unlike several of Direct's RESA colleagues which clearly play off the names of their affiliated EDCs to promote retail sales (*e.g.*, ConEdison Solutions, PPL EnergyPlus) (RESA St. 1, p. 2, n. 1; Tr. 622-624; Jt. App. Cross-Exam. Exs. 1 and 2), there has been no showing that customers in the Met-Ed, Penelec and Penn Power service areas are even aware of the corporate affiliation between FirstEnergy's competitive retail supplier, FirstEnergy Solutions or "FES," and their EDC. In addition, Direct complains about "status quo bias" and the need for "many sellers." Yet, in the Pike County service territory, where the Commission allowed Direct to aggregate customers, Direct unquestionably has been the beneficiary of "status quo bias," holding onto nearly 78% of the

[13] There are 21 alternative suppliers licensed to serve commercial and industrial customers in West Penn's service territory and 26 in Penelec's (Jt. App. St. 4, pp. 14-15) and there is no reason to believe that new entrants will not similarly vie for residential customers now that the generation rate caps have expired.

customers initially assigned to it and "dominating" a market in which it apparently is the only EGS serving residential customers (Direct Cross-Exam. Ex. 8; Jt. App. St. 10-R, p. 16).

As the record confirms, there is nothing unusual and certainly nothing sinister about FirstEnergy's three-pronged sales strategy. To the contrary, as explained by Mr. Alexander, FirstEnergy's President and CEO, FirstEnergy's sales strategy was developed long before FirstEnergy and Allegheny began serious Merger talks (Jt. App. St. 1-SR, p. 6) and its implementation is in no way contingent on consummation of the Merger.[14] Like Direct, Dominion, Constellation and the scores of other EGSs licensed by the Commission, FES aspires to be a significant player in Pennsylvania. But, for FES to attract retail, wholesale or municipal aggregation customers, it must offer a service that customers want at a price they are willing to pay. If FES can beat the default service rate charged by EDCs or the prices bid by other wholesalers in DSP auctions or municipal solicitations, it will succeed. And that is precisely how the system is supposed to work for the benefit of customers.

4. Satisfaction Of Section 1102(a)(3) (Direct Exception 4)

At pages 26-28 of its Exceptions, Direct contends that the ALJs erred in finding that the Joint Application, as supplemented by the Joint Petition, satisfies the requirements of Section 1102(a) of the Public Utility Code and the "affirmative benefits" test set forth in the *City of York* case. Specifically, Direct asserts that the proposed Merger will have a "negative impact" on competitive retail electric markets and that such "negative impact" outweighs the package of benefits agreed to by the settling parties. Direct also discounts, as "minor," the various retail market enhancements contained in the Partial Settlement at pages 16-21.

As discussed in response to Direct Exception 3, *supra*, Direct submitted no credible evidence that the proposed Merger will have a "negative impact" on retail competition. Indeed, the record is quite clear that the Merger will have little or no impact on retail competition. Met-Ed, Penelec, Penn Power and West Penn will continue to serve as DSPs in their respective

[14] As Mr. Alexander noted (Tr. 269-270), FirstEnergy is actively competing for customers throughout the Midwest, including states (e.g., Illinois, Michigan) where it neither owns generation nor has a franchise service territory.

service territories and nothing will change. Similarly, the Merger will have no effect on the DSP supply solicitation process. As Mr. Schnitzer observed (Jt. App. St. 9-R, p. 12), DSP auctions are conducted under the Commission's oversight; winning bids are selected on the basis of lowest price; and the combined entity will be only one of many potential suppliers (e.g., wholesale generation companies, power marketers, financial traders) competing for business.[15]

As to Direct's critique of the Partial Settlement, the Commission has already found that retail market enhancements virtually identical to those proposed in the Settlement constituted "significant additional steps" in support of retail electric competition when they were proposed as part of the Met-Ed/Penelec default service plans. *See Met-Ed/Penelec Default Service Order*, p. 40; *see also* Statement of Chairman James F. Cawley, Docket No. P-2009-2093053 & P-2009-2093054 (entered November 6, 2009) (commending Met-Ed, Penelec, and the settling parties "for their efforts towards substantial progress in achieving the Commission's goals established for the Retail Markets Working Group"). In the Met-Ed/Penelec proceeding, the Commission approved programs (supported by Direct Energy and RESA) whereby Met-Ed and Penelec would make customer education mailings; provide updated customer lists via supplier support website and usage data via Electronic Data Interchange ("EDI") transactions; offer rate ready, bill ready, and dual billing capability to EGSs; implement a POR program; and appoint a retail choice ombudsman. The fact that FirstEnergy's Pennsylvania utilities have already agreed to implement these programs does not detract from their significance or diminish their prospective benefit to customers in West Penn's service territory.

5. Alleged Disregard Of Evidence (Direct Exception 5)

At pages 28-30 (Exception 5), Direct simply repackages several of its principal themes – i.e., that it presented "extensive evidence of likely anticompetitive and discriminatory post-merger conduct;" that it submitted "an innovative plan" to address the Merger's alleged negative consequences; and that the ALJs disregarded all of this "in their desire to bless the Non-

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[15] Moreover, as Mr. Graves pointed out (Jt. App. St. 10-R, p. 10): "Brand name and customer familiarity are not an issue, as these procurements do not depend on the bidders' identities (nor are those disclosed in electricity bills for DS service), and customers are not involved in any way in choosing or negotiating with the winners."

Unanimous Settlement."[16] As previously discussed, none of this is true. Indeed, the Initial Decision makes it clear that the ALJs carefully and deliberately reviewed the evidence and concluded that Direct had utterly failed to prove its case. (*See, e.g.*, Findings of Fact 54-59, 69-71 and 73-76 at pages 26-30).

6. Non-Compliance Of Direct's Proposals With Act 129 (Direct Exception 6)

On pages 30-33 of its Exceptions, Direct asserts that the ALJs erred in finding that its proposed plan to supply default service customers entirely with unhedged spot market-priced generation did not satisfy Act 129's requirements of a "prudent mix" of long and short-term contracts and spot market purchases designed to ensure least cost to customers over time. Specifically, Direct contends that after its auction of customers to EGSs, any default service procurement plan other than spot-market priced supply for customers who choose to remain on default service would not be "prudent"; moreover, according to Direct, spot market pricing satisfies the "least cost" requirements of Act 129 and charging an "average" spot market price updated quarterly will provide those customers with sufficient price stability. As the ALJs found, Direct is simply wrong.

What Direct's own testimony and Exceptions make crystal clear is that its claim of compliance with Act 129 is based entirely on the assumption that there will be **no default service customers to worry about** (Direct Exc., p. 30, explaining that Direct's proposal assumes that "most, if not all, customers will be served by electric generation suppliers"). Nonetheless, for those customers who choose **not** to subject themselves to EGS pricing – an affirmative action itself plainly inconsistent with the Public Utility Code and the entire concept of default service in Pennsylvania – Direct's spot-priced default supply is designed to keep up

[16] Direct apparently thinks it can gain some mileage by repeatedly referring to the Partial Settlement as the "Non-Unanimous Settlement." In fact, the Partial Settlement, for all practical purposes, is "unanimous" because none of the non-signatories, including Direct, submitted testimony or staked out positions on most of the specific issues the Settlement addresses.

the pressure on customers to shop, not to procure a prudent mix of default generation supply.[17]

While Direct correctly notes that the Commission has approved spot-market pricing for particular (e.g., industrial) classes of default service customers and for default service customers in Pike County, the ALJs found that Direct had entirely failed to "provide[] any compelling reason, such as the highly unique circumstances presented in Pike County, to depart from the "prudent mix" regime of Act 129. More importantly, Direct Energy provided no convincing evidence that its proposal was in the best interests of consumers." I.D., pp. 71-72. Although Direct asserts that a sizeable percentage of Pike County customers are now on hourly service, that proves nothing. As Joint Applicants' witness Mr. Schnitzer explained: "[t]he fact that spot market pricing now might look like an attractive option and customers might like it is not indicative of what will happen if we have a price shock, and we have evidence from California, for instance, from some years ago, what happens when customers are in spot pricing and the prices skyrocket and it becomes both an economic and political issue very quickly." Tr. 942.

Despite the obvious lack of price stability inherent in depending on unhedged spot-market supply, Direct maintains that its Plan takes price stability into account by charging customers a "projected average" of spot-market prices to "smooth" price spikes, with a later "true-up" to recover the difference between what customers were charged and the actual spot-market prices. Direct Exc., pp. 32-33; Tr. 802-03. But "smoothing" price spikes is not the same as price stability, and, in any period of rapidly rising spot market prices, customers could be in for a very unpleasant surprise when their new DSP sends them a "true-up" bill at the end of three months. The ALJs properly found that Direct Energy's Plan failed to consider the benefits of price stability or the "prudent mix" of long-term, short-term and spot purchases required by Act 129, and their conclusions should be adopted by the Commission.

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[17] *See* Jt. App. St. No. 9-R, p. 19 (Schnitzer) ("Effectively, [Direct's] approach involves providing no benefits of price stability in the default service rates, and instead involves making default service sufficiently unattractive to pressure customers to take EGS service.").

7. Consideration Of "Individual Portions" Of Direct's Plan (Direct Exception 7)

In its Exception 7 (pp. 33-35), Direct criticizes the ALJs for "[r]efusing to consider each of the individual portions" of its Plan. Direct then advises the Commission that it "need not order all aspects of the Direct plan to be implemented at once" and outlines several options, including (1) the designation of new DSPs "in as many service territories as allowed under Pennsylvania law" and (2) the possible auction of an undefined "subset" of customers on a "pilot" basis.

Exception 7 should be denied for at least two reasons. First, the various options that Direct now claims would be acceptable were never presented below and are asserted improperly for the first time in Exceptions. This alone warrants their rejection (*see* Section II.A.1. and n. 6, *supra*). Second, the numerous and substantial legal obstacles that preclude the adoption of Direct's principal recommendations (*see* Jt. App. Initial Br., pp. 37-47) are not overcome by implementing them on a piecemeal basis.

8. Wholesale Market Power (Direct Exception 8)

Direct attacks the ALJs' finding (I.D., pp. 60-63, 67) that the proposed Merger does not raise any wholesale market power concerns. Direct accepts, as it must, that the Commission employs the same analysis as the Federal Energy Regulatory Commission ("FERC") in considering wholesale competition issues raised by mergers.[18] Direct Energy asserts, however, that the Commission is not bound to follow FERC rulings and that it applies a different statutory standard in reviewing mergers from that applied by FERC (Direct Exc., pp. 34-35).

The problem with Direct's argument is that it never identifies a single flaw in Dr. Hieronymus' market power analysis that supports the Merger. Nor does Direct provide a single reason why that analysis would lead the Commission to conclude that the Merger raises a wholesale market power concern that would cause the Commission to reject the Merger. It is not

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[18] The Initial Decision sets forth the Commission precedent for this proposition. *See* I.D., p. 61 n.105 (citing *Re: DQE, Inc.*, 186 P.U.R. 4th 39 at 62-65 (1998); *Joint Application of PECO Energy Co. And Pub. Serv. Elec. & Gas Co. for Approval of the Merger of Pub. Serv. Enter. Group, Inc. with and into Exelon Corp.*, 248 P.U.R. 4th 1 at 54 (2005); *ARIPPA v. Pa. P.U.C.*, 792 A.2d 636, 657-58 (Pa. Cmwlth 2002)).

enough for Direct to simply assert that this Commission is not bound by FERC decisions. Direct must also explain, based on the record, why this Commission should reach a different conclusion. Instead, Direct points to testimony by Mr. Morey, who simply recited selected portions of the most recent PJM State of the Market Report prepared by the PJM Market Monitor (Direct Exc., pp. 37-38). Mr. Morey did not, however, conduct the type of analysis required by this Commission to address wholesale market power issues and, accordingly, the ALJs correctly refused to give Mr. Morey's analysis any credence.

Furthermore, the State of the Market Report does not lead to the conclusion that the Merger would result in an increase in wholesale market power in PJM. For one thing, Mr. Morey ignores the fact that FirstEnergy has divested almost all of its generation in the Penelec zone and that FirstEnergy has no generation in the Allegheny zone – which are the only two PJM zones identified by Mr. Morey as being potentially problematic. Because there is no overlap of generation ownership in either zone, the combination of the two companies does not increase market power in either zone (Jt. App. St. 4-R, pp. 20-21, 26). In addition, the 2009 State of the Market Report concluded that the results of the various PJM wholesale markets in 2009 were competitive (Jt. App. Cross-Exam. Ex. 6 (2009 SOM Report Vol. 1) at 2). To the extent that any conditions arose in PJM where the level of competition was not sufficient, the PJM Market Monitor's monitoring and market power mitigation activities were successful. Tr. at 760-61. Thus, even if this evidence were considered, it does not undermine the ALJs' holding.[19]

B. OSBA Exceptions

1. Requested Delay In FirstEnergy's Ability To Implement Municipal Aggregation Following Commission Or Legislative Approval (OSBA Exceptions 1 and 2)

The Commission is currently considering three Petitions that present the question of

[19] Because the Merger does not create any market power concerns, Direct's ill-defined "divestiture" proposal (Direct Exc., p. 35) should also be rejected. Moreover, Direct's own witnesses could not articulate the basis for, or the dimensions of, the "divestiture" of generation that Direct favors. *See* Jt. App. Initial Br., pp. 56-57. In the end, Direct's own witness, Mr. Morey, drove the stake in the heart of this proposal when he conceded, on cross-examination, that there is no justification for any divestiture: "I think everyone in the room would tell you that the wholesale markets are competitive." (Tr. 1056)

whether "opt-out" municipal aggregation is authorized under current Pennsylvania law and can be implemented consistent with the requirements of the Public Utility Code (Jt. App. Reply Br., pp. 23-24). Significantly, in its Secretarial Letter consolidating the three Petitions, the Commission put all municipal aggregation in Pennsylvania on hold by ruling as follows:

> Given the important legal issues raised in the three petitions and, in particular, the lawfulness of opt-out municipal aggregation programs in the absence of either Commission oversight or authorizing legislation, the Commission directs each Electric Distribution Company to not switch any customer to an Electric Generation Supplier pursuant to an "opt-out" municipal aggregation contract until these legal issues are addressed and resolved by the Commission. Similarly, the Commission directs each Electric Generation Supplier to not switch any customer from default service (or the customer's existing electric generation supplier) pursuant to an "opt-out" municipal aggregation contract until these legal issues are addressed and resolved by the Commission.

In light of the Commission's action and the pending proceeding to address municipal aggregation, there is no valid basis for the Commission to pre-judge issues that are already before it at another docket. Moreover, there is no meaningful connection between municipal aggregation and the statutory standards for approving the Merger.[20] Indeed, the alleged problems with municipal aggregation that the OSBA discusses in its Exceptions,[21] if they exist at all, would be inherent in opt-out municipal aggregation regardless of the identity of the parties that engage in it. In short, and as the ALJs properly concluded (I.D., p. 74), they are precisely the kind of broad issues of law and public policy that are best addressed in the type of proceeding the Commission has initiated at the consolidated docket for the pending Petitions.

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[20] In its Exceptions, the OSBA tries to tie municipal aggregation to this proceeding by arguing that the Merger may give FirstEnergy access to additional generation, which FES could then market through all of its potential sales channels, including municipal aggregation. Under this broad brush approach, anything that tangentially relates to any marketing effort could be drug into a change of control proceeding like this one. In short, the OSBA is trying to use this proceeding to litigate issues that have no discernible nexus to this case, which directly contravenes principles applied by this Commission and affirmed by the Commonwealth Court. *See ARIPPA v. Pa. P.U.C.*, 792 A.2d 636, 657 (Pa. Cmwlth. 2002)("Every Commission case should not be used to decide issues that are ancillary to the main case, i.e., a case within a case.")

[21] As discussed in detail in the Joint Applicants' Reply Brief (pp. 22-32), the issues raised by the OSBA simply lack substance and constitute, at most, speculation about future "what if" scenarios that are not supported by any evidence, let alone substantial evidence. *See* I.D., p. 74.

2. Proposed Separation Of FirstEnergy And Allegheny Generating Facilities (OSBA Exception 3)

The OSBA also contends that the Commission should condition its approval of the Merger by requiring that the generating facilities of FirstEnergy and Allegheny be maintained in separate subsidiaries and any subsequent combination of those generating subsidiaries be precluded without prior Commission approval. While the OSBA tries to explain why the separation of generating assets is necessary to assure competitive retail markets, all of its contentions collapse into a single argument, namely, that the Company would have wholesale market power after the Merger. *See, e.g.*, OSBA Exc., p. 33 ("[M]erging two of the dominant owners of generation in the region means less competition in the default service procurements.")[22] However, it is clear, and the ALJs found, that FirstEnergy would not have market power in the wholesale generation markets. *See* I.D., pp. 60-64. In short, the OSBA is proposing a solution to a problem that does not exist.

Additionally, the Commission lacks the authority to impose the condition the OSBA proposes. The generating subsidiaries of FirstEnergy and Allegheny are not Pennsylvania public utilities, but rather furnish service that is within the exclusive jurisdiction of the FERC. *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 723 (2000). Consequently, the Commission cannot mandate or prohibit structural changes in those companies. Moreover, the Commission cannot overcome its lack of jurisdiction by imposing a "condition" on its issuance of a certificate of public convenience, as the Pennsylvania Supreme Court held in *Western Pa. Water Co. v. Pa. P.U.C.*, 471 Pa. 347, 354, 370 A.2d 337, 340 (1977). In short, the Commission cannot do indirectly – by imposing a "condition" on its Section 1103 approval – what it lacks authority to do directly.

C. RESA Exceptions

1. Applicable Legal Standards (RESA Exception 1)

RESA's first Exception (pp. 3-9) does little more than echo Direct's arguments that (i)

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[22] OSBA's witness, John Wilson, asserted that the Merger would adversely affect wholesale competition, but did not offer any criticism of the market power analysis presented by the Company and did not conduct any market power study of his own.

the Merger will harm competition instead of providing affirmative competitive benefits; (ii) the ALJs erred in interpreting and applying Section 2811(e)'s requirements relating to the evaluation of whether the Merger "is likely to result" in anticompetitive conduct; and (iii) the ALJs failed to adjudicate the Joint Application and the evidence and instead gave improper weight to the Partial Settlement. For the reasons discussed in Section II.A., RESA Exception 1 should be denied.

2. Alleged Anticompetitive and Discriminatory Conduct (RESA Exception 2)

Like Direct (see discussion, *supra*), RESA erroneously contends that the Merger will enable FirstEnergy to dominate retail markets. In addition, RESA makes the following two arguments: (1) the Initial Decision ignores an alleged "disruptive impact" on competitive suppliers purportedly arising from the transition of West Penn's billing system to the billing system used by the FirstEnergy Pennsylvania utilities; and (2) the ALJs disregarded RESA's claims of "deficiencies" in FirstEnergy's default service plans, default service rates, and retail supplier programs. The Commission should reject each of RESA's claims.

First, RESA's allegation that the ALJs did not "squarely address" the integration of West Penn into FirstEnergy's billing and customer information system (RESA Exc., pp. 11-12) is misleading and without foundation. RESA introduced no evidence of any "disruptive impact" of the merged Companies' systems to support retail markets; in fact, there was no dispute that the Merger and migration of West Penn's billing systems to FirstEnergy's more current infrastructure will save customers significant money, and that FirstEnergy's systems are more robust and less constrained. *See* Jt. App. St. 3, pp. 8-9; Tr. 470; Jt. App. Reply Br. pp. 37-39.

Second, RESA's repeated claims of FirstEnergy "deficiencies" were certainly not ignored by the ALJs – they were rejected. As discussed *infra*, the ALJs specifically considered RESA's proposals relating to FirstEnergy's existing retail supplier programs and concluded that such proposals were either sufficiently addressed by the Joint Application and Settlement or unnecessary (I.D., pp. 55-59; Jt. App. Initial Br., pp. 72-77). The ALJs also made specific findings regarding FirstEnergy's proper allocation of costs, clearly rejecting RESA's unsubstantiated allegations that FirstEnergy was improperly allocating expenses between regulated utilities and FES (I.D., pp. 31-32). Finally, the ALJs properly deferred consideration of

default service plan issues to future default service proceedings.

3. Adequacy of Retail Market Provisions of the Settlement and Rejection of RESA's Proposed Merger Conditions (RESA Exception 3)

As the ALJs recognized, the Joint Petition incorporates a wide variety of retail market enhancements to benefit West Penn's service territory, including flexible (e.g., rate-ready and bill-ready) billing options, a modified purchase of receivables ("POR") program, important customer information and data enhancements, and mailings to customers about competitive offers (I.D., pp. 55-56; Jt. App. Initial Br., p. 73). These programs will make West Penn's retail market programs and offerings consistent with those the PUC has approved for Met-Ed, Penelec and Penn Power, which, at the time, Direct and RESA enthusiastically supported and which the Commission lauded for significantly enhancing retail electric competition. *See* Jt. App. Reply Br., p. 36. Nevertheless, RESA contends that the Merger should only be approved if the Commission imposes seven additional conditions. As explained below, RESA's proposed conditions are inappropriate and unnecessary, and the ALJs' rejection of them was entirely justified:

> ***Code of Conduct.*** RESA, like Direct, asks the Commission to impose an "enhanced" code of conduct for FirstEnergy alone to address the "potential" for anticompetitive conduct by FES and FirstEnergy's Pennsylvania EDCs. However, no party presented evidence of any improper conduct by FirstEnergy or its affiliates in the past or that approval of the Merger warrants imposing additional competitive restrictions on FirstEnergy. There is no basis to conclude that the Commission's existing Code of Conduct is inadequate. To the extent generic revisions to the Code of Conduct may be appropriate, such changes should be considered as part of the separate Code of Conduct proceedings already initiated by the Commission. *See* Jt. App. Reply Brief, pp. 33.
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> ***Additional Programs to Inform Customers about Retail Offers.*** RESA also seeks to impose a condition requiring FirstEnergy's Pennsylvania EDCs to create expanded educational programs, including a program in FirstEnergy EDC call centers to refer customers to EGSs. Yet, RESA never addresses the ALJs' findings that (1) such an expansion is unnecessary in light of "the extensive education campaign ongoing by the Commission and the EDCs" and (2) it would be unreasonable to ask customers to pay even more for educational spending now in light of the existing campaign (I.D., pp. 56-57. Moreover, while RESA cites testimony that suppliers should pay a "reasonable fee," it never quantified the actual costs that would be incurred if its proposals were adopted (or who would pay if the suppliers did not think the fee was "reasonable").
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> ***Revised POR Program.*** RESA also proposes to condition PUC approval on expanding the POR programs that have already been approved for Met-Ed, Penelec and Penn Power. Notably, Direct supported the recently approved Penn Power program, which it described

as a "workable program that has the potential to encourage the development of robust competition in Penn Power's service territory." *See* Jt. App. Reply Brief, pp. 39-40 & n.32. The ALJs correctly found that the POR program set forth in the Joint Petition is reasonable. RESA does not actually contest that finding, but, instead, contends that the POR program is not a benefit because West Penn's own POR program could be used by EGSs with industrial customer accounts, in addition to residential and commercial customer accounts, which are not permitted under the Met-Ed, Penelec, and Penn Power POR programs. RESA Exc., p. 24. As the ALJs found, however, POR programs for large commercial and industrial customers are not necessary in light of the already-extensive shopping by those customers, and they, therefore, properly rejected RESA's proposed POR condition (I.D., pp. 31 & 57-58).

Restrictions on Municipal Aggregation. RESA also proposed restrictions on FES' ability to pursue municipal aggregation. The ALJs rejected these restrictions, and their determination should be affirmed for the reasons discussed in Section II.B.1., *supra*.

Conditions on Future Default Service Programs. The Joint Applicants explained – and the ALJs agreed – that future default service proceedings are the appropriate forum for resolving the issues presented by RESA, including such questions as the imposition of new commercial customer classes and the length of supply contracts (I.D., pp. 58-59; Jt. App. Initial Br., pp. 72-73). RESA's only argument for taking those issues up now is its alleged need for "some assurance" that FirstEnergy's Pennsylvania EDCs will not propose default service plans that will advantage FES (RESA Exc., p. 26) – i.e., the same vague factual predicate that RESA asserted, but failed to validate, in arguing for a FirstEnergy-specific Code of Conduct. The Commission should reject such conditions, which RESA can, in any event, raise in the Companies' next default service proceedings.

Mandated Revisions of EDC Operational Rules. The ALJs acknowledged that RESA sought changes to the retail markets operational rules for all FirstEnergy EDCs, but found that many of those proposals were adequately addressed by the Joint Petition. In its Exceptions, RESA asks the Commission to view its request "holistically" and "in the context of the opportunity and incentive for the merged EDCs to engage in anticompetitive and discriminatory behavior" – and not on the basis of evidence that the merged entities would undertake such behavior, which RESA did not produce. In short, RESA's position is pure speculation and was properly rejected by the ALJs.

Cost Allocation Expert. Like its other proposals, this requested condition is based on unjustified suspicions that the FirstEnergy companies "may not be properly allocating" costs and that this phantom misallocation "may be used" to gain an improper advantage. RESA Exc., p. 29. The ALJs correctly found that RESA's suspicions were unsupported by any evidence; that RESA had not undertaken any cost allocation study to substantiate its claims; and that FirstEnergy performs cost allocations consistent with the requirements of the Commission and the FERC (I.D., p. 32; *see also* Jt. App. Initial Br., p. 75-76). If the Commission has any concerns about FirstEnergy's allocations, its existing audit powers are adequate to address those concerns at any time.

D. Citizen Power Exception

1. The Merger's Economic Impact (Citizen Power Exception 1)

Citizen Power issued no discovery, presented no witnesses, offered no evidence, and

conducted no cross-examination in this case. In its Main and Reply Briefs, it raised generalized objections to the proposed Merger and argued that the Merger might facilitate future "anticompetitive or discriminatory conduct." In its Exceptions, Citizen Power abandons those arguments and, instead, asks the PUC to reject the Merger because of its alleged economic impact on Greensburg, Pennsylvania, claiming that the Merger will result in "extensive job losses." In so doing, Citizen Power neglects to mention that the Utility Workers Union of America Local 102, which represents West Penn's unionized workforce, joined in, and supports, the Partial Settlement. *See* I.D., pp. 43-44. Obviously, the stakeholder with the keenest interest in the economic effects of possible job losses does not share Citizen Power's view of the Merger.

Moreover, the Partial Settlement contains specific numeric commitments to maintain employment levels in the Greensburg area for five years after the Merger is completed (I.D., pp. 42-43). The specification of **minimum** employment levels does not mean that jobs will fall to the minimum each year.[23] In any event, the specified minimums are robust and assure there will not be a sudden or substantial adverse effect on the Greensburg area. Furthermore, Citizen Power's contention that there is no "guarantee that any jobs will remain in Greensburg," after five years ignores the facts. FirstEnergy has committed to maintain West Penn's regional headquarters in Greensburg after the Merger, which assures that it will continue to be a meaningful source of high quality jobs long after the five-year commitments expire.

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[23] Additionally, the Joint Applicants committed in the Partial Settlement to provide career transition service to employees in Greensburg that might be affected by the Merger. I.D., p. 43.

III. CONCLUSION

For the reasons set forth above and in the Joint Applicants' Initial and Reply Briefs, the Exceptions of Direct, RESA, the OSBA and Citizens Power should be denied, the Initial Decision should be adopted by the Commission, and the Commission should issue certificates of public convenience evidencing its approval of the proposed change of control on the terms set forth in the Joint Application and the Joint Petition.

Respectfully submitted,

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Date: January 20, 2011

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 CONVENIENCE UNDER SECTION 1102(A)(3) OF THE PUBLIC UTILITY CODE APPROVING A CHANGE OF CONTROL OF WEST PENN POWER COMPANY AND TRANS-ALLEGHENY INTERSTATE LINE COMPANY	**DOCKET NOS.**	**A-2010-2176520** **A-2010-2176732**

CERTIFICATE OF SERVICE

I hereby certify and affirm that I have this day served a copy of the **Joint Applicants' Replies to Exceptions to the Initial Decision of Administrative Law Judges Weismandel and Long** on the following persons in the matter specified in accordance with the requirements of 52 Pa. Code § 1.54:

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