

# CITIZEN POWER

*Public Policy Research Education and Advocacy*

January 10, 2011

Rosemary Chiavetta, Secretary  
Pa. Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

**Re: Joint Application of West Penn Power 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:

Enclosed for electronic filing with the Commission please find the Exceptions of Citizen Power to the Initial Decision issued on December 20, 2010 by the Honorable Wayne L. Weisman and the Honorable Mary D. Long in the above referenced matter. Copies have been served on all parties listed on the enclosed Certificate of Service.

Sincerely,



Theodore Robinson  
Counsel for Citizen Power

Enclosure

cc: per Certificate of Service  
Wayne Weisman, Administrative Law Judge  
Mary D. Long, Administrative Law Judge

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**EXCEPTIONS OF CITIZEN POWER, INC.**

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Dated: January 10, 2011

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## I. INTRODUCTION

Citizen Power, Inc. (“Citizen Power”) respectfully submits these Exceptions in response to the Initial Decision of Administrative Law Judges Wayne L. Weismandel and Mary D. Long (“ALJs”) issued on December 20, 2010 in accordance with 52 Pa. Code § 5.533 (relating to procedure to except to initial, tentative, and recommended decisions).

These proceedings involve the proposed merger of Allegheny Energy, Inc. (“Allegheny”) with FirstEnergy Corp. (“FirstEnergy”) (“Merger Proceeding”).<sup>1</sup> In the Merger Proceeding, West Penn Power Company (“West Penn”), Trans-Allegheny Interstate Line Company (“TrAILCo”), and FirstEnergy Corp. (“FirstEnergy”) (collectively the “Joint Applicants”) seek approval and the issuance of any and all authorizations required under the Pennsylvania Public Utility Code (“Code”) for a change of control of West Penn and TrAILCo to be effected by the merger of Allegheny with Element Merger Sub., Inc. (“Merger Sub”), a wholly-owned subsidiary of FirstEnergy.<sup>2</sup>

The proposed merger, if approved, will create the nation’s largest utility holding company with six million customers, two million in Pennsylvania alone, combining ten electric utilities spanning seven states and covering 67,000 square miles.<sup>3</sup> This combined company will have 24,000 megawatts of domestic capacity and 20,000 miles of high voltage transmission

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<sup>1</sup> Joint Applicants’ St. 1 at 1.

<sup>2</sup> Id.

<sup>3</sup> Joint Applicants’ St. 1 at 3, 13.

lines.<sup>4</sup> In addition, the proposed merger would eliminate Allegheny Energy Supply Company, a wholesale and retail competitor in the Commonwealth.<sup>5</sup>

Citizen Power's primary interests in this matter relate to whether the proposed merger would result in anti-competitive or discriminatory conduct under 66 Pa. C.S. §2811(e) or would fail to produce affirmative public benefits as required by Sections 1102 and 1103 of the Public Utility Code, as interpreted in the *City of York* case.

## **II. PROCEDURAL HISTORY**

On May 14, 2010, the Joint Applicants filed a Joint Application with the Pennsylvania Public Utility Commission ("Commission") in order to obtain approval of a change of control of West Penn and TrAILCo under Chapters 11 and 28 of the Code, 66 Pa. C.S. §§101 et. seq.

On May 29, 2010, the Commission published a notice of the Joint Applicants' application in the *Pennsylvania Bulletin* that required Petitions to Intervene and Formal Protests to the Joint Application to be filed by June 14, 2010. Citizen Power filed its petition to intervene on June 14, 2010. By Order Granting Petitions to Intervene dated June 23, 2010, Citizen Power's petition to intervene was granted. Citizen Power participated in the Initial and further Hearing, which commenced on October 12, 2010. On October 25, 2010, the Joint Applicants and several other parties filed a Joint Petition For Partial Settlement ("Joint Petition"). On November 3, 2010, Citizen Power filed its Main Brief. Citizen Power filed its Reply Brief on November 15, 2010. On January 20, 2010, ALJs Weisman and Long issued the Initial Decision recommending that the May 14, 2010 Joint Application, as supplemented by the October 25, 2010 Joint Petition, be approved.

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<sup>4</sup> Joint Applicants' St. 1 at 3.

<sup>5</sup> Joint Applicants' St. 4 at 13.

### III. EXCEPTIONS

**Exception No. 1. The ALJs erred in finding that the Merger, implemented in accordance with the terms of the Joint Application as supplemented by the Joint Petition, satisfies the requirements of Section 1102(a) of the Code and the corresponding requirements of Section 1103(a) of the Code.**

Citizen Power Main Brief at 13-15, Citizen Power Reply Brief at 8-10, Initial Decision at 37-39, 41-44, 75, and 77-79 (Conclusions of Law 12-15; 23)

The ALJs concluded that the Joint Applicants established by a preponderance of substantial evidence that the Merger satisfies the requirements of Section 1102(a) of the Code.<sup>6</sup> Although not stated separately as a Conclusion of Law, implied in the finding that the Merger satisfies the requirements of Section 1102(a) is the necessary finding that the Merger also satisfies the Section 1103(a) public benefit standard.<sup>7</sup> In interpreting Sections 1102 and 1103 of the Public Utility Code, the Supreme Court in *City of York* found that merger applicants must show that the transaction will affirmatively promote the service, accommodation, convenience, or safety of the public by creating substantial and affirmative public benefits.<sup>8</sup> Among other requirements, under Section 1103(a), the Merger must be shown by a preponderance of substantial evidence to result in net public benefits.<sup>9</sup> Citizen Power disagrees with the conclusion of the ALJs that “the benefits of the proposed merger, as modified by the settlement agreement, outweigh the negative impacts...”<sup>10</sup> Specifically, Citizen Power believes that the ALJs were in error by reaching the conclusion that the Joint Applicants satisfied their burden of establishing that the benefits of the Merger outweigh the negative impacts.

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<sup>6</sup> Initial Decision at 79.

<sup>7</sup> Initial Decision at 37.

<sup>8</sup> *City of York v. Pennsylvania Public Utility Commission*, 295 A.2d 825 (Pa. 1972).

<sup>9</sup> Citizen Power Main Brief at 9 citing *Popowsky v. Pennsylvania Public Utility Commission*, 937 A.2d 1040, 1056 (Pa. 2007); *Middletown Township v. Pennsylvania Public Utility Commission*, 482 A.2d 674, 682 (Pa. Cmwlth. 1984).

<sup>10</sup> Initial Decision at 75.

Throughout the Initial Decision, there are examples of the merits of the transaction. In determining whether there are net public benefits that will result from the Merger there must be an analysis of the both the benefits and costs of the Merger. Based on the evidence in the record, the costs of the Merger are far less known than the benefits. Without an adequate estimation of the negative impacts of the Merger, the conclusion that the benefits of the Merger outweigh any harm is not supportable. The burden of showing that there are **net** public benefits as a result of the Merger rests with the Joint Applicants. They have failed to meet this burden.

One major cost resulting from the Merger is a likelihood of extensive job losses in western Pennsylvania. As part of the Joint Petition, the Joint Applicants can phase out jobs located in Greensburg, Pennsylvania. In the first year after the merger, the Joint Applicants can reduce the number of jobs to 800, on average. In the second year, the number of jobs can be further reduced to 675, on average. In year three, the number of jobs can be cut 650, on average. In years four and five, the number of jobs can be cut to 600. After year five, there is no guarantee that any jobs will remain in Greensburg.<sup>11</sup> This needs to be compared to a non-merger scenario where substantial job losses in Greensburg are not likely because these jobs would continue to be required for Allegheny's continuing operation.

The short term benefits proposed in the Joint Petition are potentially dwarfed by costs to the public from the proposed merger. The income impact of Greensburg losing over 800 jobs in a short five years after the completion of the merger could be millions of dollars a year based on a conservative estimate. For example, if each worker was making \$25,000 per year, the lost salaries would be \$20 million per year. This likely negative impact resulting from the Merger was not accounted for in the determination of whether there were net public benefits. Therefore, the Joint Applicants did not meet their burden by a preponderance of the evidence that the

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<sup>11</sup> Joint Petition at ¶ 14.

Merger results in substantial public benefit. The finding by the ALJs that the Joint Applicants met this burden is not supportable.

#### IV. CONCLUSION

For the reasons set forth above, and in Citizen Power's Main Brief and Reply Brief, Citizen Power respectfully submits that the ALJs erred in finding that Joint Application, as supplemented by the Joint Petition, both satisfies the requirements of Section 1102(a) of the Code and the corresponding requirements of Section 1103(a) of the Code.

Respectfully Submitted,

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Dated: January 10, 2011



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A change of control of West Penn Power Company :  
And Trans-Allegheny Interstate Line Company :

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the Exceptions of Citizen Power, Inc. upon the participants listed below, in accordance with the requirements of § 1.54 (relating to service by a participant).

Dated this 10<sup>th</sup> day of January, 2011.

**SERVICE BY E-MAIL and FIRST CLASS MAIL**

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