

**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	:	Docket Nos: 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	:	

**REPLY BRIEF OF CITIZEN POWER, INC.**

November 15, 2010

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**TABLE OF CONTENTS**

	Page(s)
I. INTRODUCTION.....	1
II. SUMMARY OF THE ARGUMENT.....	2
III. ARGUMENT.....	3
A. LEGAL STANDARD.....	3
1. The Joint Applicants’ Assertion that Section 2811(e) does not Grant any Authority upon the Commission to Approve Mergers or Consolidations is Erroneous.....	3
2. The Joint Applicants’ Argument that they are not Required under the <i>City of York</i> Standard to Describe the Public Benefits with Specificity, Quantify Benefits, or Secure Legally Binding Commitments, Understates their Obligation to Show Substantial Affirmative Benefits.....	4
B. MERGER ISSUES.....	6
1. The Joint Applicants’ Claim that the Proposed Merger will not Result in Anticompetitive or Discriminatory Conduct, nor Prevent Customers from Obtaining the Benefits of a Properly Functioning and Workable Competitive Retail Electricity Market is Without Merit.....	6
2. The Joint Applicants and OCA’s Argument that the Proposed Merger is in the Public Interest and Satisfies the <i>City of York</i> Standard is Erroneous.....	7
a. The Public Benefits Cited by the Joint Applicants in Their Brief are Overstated.....	8
b. The Joint Applicants do not Sufficiently Address the Public Costs of the Proposed Merger.....	9
IV. CONCLUSION.....	11

**TABLE OF AUTHORITIES**

	Page(s)
<b>COURT CASES</b>	
<i>City of York v. Pennsylvania Public Utility Commission</i> , 449 Pa. 136, 295 A.2d 825 (1972).....	<i>passim</i>
<i>Middletown Township v. Pennsylvania Public Utility Commission</i> , 482 A.2d 674 (Pa. Cmwlth. 1984).....	7, 9
<i>Popowsky v. Pennsylvania Public Utility Commission</i> , 594 Pa. 583, 937 A.2d (Pa. 2007).....	<i>passim</i>
<b>ADMINISTRATIVE CASES</b>	
<i>Commonwealth Edison Co.</i> , 91 F.E.R.C. ¶ 61,036 (2000).....	6
<i>Ohio Edison Co.</i> , 94 F.E.R.C. ¶ 61,291 (2001).....	6
<i>USGen. New England, Inc.</i> , 109 F.E.R.C. ¶ 61,361 (2004).....	6
<b>STATUTES AND REGULATIONS</b>	
66 Pa. C.S. § 1102(a)(3).....	3
66 Pa. C.S. § 2811(e).....	3
66 Pa. C.S. § 2811(e)(1).....	2, 3
66 Pa. C.S. § 2811(e)(2).....	2, 3

## I. INTRODUCTION

On May 14, 2010, West Penn Power Company, Trans-Allegheny Interstate Line Company, and FirstEnergy filed a Joint Application to obtain the approval of the Pennsylvania Public Utility Commission (“Commission”) under Chapters 11 and 28 of the Public Utility Code for a change of control of West Penn and TrAILCo to be effected by the merger of Allegheny Energy, Inc. with Element Merger Sub., Inc., a wholly-owned subsidiary of FirstEnergy.<sup>1</sup> The Joint Applicants also requested that the Commission approve certain revisions to affiliated interest arrangements under Chapter 21 of the Public Utility Code, which they believe will facilitate the sharing of services between the Allegheny and FirstEnergy systems.<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 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>

In this Reply Brief, Citizen Power responds to arguments made by other parties that the proposed merger should be approved as modified by a Joint Petition for Partial Settlement (“Joint Petition”) that was filed on October 25, 2010 by the Joint Applicants and several of the

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<sup>1</sup> Joint Applicants’ Ex. 1, at ¶¶ 1, 10 to 15.

<sup>2</sup> Joint Applicants’ Ex. 1, at ¶¶ 1, 23 to 26.

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

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

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

parties to the proceeding.<sup>6</sup> Specifically, Citizen Power responds to other parties regarding the correct legal standard, competition issues, and the *City of York* public interest requirement.<sup>7</sup>

## **II. SUMMARY OF THE ARGUMENT**

In order for the merger to be approved by the Commission, the Joint Applicants must meet their burden of proof on two specific issues. First, the Joint Applicants must show, by a preponderance of the evidence, that the proposed merger is not likely to result in anticompetitive or discriminatory conduct under 66 Pa. C.S. § 2811(e)(2). Second, the Joint Applicants must demonstrate, by a preponderance of the evidence, that the proposed merger will affirmatively benefit the public interest in some substantial way under the *City of York* standard. Under 66 Pa. C.S. § 2811(e)(1), evidence of likely anticompetitive or discriminatory conduct may be used in determining whether there is a net public benefit. In addition, in determining whether there is a net public benefit, Citizen Power believes that the Commission should take into account evidence of costs and benefits that are not guaranteed to occur, are not fully quantified, and are not described with specificity.

In the application of these legal standards, Citizen Power avers that the Joint Applicants have not met their burden of proof because it is likely that the merger would result in anticompetitive or discriminatory conduct and that the merger fails to provide substantial net affirmative benefit to the public.

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<sup>6</sup> Joint Petition for Partial Settlement (October 25, 2010).

<sup>7</sup> *City of York v. Pa. P.U.C.* 449 Pa. 136, 295 A.2d 825 (1972).

### III. ARGUMENT

#### A. LEGAL STANDARD

1. The Joint Applicants' Assertion that Section 2811(e) does not Grant any Authority upon the Commission to Approve Mergers or Consolidations is Erroneous.

In their Main Brief, the Joint Applicants state that Section 2811(e) does not grant the Commission the power to approve mergers or consolidations above that already given by Chapter 11 of the code.<sup>8</sup> In support of this position, the Joint Applicants refer to the language in Section 2811(e)(1) which clearly states that the Commission shall consider whether the merger is likely to result in anticompetitive or discriminatory conduct “in the exercise of authority the commission otherwise may have to approve mergers or consolidations.”<sup>9</sup> However, Section 2811(e)(2) requires the Commission to reject any proposed merger that is “likely to result in anticompetitive or discriminatory conduct, including the unlawful exercise of market power, which will prevent retail electricity customers in this Commonwealth from obtaining the benefits of a properly functioning and workable competitive retail electricity market...” The authority granted to the Commission under Section 2811(e)(2) cannot be limited to existing powers held by the Commission under Chapter 11 because then a scenario could occur where a proposed merger violates Section 2811(e)(2) but does not fail the substantial benefit test of Section 1102(a)(3), which would leave the Commission powerless to enforce Section 2811(e)(2). Therefore it is clear that Section 2811(e)(1) requires the Commission to take into account competitive impacts while looking at the substantial benefits of the merger under the *City of York* standard, while Section 2811(e)(2) imposes a separate requirement for the Commission to look at the competitive impacts on their own.

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<sup>8</sup> Joint Applicants' Main Brief at 14.

<sup>9</sup> Id quoting 66 Pa. C.S. §2811(e)(1).

2. The Joint Applicants' Argument that they are not Required under the *City of York* Standard to Describe the Public Benefits with Specificity, Quantify Benefits, or Secure Legally Binding Commitments, Understates their Obligation to Show Substantial Affirmative Benefits

In their Main Brief, the Joint Applicants look to the Pennsylvania Supreme Court case *Popowsky v. Pa. P.U.C.*, 594 Pa. 583, 937 A.2d 1040 (2007) in order to examine the proper application of the *City of York* standard.<sup>10</sup> Specifically, the Joint Applicants point to the holding that the *City of York* standard allows the Commission to find substantial public benefit even when the Joint Applicants have not guaranteed the public benefits, quantified these benefits, or described the public benefits with specificity.<sup>11</sup> Citizen Power does not dispute that it is possible under some circumstances for uncertain benefits that are not described with specificity to meet the preponderance of the evidence standard in order for the Commission to make a factual determination that there is substantial affirmative public benefit. For example, when it is impossible to determine the benefits with specificity, as in *Popowsky*, where the Applicants in that case were prohibited by federal law from investigating the detailed synergies available to them in a quickly evolving telecommunications industry.<sup>12</sup> This can be contrasted with the current proposed merger where the Joint Applicants did not have a federal law restricting their merger benefit calculations. In fact, the Joint Applicants are still developing their merger plans.<sup>13</sup> The uncertainty in this case is a result of moving forward with the merger without fully investigating all the possible ramifications.

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<sup>10</sup> Joint Applicants' Main Brief at 13-14.

<sup>11</sup> Joint Applicants' Main Brief at 13-14 citing *Popowsky v. Pa. P.U.C.*, 594 Pa. at 609, 611-613, 937 A.2d at 1055, 1057-1058 (2007).

<sup>12</sup> *Popowsky v. Pa. P.U.C.*, 594 Pa. at 615, footnote 22, 937 A.2d at 1058, footnote 22.

<sup>13</sup> Joint Applicants' St. 1 at 15, "the companies do not expect the transition plan to be fully developed for some time".

However, the Supreme Court in *Popowsky* noted that the Commission's decision concerning public benefit was supported by substantial evidence because the Applicants in that case provided sufficient detail regarding the public benefit objectives and the means to reach those objectives.<sup>14</sup> Therefore, in order to use uncertain benefit evidence in the net public benefit calculus, there must be enough underlying detail about the means of achieving the benefits, to give credence to the possibility or probability of the claimed benefits. The fact that uncertain benefit evidence may be taken into account in determining net public benefits does not lead to the conclusion that this evidence must be given equal weight in fact determination or even that it necessarily needs to be given any weight at all. As stated in *Popowsky*, it is appropriate for regulatory bodies to rely on probabilities when making factual determinations of future impacts such as net public benefits.<sup>15</sup>

Furthermore, the net public benefit calculation involves a balancing process of weighing the public benefits with the public costs.<sup>16</sup> Under the holding in *Popowsky*, the Commission should treat uncertain costs the same as uncertain benefits. In other words, the Commission should have the discretion to include evidence of costs that are not guaranteed to occur, are not fully quantified, and are not described with specificity, into their net public benefit analysis. This is because the reasoning of *Popowsky* was focused on the ability of the Commission to analyze uncertain evidence. The fact that the uncertain evidence in question in the *Popowsky* case supported a finding of net public benefit is immaterial. If the Commission were to include uncertain or unquantified costs in the instant proceeding, the proposed merger would not pass the net public benefits test by a preponderance of the evidence.

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<sup>14</sup> *Popowsky v. Pa. P.U.C.*, 594 Pa. at 612, 937 A.2d at 1057-1058.

<sup>15</sup> *Popowsky v. Pa. P.U.C.*, 594 Pa. at 610, footnote 18, 937 A.2d at 1056, footnote 18.

<sup>16</sup> *Popowsky v. Pa. P.U.C.*, 594 Pa. at 610, 937 A.2d at 1056-1057.



## B. MERGER ISSUES

1. The Joint Applicants' Claim that the Proposed Merger will not Result in Anticompetitive or Discriminatory Conduct, nor Prevent Customers from Obtaining the Benefits of a Properly Functioning and Workable Competitive Retail Electricity Market is Without Merit.

The Joint Applicants claim that the merger does not raise wholesale or retail market concerns.<sup>17</sup> In order to support this claim, the Joint Applicant's mainly rely upon Dr. Hieronymus' testimony which concludes that there will not be market power concerns in electric markets as a result of the merger.<sup>18</sup> The retail markets are not examined in much detail since "the competitiveness of retail markets is directly related to the competitiveness of wholesale electric markets."<sup>19</sup>

The Joint Applicants acknowledge that Dr. Hieronymus found screen violations when he performed an Appendix A analysis in accordance with FERC regulations.<sup>20</sup> The Joint Applicants concluded that these screen failures were insignificant because they occur only during off-peak periods.<sup>21</sup> The cases cited by the Joint Applicants as evidence that off-peak screen failures are less likely to allow for the exercise of market power focused on the question of whether low cost generation assets could implement profitable strategic bidding and dispatch strategies given their operational constraints.<sup>22</sup> However, the assumptions made by FERC in those cases may be less valid because of emerging technologies such as the pumped-storage capacity owned by FirstEnergy.<sup>23</sup> It is unclear whether FERC would today find off-peak screen failures susceptible to bidding and dispatch strategies given storage opportunities.

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<sup>17</sup> Joint Applicants' Main Brief at 21-35.

<sup>18</sup> Joint Applicants' Main Brief at 22-34.

<sup>19</sup> Joint Applicants' Main Brief at 21.

<sup>20</sup> Joint Applicants' Main Brief at 25.

<sup>21</sup> Joint Applicants' Main Brief at 25-26 citing *US Gen. New England, Inc.*, 109 FERC ¶ 61,361 at P 23 (2004); *Ohio Edison Co.*, 94 FERC ¶ 61,291 at 62.044 (2001); *Commonwealth Edison Co.*, 91 FERC ¶ 61,036 at 61,134.

<sup>22</sup> *Id.*

<sup>23</sup> Joint Applicants' Ex. 1 at 12.

The retail market issues are also concerning. The Joint Applicants admit that the merger would result in the loss of Allegheny Energy Supply ("AES") as a competitor in electricity markets.<sup>24</sup> Although the Joint Applicants believe that the impact of this loss may be minimal because of the size of AES, they do not take into account the possibility that AES could have become a more aggressive market player in the future.<sup>25</sup> In addition, contrary to the Joint Applicant's position that "retail competition has flourished", on average, less than 10% of residential customers in Pennsylvania are served by an alternative supplier after 11 years of Electric Choice. In fact, hardly any customers are being served by an EGS in the MetEd, Penelec and West Penn Power territories and only a few residential customers have switched to a Penn Power competitor.<sup>26</sup>

2. The Joint Applicants and OCA's Argument that the Proposed Merger is in the Public Interest and Satisfies the *City of York* Standard is Erroneous.

The Joint Applicants and OCA, in their Main Briefs, argue that the proposed merger will provide substantial affirmative benefits to the public under the *City of York* standard.<sup>27</sup> In applying this standard, the Commission must look at the benefits and costs of the acquisition as they impact all affected parties.<sup>28</sup> In addition, the determination of substantial affirmative benefits must be in excess of any costs, including anticompetitive effects, resulting from the merger.<sup>29</sup>

Citizen Power does not believe that the Joint Applicants have satisfied their burden by a preponderance of the evidence that the merger will result in substantial net affirmative benefits to

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<sup>24</sup> Joint Applicants' Main Brief at 34.

<sup>25</sup> Id.

<sup>26</sup> Direct Energy Cross-Exam Exhibit 7; Tr. 916-918.

<sup>27</sup> Joint Applicants' Main Brief at 15, OCA's Main Brief at 44.

<sup>28</sup> *Middletown Township v. Pennsylvania Public Utility Commission*, 482 A.2d 674, 682 (Pa. Cmwlth. 1984).

<sup>29</sup> *Popowsky v. Pa. P.U.C.*, 594 Pa. at 610, 937 A.2d at 1056-1057.

the public as required under *City of York*. Citizen Power has disagreements with the characterization of certain items as benefits by the Joint Applicants in their Brief.<sup>30</sup> However, our main concern is that the Joint Applicants did not adequately address the costs of the potential merger in their Main Brief. It is these costs that we believe are likely greater than all the benefits produced by the potential merger. We believe that by not fully detailing the costs of the merger, the Joint Applicants failed to prove by a preponderance of the evidence that there were substantial **net** public benefits.

a. The Public Benefits Cited by the Joint Applicants in Their Brief are Overstated.

In their Main Brief, the Joint Applicants claim an extensive list of public benefits that they believe will be achieved as a result of the merger.<sup>31</sup> Many of the benefits claimed are unspecific or hypothetical, including the belief that a larger parent company would be in a better position to attract capital on reasonable terms, or that the merger will create synergies and result in overall cost savings.<sup>32</sup> In addition, Citizen Power does not believe that some of the more specific items regarded as benefits by the Joint Applicants are truly benefits of the merger. First of all, the commitment to "maintain at least Allegheny's current levels of charitable support in local communities" for at least three years is not a benefit because the Joint Applicants are not increasing spending, but simply keeping it where it would have been, and only for a period of three years.<sup>33</sup> Secondly, the new retail enhancements in West Penn's service territory should not count as benefits since they are methods of remedying the market power issues that the proposed

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<sup>30</sup> Joint Applicants' Main Brief at 15-20.

<sup>31</sup> Joint Applicants' Main Brief at 15-20.

<sup>32</sup> Joint Applicants' Main Brief at 15-16.

<sup>33</sup> Joint Applicants' Main Brief at 19.

merger will create.<sup>34</sup> Overall, in the opinion of Citizen Power, the competitive situation in Pennsylvania will deteriorate as a result of the merger. Third, and most importantly, the expanded employment commitments to employees are not affirmative public benefits as claimed in the Joint Applicants' Main Brief.<sup>35</sup> Public benefits resulting from a merger should be based upon the result if the merger is consummated versus the result if a merger is not consummated. In this case, if the merger does not go through employment levels are likely to remain relatively stable in Greensburg. However, if the merger is approved, there are likely to be significant employment losses in Greensburg as evidenced by the terms in paragraph 14 of the Partial Settlement. In short, a schedule of anticipated job cuts is not a public benefit.

b. The Joint Applicants do not Sufficiently Address the Public Costs of the Proposed Merger.

The Joint Applicants, in their Initial Brief, cite many specific and non-specific benefits that they believe will result from approval of the potential merger.<sup>36</sup> However, nowhere in their Brief do they address the requirement that the benefits must substantially outweigh the costs of the merger.<sup>37</sup> Instead, the Joint Applicants assume that there are no negative consequences as a result of the merger, and therefore the selection of benefits outlined in the Application and the Joint Petition satisfy the *City of York* standard. This assumption is in error and is a fundamental flaw of the Application. The Joint Applicants cannot, by a preponderance of the evidence, show that the net benefits to the public are substantial without some accounting for the negative impacts of the proposed merger. The Joint Applicants have clearly failed to meet their burden in this regard.

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<sup>34</sup> Id.

<sup>35</sup> Joint Applicants' Main Brief at 17-18.

<sup>36</sup> Joint Applicants' Main Brief at 15-20.

<sup>37</sup> *Middletown Township v. Pennsylvania Public Utility Commission*, 482 A.2d 674, 682 (Pa. Cmwlth. 1984).

There are two main categories of public costs related to the potential merger, anticompetitive behavior in the electricity market and job losses. The potential for anticompetitive effects is discussed in Section B.1., *supra*. As discussed in Section A.II., *supra*, the Commission has wide latitude to take the potential and unquantified anticompetitive effects of the merger into account in determining net public benefit.

The job loss issue is also a significant cost resulting from the merger. Under the terms of the Partial Settlement, the number of jobs located in Greensburg and Westmoreland County may be cut according to a schedule over a five-year period.<sup>38</sup> At the end of the five-year period, the Joint Applicants have no obligation to employ anyone in either Greensburg or Westmoreland County.<sup>39</sup> Although the total number of jobs that will be lost is unknown, the settlement terms clearly imply that the losses will be significant.

The costs of these job losses are properly included in any calculation of net public benefit. Not only are there impacts on the workers who lose their jobs, and their families, but also on the local businesses where they spend their money, and on the municipalities that depend on their tax revenue. The total impact on Greensburg and the Commonwealth likely will be very considerable. Although the Joint Applicants did not include these job losses and the ripple effect they create in their determination that there are substantial net public benefits, the Commission should take these significant impacts into account in its investigation. Although the specific impacts may not be known, under *Popowsky* as described in Section III.A.II., *supra*, the Commission has the discretion to include the job losses in its analysis.

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<sup>38</sup> Joint Petition for Partial Settlement at ¶14.

<sup>39</sup> *Id.*

#### IV. CONCLUSION

As stated in its Main Brief and noted in the Introduction to this Reply Brief, Citizen Power submits that the Joint Application as modified by the Joint Petition does not meet its burden to show that the merger would not result in anticompetitive or discriminatory conduct or that the merger would result in substantial affirmative public benefits. Citizen Power respectfully requests that the Commission reject the Joint Application.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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

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