

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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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

AMICUS CURIAE BRIEF OF THE
ENERGY ASSOCIATION OF PENNSYLVANIA

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I. INTRODUCTION AND STATEMENT OF INTEREST

This proceeding involves a request for approval of a merger between West Penn Power Company and FirstEnergy Corp. pursuant to Section 1102 of the Public Utility Code, 66 Pa.C.S. Sec. 1102. In the course of this proceeding, Direct Energy Services, LLC (“Direct Energy”) has submitted testimony contending that the Public Utility Commission (“Commission”) should only approve the merger if it imposes, *inter alia*, the following conditions:

- The electric distribution companies (“EDCs”) of the merged company would be removed from their role as the default service provider (“DSP”) of electricity.
- The Commission would conduct a process to select an alternative DSP. The alternative DSP would purchase energy in the hourly market to serve non-shopping customers and would set prices quarterly based upon an averaging of these hourly prices.
- Once chosen, the alternative DSP would auction off groups of residential and small business customers to electricity generation suppliers (“EGSs”). These EGSs would commit to charge prices for the auctioned customers based upon NYMEX prices and an administrative adder for one year, then would be free to charge market-based prices. Customers could “opt out” of the auctions to take service from the DSP or from another EGS.
- The merged company would be mandated to create a separate company (referred to as “billco”) to provide billing services to EGSs and to the merged company’s EDCs. The Commission would regulate billco’s service to EGSs.

The Energy Association of Pennsylvania (“EAP”) is a trade association that represents and promotes the interests of electric distribution companies (“EDCs”) and natural gas distribution companies (“NGDCs”). EAP files this *amicus* brief on behalf of its EDC members¹ pursuant to 52 Pa. Code § 5.502 (e) for the sole purpose of opposing the Direct Energy proposal regarding default service.

EDCs have an interest in this proceeding because they serve throughout Pennsylvania as the “default service providers” for customers who do not choose an alternative supplier. 66 Pa.C.S. § 2803 (definition of “default service provider”). The Direct Energy proposal has ramifications that transcend this merger proceeding. It is based upon the supposition that, in the words of Direct’s own witness, “[t]he DSP model in use in Pennsylvania . . . is not consistent with the concept of a competitive retail electricity sector.” (Direct Energy St. 1, p. 11). If Direct Energy is successful in this proceeding, it might establish a precedent that could be used to contest the DSP role of other EDCs in the Commonwealth.

EAP and its member EDCs support retail competition and encourage customers to shop for electricity. The Commission itself acknowledges on its “powerswitch” website that “Electric utilities are encouraging customers to shop around because you may be able to save money by switching to a competitive supplier.” (www.papowerswitch.com, FAQ no. 13). EAP’s interest here is not to retain customers on the default service offered by EDCs, or to retain default service as the sole province of EDCs. In the long-run, serving in the role of DSPs is not critical to the business interests of EDCs, because the predominant model for default service is that EDCs simply pass along the cost of buying electricity in the wholesale market to customers.

¹ Allegheny Power, Citizens’ Electric Company, Metropolitan Edison Company, PECO Energy Company, Pennsylvania Electric Company, Pennsylvania Power Company, Pike County Light & Power Company, PPL Electric Utilities Corporation, UGI Utilities, Inc. (Electric), and Wellsboro Electric Company.

At the same time, EDCs do have an interest in ensuring that any change to the policy concerning default service in the Commonwealth is developed and implemented in a manner which promotes customer interests and public policy,² encourages broad stakeholder input and does not impose risks, uncertainty, and costs on customers or EDCs. EDCs have made substantial investments of time and resources to develop and implement the current approach to default service. Direct Energy's proposal seeks an abrupt departure from this course, which would, among other things, require EDCs to invest more time and resources to implement.

EAP is concerned that the Direct Energy proposal is flawed procedurally and substantively. If the Commission is interested in pursuing another model for default service, this interest should be pursued in a legislative hearing or, at a minimum, in a generic proceeding devoted to the issue.

II. THE COMMISSION SHOULD NOT CONSIDER MAJOR CHANGES TO DEFAULT SERVICE POLICIES IN A MERGER PROCEEDING INVOLVING A FEW EDCS

As the above quotation from its testimony makes clear, Direct Energy admits that its main complaint with the default service plans of the merged company stems from its disagreement with the current policy in place throughout Pennsylvania regarding default service. Changes to this policy should only be considered in a generic proceeding that is focused specifically on those issues and that involves all the parties in the Commonwealth that have an interest in these policies. A merger case involving only some of those stakeholders is not the appropriate proceeding to contest those policies.

The legal standard governing this merger proceeding is whether the proposed merger is in the public interest. *City of York v. Pa. Public Utility Commission*, 449 Pa. 136, 295 A.2d 825

² The rebuttal testimony of Michael Schnitzer sets out a number of policy concerns with Direct Energy's proposal. (Joint Applicant's St. No. 9-R)

(1972). The focus in this proceeding should be on impacts of the proposed merger, and nothing else. Instead, Direct Energy is seeking to expand and divert that focus to an issue of statewide scope – the impact of default service policies on retail competition. Considering the Direct Energy proposal on its merits in this merger proceeding would increase the risk of errors and unforeseen consequences because this complex plan cannot receive the degree of attention that is necessary. The record in this case leaves many questions about the plan unanswered. For example, Direct Energy witness Lacey acknowledged that he did not know how much it would cost for the merged company to set up a separate “billco” as required under the proposal. (Direct Energy St. 3-SR, p.29). While EAP contends that the Direct Energy proposal would require statutory changes (as explained below), to the extent the Commission wishes to consider the proposal, it should only do so in a generic proceeding that is focused specifically on these issues.

In addition, considering the Direct Energy proposal on its merits in this proceeding would have the pernicious effect of encouraging parties to raise extraneous, unrelated claims and demands in merger proceedings based on the perception that they can gain leverage because “anything goes” in a merger case. Allowing such consideration would be harmful to the regulatory environment in Pennsylvania.

III. DIRECT ENERGY’S DEFAULT SERVICE PROPOSAL IS INCONSISTENT WITH THE PUBLIC UTILITY CODE AND THE COMMISSION’S REGULATIONS.

A. Direct’s Proposal is Inconsistent with the Public Utility Code

Direct Energy asserts that adoption of its default service proposal is consistent with the “end state” envisioned in the Competition Act. (Direct Energy St. 2, pp 6, 9). This assertion is not supported by the language of the Act or the circumstances leading to its adoption.

The full name of the Act is the “Electricity Generation Customer Choice and Competition Act.” 66 Pa.C.S. § 2801. As this title implies, the emphasis is on giving choices to customers.

The Act itself clearly contemplates that EDCs, while no longer having a monopoly on supplying electricity to customers, may continue to perform that role. The Act states explicitly that EDCs may continue to serve as the “provider of last resort” (the term used in the original Act) or as the “default service provider” (the term used in the Act 129 amendments to the original Act) unless an alternative supplier is designated by the Commission.³ Moreover, to the extent either an EDC or an alternate supplier provides default service, it must do so by directly procuring and providing default service supplies pursuant to a Commission-approved default service plan in the manner specified in Section 2807(e) of the Public Utility Code, and not through “auctioning” default service customers to other electric generation suppliers as Direct Energy proposes. 66 Pa. C.S. § 2807(e).

The current approach to retail competition in Pennsylvania may be characterized as a “bottom up” approach. Customers are in charge – they can decide whether to shop or remain on the default service offering of the EDC.⁴ Switching may take time to develop fully, as it did when customers were given a choice of long-distance telephone carriers, but the choice remains with the customer. Under this approach, the role of the Commission is to provide customers with information and the opportunity to shop, not to force customers to do so.

The approach reflected in Direct Energy’s proposal might be fairly described as a “top down” approach. In the name of advancing what it considers to be “real” choice, it seeks to eliminate a customer’s choice of remaining on default service offered by EDCs. Instead of simply giving customers the opportunity to shop, it would force them to do so.

³ The Act’s allowing EDCs to supply electricity to customers is consistent with the background leading to passage of the Act. For example, the Commission’s “*Report and Recommendation to the Governor and General Assembly on Electric Competition*” listed buying from the utility as a choice customers would have in a competitive market. *Report*, pp. 30-31.

⁴ The General Assembly has made clear in the Act 129 amendments that default service plans should be constructed with some thought and care – they must use competitive processes, be designed to yield the lowest price over time, and give consideration to the benefits of price stability. 66 Pa. C.S. §2807(e).

In addition, in contrast to the general deregulatory thrust of the Competition Act, Direct Energy calls for dramatic and ongoing regulatory intervention – compelling the EDC to create a structurally separate “billco” and then regulating the service the “billco” provides to EGSs, despite the lack of authority for the Commission to do so. Specifically, Section 2804(5) of the Public Utility Code provides that the “Commission may permit, but not require, an electric utility to divest itself of facilities or to reorganize its corporate structure.” 66 Pa. C.S. § 2804(5). (Emphasis added.) In addition, Section 2807(c) of the Public Utility Code provides that, “[s]ubject to the right of an end-user customer to chose to receive separate bills from its electric generation supplier, the electric distribution company may continue to be responsible for billing customers for all electric services, consistent with the regulations of the Commission, regardless of the identity of the provider of those services[,]” and specifies rules for the provision of billing, including that “[i]f services are provided by an entity other than the electric distribution company, the entity that provides the services shall furnish to the electric distribution company billing data sufficient to enable the electric distribution company to bill the customers.” 66 Pa. C.S. § 2807(c). (Emphasis added.) The Commission’s customer information disclosure regulations at 52 Pa.Code 54.1-54.9, in turn, do not mandate any involuntary relinquishment by EDCs of their right to continue the provision of billing services.

The Commission’s authority to regulate a particular service must come from the General Assembly, and nothing in the Code gives the Commission authority to order creation of, or to regulate, a separate billing entity. Would the “billco” be considered a public utility? What sections of the Code would apply to it? Would it pay assessments to the Commission to cover the costs of regulation? How would its rates be set? Such questions are currently within the

purview of the General Assembly, which would have to amend the Public Utility Code to authorize the Commission to perform the functions that Direct Energy has requested here.

Finally, the mandated creation of a “billco” could have serious financial consequences for Pennsylvania EDCs and ultimately their customers. Over the years, EDCs have invested hundreds of millions of dollars in their billing systems in order to ensure their ability to render accurate bills to customers on a timely basis. Act 129 (2008, Oct. 15, P.L. 1592, No. 129) created the need for significant additional investment in billing technology to all of its retail customers on an accelerated basis, and offered innovative pricing plans. Under Direct Energy’s proposal to create a “billco,” much of that investment could be stranded or inadequately recovered.

B. Direct’s Proposal is Inconsistent with the Commission’s Regulations

The Commission’s default service regulations set out procedures and substantive standards for the Commission to name an alternative DSP. Direct Energy’s proposal runs afoul of these procedures and standards.

The regulations state that the DSP may be changed by “one of the following processes” – the EDC may petition the Commission, an EGS may petition the Commission, or the Commission may propose the change on its own motion. 52 Pa.Code § 54.183 (b) (1) - (3). Under any of these options, a proceeding would be initiated that would focus specifically on the issues raised by considering an alternative DSP. In contrast, Direct Energy has proposed to name an alternative DSP (and then auction off the customers and create a separate “billco”) in a merger proceeding that contains a myriad of other claims and issues that are competing for attention. This procedural flaw alone warrants rejection of Direct Energy’s default service proposal.

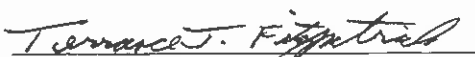
The proposal is also inconsistent with the substantive standards for changing the DSP set out in the regulations. The regulations state that the Commission will make this change when it is “necessary for the accommodation, safety and convenience of the public.” 52 Pa. Code §

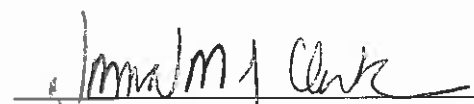
54.183 (c) This regulation goes on to state specifically that the Commission's finding will include an evaluation of the EDC's operational and financial fitness and its ability to provide default service under reasonable rates and conditions in the context of determining that the change is necessary. *Id.* The focus of this language is on whether the EDC is financially sound so that it can purchase energy in the wholesale market on reasonable terms for the benefit of its customers. The language does not contemplate changing the DSP based on a sweeping policy conclusion that it is no longer in the public interest for EDCs to serve as DSPs; rather the regulatory language contemplates that a Commission motion to relieve an EDC of its default service obligation must be based, in part, on a finding that the incumbent EDC is not operationally and/or financially fit to provide default service under reasonable rates and conditions. No such inquiry or finding has been made in this proceeding.

IV. CONCLUSION

For the reasons set forth above, EAP respectfully requests that the Commission reject the default service proposal of Direct Energy in this proceeding.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify and affirm that I have this day served a copy of the *Amicus Curiae* Brief of the Energy Association of Pennsylvania on the following persons in the matter specified in accordance with the requirements of 52 Pa. Code § 1.54:

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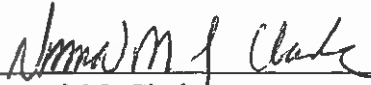
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