



Case No.

13-1126

**IN THE SUPREME COURT OF APPEALS OF WEST  
VIRGINIA**

**WEST VIRGINIA CITIZEN ACTION GROUP  
PETITION FOR SUSPENSION**

**OF PLURALITY OPINION AND ORDER OF  
PUBLIC SERVICE COMMISSION  
DATED OCTOBER 7, 2013  
IN CASE NO. 12-1571-E-PC**

**Granting Petition To Transfer Electric Generating  
Assets  
Between Affiliates At A Price Including A  
Quarter Billion Dollar "Acquisition Premium"**

*William V. DePaulo, Esq. #995  
179 Summers Street, Suite 232  
Charleston, WV 25301-2163  
Tel: 304-342-5588  
Fax: 304-342-5505  
[william.depaulo@gmail.com](mailto:william.depaulo@gmail.com)*

*Counsel for West Virginia Citizen Action Group*

Filed: November 6, 2013

## I. Table of Contents

II.	Table of Authorities.....	ii
III.	Assignments of Error.....	1
IV.	Statement of the Case.....	2
A.	Course of Proceedings Below.....	2
B.	Timeliness of Appeal.....	3
C.	Statement of the Facts.....	3
1.	Mon Power’s initial proposal to purchase Harrison for \$1.1 billion included a \$589 million “acquisition adjustment.”.....	3
2.	The Harrison sale was the centerpiece of FirstEnergy’s excessive debt restructuring.....	5
3.	PJM 101.....	8
4.	The Harrison transaction benefits FirstEnergy at Mon Power’s expense.....	10
5.	No evidence supported Mon Power’s claim of arms-length negotiations.....	12
6.	The August 21, 2013 Harrison Stipulation.....	15
7.	The October 7, 2013 Plurality Opinion.....	16
8.	The October 7, 2013 Dissenting Opinion.....	19
V.	Summary of Argument.....	20
VI.	Request for Oral Argument.....	22
VII.	Argument.....	23
A.	The Standard for Judicial Review.....	23
B.	The Approval of any “acquisition adjustment” in the price paid for the Harrison power plant ignores universally recognized principles of “cost-based” ratemaking.....	25
C.	The Commission’s decision to allow recovery of “any acquisition premium” violates the plain language of the Merger Stipulation incorporated into the PSC’s 2010 decision approving the merger of FirstEnergy and Allegheny Energy.....	30
D.	The PSC’s approval of a “conditional” \$257 million Acquisition Adjustment violates the 2010 Merger Stipulation and is totally arbitrary.....	40
E.	The evidentiary record in this proceeding demonstrates conclusively that FirstEnergy enjoyed an “undue advantage” over its wholly-owned subsidiaries.....	41
VIII.	Conclusion And Request For Relief.....	43
IX.	Addendum.....	45
X.	Certificate Of Service.....	50

## II. Table of Authorities

### CASES

American Water Resources, Inc., Case No. UW-980072 January 21, 1999.....	29
Apple Valley Waste Service, Case No. 10-1630-MC-TC, December 29, 2010 .....	30
C. R. Coleman, Case No. 85-406-G-PC (Aug. 28, 1985).....	24
C&J Utilities, LLC, Case No. 10-0482-S-PC OCT 19, 2010 .....	30
Carolina Power & Light Company, Docket No. 1999-434-E/C, March 6, 2000.....	29
Central Vermont Pub Serv Corp, Case No. 7688, July 8, 2011 .....	29
Citizens Telecommunications-WV, Case No. 00-0628-T-PC Sept 2, 2000).....	24
Columbia Gas of West Virginia, Inc. et al., Case No. 83-648-G-SC (May 25, 1984).....	24
Delta Natural Gas Company, Inc., Case No. 9059, September 11, 1985.....	28
Devon Energy Production Co., Case No. 00-0932-G-PC (Oct. 13, 2000).....	24
Frontier Comm. Corp, Case No. 09-0871-T-OC, May 13, 2010 .....	30
Golden Heart Utilities, Inc., Case Nos. U-02-13, 14, 15, March 20, 2003 .....	27
Hawaiian Tug & Barge Co. in Case No. 98-0231, October 20, 1999.....	28
Heron v. Transportation Cas. Ins. Co., 274 Va. 534, 650 S.E.2d 699, 702 (2007).....	34
In Re Petition Of Utilities, Inc., 555 S.E.2d 333, 147 NC App. 182 (N.C. App., 2001) .....	27
Indiana-American Water Co., Case No. 42029, November 6 2002.....	28
Jefferson Utilities Inc. v. Pub. Serv. Comm'n of West Va., 227 W.Va. 589, 712 S.E.2d 498 (W.Va., 2011).....	23
Kelda Group, Inc., Case No. 07-W-0178 April 19, 2007 .....	28
Mountaineer Village, Case No. 07-2072 March 17, 2008 .....	30
NorthWestern Corporation, Case No. D2006.6.82, August 1, 2007.....	28
Philadelphia Suburban Corp., Case No. 02-11-14, April 23, 2003 .....	27
Suburban Sanitation Co., 10-1757-MC-TC, July 31, 2011.....	30
Thunder Bay Gathering Company, Case No. U-14672, February 14, 2007 .....	28
Trans Louisiana Gas Company, Case No. U-19631, September 3, 1992 .....	28
UtiliCorp. United, Inc., Case No. 99-WPEE-818-RTS, July 18, 2000 .....	28
Virginia Electric Power Co., Case No. 85-553-E-PC (Dec. 12, 1986) .....	24
Wallace Van & Storage Corp., 11-0703-MC-TC August 22, 2011 .....	30
War Telephone Co., Case No. 98-1001-T-PC (Nov.4, 1998).....	24
Weston Transfer, Inc., Case No. 12-0436-42A , September 1, 2013.....	30
Willow Spring Public Service Corp, Case No. 12-0217-S-PC March 8, 2013 .....	30
Wisc Energy Corp, Case No. 9401-YO-100 March 15, 2000.....	30
WV Power Gas Service, Case No. 92-0208-G-PC, (June 1, 1993) .....	24

### STATUTES

35 ILCS 200/10-230.....	28
66 Pa.C.S. § 1327(a) (“ .....	29
Florida Administrative Code, Rule 25-30.0371 (2) .....	28
NH Stat. 369-B:3(IV)(b)(4).....	28
OAR 860-036-0716.....	29
TX Util. Code Ann. §53.053 .....	29
W. Va. Code § 24-2-12 .....	2, 23, 40
W. Va. Code § 24-5-1 .....	3

### OTHER AUTHORITIES

Melnik and Lamb, PUHCA'S GONE: WHAT IS NEXT FOR HOLDING COMPANIES?, 27 Energy L. J. 1 .....	26
RS20015: Electricity Restructuring Background: Public Utility Holding Company Act of 1935 .....	25

### III. Assignments of Error

A. The Commission's approval of any acquisition premium in the rate base attributable to the Harrison power plant purchase violated universally recognized principles of "cost-based" rate making, and the Commission's own consistently applied precedent in prior cases.

B. The Merger Stipulation incorporated into the Commission 2010 decision approving the merger of FirstEnergy and Allegheny Energy, expressly prohibited the pass through to W. Va. rate payers of "any acquisition premium" associated with the merger transaction.

C. The Commission findings that likely future carbon costs and speculative price projections barred the unconditional pass-through to West Virginia rate payers of either a \$589 or a \$257 million "acquisition adjustment," also barred PSC approval of the "conditional" pass through of a \$257 million markup over the original cost of Harrison.

D. In the absence of any substantial evidence that the Harrison sale was the product of "arms length negotiations," the PSC's approval of the Harrison purchase violates W.Va. Code § 24-2-12 prohibition against "undue advantage" in inter-affiliate transactions.

## IV. Statement of the Case

### A. Course of Proceedings Below

On November 26, 2012, Monongahela Power Company and Potomac Edison Company (hereafter, collectively, “Mon Power”) filed a petition with the West Virginia Public Service Commission (“PSC” or “Commission”) for approval of the transfer of various electric generation assets between and among Mon Power and Allegheny Energy Supply Company, LLC (“AES”). Because both Mon Power and AES are wholly-owned subsidiaries of FirstEnergy Corp. (“FirstEnergy”), an Akron, Ohio based utility holding company, the transaction between affiliates was subject to review under W. Va. Code § 24-2-12.

On November 27, 2012, WVCAG filed a Petition to Intervene, which was granted on January 23, 2013. Direct testimony was filed on behalf of Mon Power at the time of the November 26, 2012 petition and by other intervenors on April 26, 2013; rebuttal testimony was filed on May 17, 2013. The PSC conducted hearings at which all witnesses were subject to cross examination from May 29 to May 31, 2013. Post hearing briefs were filed thereafter by all parties.

On August 21, 2013, Mon Power and several intervenors entered into a Joint Stipulation (hereafter “Harrison Stipulation”) reciting terms on which the signing parties would resolve their opposing positions relating to the petition. On August 23, 2013, WVCAG filed its objections to the Harrison Stipulation proposed to settle the matter, and thereafter filed expert witness

testimony on the issue. The PSC conducted a one-day hearing on September 13, 2013 pertaining to the Harrison Stipulation.

On October 7, 2013, Commissioners Michael Albert and Jon McKinney issued a plurality opinion and order approving the petition as modified by the Harrison Stipulation, and subject to the Petitioner's agreement to certain additional conditions. Commissioner Ryan Palmer filed a dissenting opinion on October 7, 2013. On October 9, 2013, the Petitioner and related entities filed their consents to the conditions recited in the October 7, 2013 plurality opinion.

### B. Timeliness of Appeal

Appeals from the Public Service Commission (Commission) to the Supreme Court of Appeals are governed by W. Va. Code § 24-5-1, entitled "Review of final orders of commission," which provides in pertinent part that "Any party feeling aggrieved by the entry of a final order by the commission, affecting him or it, may present a petition in writing to the Supreme Court of Appeals, or to a judge thereof in vacation, within thirty days after the entry of such order, praying for the suspension of such final order." This Petition for Suspension is filed on November 6, 2013, within the thirty-day period for appeal of the October 7, 2013 order provided by W. Va. Code § 24-5-1.

### C. Statement of the Facts

#### **1. Mon Power's initial proposal to purchase Harrison for \$1.1 billion included a \$589 million "acquisition adjustment."**

FirstEnergy subsidiary Mon Power's November 16, 2012 petition to the PSC sought approval to purchase the 1,576 MW share (79% portion) of the Harrison power plant owned by

their affiliate AES, also a FirstEnergy subsidiary. Simultaneous with the Harrison purchase, Mon Power proposed to sell to AES, the 100 MW share (8% portion) of the Pleasants power plant which Mon Power owned. (App. Vol. I at 125).

As a result of the proposed transactions, Mon Power would pay a net price in excess of \$1.1 billion cash to its affiliate, FirstEnergy subsidiary AES, and assume a note in the face amount of \$73.5 million which was secured by the Harrison plant. The carrying cost of the Harrison acquisition was proposed to be recouped by Mon Power in a currently recovered surcharge and then added to the permanent rate base in a 2014 base rate case. (App. Vol. I at 125 and 142).

In 2010, the Harrison power plant was owned 79/21 by AES and Mon Power, both subsidiaries of Allegheny Energy, at the time of the merger of Allegheny Energy and FirstEnergy. FirstEnergy increased the book value of the 79% owned by AES after the merger to its estimated “fair market value.” (App. Vol. I at 488). This “acquisition adjustment” equaled \$589 million and was included in the price for the current sale of Harrison to Mon Power. (App. Vol. I at 165).<sup>1</sup>

In December 2010, the PSC approved the FirstEnergy-Allegheny Energy merger on the condition – recorded in a Joint Stipulation (hereafter “2010 Merger Stipulation”) incorporated into the PSC’s final order – that FirstEnergy would not attempt to recover through from West Virginia rate payers any merger transaction costs which were defined broadly to include “purchase price goodwill.” FirstEnergy further agreed not to reflect any acquisition premium or goodwill associated with the merger in the regulatory capital structure used for Mon Power in future West Virginia base rate proceedings. (App. Vol. I at 24-25).

---

<sup>1</sup> Following the merger, the book value of the 21% portion of Harrison still owned by Mon Power was not adjusted to reflect the higher appraised value recorded on AES books and records. (App. Vol. I at 495).

Notwithstanding the 2010 Merger Stipulation, the \$1.1 billion price for Harrison in the transaction proposed on November 26, 2012 included an “acquisition adjustment” of \$589 million over AES original cost at the time of the 2010/2011 merger. This \$589 million acquisition adjustment was described as a “purchase accounting fair value measurement ... related to the completion of the FirstEnergy Corp./Allegheny Energy, Inc. merger in February 2011”. (App. Vol. I at 165).

**2. The Harrison sale was the centerpiece of FirstEnergy’s excessive debt restructuring.**

In November 2012 and January 2013, multiple independent financial analysts commented publicly that the debt of FirstEnergy – the parent of the AES and Mon Power subsidiaries whose inter-affiliate sale of the Harrison power plant for \$1.1 billion in cash is the subject of this appeal – was grossly excessive to the tune of \$1.5 billion.

In a November 29, 2012 Credit Opinion issued with respect to FirstEnergy, Moody’s Investment service emphasized the role of the Harrison transfer in shoring up FirstEnergy’s credit ratings:

FE's non-regulated generating business is operating in a weak business environment driven by a sluggish recovering economy and depressed power and natural gas prices...Given the current outlook for unregulated power prices, we are of the opinion that FE may need incremental balance sheet improvement at its unregulated businesses in order to improve the positioning of both the consolidated entity and FES ratings within the Baa3 rating category. To that end, FE filed a generation transfer with the West Virginia Public Service Commission that has the potential to provide its unregulated business a significant cash payment...We would view approval of the proposed transaction positively as it would net AYE Supply/FES with cash proceeds of approximately \$1 billion that could be used to fund future environmentally-related capital expenditures and de-lever its balance sheet.

(App. Vol. I at 328-330) (emphasis added).

On January 22, 2012, Jefferies & Company, Inc., another independent investment advisor, downgraded FirstEnergy's stock to "underperform" based on "growing rating industry pressure that may cause the company to issue equity to enhance the company's credit metrics." (App. Vol. I at 313). Jefferies & Company, Inc. added a pessimistic projection of the likelihood of success of PSC approval – "[t]here is no precedent in West Virginia for providing regulatory recovery of acquisition adjustments or goodwill associated with merger transactions." (App. Vol. I at 314).

In FirstEnergy's Fourth Quarter 2012 earnings call, held on February 25, 2013, FirstEnergy CFO, James F. Pearson, explicitly identified the Harrison transaction as the center piece of the company's plan for debt reduction, and as necessary to maintain investment-grade credit rating for FirstEnergy's debt issuance:

Looking now at 2013. Our financial plan is structured to improve the balance sheet, enhance liquidity and maintain investment-grade credit metrics. The plan initially focuses on reducing debt at our competitive companies, primarily FES and Allegheny Supply, by at least \$1.5 billion. The proceeds of the Harrison-Pleasants transaction in West Virginia combined with asset sales are expected to be sufficient to fund the debt reduction. The assets we intend to sell are primarily our competitive hydro fleet, which includes nearly 1,180 megawatts that were initially in our plans to be sold in 2015.

(App. Vol. I at 290) (emphasis added).

In February 2013, FirstEnergy issued \$1.5 billion in debt with 5 to 10 year maturities, and used the proceeds to repurchase \$665 million of senior notes, \$400 million of senior notes, \$100 million of lease debt, and \$235 million of tax-exempt bonds (totaling \$1.4 billion). (App. Vol. II at 574-575).

On May 7, 2013, in the company's First Quarter 2013 earnings call, immediately following the issuance of the \$1.5 billion in new debt, FirstEnergy CEO Anthony Alexander,

claimed to have resolved FirstEnergy excessive debt problems, but confirmed, indirectly, the importance of the Harrison transaction, at the time it was proposed in November 2012:

[T]he Harrison transaction ... is no longer critical to the successful completion of our financial plan.

(App. Vol. II at 575) (emphasis added).

Notwithstanding the February 2013 debt restructuring, Mon Power's financials were negatively impacted when PJM (the manager of the regional electricity market) announced the results of its three-year-ahead forward capacity auction for 2016-17. Mon Power's November 2012 petition had included financial projections for capacity market prices "in the \$100/MW-day range;" however, the 2016-17 auction cleared on May 24, 2013 at only \$59.37/MW-day, more than 40% below Mon Power's projections. (App. Vol. I at 479 and App. Vol. II at 589).

The \$59.37/MW-day auction clearing price had immediate implications for competitive generation companies. In plain terms, competitive generation firms, which depend on market sales for profitability, knew that they would receive substantially less revenue than expected from selling their capacity into PJM. In an Investment Research Report issued by UBS immediately following the announcement of PJM's capacity auction, FirstEnergy was among two firms whose credit was most adversely affected:

EXC [Exelon] and FE are both particularly impacted, with credit implications once again relevant ... [W]e see little to suggest any material recovery [in capacity prices] in subsequent years.

(App. Vol. II at 589) (emphasis added).

In short, FirstEnergy's precarious financial condition, noted at year-end 2012, had returned.

### 3. PJM 101

Mon Power's purchases and sales of electricity are executed in the energy and capacity markets operated by PJM Interconnection, LLC (PJM),<sup>2</sup> a "regional transmission organization" (RTO), regulated by the Federal Energy Regulatory Commission. As an RTO, PJM does not own any electric generation or transmission facilities, but manages the regional transmission grid, which interconnects generation facilities. PJM is the regional electrical grid operator for an area covering the District of Columbia and thirteen states, including West Virginia. FirstEnergy and American Electric Power (and their respective subsidiaries), the two largest electric utilities in West Virginia, are both members of PJM.

PJM is responsible for balancing electric supply and demand across its system to ensure electric reliability. As part of its mission, PJM operates wholesale electricity markets that determine which power plants are dispatched at any given time to meet demand. Power plants are centrally dispatched to operate by PJM, based on whether the bid made by a given plant "clears" PJM's energy market.

Mon Power sells all of the output of their power plants into the energy and capacity markets operated by PJM, and purchases all of the energy and capacity they need to serve their customers from PJM's markets.<sup>3</sup> (App. Vol. I at 45). The net revenues from Mon Power's sales

---

<sup>2</sup> States in PJM include all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia. More than 830 companies are members of PJM, which serves 60 million customers and has 167 gigawatts of generating capacity.

<sup>3</sup> Capacity refers to the total power that a power plant is capable of producing, measured in megawatts (MW) at a given moment of time. Energy refers to the actual amount of electricity produced by the plant over a given time period (measured in megawatt-hours, MWh), based on how often the plant runs and whether it is run at full capacity. The plant's "capacity factor" is used to convert from capacity to energy:

into PJM (i.e. the revenues less the cost of generating that power) are credited against the cost of market purchases to serve Mon Power's load. (App. Vol. I at 247).

PJM's "capacity" market (which generated the \$59.37/MW-day auction clearing price announced on May 24, 2013 and referenced above) is a 3-year-ahead forward market through which PJM seeks to ensure that it has sufficient capacity to meet the projected peak demand on its system in three years. Because electricity demand varies significantly throughout the year, PJM must ensure that it can meet demand at peak times, even though these times represent only a few hours of the year.

Existing and new power plants bid their capacity into this market, typically at prices designed to recover the plant's fixed costs. PJM accepts all the bids necessary to meet forecasted peak demand, starting with the lowest-cost bids (subject to transmission constraints). All power plants that clear the auction receive the auction clearing price for their capacity and are required to offer their plants output into PJM's energy markets for that year.

PJM's "energy" markets are very short term spot markets designed to match supply with demand on moment-to-moment, hourly and daily basis. Plants are typically bid into the energy market based on their variable cost of operation.<sup>4</sup> PJM evaluates all bids and dispatches power plants as needed to meet demand, beginning with the lowest-cost offers (subject to transmission constraints). Thus, those plants with lower bids are more likely to be dispatched. Higher-cost plants are only dispatched at times of high demand.

---

it compares the plant's actual generation during a year with the generation that the plant would produce if it operated at 100 percent power for all 8,760 (365 X 24) hours of the year.

<sup>4</sup> Mon Power Witness Delmar confirmed that "under most normal circumstances," Mon Power seeks to recover its variable costs when bidding plants into the PJM energy market. (App. Vol. II at 612).

As a consequence of the way PJM works, the continued operation of the Harrison power plants – or any other electric generation facility operated in PJM’s jurisdiction – does not depend on the name plate on the fence in front of the plant. Specifically, the Harrison power plant will continue to operate, whether owned by AES or Mon Power, as long as Harrison’s costs of operations are competitive in PJM markets. (App. Vol. I at 238). Nothing the PSC or this Court does will affect the outcome of those market forces.

Correspondingly, Mon Power will be able to purchase electricity from PJM energy and capacity markets to meet its delivery obligations, as it has to date, regardless of the amount of generating capacity under its direct ownership; changing the name plate on the Harrison plant will not affect the volume or prices for electricity in PJM’s energy and capacity markets.

#### **4. The Harrison transaction benefits FirstEnergy at Mon Power’s expense.<sup>5</sup>**

---

<sup>5</sup> Deserving of special note is the first sentence in paragraph 2 of page 1 of the Plurality Opinion declaring that: “The net impact of the transaction surcharge and modified ENEC rates provide <sup>[sic]</sup> an immediate rate decrease of approximately \$16 million.” (App. Vol. II at 912). As explained by WVCAG witness Kunkel, in her September 10, 2013 supplemental testimony, “[T]he cost of upgrades for compliance with MATS in 2015... is not reflected in the proposed rate decrease. Also, the rate decrease proposed in the settlement is the \$16.1 million difference between the \$113.4 million surcharge and the \$129.5 million ENEC decrease. The surcharge includes a \$19 million reduction that comes from arbitrarily amortizing the gain from the sale of Pleasants over the 16-month surcharge duration, rather than the 32-year remaining life of Pleasants (as originally proposed). Without this accelerated amortization of the Pleasants gain, the rate decrease would disappear.” (App. Vol. II at 824)(emphasis added).

The Plurality Opinion’s recitation of the artificially concocted “rate reduction” represents a conscious decision to adopt as its own Mon Power’s effort to obtain some public relations cover, albeit transparent, for the undeniable fact that the “net impact” of the proposed Harrison acquisition would add up to a quarter of a billion dollars to the rate base passed through to West Virginia consumers, in violation of the explicit prohibition of “any acquisition premium” of the Commission’s 2010 decision in the FirstEnergy/Allegheny Energy merger case, barely three years earlier. Although of little value as a measure of the real impact of the Harrison transaction, this prominent heralding of an artificially concocted “rate decrease” is instructive as an early sign that the Plurality Opinion is a model of “special pleading,” i.e., a document which cites only the evidence in support of its result-driven conclusions, while either distorting or ignoring completely any evidence which contradicts those pre-ordained results.

What *will* be affected by the petition in this case is clear: \$1.1 billion in cash will be wiped off of Mon Power's balance sheet, to its clear disadvantage, and \$1.1 billion in cash will appear on the balance sheet of FirstEnergy's AES subsidiary (an unregulated "merchant" electric generation company), to its undisputed benefit. As initially proposed in November 2012 by Mon Power, the Harrison power plant transaction would have transferred approximately \$1.1 billion in cash from Mon Power to FirstEnergy subsidiary AES, and, simultaneously, authorized Mon Power to pass through all of that cost – including the \$589 million acquisition adjustment – to West Virginia rate payers.

The possibility that the PSC would bar Mon Power from passing through to rate payers all of the \$589 million acquisition adjustment in the price paid for Harrison – advocated by many intervenors – raised concern on Mon Power's part. In rebuttal testimony, Mon Power witness Staub testified that a disallowance of the \$589 million "acquisition adjustment" "would have a material and prolonged damaging effect on Mon Power's financial condition." (App. Vol. I at 488).

At the May 29, 2013 hearing, Mr. Staub noted that Mon Power had very limited financial flexibility: "Our ratings ... are at the bottom end of the investment grade." (App. Vol. II at 620). Mr. Staub emphasized that disallowance of any portion of the acquisition adjustment greater than \$10 million would be "material:"

\$590 million is something that we need to have recovery for. We can't make a capital investment and not get recovery of it. We won't be able to sustain our credit profile, our credit ratings. We would be downgraded.

...

Q. Could Mon Power do or handle some offset associated with rate recognition less than \$590 million?

A. I would have to know the magnitude in order to answer that question.

Q. What if it was \$10 million?

A. I would view \$10 million as [im]material, but anything more I wouldn't.

(App. Vol. II at 623-625).

The August 21, 2013 Harrison Stipulation, entered into by Mon Power and a number of intervenors in this proceeding, did nothing to alter the amount of cash to be transferred to FirstEnergy's subsidiary.

**5. No evidence supported Mon Power's claim of arms-length negotiations.**

Mon Power argued throughout the course of the proceedings that the terms of the Harrison transaction were the result of arms-length negotiations, and that the parent company's financial problems did not influence the negotiation between Mon Power and its affiliate, AES. (App. Vol. I at 474-481). Mon Power witnesses Delmar and Szwed – neither of whom are Mon Power officers, directors or employees<sup>6</sup> – purportedly negotiated the transaction on behalf of Mon Power beginning in April 2012. Mr. Szwed testified that Mon Power identified a need to acquire additional capacity and that Delmar and Szwed presented the various options it was considering, including an affiliate transaction, to FirstEnergy senior management. Management then gave Delamar and Szwed permission to approach AES to see if they were interested in selling a West Virginia asset to Mon Power:

---

<sup>6</sup> (App. Vol. I at 475, App. Vol. II at 675).

Mr. Delmar and myself met with our president and chief executive officer [Anthony Alexander] and laid out what we were thinking, and he thought we should go ahead and pursue the discussion with Allegheny Energy Supply.

(App. Vol. II at 739).

According to Mon Power witnesses, the negotiations on behalf of Mon Power with AES focused on the price at which Harrison would be acquired, with Mon Power's negotiator insisting on the book value (approximately \$1.1 billion, including the Acquisition Adjustment) and AES arguing for a higher price. Mr. Delmar testified that Mon Power's negotiators maintained throughout the negotiations that they could not pay higher than the book value. (App. Vol. II at 654).

The persons negotiating on behalf of Mon Power did not attempt to negotiate a different percentage ownership stake in Harrison and/or Pleasants. (App. Vol. II at 652). The persons negotiating on behalf of Mon Power did not attempt to negotiate a price for Harrison lower than the book value, based on the argument that passing on the Acquisition Adjustment included in the book value into rates would violate the FirstEnergy/Allegheny Merger Stipulation. (App. Vol. II at 655).

The persons negotiating on behalf of Mon Power also did not negotiate whether the transaction would be an asset sale or a stock deal. (App. Vol. II at 727). This distinction, affecting \$411 million in accumulated deferred income taxes (ADIT), had significant consequences for the ratepayers of Mon Power. According to WVEUG<sup>7</sup> witness Baron, had the persons negotiating on behalf of Mon Power structured the transaction differently, this ADIT

---

<sup>7</sup> WVEUG is the acronym for West Virginia Energy Users Group, a coalition of large industrial energy users including: ArcelorMittal, USA; ATK Tactical Propulsion and Controls; E. I. du Pont de Nemours and Company; Essroc Cement Company; Fibrek Recycling US, Inc.; Graftech International Holdings, Inc.; Linde, LLC; Novelis Corporation; Quad/Graphics, Inc.; U.S. Silica; Weyerhaeuser, Zoetis Products, LLC.

benefit would have been treated as an offset to the rate base, i.e. a reduction in the cost to ratepayers by \$411 million. (App. Vol. I at 410-412).

WVEUG witness Baron testified that accumulated deferred income taxes (ADIT) were lost as a result of the accounting treatment accorded ADIT by structuring the Harrison acquisition as an asset deal. Had the acquisition been structured as a stock deal (Mon Power buying the stock of AES) the resulting transfer of \$411 million in ADIT to Mon Power would have led to a corresponding offset to rate base of \$411 million. Consequently, the structure of the deal did not result in the lowest cost to West Virginia rate payers, who would have been accorded an ADIT liability offset in a stock transaction. (App. Vol. II at 697-700).

In the following colloquy Mon Power's counsel acknowledged that the form of the transaction would, as a matter of course, be the subject of negotiations, but WVEUG witness Baron countered that there was no evidence that anyone bargained on Mon Power's behalf for the \$411 million offset for Mon Power or West Virginia rate payers:

BY MON POWER COUNSEL GARY JACK:

Q. And that would all be part of the negotiation?

A. Correct.

\*\*\*

The company didn't present any testimony in this case, to my knowledge, that explained why the structure of the transaction was the one that they settled on and confirmed versus a stock type of transaction that would've afforded ratepayers the ADIT balance.

(App. Vol. II at 700).

Incredibly, the negotiations with AES on behalf of Mon Power produced no paper trail. In response to discovery, Mon Power stated: "there are no written documents on the actual negotiation of the transaction." (App. Vol. I at 337). This statement bears repetition: not a single

document was produced in discovery, despite repeated requests, to document the back and forth of the purported “arms length” negotiations resulting in a parent corporation extracting \$1.1 billion from a regulated subsidiary – not one piece of paper.

On the basis of the above evidence, WVEUG, CAD, Staff and WVCAG all argued that the terms and conditions of the affiliate transaction were not the product of arms-length negotiations. As stated by CAD Witness Harris:

[T]he companies never addressed the structure of the transaction in the negotiations and the impact of ADITs. They never even brought up the notion that the settlement wouldn't allow an acquisition premium which Staff, WVEUG and CAD has clearly believed is the case. How is that a negotiation, when you're not using your best bargaining tools to get the best price you can? That, to me, is not a negotiation.

(App. Vol. II at 787) (emphasis added).

## **6. The August 21, 2013 Harrison Stipulation**

In the 2013 Harrison Stipulation, signed by Mon Power and several other intervenors on August 21, 2013, the signatories acquiesced in PSC approval of Mon Power's acquisition of Harrison at the \$1.1 billion price initially proposed. However, the 2013 Harrison Stipulation reduced by \$332 million (from \$589 million to \$257 million)<sup>8</sup> the portion of the \$1.1 billion purchase price that could be added to the rate base and, thereby, passed through to Mon Power customers. See (App. Vol. II at 970 and 992).

---

<sup>8</sup> Additionally, the Harrison Stipulation recited “benefits” to West Virginia in the form of (a) a commitment to add fifty jobs in West Virginia, and (b) “economic development” benefits for low-income energy assistance, weatherization, renewable energy support totaling \$3.9 million, sixty percent of which consisted of a \$2.3 million rate reduction for the largest industrial customers in the state. (App. Vol. II at 966-969).

At the September 13, 2013 hearing on the Harrison Stipulation, Mon Power Witness Wise testified that he had been assured by Mr. Staub that (notwithstanding Mr. Staub's prior testimony) the \$332 million disallowance agreed to in the Harrison Stipulation would have no impact on Mon Power credit ratings; Wise offered no reason why Mr. Staub's prior testimony, under oath, had changed. (App. Vol. II at 874-875).

Mr. Wise also referenced a Moody's report, which he suggested approved of the \$332 million write down in the acquisition adjustment, leading to the following colloquy with Commissioner Ryan Palmer:

COMMISSIONER PALMER:

I want to understand the impact of the \$333 million figure, and how that's going to impact financial stability of the Company. So what impact will the write off of the \$333 million acquisition adjustment have on Mon Power's credit rating?

A. According to Moody's release of August 21st, the same date the settlement was filed, none.

(App. Vol. II at 872).

However, the actual text of the Moody's release states the exact opposite. Citing the Moody's release, Commissioner Palmer stated Moody's had concluded that the transaction "will weaken [MP's] positioning within its current credit rating category." See (App. Vol. II at 1009).

## **7. The October 7, 2013 Plurality Opinion**

The October 7, 2013 Plurality Opinion approving the sale of Harrison to Mon Power makes only one head-in-the-sand reference to the negotiations between Mon Power and AES and WVCAG's argument that FirstEnergy subsidiary AES had an "undue advantage":

Although WVCAG did not provide evidence of unfair advantage to AE Supply, it seems to argue that Commission approval of the Transaction places interests of owners ahead of the interests of customers. The Commission sees no basis for this criticism.

The un rebutted testimony by Mon Power is that the Transaction was arm's length and that negotiations were sensitive to FERC rules regarding affiliated transactions and cross-subsidization and carefully adhered to FERC rules.

(App. Vol. II at 945).

Nonetheless, the Commission rejected Mon Power's request for approval of the transaction with a \$589 million acquisition adjustment, as originally proposed, with a finding on page 30 of the October 7, 2013 Plurality Opinion, that:

We have considered that request, independent of any consideration of the Merger Stipulation, and determine that the original request to allow the full \$589 million Acquisition Adjustment in rate base and to set rates based on a return on and of the \$589 million Acquisition Adjustment is not reasonable.

(App. Vol. II at 941) (emphasis added).

Further, the 2013 Harrison Stipulation's proposal to reduce to \$257 million the amount of the acquisition adjustment that could be passed through to West Virginia rate payers was also rejected in language virtually identical to the Commission's rejection of the \$589 million acquisition adjustment:

Because of the uncertainties, however, related to carbon emission costs and market prices, the Stipulating Parties have not demonstrated that a final decision to allow a \$257 million Acquisition Adjustment in rate base on a permanent basis subject to unrestricted rate recovery is reasonable and will not adversely affect the public.

(App. Vol. II at 945) (emphasis added).

The October 7, 2013 Plurality Order accepted the terms of the 2013 Harrison Stipulation with a critical added condition. Mon Power's recovery of the \$257 million acquisition adjustment depended on FirstEnergy either (a) making a \$332 million equity infusion into Mon Power, or (b) agreeing not to extract dividends from Mon Power until the company achieved a 45/55 equity-to-debt ratio. (App. Vol. II at 959-960).

Additionally, the Plurality Opinion tied Mon Power's full recovery of the \$257 million acquisition adjustment to Harrison's subsequent economic performance. Specifically, the Plurality Opinion recognized the risk that the supposed benefits of owning Harrison (its revenues from electricity sales less its generation costs) might not outweigh the fixed cost of purchasing the asset.

In light of that risk, the Plurality Opinion imposed a condition to recovery which provided that:

[T]he return on, and return of, the \$257 million Acquisition Adjustment will be allowed in base rates only to the extent that fifty percent of the net margins from off-system transactions from the additional Harrison capacity acquired by Mon Power will support that return

(App. Vol. II at 960).

Thus, as finally issued, the October 7, 2013 Plurality Opinion, approved AES sale of 79% of Harrison to Mon Power, and authorized Mon Power to pay AES \$1.1 billion (including a \$257 million "acquisition premium") for the increased generation capacity, but conditioned Mon Power's recovery of the \$257 million acquisition premium included in the \$1.1 billion price on Mon Power recovering a specific level of earnings from the newly acquired generation capacity - - because the Commission lacked sufficient confidence in the petitioner's economic and other projections presented in the course of the evidentiary proceeding.

## 8. The October 7, 2013 Dissenting Opinion

In his October 7, 2013 Dissenting Opinion, Commissioner Palmer rejected the proposed Harrison transaction -- as modified by the 2013 Harrison Stipulation and the Plurality Opinion -- in its entirety. Commissioner Palmer found the inclusion of any acquisition adjustment in rates to be a violation of the 2010 Merger Stipulation and, additionally:

I object to allowing any portion of the Acquisition Adjustment in rate recovery on policy grounds. Absent compelling public interest needs, the Commission does not allow rate recovery of a utility asset purchase price premium, also known as an Acquisition Adjustment or Goodwill, because to do so is contrary to the basic ratemaking principle that rates be cost-based.

(App. Vol. II at 1004).

Commissioner Palmer noted that the condition imposed by the Plurality Order on the recovery of the \$257 million Acquisition Adjustment “fails to completely protect ratepayers from the write-up that the parties to the [2010] Merger Stipulation foresaw and attempted to prevent.” (App. Vol. II at 1005). He also noted that Mon Power’s write-off of \$332 million of the purchase price “will likely harm the financial condition and bond rating of the companies.” (App. Vol. II at 1008).

Additionally, Commissioner Palmer stated that there was not “sufficient evidence of arms-length negotiations between the Companies and the seller, AES, or its holding company, FirstEnergy.” (App. Vol. II at 1003).<sup>9</sup>

---

<sup>9</sup> Commissioner Palmer’s dissent also rejected: (a) Mon Power’s analysis of the cost of Harrison compared to other alternatives, which he found to be “flawed and results-driven,” (b) Mon Power’s “overreliance on one fuel source” as a result of the asset transfer, and (c) Mon Power’s claim of an “immediate need” for the asset transfer. (App. Vol. II at 1005-1010).

## V. Summary of Argument

As noted, Mon Power's original petition's request for approval of the transaction with a \$589 million acquisition adjustment was rejected by the Commission in finding on page 30 of the October 7, 2013 Plurality Opinion, referenced above. Further, the Harrison Stipulation's proposal to reduce to \$257 million the amount of the acquisition adjustment that could be passed through unconditionally to West Virginia rate payers was also rejected in language virtually identical to the Commission's rejection of the \$589 million acquisition adjustment.

What survived was the October 7, 2013 Plurality Opinion's total rewrite of Mon Power's petition, described below, which resulted in the PSC "conditionally" authorizing Mon Power's pass through of the \$257 million acquisition adjustment. That conditional approval of the pass through of an acquisition premium presents two questions:

- (1) Whether the PSC may authorize Mon Power to pass through any "acquisition adjustment" to West Virginia rate payers, as a matter of utility regulation generally, or in light of the explicit prohibitions in the 2010 merger stipulation of "any acquisition premium" associated with the FirstEnergy/Allegheny Energy merger transaction
- (2) Whether the October 7, 2013 plurality opinion's conditioning the pass through to West Virginia rate payers of \$257 million of the "acquisition adjustment" is reasonable, as a matter of law, or adversely affects the public, and

The answer to the first question is straight forward – the overwhelming weight of authority, in place for the seven decades following the Great Depression, is that utilities may only recover actual costs in rates charged to customers. This is the near universal rule across the United States, and has been adopted by West Virginia's PSC in a wide range of cases spanning the universe of utility activities. The October 7, 2013 Plurality Opinion offers no plausible

rationale for the abrupt and unmistakable departure from the core rule of “cost-based” utility regulation.

Apart from utility regulation generally, however, the October 7, 2013 Plurality Opinion literally stands on its head the 2010 Merger Stipulation incorporated into the December 2010 PSC decision approving the 2010/2011 merger of FirstEnergy and Allegheny Energy, Inc. That stipulation’s express terms bar the pass through of “any acquisition premium.”

The Plurality Opinion the Plurality Opinion asserts that the 2010 Merger Stipulation applied *only* to the 20% of Harrison Mon Power continued to own at the time of the merger of FirstEnergy and Allegheny Energy – *not* property acquired thereafter. No language in the 2010 Merger Stipulation limits the prohibition on pass through of acquisition premiums to property owned by Mon Power at the time of the merger, nor is there any ambiguity in the Merger Stipulation that would allow the Commission to infer the parties’ intentions. To the contrary, the 2010 Merger Stipulation’s plain language explicitly reserves the right to challenge the pass through of unforeseen costs associated with the merger.

To the extent that the Commission’s interpretation of the 2010 Merger Stipulation relies upon the parties’ intent, the exercise compels the finding that, had they thought of it, the parties to the 2010 Merger Stipulation would unquestionably have applied the ban on pass through of acquisition premiums to Mon Power’s later acquisition of the 79% of Harrison owned by AES at the time of the merger. The highly technical, and totally out of context, contrary interpretation endorsed in the Plurality Opinion is, as Commissioner Palmer stated in his dissent, a result-driven misinterpretation of the 2010 Merger Stipulation.

Apart from the illegality, as a matter of law, of the October 7, 2013’s approval of the pass through of “any” acquisition adjustment, the Plurality Opinion’s conditions for recovery of Mon

Power's payment of the \$257 million acquisition adjustment are unreasonable and arbitrary and capricious as a matter of law. Moreover, nothing undermines the credibility of the Pluarlity Opinion's approval of the Harrison acquisition itself more than the Plurality Opinion's conditioning the recovery of the \$257 million acquisition premium on future economic performance, a condition explicitly predicated on the Plurality Opinions stated discomfort with the petitioner's economic projections and assumptions.

Finally, as detailed above, Mon Power submitted no documentary or other evidence to support the Commission's finding that the two individuals who purportedly negotiated on Mon Power behalf -- *neither of whom were employed by Mon Power* -- engaged in the kind of "arms length" negotiations necessary to demonstrate that no party had an "undue advantage," a showing required by W. Va. Code § 24-2-12.

## **VI. Request for Oral Argument**

WVCAG respectfully requests oral argument on this Petition pursuant to Rule 20 because the case involves issues of fundamental importance. The decision on the merits of this case will in all likelihood determine the energy future of the northern half of this state for the next quarter century. Additionally, the case presents important questions, if not absolutely of first impression, involving inconsistent and conflicting decisions of the Public Service Commission.

## VII. Argument

### A. The Standard for Judicial Review.

The standard of review generally applicable to decisions of the Public Service Commission was stated succinctly in Syllabus Points 1 and 2 of *Jefferson Utilities Inc. v. Pub. Serv. Comm'n of West Va.*, 227 W.Va. 589, 712 S.E.2d 498 (W.Va., 2011), as follows:

(1) whether the Commission exceeded its statutory jurisdiction and powers; (2) whether there is adequate evidence to support the Commission's findings; and, (3) whether the substantive result of the Commission's order is proper...

2. [A]n order of the public service commission based upon its finding of facts will not be disturbed unless such finding is contrary to the evidence, or is without evidence to support it, or is arbitrary, or results from a misapplication of legal principles

227 W.Va. 589, 712 S.E.2d 498.

The statutorily fixed standard for review of transactions among affiliates is recited at W. Va. Code 24-2-12, and provides that the Commission may approve a transfer of assets among affiliates:

upon proper showing that the terms and conditions thereof are reasonable and that neither party thereto is given an undue advantage over the other, and do not adversely affect the public in this state.

WV Code § 24-2-12.

The purpose of this statute has been described as “protection of the using public,” See *Columbia Gas of West Virginia, Inc. and Allegheny and Western Energy Corporation*, Case No.

83-648-G-SC (May 25, 1984); *C. R. Coleman*, Case No. 85-406-G-PC (Aug. 28, 1985); *Pennzoil Oil Products Company*, Case No. 96-0065-G-PC (Sept 3, 1996); *WorldCom, Inc.*, Case No. 97-1338-T-PC (Aug. 13, 1998), *Hope Gas, Inc.*, Case NO. 99-0462-G-PC (July 27, 1997); *Devon Energy Production Co.*, Case No. 00-0932-G-PC (Oct. 13, 2000).

And the matters to be protected against include adverse consequences such as higher rates. *Virginia Electric Power Co.*, Case No. 85-553-E-PC (Dec. 12, 1986). The petitioner “need not show that the public will be better off or that a net positive benefit to the public occurs due to the transaction.” *Devon* at 11; *VEPCO* at 7-9. But the Commission must find that “West Virginia consumers will be no worse off.” *WorldCom* at 17-18. And the Commission has interpreted the statutory requirement that no undue advantage be exercised to require a demonstration that “the transaction was negotiated at arms length.” *War Telephone Co.*, Case No. 98-1001-T-PC (Nov.4, 1998); *Hope Gas, Inc.*, at 3-4; *Citizens Telecommunications-WV*, Case No. 00-0628-T-PC Sept 2, 2000).

In connection with the requirement that neither party have an undue advantage, the Commission has held that inordinately high profits in affiliate transactions run afoul of both the reasonableness test of § 24-2-12 but also the requirement of arms length negotiations. See *WV Power Gas Service*, Case No. 92-0208-G-PC, Rec. Dec., p. 7 (May 12, 1993; Final June 1, 1993) (Inter-utility contract that included a 37% profit margin embedded in the contract rate, in the absence of a thorough examination of other alternatives, supported finding that the embedded profit margin was unreasonable on its face, and indicated that the terms and conditions of the agreement in question were not the product of arms length negotiations and that beneficiary of contract rate had an undue advantage in the contract negotiations to the detriment of the West Virginia ratepayers.)

This appeal presents no challenge to these broadly adopted statements of the law; it is their application alone that is at issue.

B. The Approval of any “acquisition adjustment” in the price paid for the Harrison power plant ignores universally recognized principles of “cost-based” ratemaking.

The idea of “cost-based” rate making proceedings did not spring suddenly out of the blue in the December 2010 case in which the Commission approved the merger of FirstEnergy and Allegheny Energy. As Commissioner Palmer stated in the October 7, 2013 Dissenting Opinion, allowing recovery of an Acquisition Adjustment in customer rates “is contrary to the basic ratemaking principle that rates be cost-based.” (App. Vol. II at 1004).

To be sure, cost-based rate making has been the bedrock of American utility rate making since the debacles of the 1920’s and 1930’s when the widespread collapse of holding companies, including those dominant in the electricity generation business, wiped out the savings of hundreds of thousands of American citizens. The Congressional history of the Public Utility Holding Company Act of 1935 records that, although electric companies numbered in the thousands at the beginning of the 1920’s, by 1932 three companies controlled 45% of all electric generation. See: RS20015: *Electricity Restructuring Background: Public Utility Holding Company Act of 1935* (PUHCA), published by the Congressional Research Service.

The holding companies were characterized as having excessive consumer rates, high debt-to-equity ratios, self-dealing, and increasingly unreliable service. Typically a holding company parent was able to charge its associated utilities exorbitant amounts for services, such as construction of facilities, fuel supply, or billing. Excessive fees charged to operating companies

were passed through to consumers as higher rates. With the decrease in demand following the stock market crash of 1929, and the ensuing Great Depression, more and more companies went bankrupt, and service deteriorated.<sup>10</sup>

During the seven-year period between 1929 and 1936, 53 holding companies with combined securities of \$1.7 billion went into bankruptcy or receivership. The legislative response was the Public Utility Holding Company Act of 1935 which, among other things, prohibited sales of goods or services between Holding Company affiliates at a profit. PUHCA rules prevented the utilities from increasing their cost-based regulated rates by artificially marking-up the prices paid by the utility operating companies above what the central purchasing affiliate paid. Although the PUHCA itself was replaced by the Energy Policy Act of 2005, nothing in that later act purported to repeal the core “cost-based” rule of utility regulation learned at the expense of the financial security of hundreds of thousands of American citizens seven decades before.<sup>11</sup>

---

<sup>10</sup> Melnyk and Lamb, *PUHCA'S GONE: WHAT IS NEXT FOR HOLDING COMPANIES?*, 27 Energy L. J. 1 (“The collapse of so many utilities and holding companies coincided with an extensive, 101-volume study of the industry conducted by the Federal Trade Commission (FTC) from 1928-1935.<sup>12</sup> The study formed much of the basis of the Congressional findings leading to the enactment of PUHCA. The FTC study found many systemic abuses including: the issuance of securities to the public based on unsound asset values or on paper profits from intercompany transactions; the extension of holding company ownership to disparate, nonintegrated operating utilities throughout the country without regard to economic efficiency or coordination of management; the mismanagement and exploitation of operating subsidiaries through excessive service charges, excessive common stock dividends, upstream loans and an excessive proportion of senior securities; and the use of the holding company to evade state regulation. Accounting manipulations were typical holding company abuses. Utility assets were often written up through the sale of properties to controlled subsidiaries at amounts higher than market values, and depreciation charges were often inadequate. These and other abuses inflated earnings and justified increased dividends, while weakening the capital structure of utilities and their ability to provide service.”)

<sup>11</sup> 27 Energy L. J. 1, 16 (“In its 1995 study of utility holding company regulation, the SEC's Division of Investment Management recommended that if Congress repealed PUHCA, it should ensure state access to books and records, and provide for federal audit authority and oversight of affiliate transactions. That is largely what happened under E[nergy] P[olicy] Act 2005.”)

Under “cost-based” utility regulation, acquisition premiums or acquisition adjustments are only allowed in rates when the utility is able to prove the existence of extraordinary circumstances. Such extraordinary circumstances include: (a) economic or quality of service benefits of the transaction, e.g. reduced operating costs and other synergies (Alaska, Indiana, Kansas, Kentucky, Washington, Wisconsin) ; (b) situations where the acquisition premium came about through purchasing a troubled or distressed utility, i.e., where the purchase was necessary to ensure continued service to the customers of the distressed utility, typically water or sewer utilities (Indiana, Pennsylvania). These exceptions are also consistent with the past treatment of acquisition adjustments by the West Virginia PSC.

Some Commissions appear to deny acquisition adjustments in any circumstance (Hawaii, Louisiana, New Hampshire, New York, Vermont). See generally, In Re Petition Of Utilities, Inc., 555 S.E.2d 333, 147 NC App. 182 (N.C. App., 2001). See also: Bonbright, Danielson, and Kamerschen, *Principles of Public Utility Rates* 286 (1987)(“Most commissions are skeptical of transfers between utilities at excess costs, so rate base adjustments are generally not made unless the utility can demonstrate actual, distinct and substantial benefits to all affected ratepayers”). The rules adopted state by state by regulatory commissions across the United States reflect these principles.<sup>12</sup> And the same rule has been adopted in a long line of West Virginia PSC decisions.<sup>13</sup>

---

<sup>12</sup> **Alaska**: (Golden Heart Utilities, Inc., Case Nos. U-02-13, 14, 15, March 20, 2003 at 7-8)(“This statute states a well-accepted ratemaking principle that acquisition adjustments will not generally be allowed in a utility’s rate base because the ratepayers should not be required to pay the cost of speculation in utility assets. We have recognized an exception to the general rule against acquisition adjustments when the ratepayers will benefit, and the utility has demonstrated specific, tangible benefits in an amount at least equal to the cost of the acquisition adjustment. We have disallowed acquisition adjustments when alleged benefits are speculative or derived from causes other than the acquisition”); **Connecticut**: (Philadelphia Suburban Corp., Case No. 02-11-14, April 23, 2003 at 10)(“PSC will use the purchase method of accounting (Purchase Method) to account for the transaction. The Purchase Method classifies any difference between the purchase price and the value of the assets as an acquisition adjustment.... PSC will not push down any goodwill, positive or negative, to ECRWC that arises from this merger, and assures the

---

Department that it will omit, for ratemaking purposes, any goodwill that arises from this merger involving ECRWC”); **Florida:** Florida Administrative Code, Rule 25-30.0371 (2), (“Any entity that believes that a full or partial positive acquisition adjustment should be made has the burden to prove the existence of extraordinary circumstances. In determining whether extraordinary circumstances have been demonstrated, the Commission shall consider evidence provided to the Commission such as anticipated improvements in quality of service, anticipated improvements in compliance with regulatory mandates, anticipated rate reductions or rate stability over a long-term period, anticipated cost efficiencies, and whether the purchase price was made as part of an arms-length transaction”); **Hawaii:** (Hawaiian Tug & Barge Co. in Case No. 98-0231, October 20, 1999 at 6-7)(“We have never allowed a public utility to recover an acquisition premium or transaction or implementation costs attributable, directly or indirectly, to an acquisition or merger. We exclude acquisition adjustments from calculating plant in service because the excess over original cost provides no additional benefit to ratepayers”); **Illinois:** 35 ILCS 200/10-230 (“(e) Beginning with the 1997 assessment year through the assessment year of 1999, the fair cash value of any electric power generating plant owned as of November 1, 1997, by an electric utility, as that term is defined in Section 16-102 of the Public Utilities Act, shall be determined using original cost less depreciation of the electric power generating plant”); **Indiana:** Indiana-American Water Co., Case No. 42029, November 6 2002 at 5 (“It is the established policy of this Commission to allow an acquisition adjustment in rates in only two events, namely: 1. As a result of the acquisition, are there significant and demonstrable benefits flowing to the ratepayers, e.g. better service and/or lower rates? 2. Does the acquisition result in correction or salvage of an entity identified by this Commission as a “troubled” utility?... We will not endorse the recovery of acquisition adjustments without sufficient proof that a particular acquisition meets one or both of the two standards set out above.); **Kansas:** UtiliCorp. United, Inc., Case No. 99-WPEE-818-RTS, July 18, 2000 at 11 (“Absent extraordinary circumstances, the Commission will not incorporate any acquisition premium into a company’s rate base and allow a return “on” and a return “of” an acquisition premium. Public utility companies should not be encouraged to artificially inflate asset values and impose higher rates on captive customers”); **Kentucky:** Delta Natural Gas Company, Inc., Case No. 9059, September 11, 1985 at 3-4 (“The Commission maintains its position that the net original cost of plant devoted to utility use is the fair value for rate-making purposes, unless the utility can prove with conclusive evidence, that the overall operations and financial condition of the utility have benefited from acquisitions at prices in excess of net book value.”); **Louisiana:** Trans Louisiana Gas Company, Case No. U-19631, September 3, 1992 at 18 (“[T]he recovery of an acquisition premium fails within the discretion of this Commission, and the Commission does not believe, as a matter of policy, that it is appropriate to allow recovery of an acquisition premium”); **Michigan:** Thunder Bay Gathering Company, Case No. U-14672, February 14, 2007 at 19 (“In the September 29, 1990 order in Case No. U-9323, p. 30, which involved in part a utility’s request for recovery of an acquisition premium adjustment associated with a purchase of certain utility assets, the Commission stated that: “[P]ublic policy dictates that we allow recovery of and on acquisition adjustments only where ratepayers receive a net benefit from the change in ownership.” The Commission defined an acquisition premium adjustment as “the amount paid above ‘book cost’ or ‘depreciation original cost’ to acquire utility property previously devoted to public service.” June 29, 1990 order, Case No. U-9323, p. 19, fn 5. More recently, the Commission rejected rate recovery of the acquisition premium paid by DTE Energy when it acquired Mich Con’s corporate parent”); **Montana:** NorthWestern Corporation, Case No. D2006.6.82, August 1, 2007 at 53 (“The Commission does not allow the recovery of acquisition adjustments in any form for ratemaking absent a showing of good cause”); **New Hampshire:** NH Stat. 369-B:3(IV)(b)(4) (“ In the event that PSNH or its parent company is acquired or otherwise sold or merged: ... (C) No acquisition premium paid by an acquiring company for the assets or securities of any acquired company, resulting from any such merger, acquisition or sale, may in any way increase rates at any time from what they would have been without the acquisition premium”); **New York:** Kelda Group, Inc., Case No. 07-W-0178 07-W-0177 07-W-0176 06-W-0760, April 19, 2007 at 21 (“New York is an

---

original cost state, and goodwill is termed an 'acquisition adjustment.' We do not allow recovery of 'acquisition premiums' which represent the excess of the purchase price over the net book value"); **Oregon:** OAR 860-036-0716 ("(1) A rate-regulated water utility may petition the Commission for approval of an acquisition adjustment in rates for acquiring a water system when the benefits of the acquisition outweigh the increase to customers' rates resulting from an acquisition adjustment; (2) The Commission will consider the merits of the utility's petition based on the benefit to the customers being acquired and the public interest on a case-by-case basis."); **Pennsylvania:** 66 Pa.C.S. § 1327(a)("Acquisition of water and sewer utilities. (a) Acquisition cost greater than depreciated original cost.--If a public utility acquires property from another public utility, a municipal corporation or a person at a cost which is in excess of the original cost of the property when first devoted to the public service less the applicable accrued depreciation, it shall be a rebuttable presumption that the excess is reasonable and that excess shall be included in the rate base of the acquiring public utility, provided that the acquiring public utility proves that: ... (3) the public utility, municipal corporation or person from which the property was acquired was not, at the time of acquisition, furnishing and maintaining adequate, efficient, safe and reasonable service and facilities ... (5) the public utility, municipal corporation or person whose property is being acquired is in agreement with the acquisition and the negotiations which led to the acquisition were conducted at arm's length ...(7) neither the acquiring nor the selling public utility, municipal corporation or person is an affiliated interest of the other..."); **South Carolina:** Carolina Power & Light Company, Docket No. 1999-434-E/C, March 6, 2000 at 12 ("Any acquisition adjustment that results from the Formation (or any future merger or acquisition by Holdings or its affiliates) shall be excluded from CP&L's utility accounts and treated for accounting and ratemaking purposes so that it does not affect CP&L's retail electric rates and charges. Provided, to the extent CP&L demonstrates that Formation generates savings, CP&L may seek cost recovery through utility rates of any acquisition premium not to exceed the level of such savings"); **Texas:** TX Util. Code Ann. §53.053 ("Components of Invested Capital (a) Public utility rates shall be based on the original cost, less depreciation, of property used by and useful to the utility in providing service; (b) The original cost of property shall be determined at the time the property is dedicated to public use, whether by the utility that is the present owner or by a predecessor; (c) In this section, "original cost" means the actual money cost or the actual money value of consideration paid other than money"); **Vermont:** Central Vermont Public Service Corporation, Case No. 7688, July 8, 2011 at 9-10 ("In Dockets 5716 and 5717, the Board stated that its 'long standing policy has been to consider only the book value, or historical cost, of tangible assets for rate-making purposes.' In Docket 5396, the Board ruled that only the book value of the selling utility's property could be included in the rate base for rate-making purposes. The guiding principle is that ratepayers of the acquiring utility (here, CVPS) should not have to pay for any premium in the purchase price over the book value of an asset that other ratepayers (Readsboro Electric's) have already paid down to net book value. In effect, to allow the inclusion of an acquisition premium in rate base would mean an increase in the aggregate rate base for all utilities in Vermont without any change in the composition of assets included in the aggregate rate base"); **Virginia:** Virginia Gas Pipeline Co., Case No. PUE960093, Report of Deborah V. Ellenberg, Hearing Examiner (July 25, 1997) at 10, cited in 31 U. Rich. L. Rev. 1173, 1207-1208 ("The Examiner agreed with the Staff and rejected the acquisition adjustment stating that 'the record does not support the purchase price [of Tenneco Energy's interest] or a finding of net benefit to the ratepayer, both of which must be clearly established before such an extraordinary adjustment should be made.' 209 In rejecting VGPC's acquisition adjustment, the Examiner relied on Commission precedent, noting that 'an acquisition adjustment is made only in extraordinary circumstances'"); **Washington:** American Water Resources, Inc., Case No. UW-980072 UW-980258 UW-980265 US-980076, January 21, 1999 ("AWRI should not be allowed a positive acquisition adjustment with respect to certain systems it purchased for more than per books values when there is no showing that the acquisitions confer benefits on AWRI's customers commensurate with the premiums paid."); **Wisconsin:** Wisconsin Energy Corporation, Case No. 9401-

C. The Commission’s decision to allow recovery of “any acquisition premium” violates the plain language of the Merger Stipulation incorporated into the PSC’s 2010 decision approving the merger of FirstEnergy and Allegheny Energy.

The relevant section of the 2010 Merger Stipulation, incorporated into the December 2010 PSC decision approving the merger of FirstEnergy and Allegheny Energy, Inc., states in ¶ 15 (h) entitled “Non-Recovery of Transaction Costs,” that:

FirstEnergy will make no attempt to recover through the rates of Mon Power or Potomac Edison in West Virginia Merger transaction

---

YO-100 March 15, 2000 at 8 (“The Commission has generally rejected dollar for dollar recovery of acquisition premiums. Recovery of any of the premium has required a clear showing of substantial system benefits resulting from the acquisition...The applicant was unable to substantiate sufficient system or economic benefits resulting from the acquisition; therefore direct recovery of the acquisition premium is not reasonable.”).

<sup>13</sup> Frontier Communications Corporation, Case No. 09-0871-T-OC 09-1600-T-CN, May 13, 2010 (“Frontier will not attempt to pass through to or recover from West Virginia customers or have West Virginia customers fund any portion of the acquisition premium or purchase price for Verizon WV stock or any costs associated with the Transaction, including but not limited to financial, legal, severance payments, regulatory fees or investment services.”); Weston Transfer, Inc., Case No. 12-0436-42A etc. Recommended Decision final September 1, 2013 (“IT IS FURTHER ORDERED that no portion of the goodwill/acquisition adjustments may be recovered through rates.”); Willow Spring Public Service Corporation, Case No. 12-0217-S-PC March 8, 2013 (“Commission policy is that amounts paid to acquire utility assets that are in excess of the net book value of those assets should be booked as an acquisition adjustment or goodwill and not be directly or indirectly allowed for ratemaking purposes.”); Mountaineer Village, Case No. 07-2072 March 17, 2008 (“the Commission does not typically allow recovery of any premium”); Wallace Van & Storage Corp., 11-0703-MC-TC August 22, 2011 (“IT IS FURTHER ORDERED that Relocation Benefits, LLC shall record on its books as an acquisition adjustment any excess purchase price over the net book value of assets received. This acquisition adjustment will be considered goodwill and shall not be included either directly or indirectly in revenue requirements in any future rate case.”); Apple Valley Waste Service, Case No. 10-1630-MC-TC, December 29, 2010 (“The excess purchase price, which is the amount paid in excess of the net book value of Apple’s tangible assets, will be recorded as an acquisition adjustment on the books of AVWWV. This acquisition adjustment is goodwill and may not be recovered directly or indirectly through rates.”); Suburban Sanitation Co., 10-1757-MC-TC etc. Recommended Decision final July 31, 2011 (“IT IS FURTHER ORDERED that Allied Waste Services of North America, LLC, record \$4,652,662 as an acquisition adjustment on its books and records, with is considered good will and may not be recovered through rates.”); C&J Utilities, LLC, Case No. 10-0482-S-PC, Recommended Decision final October 19, 2010 (“It is reasonable to order that the excess purchase price paid by the Transferees not be recovered in any future rate proceedings”).

costs, which include: purchase price goodwill, consultant fees, fees for investment services, legal fees, regulatory fees, or lender consents; costs associated with the shareholders' meetings and proxy statement/registration statement related to the Merger, tail insurance, change in control payment, or retention payment resulting from completion of the Merger and costs associated with the imposition of conditions or approval of settlement terms in other state jurisdictions (collectively, "Transaction Costs"). Joint Petitioners believe that this reflects an exhaustive list of Transaction Costs; however, the other Parties reserve the right to see whether there are other incurred costs that might fit within such category and advocate in the next base rate case that such costs should be disallowed as non-recoverable Transaction Costs.

(App. Vol. I at 24-25)(emphasis added).

Further, in ¶ 15 (i) of the 2010 Merger Stipulation, entitled “Non-recovery of Acquisition Premium, Goodwill,” provided that:

FirstEnergy agrees that in future base rate proceedings of Mon Power or Potomac Edison in West Virginia, the regulatory capital structure used for Mon Power and Potomac Edison will not reflect any acquisition premium or “goodwill” associated with the Merger transaction.

(App. Vol. I at 25)(emphasis added).

As a result of the 2010/2011 merger of FirstEnergy and Allegheny Energy, FirstEnergy subsidiary AES increased the book value of the 79% of Harrison owned by AES by \$589.5 million to reflect what petitioner Mon Power described as “a purchase accounting fair value measurement ... related to the completion of the FirstEnergy Corp./Allegheny Energy, Inc. merger in February 2011.” (App. Vol. I at 165). No such adjustment was made to the book value of the 21% of the plant owned by Mon Power.

Notwithstanding the language of ¶ 15 (i) above barring the pass through of “any acquisition premium,” the October 7, 2013 plurality opinion approves the pass through to West

Virginia rate payers of up to \$257 million representing an “acquisition adjustment” to the book value of the 79% share of Harrison proposed to be sold to Mon Power.<sup>14</sup>

In reaching the conclusion that this pass through does not violate the 2010 Merger Stipulation, the Plurality Opinion takes the position that all the Merger Stipulation did was keep Mon Power from marking up its *own* book value, for the 21% share of Harrison Mon Power still owned after the merger, by an amount which reflected the increased book value AES tacked onto the book value at the time of the merger.

Since the 79% of Harrison proposed to be acquired by Mon Power in the current proceeding was *not* owned by Mon Power “at the time of the merger,” the Plurality Opinion reasons, the Merger Stipulation’s bar of “any acquisition premiums” has no application to the property.

As phrased by the plurality opinion, “There is no evidence in the record that indicted the value of the current assets of [Mon Power] have been impacted by the merger-related accounting entries.” (App. Vol. II at 951, Finding of Fact No. 14)(emphasis added). Continuing, the Plurality Opinion recites that “The Commission approved the FirstEnergy/Allegheny Energy Merger based on the conditions in the [2010] Merger Stipulation regarding the excess price paid

---

<sup>14</sup> Both the Plurality Opinion and the Dissent reject Mon Power’s feeble attempt to distinguish between the “acquisition premium” explicitly barred in the 2010 Merger Stipulation, and the current petition’s use of the phrase “acquisition adjustment.” Specifically, the Plurality Order rejected Mon Power witness Wagner’s argument that an “acquisition adjustment” is distinct from an “acquisition premium” or “goodwill,” holding instead that “any acquisition premium or goodwill is recorded as an Acquisition Adjustment” under the System of Accounts established by the West Virginia PSC. (App. Vol. II at 933). Commissioner Palmer agreed in his dissenting opinion: “[F]or regulatory purposes this Commission has always considered an Acquisition Premium, Acquisition Adjustment and Goodwill as one in the same.” (App. Vol. II at 1003).

by First Energy for Allegheny Energy.”<sup>15</sup> (App. Vol. II at 955, Conclusion of Law No. 6) (emphasis added).

Again, “The intent of the [2010] Merger Stipulation was to prevent First Energy and [Mon Power] from requesting an increased West Virginia jurisdictional rate base valuation related to the First Energy purchase price of Allegheny Energy in excess of book value at the time of the merger.” (App. Vol. II at 955, Conclusion of Law No. 9) (emphasis added).

And in the same vein, “The [2010] merger was not intended and could not reasonably be extended to apply to all possible future transactions, such as the [Harrison] Transaction, filed with the Commission for approval.” (App. Vol. II at 955, Conclusion of Law No. 10) (emphasis added).

The October 7, 2013 Plurality Opinion literally stands the 2010 Merger Stipulation on its head. Indisputably, the overwhelming weight of precedent would require any tribunal, jurisprudential or administrative, to effectuate the intent of the parties when interpreting a negotiated document like the Merger Stipulation. But before a tribunal may use intent as a convenient tool for rewriting a contract, they need the judicial license of some ambiguity. No such ambiguity, patent or latent, is alluded to or even suggested by the Plurality Opinion.

Equally indisputable is the rule that parties are bound where the language of their agreement is plain and ambiguous:

When the terms in a contract are plain and unambiguous, the contract is construed according to its plain meaning. The words

---

<sup>15</sup> An outside observer might reasonably inquire why FirstEnergy would pay an inflated price for the 79% interest in Harrison acquired in the 2010/2011 merger of FirstEnergy and Allegheny Energy, Inc. However, the \$589 million “acquisition adjustment,” albeit merely a paper profit, could substantially increase profits from operations also booked at that time, and in an entity not subject to the limitations of regulated utilities, justify any number of corporate decisions, including the payment of \$23 million annual compensation to FirstEnergy CEO Anthony Alexander.

that the parties used are normally given their usual, ordinary and popular meaning.

Heron v. Transportation Cas. Ins. Co., 274 Va. 534, 650 S.E.2d 699, 702 (2007).

In the context of the 2010 Merger Stipulation there is no textual basis for the temporal limitation the Commission attempts to place on the prohibition of Mon Power's pass through of an acquisition adjustment. To be sure, the words "current" or "at the time of the merger" do not appear in the Merger Stipulation.

To the contrary, the plain language of the Merger Stipulation bars the inclusion in West Virginia rate base of "any acquisition premium or 'goodwill' associated with the Merger transaction." (App. Vol. I at 25)(emphasis added). For purposes of applying the plain language of the Merger Stipulation an examination of Mon Power's own language is dispositive.

Thus, in rebuttal testimony, Mr. Staub testified that:

[T]he \$590 million purchase accounting adjustment [was] done in 2011 at the time of the merger when AE Supply's assets were adjusted to reflect fair market value. In Harrison's case, the adjustment was upward to reflect its fair market value. The [proposed] Transaction cannot be done without rate recognition of the current book value, which reflects the fair market value at the time of the merger.

(App. Vol. I at 488) (emphasis added).

And Mon Power repeatedly described the \$589 million acquisition adjustment as "a purchase accounting fair value measurement ... related to the completion of the FirstEnergy Corp/Allegheny Energy, Inc. merger in February 2011" (App. Vol. I at 165).

This candid and consistent association of the acquisition adjustment proposed in this proceeding with the merger of FirstEnergy and Allegheny Energy in 2010/2011 is all that is required to trigger the 2010 Merger Stipulation's plain English prohibition on pass through of "any acquisition premium or goodwill associated with the Merger transaction."

Moreover, in the present case, the existence of even a patent ambiguity would not save the Plurality Opinion's result-driven determination of the intent of the Merger Stipulation. It is unquestionably the case that the 2010 Merger Stipulation intended to bar Mon Power from tacking an acquisition adjustment onto its own books and records – proportional to its ownership in Harrison and AES' \$589 acquisition adjustment. But that is not logically or textually a basis for the temporal limit the Plurality Opinion invents.

To be sure, the Plurality Opinion's facile interpretation of the intent of the Merger Stipulation, as stated in Conclusion of Law No. 9, leads to totally absurd results clearly never anticipated by any party to the 2010 Merger Stipulation. It is nothing short of nonsensical to assert that – had the parties to the 2010 Merger Stipulation ever conceived that Mon Power would somehow end up with 100% ownership of Harrison – they would have authorized Mon Power to pass through to rate payers:

(a) only the historic book value Mon Power had recorded, both before and after the merger with respect to the 21% of Harrison it owned,

(b) but historic book value, plus an acquisition premium, for the 79% of Harrison newly acquired from AES.

Such an arbitrary and contradictory result is totally implausible, either as a matter of utility regulation generally or as a fair interpretation of what the parties to the Merger Stipulation intended.

Indeed, the 2010 Merger Stipulation itself provided for matters then unforeseen. Specifically, ¶ 15 h., titled "Non-Recovery of Transaction Costs, which recited in the first sentence of subparagraph (i) that Mon Power could not pass through in rates any transactions

costs, and specifically listed “purchase price goodwill,” also listed numerous other items which were barred from pass through to rate payers. (App. Vol. I at 24). Critically, the last sentence of ¶ 15 h., of the 2010 Merger Stipulation reserved the right to deal with matters not then foreseen, as follows:

Joint Petitioners believe that this reflects an exhaustive list of Transaction Costs; however, the other Parties reserve the right to see whether there are other incurred costs that might fit within such category and advocate in the next base rate case that such costs should be disallowed as non-recoverable Transaction Costs.

(App. Vol. I at 24-25)(emphasis added).

Plainly, this reservation is an infinitely better guide to the intent of the parties – to protect rate payers from rate increases based on matters other than actual cost – than the intellectual back flips adopted by the Plurality Opinion which, in no uncertain terms, are designed to defeat, not implement, the plain purpose for which the Merger Stipulation was intended.

And it is equally clear that if the parties had at the time of the merger in 2010 – in a spectacular instance of clairvoyance – foreseen the day in 2012 when AES would propose to sell its 79% share of Harrison to Mon Power, the parties unquestionably would have recited that eventuality as one covered by the 2010 Merger Stipulation. And given how they limited Mon Power on the 21% portion of Harrison which Mon Power continued to own, it is inconceivable that “any acquisition premium” would have been approved, let alone the pass through of either a \$589 or a \$257 million acquisition premium resulting from nothing more than an accounting entry of a paper profit on the part of AES.

Additionally, several intervening parties in this proceeding – all signatories to the 2010 Merger Stipulation – argued that Mon Power’s proposal to recover a \$589 million Acquisition Adjustment from Mon Power ratepayers violated the terms of the 2010 Merger Stipulation

approved by the Commission's Final Order in the FirstEnergy/Allegheny Energy merger case. (App. Vol. I at 298-300, 396, 407-409, 417-418). Witness Baron, appearing for WVEUG, a signatory to the 2010 Merger Stipulation, testified in this proceeding that the intent of this provision, as understood by WVEUG, was to exclude "any increase in what otherwise was recorded book value prior to the acquisition by FirstEnergy." (App. Vol. II at 702)(emphasis added).

Nor does the 2013 Harrison Stipulation evidence a contrary intent on the part of the signatories relating to the intent of the 2010 Merger Stipulation, or any determination that the 2010 Merger Stipulation had, or had not been, violated:

[T]he Parties specifically represent that the Settlement does not include any recommended finding on or resolution of the question of whether the Transaction violates the Merger Stipulation, in whole or in part.

(App. Vol. II at 977)(emphasis added).

It may be, as the Plurality Opinion gratuitously states, that the parties never intended the Merger Stipulation to apply to "all" situations. However, the pass through of "acquisition adjustments" in the price paid for Harrison – whether at the time of the merger or in a subsequent sale to Mon Power – is far from the potentially irrelevant situations contemplated by the phrase "all" transactions. It was, to be sure, the "one" transaction surely intended to be treated in the same fashion, i.e., they were barred from pass through *in toto*.

In a final effort to avoid the plain language of the Merger Stipulation, the Plurality Opinion argues that Mon Power was simply considering a request to purchase Harrison at a reasonable price that happened to include an acquisition adjustment, and that this was not in violation of the 2010 Merger Stipulation. (App. Vol. II at 934). In order to justify the inclusion of

this acquisition adjustment in rates, the Plurality Order concocts an alternative reality to explain

Mon Power's case:

It is unfortunate that from the initial filing, Mon Power have confused the difference between Mon Power inheriting an Acquisition Adjustment that is "necessary" or created solely because of the fair-value adjustments made by AE Supply at the time of the FirstEnergy/Allegheny Energy Merger (that would be contrary to the Merger Stipulation) and a request to sell an asset to Mon Power at a price in excess of the net original cost book value. This confusion comes from Mon Power initially appearing to claim that the justification for the purchase price of Harrison is the fair value of the plant recorded on the AE Supply books at the time of the Merger.

(App. Vol. II at 940) (emphasis and bolding added).

The Plurality Order agrees in their parenthetical remark above that the inclusion of an acquisition adjustment created solely because of a fair-value adjustment at the time of merger would be “contrary to the Merger Stipulation.”

However, here Mon Power did not appear to claim that the justification for their proposed purchase price was the fair value of the plant at the time of the merger; they did make that claim throughout their case, as noted *infra*. This reality is only “unfortunate” to the extent that it impels the Plurality Opinion to ever more tortured reasoning as a means of granting Mon Powers’ request for inclusion of a \$257 million acquisition premium in customer rates.

After excusing Mon Power’s “confusion” over how they presented the acquisition adjustment throughout their case, the Plurality Opinion, not content to ghost write Mon Power’s petition, undertakes a complete rethinking of the strategy of the case, :

Mon Power should have focused less, or not at all, on the higher value recorded on the AE Supply books, and focused instead on the fact that they were requesting approval to purchase Harrison at a price in excess of net original cost and that they believed that the price was a fair price regardless of the unrelated merger accounting.

The Commission could consider that request without any consideration of the merger accounting.

(App. Vol. II at 941) (emphasis added).

As an exercise in result-driven analysis, the foregoing statement simply has no rival.

The Majority Commissioners conclude their discussion of alleged Merger Stipulation violation by stating – in total and direct contradiction of the statements made by Mon Power *supra* – that:

The fact is, the Transaction was not dictated, controlled, or dependent on the fair value adjustment made at the time of the merger.

(App. Vol. II at 934).

The undeniable reality is that Mon Power reiterated throughout its case that the Acquisition Adjustment was created, as the Plurality Opinion itself noted, “because of the fair-value adjustments made by AE Supply at the time of the FirstEnergy/Allegheny Energy Merger.” (App. Vol. II at 940). That plain language fits easily, indeed very snugly, into the 2010 Merger Stipulation’s ban on pass through of “any acquisition premium or goodwill associated with the Merger transaction.” (App. Vol. I at 25).

D. The PSC's approval of a "conditional" \$257 million Acquisition Adjustment violates the 2010 Merger Stipulation and is totally arbitrary.

The first and simplest demonstration the "conditions" are unreasonable is the unaddressed question: *What happens if Mon Power doesn't meet achieve the economic performance level necessary to recover the \$257 million adjustment?*<sup>16</sup>

Make no mistake about it, financial markets that grade the bonds issued by Mon Power will unhesitatingly downgrade those instruments, and thereby increase the yield necessary to sell them -- and consequently increase the interest costs passed through to West Virginia rate payers -- if Mon Power cannot achieve the earnings level, from the incremental generation capacity required to allow rate recovery of the \$257 million. That is, *per se*, an adverse effect on the public which is fatal to this transaction, as approved by the Plurality Opinion, under W. Va. Code § 24-2-12 for the condition.

Compounding this patent concern is the arbitrary linking of Mon Power's recovery of one third of the cost of the Harrison purchase, to one half of the earnings of Harrison. No rational basis exists for holding hostage fully one-half of Mon Power's net earnings to recovery of only one-third of the proposed purchase price ( $\$257 \text{ million} / \$796 \text{ million} = 1/3$ )<sup>17</sup>

There is no rationale for singling out the \$257 million Acquisition Adjustment for special rate-making treatment. The risk cited by the Plurality Order in establishing this condition -- that low wholesale electricity market prices and/or a carbon price would leave ratepayers paying for

---

<sup>16</sup> The Commission addressed this issue for the \$332 million write off -- by barring extraction of dividends that impaired Mon Power's credit -- but simply ignored the same issue for the potential \$257 million write off, a model of arbitrariness. (App. Vol. II at 959-960).

<sup>17</sup> The \$796 million price for Harrison is net of \$62 million paid to Mon Power for the 100 MW share of Pleasants. (App. Vol. II at 992).

stranded fixed costs – applies just as well to the non-Acquisition Adjustment portion of the fixed cost as it does to the Acquisition Adjustment.

The Plurality Order’s attempt to mitigate the impact of including the Acquisition Adjustment in rates, after previously stating that the Acquisition Adjustment was “unrelated” to their determination of the reasonable price of the Transaction (App. Vol. II at 941), simply underscores the highly tentative character of the rationale for allowing any acquisition adjustment at all to be included in the Transaction price in the first place.

E. The evidentiary record in this proceeding demonstrates conclusively that FirstEnergy enjoyed an “undue advantage” over its wholly-owned subsidiaries.

Finally, the record in this proceeding is replete with evidence that the sale to Mon Power of AES’s 79% of the power plant in Harrison County, West Virginia, was *not* designed to remedy any shortfall in Mon Power’s electric generation capacity. Rather, the transaction was instead motivated by FirstEnergy’s desperate need to shore up its widely recognized, and highly precarious financial position, all at the expense of its wholly-owned West Virginia subsidiary, Mon Power, whose rate payers had over many decades built up cash reserves in excess of \$1 billion.

The removal of \$1.1 billion cash from the balance sheet of the West Virginia based Mon Power (and limiting Mon Power’s recovery of the cost of the acquisition) weakens Mon Power’s financials and jeopardizes its credit rating – while simultaneously improving the balance sheet of FirstEnergy on a dollar-for-dollar basis.

This totally asymmetric economic result is the product of “undue advantage” by FirstEnergy, whose officers are clearly in a position to dictate the terms of the transaction

between and among its subsidiaries, and have an overriding motivation to do so. Moreover, the evidence, both direct and circumstantial, in the record leaves no doubt that FirstEnergy's financial requirements – not the purported electric generation needs of Mon Power – were the driving forces behind this transaction.

Tellingly, as noted previously, despite multiple and varied requests, all designed to elicit responsive documents, Mon Power produced no documents in discovery – none whatsoever -- evidencing the purported “arms length” negotiations between FirstEnergy's AES or Mon Power subsidiaries which led to this totally unbalanced, \$1.1 billion transaction. And FirstEnergy CEO Anthony Alexander's public pronouncements clearly concede that the Harrison transaction was the centerpiece of the restructuring of FirstEnergy's excessive debt burden at the time in November 2012 when the petition in this case was filed.

The “undue advantage” of FirstEnergy permeated every aspect of the proposed Harrison transaction from beginning to end, and the fatuous charade to the contrary in the October 7, 2013 plurality order should be viewed as an affront to this Court. FirstEnergy Corp., through its wholly-owned, indirect subsidiaries in this proceeding has – to date – successfully focused the great bulk of attention and discussion on what Mon Power was getting out of the transaction, while avoiding any serious discussion of the \$1.1 Billion in cash which FirstEnergy will obtain.

As has been clear from day one of this proceeding, there was one and only one clear need, reinforced repeatedly in this proceeding: the need of FirstEnergy to shore up its highly leveraged balance sheet. That need is fulfilled in its entirety by the October 7, 2013 plurality opinion.

And the fact that it is fulfilled – completely – is the best explanation of why FirstEnergy subsidiary Mon Power so casually agreed to the August 21, 2013 Harrison Stipulation's \$332 million reduction from the \$589 million initially proposed to be included in Mon Power's rate

base. Following immediately on that concession FirstEnergy and its AES, Mon Power and Potomac Edison subsidiaries on October 9, 2013 all signed consents accepting -- within 48 hours of issuance -- the October 7, 2013 Plurality Opinion's conditions applicable to pass through of the remaining \$257 million "acquisition adjustment."

*One might fairly ask where was Mon Power's impressive "arms length" negotiating skill set when West Virginia rate payers needed it?*

FirstEnergy's subsidiary did not object to those conditions for one simple reason. To do so would undo the primary objective of the proceeding: the movement of \$1.1 billion in cash, paid in over decades by West Virginia rate payers, from the balance sheet of Mon Power to the coffers of FirstEnergy. The long term consequences on Mon Power and West Virginia rate payers are nowhere accorded the consideration accorded FirstEnergy's short-term need to improve the optics of its financial statements for a critical financial community.

### **VIII. Conclusion And Request For Relief**

There is no way this Court can enforce the 2010 Merger Stipulation which bars the pass through of "any acquisition premium" and simultaneously allow the transaction -- including the transfer of \$1.1 billion in cash from Mon Power to FirstEnergy subsidiary AES -- to go forward. Nor has a plausible case, supported by substantial evidence, been made for passing through the totally illegal, quarter billion dollar "acquisition adjustment" proposed in this transaction.

WVCAG respectfully requests that this Court grant its Petition for Suspension of the October 7, 2013 Plurality and enter an order vacating the Commission's decision in its entirety.

Respectfully submitted,

**WEST VIRGINIA  
CITIZEN ACTION GROUP**

By Counsel



William V. DePaulo, Esq. #995  
179 Summers Street, Suite 232  
Charleston, WV 25301-2163  
Tel: 304-342-5588  
Fax: 304-342-5505  
[william.depaulo@gmail.com](mailto:william.depaulo@gmail.com)

### IX. Addendum

URLs for string cite in footnote 12.

AL	Golden Heart Utilities, Inc., Case Nos. U-02-13, 14, 15	<a href="http://rca.alaska.gov/RCAWeb/ViewFile.aspx?id=04AAA8EA-AD45-4C00-92E4-A56C72F6940D">http://rca.alaska.gov/RCAWeb/ViewFile.aspx?id=04AAA8EA-AD45-4C00-92E4-A56C72F6940D</a>
CT	Philadelphia Suburban Corp., Case No. 02-11-14	<a href="http://www.dpuc.state.ct.us/FINALDEC.NSF/0d1e102026cb64d98525644800691cfe/e3a09dd467958f0885256d13006108cd?OpenDocument">http://www.dpuc.state.ct.us/FINALDEC.NSF/0d1e102026cb64d98525644800691cfe/e3a09dd467958f0885256d13006108cd?OpenDocument</a>
FL	Florida Administrative Code, Rule 25-30.0371	<a href="https://www.flrules.org/gateway/RuleNo.asp?id=25-30.0371">https://www.flrules.org/gateway/RuleNo.asp?id=25-30.0371</a>
HI	Hawaii Tug and Barge Co., Case No. 98-0231	<a href="http://dms.puc.hawaii.gov/dms/DocumentKeySearch.jsp">http://dms.puc.hawaii.gov/dms/DocumentKeySearch.jsp</a>
IL	35 ILCS 200/10-230	<a href="http://www.ilga.gov/legislation/ilcs/documents/003502000K10-230.htm">http://www.ilga.gov/legislation/ilcs/documents/003502000K10-230.htm</a>
IN	Indiana American Water Co., Case No. 42029	<a href="https://myweb.in.gov/IURC/eds/Modules/Ecms/Cases/Docketed_Cases/ViewDocument.aspx?DocID=0900b6318001e397">https://myweb.in.gov/IURC/eds/Modules/Ecms/Cases/Docketed_Cases/ViewDocument.aspx?DocID=0900b6318001e397</a>
KS	UtiliCorp United, Case No. 99-WPEE-818-RTS	<a href="http://estar.kcc.ks.gov/estar/ViewFile.aspx/20000718162948.pdf?Id=5af40494-2b2f-4ee8-bfd3-2ec165226c85">http://estar.kcc.ks.gov/estar/ViewFile.aspx/20000718162948.pdf?Id=5af40494-2b2f-4ee8-bfd3-2ec165226c85</a>
KY	Delta Natural Gas Company, Case No. 9059	<a href="http://psc.ky.gov/order_vault/orders_1980-1988/orders_1985/19009059_09111985.pdf">http://psc.ky.gov/order_vault/orders_1980-1988/orders_1985/19009059_09111985.pdf</a>
LA	Trans Louisiana Gas Company, Case No. U-19631	<a href="http://lpscstar.louisiana.gov/star/ViewFile.aspx?Id=e8574b8a-1951-4486-b7f3-16232d001707">http://lpscstar.louisiana.gov/star/ViewFile.aspx?Id=e8574b8a-1951-4486-b7f3-16232d001707</a>
MI	Thunder Bay Gathering Company, Case No. U-	<a href="http://efile.mpsc.state.mi.us/efile/docs/14572/0003.pdf">http://efile.mpsc.state.mi.us/efile/docs/14572/0003.pdf</a>

	14672	
MT	NorthWestern Corporation, Case No. D2006.6.82	<a href="http://leg.mt.gov/content/committees/interim/2007_2008/energy_telecom/assigned_studies/publicpowerpage/PSCfinalorder.pdf">http://leg.mt.gov/content/committees/interim/2007_2008/energy_telecom/assigned_studies/publicpowerpage/PSCfinalorder.pdf</a>
NH	NH Stat. 369-B:3-a	<a href="http://www.gencourt.state.nh.us/rsa/html/XXXIV/369-B/369-B-3.htm">http://www.gencourt.state.nh.us/rsa/html/XXXIV/369-B/369-B-3.htm</a>
NY	Kelda Group, Case No. 07-W-0178	<a href="http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=07-W-0178&amp;submit=Search+by+Case+Number">http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=07-W-0178&amp;submit=Search+by+Case+Number</a>
OR	Oregon Admin. Rules 860-036-0716	<a href="http://arcweb.sos.state.or.us/pages/rules/oars_800/oar_860/860_036.html">http://arcweb.sos.state.or.us/pages/rules/oars_800/oar_860/860_036.html</a>
PA	66 Pa.C.S. §1327(a)	<a href="http://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&amp;ttl=66&amp;div=0&amp;chpt=13&amp;sctn=27&amp;subsctn=0">http://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&amp;ttl=66&amp;div=0&amp;chpt=13&amp;sctn=27&amp;subsctn=0</a>
SC	Carolina Power & Light Company, Case No. No. 1999-434-E/C	<a href="http://dms.psc.sc.gov/pdf/orders/DE13FE34-C63C-081D-65F4F1B4945AB003.pdf">http://dms.psc.sc.gov/pdf/orders/DE13FE34-C63C-081D-65F4F1B4945AB003.pdf</a>
TX	TEX UT. CODE ANN. § 53.053	<a href="http://codes.lp.findlaw.com/txstatutes/UT/2/C/53/B/53.053">http://codes.lp.findlaw.com/txstatutes/UT/2/C/53/B/53.053</a>
VT	Central Vermont Public Service Corp, Case No. 7688	<a href="http://psb.vermont.gov/sites/psb/files/orders/2011/7688FinalOrder.pdf">http://psb.vermont.gov/sites/psb/files/orders/2011/7688FinalOrder.pdf</a>
VA	Virginia Gas Pipeline Co., Case No. PUE960093	
WA	American Water	<a href="http://fortress.wa.gov/wutc/home/webdocs.nsf/">http://fortress.wa.gov/wutc/home/webdocs.nsf/</a>

	Resources, Inc., Case No. UW-980072	6529ee64a98531398825650200787e65/ aa8c4a6ac26bb0e888256701007efdc8!OpenDocument
WI	Wisconsin Energy Corporation, Case No. 9401-YO-100	<a href="http://psc.wi.gov/apps40/dockets/content/detail.aspx?dockt_id=9401-YO-100">http://psc.wi.gov/apps40/dockets/content/detail.aspx?dockt_id=9401-YO-100</a>

URLs for string cite in footnote 13

Frontier Communications, 09-0871-T-OC, 09-1600-T-CN May 13, 2010	<a href="http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=296231&amp;NotType='WebDocket'">http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=296231&amp;NotType='WebDocket'</a>
Weston Transfer Inc., 12-0436-MC-42A etc, August 16, 2013	<a href="http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=376553&amp;NotType='WebDocket'">http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=376553&amp;NotType='WebDocket'</a>
Willow Spring Public Service Corporation, 12-0217-S-PC March 8, 2013	<a href="http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=364281&amp;NotType='WebDocket'">http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=364281&amp;NotType='WebDocket'</a>
Mountaineer Village, 07-2072-S-PC March 17, 2008	<a href="http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=235234&amp;NotType='WebDocket'">http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=235234&amp;NotType='WebDocket'</a>
Wallace Van & Storage Corp., 11-0703-MC-TC August 22, 2011	<a href="http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=327684&amp;NotType='WebDocket'">http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=327684&amp;NotType='WebDocket'</a>
Apple Valley Waste Service, 10-1630-MC-TC	<a href="http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=312030&amp;NotType='WebDocket'">http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=312030&amp;NotType='WebDocket'</a>

December 29, 2010	
Suburban Sanitation Co., 10-1757-MC-TC etc July 31, 2011	<a href="http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=324677&amp;NotType='WebDocket'">http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=324677&amp;NotType='WebDocket'</a>
C&J Utilities, LLC, 10-0482-S-PC October 19, 2010	<a href="http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=305916&amp;NotType='WebDocket'">http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=305916&amp;NotType='WebDocket'</a>

URLs for PSC cases cited on pp. 23-24

<i>Columbia Gas of W Va, Inc. and Allegheny and Western Energy Corp</i> , Case No. 83-648-G-SC	<a href="http://www.psc.state.wv.us/Scripts/FullTextOrderSearch/ViewArchiveDocument.cfm?CaseActivityID=19541&amp;Source=Archive">http://www.psc.state.wv.us/Scripts/FullTextOrderSearch/ViewArchiveDocument.cfm?CaseActivityID=19541&amp;Source=Archive</a>
<i>C. R. Coleman</i> , Case No. 85-406-G-PC	<a href="http://www.psc.state.wv.us/Scripts/FullTextOrderSearch/ViewArchiveDocument.cfm?CaseActivityID=25053&amp;Source=Archive">http://www.psc.state.wv.us/Scripts/FullTextOrderSearch/ViewArchiveDocument.cfm?CaseActivityID=25053&amp;Source=Archive</a>
<i>Pennzoil Oil Products Company</i> , Case No. 96-0065-G-PC	<a href="http://www.psc.state.wv.us/Scripts/FullTextOrderSearch/ViewArchiveDocument.cfm?CaseActivityID=72282&amp;Source=Archive">http://www.psc.state.wv.us/Scripts/FullTextOrderSearch/ViewArchiveDocument.cfm?CaseActivityID=72282&amp;Source=Archive</a>
<i>WorldCom, Inc.</i> , Case No. 97-1338-T-PC	<a href="http://www.psc.state.wv.us/Scripts/FullTextOrderSearch/ViewArchiveDocument.cfm?CaseActivityID=81157&amp;Source=Archive">http://www.psc.state.wv.us/Scripts/FullTextOrderSearch/ViewArchiveDocument.cfm?CaseActivityID=81157&amp;Source=Archive</a>
<i>Hope Gas, Inc.</i> , Case No. 99-0462-G-PC	<a href="http://www.psc.state.wv.us/Scripts/FullTextOrderSearch/ViewArchiveDocument.cfm?CaseActivityID=87662&amp;Source=Archive">http://www.psc.state.wv.us/Scripts/FullTextOrderSearch/ViewArchiveDocument.cfm?CaseActivityID=87662&amp;Source=Archive</a>
<i>Devon Energy Production Co.</i> , Case No. 00-0932-G-PC	<a href="http://www.psc.state.wv.us/Scripts/FullTextOrderSearch/ViewArchiveDocument.cfm?CaseActivityID=116921&amp;Source=Archiv">http://www.psc.state.wv.us/Scripts/FullTextOrderSearch/ViewArchiveDocument.cfm?CaseActivityID=116921&amp;Source=Archiv</a>

<i>Virginia Electric Power Co., Case No. 85-553-E-PC</i>	<a href="http://www.psc.state.wv.us/Scripts/FullTextOrderSearch/ViewArchiveDocument.cfm?CaseActivityID=25986&amp;Source=Archive">http://www.psc.state.wv.us/Scripts/FullTextOrderSearch/ViewArchiveDocument.cfm?CaseActivityID=25986&amp;Source=Archive</a>
<i>War Telephone Co., Case No. 98-1001-T-PC</i>	<a href="http://www.psc.state.wv.us/Scripts/FullTextOrderSearch/ViewArchiveDocument.cfm?CaseActivityID=82261&amp;Source=Archive">http://www.psc.state.wv.us/Scripts/FullTextOrderSearch/ViewArchiveDocument.cfm?CaseActivityID=82261&amp;Source=Archive</a>
<i>Citizens Telecommunications-WV, Case No. 00-0628-T-PC</i>	<a href="http://www.psc.state.wv.us/Scripts/FullTextOrderSearch/ViewArchiveDocument.cfm?CaseActivityID=115747&amp;Source=Archive">http://www.psc.state.wv.us/Scripts/FullTextOrderSearch/ViewArchiveDocument.cfm?CaseActivityID=115747&amp;Source=Archive</a>
<i>WV Power Gas Service, Case No. 92-0208-G-PC</i>	<a href="http://www.psc.state.wv.us/Scripts/FullTextOrderSearch/ViewArchiveDocument.cfm?CaseActivityID=55131&amp;Source=Archive">http://www.psc.state.wv.us/Scripts/FullTextOrderSearch/ViewArchiveDocument.cfm?CaseActivityID=55131&amp;Source=Archive</a>

## **X. Certificate Of Service**

I hereby certify that I delivered a copy of this Petition for Suspension and Review, by hand or US mail, postage prepaid, this 6<sup>th</sup> day of November 2012, to the following:

Richard Hitt, Esq.  
General Counsel  
West Virginia Public Service Commission  
201 Brooks Street  
Charleston, WV 25301

Executive Secretary  
West Virginia Public Service Commission  
201 Brooks Street  
Charleston, WV 25301

Christopher L. Callas, Esq.  
JacksonKelly, PLLC  
PO Box 553  
Charleston, WV 25322

Gary A. Jack, Esq.  
Senior Corporate Counsel  
Monongahela Power Company  
5001 NASA Boulevard  
Fairmont, WV 26554



William V. DePaulo, Esq.