

IN THE SUPREME COURT OF PENNSYLVANIA

Citizen Power, Inc.,	:	
	:	
Petitioner,	:	
	:	
v.	:	Case No. _____
	:	
Pennsylvania Public	:	
Utility Commission, et al.,	:	
	:	
Respondents.	:	

**SEPARATE APPENDIX TO
PETITION OF CITIZEN POWER, INC.
FOR ALLOWANCE OF APPEAL**

Petition for Allowance of Appeal from the Order of the Commonwealth Court of Pennsylvania in *ARIPPA, et al. v. Pennsylvania Pub. Utility Comm’n*, Nos. 1462 C.D. 2001, *et al.* (February 21, 2002), affirming in part and reversing and remanding in part the order of the Pennsylvania Public Utility Commission in PUC Docket Nos. A-110300F0095, A-110400F0040, P-00001860, P-00001861 and C-00015085 to C-00015095

Kelly A. Daly (No. 57164)
Harvey L. Reiter
John E. McCaffrey
Morrison & Hecker L.L.P.
1150 18th Street, NW, Suite 800
Washington, DC 20036
(202) 785-9100
(202) 785-9163 (fax)

Dated: March 25, 2002

**Attorneys for Petitioner
Citizen Power, Inc.**

CONTENTS

Pennsylvania Public Utility Commission Opinion and Order adopted May 24, 2001 and entered June 20, 2001, *Joint Application for Approval of the Merger of GPU, Inc. with FirstEnergy Corp.* (including Statement of Commissioner Nora Mead Brownell), Docket

Nos. A110300F0095, A-110400F0040, P-00001860, P-00001861, C-00015085 to C-00015095

Pennsylvania Public Utility Commission Opinion and Order adopted June 14, 2001 and entered June 20, 2001, *Petition of Metropolitan Edison Company and Pennsylvania Electric Company, as Supplemented, For Relief Under Their Approved Restructuring Plan and the Electricity Customer Choice and Competition Act*, Docket Nos. A110300F0095, A-110400F0040, P-00001860, P-00001861

TABLE OF CONTENTS

I. IDENTIFICATION OF THE OPINION PETITIONER REQUESTS THIS COURT TO REVIEW 1

II. THE TEXT OF THE OPINION SOUGHT TO BE REVIEWED..... 2

III. QUESTIONS PRESENTED FOR REVIEW 4

IV. STATEMENT OF THE CASE 5

V. REASONS FOR ALLOWANCE OF CITIZEN POWER’S APPEAL..... 9

A. WHETHER THE MERGER APPLICANTS BEAR THE BURDEN OF PROOF UNDER THE COMPETITION ACT PRESENTS AN IMPORTANT QUESTION OF PUBLIC POLICY THAT HAS NOT PREVIOUSLY BEEN ADDRESSED BY THIS COURT. 9

B. BY FAILING TO CONSIDER THE WHOLE OF THE RECORD, INCLUDING CONTRARY EVIDENCE, BY RELYING ON ASSERTIONS CONTRADICTED BY THE RECORD AND BY RELYING ON IRRELEVANT EVIDENCE OF COMPETITION IN WHOLESALE MARKETS, THE COMMONWEALTH COURT DEPARTED SIGNIFICANTLY FROM THE PROPER APPLICATION OF THE SUBSTANTIAL EVIDENCE TEST. 13

VI. CONCLUSION..... 17

APPENDIX

ARIPPA, et al. v. Pennsylvania Public Utility Commission, Nos. 1462 C.D. 2001 *et al.*, ___ A.2d ___ (Pa. Commw. Ct. 2002) (“February 21 Order”)

Text of pertinent statutory provisions

Pertinent portions of PaPUC and GPU/FirstEnergy

Briefs to Commonwealth Court

Competitive supplier information reported on Office of
Consumer Advocate website

TABLE OF AUTHORITIES

CASES

ARIPPA, et al. v. Pennsylvania Public Utility Commission, Nos. 1462 C.D. 2001 *et al.*,
___ A.2d ___ (Pa. Commw. Ct. 2002) *passim*

Atlixco Coalition v. Maggiore, 965 P.2d 370 (N.M. Ct. App.1998)..... 16

Greene Township v Pennsylvania Pub. Utility Comm’n, 164 Pa. Commw. 88, 642 A.2d
541 (1994)..... 16

Popowsky v. Pennsylvania Pub. Utility Comm’n, 550 Pa. 449, 706 A.2d 1197 (1997)... 11

PP&L Industrial Cust. Alliance v. Pennsylvania Pub. Util. Comm’n, 780 A.2d 773 (Pa.
Commw. Ct. 2001) 6

Redstone Water Co. v. Pennsylvania Pub. Utility Comm’n, No. 531 C.D. 2001, 2001 Pa.
LEXIS 789 (October 30, 2001) 14

Tool Sales & Serv. Co. v. Commonwealth, 536 Pa. 10, 637 A.2d 607 (1993) 11

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 13

York v. Pennsylvania Pub. Utility Comm’n, 449 Pa. 136, 295 A.2d 825 (1972)..... 6

York v. Pennsylvania Public Utility Commission, 281 A.2d 261 (Pa. Cmwlt. 1971),
affirmed, 449 Pa. 136, 295 A.2d 825 (1972) 2

STATUTES

2 Pa. Cons. Stat. § 704 4

42 Pa. Cons. Stat. § 724 1

66 Pa. Cons. Stat. § 332 4, 6, 11

66 Pa. Cons. Stat. § 1102 5

66 Pa. Cons. Stat. § 1103 2, 12

66 Pa. Cons. Stat. § 2811 *passim*

OTHER AUTHORITIES

Ohio Edison Co., 94 FERC ¶ 61,291 (2001) 15

RULES

Pa. R.A.P. 1112.....	1, 7
Pa. R.A.P. 1115.....	1

I. IDENTIFICATION OF THE OPINION PETITIONER REQUESTS THIS COURT TO REVIEW

In accordance with 42 Pa. Cons. Stat. § 724(a) and Pa. R.A.P. 1112 and 1115, Citizen Power, Inc. (“Citizen Power”) hereby petitions the Court for allowance of an appeal of the February 21, 2002 Opinion and Order issued by the Commonwealth Court of Pennsylvania in *ARIPPA, et al. v. Pennsylvania Public Utility Commission*, Nos. 1462 C.D. 2001 *et al.*, ___ A.2d ___ (Pa. Commw. Ct. 2002) (“February 21 Order”).

By related orders issued on May 24, 2001 and June 20, 2001, respectively, the Pennsylvania Public Utility Commission (“Commission” or “PUC”) approved (1) an application by GPU, Inc. and its Pennsylvania electric utility operating subsidiaries, Metropolitan Edison Company (“Met-Ed”) and Pennsylvania Electric Company (“Penelec”) (collectively, “GPU”) to merge into FirstEnergy Corp. (“FirstEnergy”),¹ a competing electric utility and (2) a contested settlement accepting a deferral accounting mechanism as a means for GPU to recover increased costs above an electricity rate cap to which it had previously agreed.² In the February 21 Order, the Commonwealth Court rejected the settlement deferral mechanism that Citizen Power had challenged on appeal, but affirmed the PUC’s decision to approve the FirstEnergy/GPU merger. Pursuant to 42 Pa. Cons. Stat. § 724(a), Citizen Power hereby files its Petition for Allowance of Appeal from the portion of the Commonwealth Court’s February 21 Order affirming the

¹ FirstEnergy and GPU are referred to herein as the “Applicants.”

² In accordance with Pa. R.A.P. 1115, copies of the underlying PUC orders are being filed with this Petition. *See* Separate Appendix to Petition of Citizen Power, Inc. for Allowance of Appeal.

Commission's approval of a merger that would create one of the largest utilities in the United States.³

II. THE TEXT OF THE OPINION SOUGHT TO BE REVIEWED

The Commonwealth Court's decision is lengthy and is appended to this Petition. The portion of the opinion that Citizen Power seeks to have reviewed, however, is brief. It reads in its entirety as follows:

III. A. MERGER APPEAL

Clean Air and Citizen contend that the Commission erred by approving the merger and granting the certificate of public convenience to the merged companies. The standard for approving a merger and granting a certificate of public convenience is found under Section 1103(a) of the Code, 66 Pa. C.S. §1103(a), which provides in relevant part:

A certificate of public convenience shall be granted by order of the commission, only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation convenience, or safety of the public. The commission, in granting such certificate, may impose such conditions as it may deem to be just and reasonable.

In *York v. Pennsylvania Public Utility Commission*, 281 A.2d 261 (Pa. Cmwlth. 1971), *affirmed*, 449 Pa. 136, 295 A.2d 825 (1972), a case involving the merger of three telephone companies that the Commission approved and we affirmed, we held that a certificate of public convenience approving a merger of public utilities was not to be granted unless the Commission was able to determine by substantial evidence that public benefit would result from the merger. We specified that those seeking the merger were required to demonstrate more than the mere absence of any adverse effect upon the public, i.e., that the merger would promote the service,

³ Citizen Power was, along with Clean Air Council, the Petitioner in Commonwealth Court Case No. 1674 C.D. 2001, which was consolidated with several other appeals challenging the same Commission orders and decided by the Commonwealth Court in the February 21 Order.

accommodation, convenience or safety of the public in some substantial way.

In addition, 66 Pa. C.S. §2811(e)(1) requires the Commission to consider whether a proposed merger is “likely to result in anti-competitive or discriminatory conduct, including the unlawful exercise of market power, which will prevent retail electricity customers in this Commonwealth from obtaining the benefits of a properly functioning and workable competitive retail electricity market.” Subsection (2) of that same section precludes the Commission from approving a merger “except upon such terms and conditions as it finds necessary to preserve the benefits of a properly functioning and workable competitive retail electricity market.” 66 Pa. C.S. § 2811(e)(2). [Footnote omitted]

* * *

4. COMPETITION

Finally, Clean Air and Citizen argue that the Commission erred by approving the merger because FirstEnergy and GPU Energy failed to show that the merger would not adversely affect competition in retail markets. They contend that GPU Energy and First Energy’s witness, Rodney M. Frame, only testified regarding the effect of the merger on competition in the wholesale markets supplying electricity in Pennsylvania, but 66 Pa. C.S. §2811(e)(1) requires that the merger not adversely affect the retail electricity market. In addition, Clean Air and Citizen point out that FirstEnergy and GPU Energy have subsidiaries that compete with one another to supply electricity to retail customers in Pennsylvania, and, at the very least, the merger would eliminate competition between the retail supply subsidiaries of the two merging companies.

GPU Energy and FirstEnergy provided testimony that the proposed merger would not prevent retail customers from obtaining the benefits of a properly functioning and workable competitive retail electricity market because it would result in the loss of only one retail market participant among a field of over 50 electricity retailers licensed by the Commission. Relying on that evidence, the Commission did not find that any evidence was presented to indicate an adverse impact on either the wholesale or retail markets resulting from the merger. It found that there was no evidence regarding a negative impact on the retail markets because GPU Energy is not in the retail market now, and competition would come from other electric retailers without any adverse effect. Moreover, the FERC had found that the merger would not have any anti-competitive effects. *See* FERC Order Authorizing Merger,

FERC Docket No. EC01-22-000, Order (Issued March 15, 2001).
Because there is no evidence that retail competition will suffer, the
Commission did not err in approving the merger, and the
Commission's May 24, 2001 order approving the merger is
affirmed.

February 21 Order, slip op. at 30-31, 36-37.

III. QUESTIONS PRESENTED FOR REVIEW

1. Whether, in affirming the PUC's approval of the GPU/FirstEnergy merger, in part on the basis that "there is no evidence that retail competition will suffer," the Commonwealth Court contravened 66 Pa. Cons. Stat. § 332(a), which places the burden of proof on the "proponent of a rule or order," in this case on the Applicants seeking an order approving their merger application.

2. Whether the Commonwealth Court misapplied the substantial evidence test under 2 Pa. Cons. Stat. § 704, which requires that the reviewing court examine the record as a whole, including anything that might fairly detract from the evidence relied upon by the agency, by:

(i) relying on the Applicants' direct testimony that the merger would not harm competition because it would result in the loss of only one of fifty licensed retail suppliers in Pennsylvania, but failing to examine core admissions on cross-examination that Applicants' witness had no basis for such a conclusion because he neither determined if any of the licensed suppliers were selling retail power in the areas served by GPU or FirstEnergy nor even conducted a study of competition in retail markets;

(ii) relying on its own assertion that GPU Energy is "not in the retail market now" that is without record support; and

(iii) relying on the Federal Energy Regulatory Commission’s (“FERC”) approval of the merger, notwithstanding the fact that FERC did not examine the effect of the merger on Pennsylvania retail markets.

IV. STATEMENT OF THE CASE

On November 9, 2000, GPU and FirstEnergy filed a Joint Application with the Commission seeking approval of the proposed merger of GPU with FirstEnergy. The Commission’s approval was required, as the Commonwealth Court noted, under both 66 Pa. Cons. Stat. § 1102(a)(3)⁴ and 66 Pa. Cons. Stat. § 2811(e)(1).⁵ See February 21

⁴ Section 1102(a)(3) provides:

(a) Upon the application of any public utility and the approval of such application by the commission, evidenced by its certificate of public convenience first had and obtained, and upon compliance with existing laws, it shall be lawful:

* * *

(3) For any public utility or an affiliated interest of a public utility as defined in section 2101 (relating to definition of affiliated interest), except a common carrier by railroad subject to the Interstate Commerce Act, to acquire from, or to transfer to, any person or corporation, including a municipal corporation, by any method or device whatsoever, including the sale or transfer of stock and including a consolidation, merger, sale or lease, the title to, or the possession or use of, any tangible or intangible property used or useful in the public service.

⁵ 66 Pa. Cons. Stat. § 2811(e)(1) provides:

In the exercise of authority the commission otherwise may have to approve the mergers or consolidations by electric utilities or electricity suppliers, or the acquisition or disposition of assets or securities of other public utilities or electricity suppliers, the commission shall consider whether the proposed merger, consolidation, acquisition or disposition is likely to result in anticompetitive or discriminatory conduct, including the unlawful exercise of market power, which will prevent retail electricity customers in this Commonwealth from obtaining the benefits of a properly functioning and workable competitive retail electricity market.

Order, slip op. at 12-13. The former provision obligates merger applicants to obtain a certificate of public convenience and necessity. *Id.* at 13. Consistent with 66 Pa. Cons. Stat. § 332(a), which places the burden of proof on the “proponent of a rule or order,” GPU and FirstEnergy “had to prove and the Commission had to find that the granting of the certificate was necessary or proper for the service, accommodation, convenience or safety of the public.” February 21 Order, slip op. at 13. To make that showing, this Court has held, merger applicants must demonstrate that the merger benefits the public in some substantial way. *York v. Pennsylvania Pub. Utility Comm’n*, 449 Pa. 136, 295 A.2d 825 (1972) (“*York*”).

As the Applicants acknowledged, the second governing provision, 66 Pa. Cons. Stat. § 2811 (part of the Competition Act) “expanded the Commission’s duties with respect to utility mergers beyond Section 1102 of the Code.” *ARIPPA, et al. v. Pennsylvania Pub. Utility Comm’n*, Nos. 1462 C.D. 2001 *et al.*, Definitive Brief for Intervenors Metropolitan Edison Company, Pennsylvania Electric Company, GPU, Inc. and FirstEnergy Corp. at 68 (October 31, 2001) (included in the Appendix hereto). It added a requirement giving primacy to the potential anticompetitive effects of mergers because the legislature recognized that nurturing competition was crucial to protect electricity customers when prices are deregulated.⁶ *See, e.g.*, February 21 Order, slip op. at 5, 30-31. Section 2811(e)(1) “requires the Commission to consider whether a proposed merger ‘is likely to result in anti-competitive or discriminatory conduct,

⁶ The Electricity Generation Customer Choice and Competition Act (“Competition Act”) was passed in December 1996 to establish competition in the sale of electric power in Pennsylvania, a service that had previously been “bundled” with the transmission and distribution of electricity and provided by one local utility with a monopoly in its service area. *See* February 21 Order, slip op. at 5 (citing *PP&L Industrial Cust. Alliance v. Pennsylvania Pub. Util. Comm’n*, 780 A.2d 773 (Pa. Commw. Ct. 2001)).

including the unlawful exercise of market power, which will prevent retail electricity customers in this Commonwealth from obtaining the benefits of a properly functioning and workable competitive retail electricity market.” February 21 Order, slip op. at 31 (quoting 66 Pa. Cons. Stat. § 2811(e)(1)). Indeed, even if a merger were to meet the substantial benefit test of Section 1102(a)(3) under *York*, subsection (2) of Section 2811(e) “precludes the Commission from approving a merger ‘except upon such terms and conditions as it finds necessary to preserve the benefits of a properly functioning and workable competitive retail electricity market.’” *Id.* (quoting 66 Pa. Cons. Stat. § 2811(e)(2)) (emphasis added).

Against this statutory backdrop, the Commission set the merger application for hearing before an administrative law judge. The Applicants presented the testimony of Mr. Rodney Frame that the merger would eliminate competition between the retail subsidiaries of the two merging companies. R. 545a; R. 1074.⁷ But he concluded (as the Commonwealth Court also recounted), that “there are more than 50 electricity retailers that now have been licensed by the Commission. The loss of one independent supplier does not seem particularly important when so many others remain.” R. 545a. *See also* February 21 Order, slip op. at 37.

On cross-examination, Mr. Frame acknowledged that only half of the fifty retail suppliers he referenced were licensed to serve GPU customers, (R. 1103a-1104a), and that he did not know how many, *if any*, of them were selling retail power in those markets. R. 1103a; R. 1104a. Mr. Frame further acknowledged that he did not even

⁷ Citations to “R. ____” refer to the Reproduced Record filed in the Commonwealth Court, a copy of which Citizen Power is lodging in this Court pursuant to Pa. R.A.P. 1112(d).

attempt to define the relevant retail markets, (R. 1106a), and thus did not conduct any study of the merger's impact on them. In its own brief to the Commonwealth Court, the Commission observed that in GPU's territory there are "few or no opportunities to purchase competitive generation supply."⁸ *ARIPPA, et al. v. Pennsylvania Pub. Utility Comm'n*, Nos. 1462 C.D. 2001 *et al.*, Pennsylvania Public Utility Commission's Brief on the Merits at 26 (October 31, 2001) (included in the Appendix hereto).

Citizen Power argued to the administrative law judge, and then to the Commission, that the resulting testimony, taken as a whole, failed to satisfy the Applicants' burden to demonstrate with substantial evidence that the merger would not harm retail competition. *See* R. 1500a-1501a; R. 1567a-1572a. The Commission dismissed Citizen Power's objections in a two sentence passage of its May 24, 2001

Order:

We conclude that the merger does not foster anti-competitive conduct and does not allow for discrimination against PPL, New Power, or any other Pennsylvania EGS. We, therefore, adopt the ALJ's recommendation because we are persuaded that the record demonstrates that the merger is not likely to result in anti-competitive or discriminatory conduct, or in the unlawful exercise of market power.

May 24 Order at 74 (included in Separate Appendix); R. 1870a.

⁸ The Pennsylvania Office of Consumer Advocate ("OCA") reports information confirming this observation on its official website. It reports that in territories served by Met-Ed and Penelec there are only two competing suppliers offering retail electric service to new customers. The situation in the area served by FirstEnergy's Pennsylvania subsidiary Pennsylvania Power Company ("Penn Power") is little different. There are only three suppliers in Penn Power's territory. None of these suppliers, moreover, is offering a price as low as the incumbent GPU and FirstEnergy utilities. This information is available at <http://www.oca.state.pa.us/elecomp/metted.pdf> (Met-Ed), <http://www.oca.state.pa.us/elecomp/pen.pdf> (Penelec), and <http://www.oca.state.pa.us/elecomp/pp.pdf> (Penn Power), and copies are appended to this Petition.

On appeal to the Commonwealth Court, Citizen Power raised the same concerns cited above. As noted earlier, the Court rejected Citizen Power’s appeal, ascribing to the above-quoted passage of the May 24 Order that (1) the Commission was relying on Mr. Frame’s evidence of fifty licensed suppliers (slip op. at 37); (2) with such reliance, the Commission did not find evidence to indicate an adverse impact on retail markets resulting from the merger, *id.*; and (3) a finding that the FERC’s approval of the merger under federal law was relevant to the PUC’s approval under Pennsylvania law. *Id.* The Court also asserted that “GPU Energy is not in the retail market now.” *Id.* The instant Petition for Allowance of Appeal followed.

V. REASONS FOR ALLOWANCE OF CITIZEN POWER’S APPEAL

A. Whether The Merger Applicants Bear The Burden Of Proof Under The Competition Act Presents An Important Question Of Public Policy That Has Not Previously Been Addressed By This Court.

In its February 21 Order, the Commonwealth Court observed that “to encourage a competitive wholesale electric market and to provide cost savings to consumers, in December 1996, the Competition Act was enacted to establish competition in the sale of electric power.” February 21 Order, slip op. at 5. Ensuring that mergers would not damage nascent competition in retail electricity markets was an integral part of the Act: subsection (2) of 66 Pa. Cons. Stat. § 2811(e) “*precludes* the Commission from approving a merger ‘except upon such terms and conditions as it finds necessary to preserve the benefits of a properly functioning and workable competitive retail electricity market.’” February 21 Order, slip op. at 12 (quoting 66 Pa. Cons. Stat. § 2811(e)(2)) (emphasis added).

Although the Commonwealth Court properly recognized that under 66 Pa. Cons. Stat. § 1103(a), GPU and FirstEnergy had the burden “to prove and the Commission had

to find that the granting of the certificate was necessary or proper for the service, accommodation, convenience or safety of the public,” (slip op. at 13), the order implies, but does not expressly state, that opponents of a merger have the burden of proof under the Competition Act to show the merger is likely to harm competition in retail markets. In this regard, the relevant part of the Opinion observes that Applicants provided testimony that the merger would not be anticompetitive because it would result in the loss of only one supplier among a purported fifty licensed suppliers (a finding which, as discussed in Section B, is unsustainable). The Court also noted that “the Commission did not find that any evidence was presented to indicate an adverse impact on either the wholesale or retail markets resulting from the merger.” February 21 Order, slip op. at 37. The Opinion concludes that “[b]ecause there is no evidence that retail competition will suffer, the Commission did not err in approving the merger,” implying, if not expressly holding, that opponents bore the burden of proof under the Competition Act to show adverse impact resulting from the merger. *Id.* It is an unsustainable construction of the Competition Act to suggest that opponents of a merger have the burden to prove competitive harm rather than that proponents have the burden to prove through substantial evidence that a merger is unlikely to be anticompetitive.

Whether merger applicants bear the burden under § 2811(e) of the Competition Act of proving that their merger is not likely to harm retail competition is a matter of first impression for this Court and a matter of great practical importance. On its face, the Competition Act evinces a deep legislative concern about the protection of the vigorous retail competition necessary to restrain prices once they have been deregulated. Requiring opponents of future electric mergers to bear the burden of proof – and there are

sure to be future merger applications that the Commission will adjudicate – turns the statutory scheme on its head, by placing the onus on those with the least information about the merger’s impact (and those with the fewest resources)⁹ and is likely to make mergers easier to obtain, rather than subjecting them to the heightened scrutiny the Competition Act plainly contemplates.

It bears emphasis that this is not a case in which the Court has been asked to give deference to an agency’s interpretation of a statute it administers. *See Tool Sales & Serv. Co. v. Commonwealth*, 536 Pa. 10, 22, 637 A.2d 607, 613 (1993) and *Popowsky v. Pennsylvania Pub. Utility Comm’n*, 550 Pa. 449, 706 A.2d 1197 (1997). Neither the Commission nor any party disputed Citizen Power’s assertions that Applicants bore the burden of proof.¹⁰ Rather, the Commonwealth Court’s holding reflected its interpretation, not deference to the agency’s construction of the Competition Act.

The fact that Applicants never questioned their burden follows logically from the statutory scheme. Except as otherwise provided by statute, 66 Pa. Cons. Stat. § 332(a) establishes that “the proponent of a rule or order [in this case GPU and FirstEnergy] has the burden of proof.” Consistent with this provision, the Commonwealth Court found that “that those seeking the merger were required to demonstrate more than the mere absence of any adverse effect upon the public, i.e., that the merger would promote the service, accommodation, convenience or safety of the public in some substantial way”

⁹ *See, e.g., Philadelphia Elec. Co. v. Pennsylvania Pub. Utility Comm’n*, 122 Pa. Commw. 421, 437, 552 A.2d 342 (1989) (burden properly placed on utility in exclusive possession of relevant data).

¹⁰ *See ARIPPA, et al. v. Pennsylvania Public Utility Commission*, Nos. 1462 C.D. 2001 *et al.*, Definitive Main Brief of the Joint Petitioners Clean Air Council and Citizen Power, Inc. at 44 (November 2, 2001); Reply Brief (Definitive Form) of the Joint Petitioners Clean Air Council and Citizen Power, Inc. at 3 (October 31, 2001).

under 66 Pa. Cons. Stat. § 1103. February 21 Order, slip op. at 30-31. The Competition Act, 66 Pa. Cons. Stat. § 2811(e)(1), requires that “[i]n the exercise of the authority the commission otherwise may have to approve the mergers or consolidations by electric utilities or electricity suppliers . . . the commission shall consider whether the proposed merger . . . will prevent retail electricity customers in this Commonwealth from obtaining the benefits of a properly functioning and workable competitive retail electricity market.” (Emphasis added).

The Commission’s “*exercise of the authority the commission otherwise may have to approve the mergers or consolidations by electric utilities or electricity suppliers*” – 66 Pa. Cons. Stat. § 1103 – already places the burden of proof on the Applicants. It simply made no sense for the Court to suggest, with respect to the Commission’s exercise of that authority over the *same* merger, that opponents have the burden to demonstrate it would harm retail competition rather than requiring Applicants to show that the merger is unlikely to harm competition. *See* February 21 Order, slip op. at 37. Indeed, this conclusion is inconsistent with the Commonwealth Court’s own observation that the Competition Act “*precludes* the Commission from approving a merger ‘except on such terms and conditions as it finds necessary to preserve the benefits of a properly functioning an workable competitive retail electricity market.’” February 21 Order, slip op. at 31. For example, if no party opposes the merger, the only way the Commission can make the required finding as to competitive impact is if the *applicants* have presented evidence demonstrating the absence of competitive harm.

B. By Failing To Consider The Whole Of The Record, Including Contrary Evidence, By Relying On Assertions Contradicted By The Record And By Relying On Irrelevant Evidence Of Competition In Wholesale Markets, The Commonwealth Court Departed Significantly From The Proper Application Of The Substantial Evidence Test.

As noted earlier, Section 2811 of the Competition Act requires the Commission to find that mergers will not harm competition in retail markets. The Commonwealth Court’s opinion recounts GPU and FirstEnergy “testimony that the proposed merger would not prevent retail customers from obtaining the benefits of a properly functioning and workable competitive retail market because it would result in the loss of only one retail market participant among a field of over 50 electricity retailers licensed by the Commission.” February 21 Order, slip op. at 37. “Relying on *that* evidence,” the Commonwealth Court explains, “the Commission did not find that any evidence was presented to indicate an adverse impact on either the wholesale or retail markets resulting from the merger.” *Id.* (emphasis added). According to the Commonwealth Court, the Commission also “found that there was no evidence regarding a negative impact on the retail markets because GPU Energy is not in the retail market now.” *Id.*

Even assuming that the Commission had made all of the findings the Court ascribed to it, the Court misapplied the substantial evidence test by failing to consider the record as a whole. In interpreting a substantial evidence test similar to that applicable here, the Supreme Court has held that “[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951).

The Applicants’ threadbare assertion about the existence of fifty licensed suppliers does not constitute substantial evidence sufficient to support a conclusion under

66 Pa. Cons. Stat. § 2811(e)(1) that that the merger is not likely to harm retail competition. The fact that fifty companies received licenses says nothing about the actual extent of retail competition. As noted in the Statement of the Case, Applicants' retail competition witness never analyzed the relevant retail markets, nor did he know how many, *if any*, of the retail suppliers with licenses were actually in the business of selling electricity in the markets where GPU operated. *Cf. Redstone Water Co. v. Pennsylvania Pub. Utility Comm'n*, No. 531 C.D. 2001, 2001 Pa. LEXIS 789 (October 30, 2001) (finding that PUC's decision that water company failed to provide service at adequate pressure was not based on substantial evidence where evidence was based on "supposition rather than actual evidence" and "a best guess based on a mathematical formula").¹¹ In its own brief to the Commonwealth Court, the Commission observed that in GPU's territory there "are few or no opportunities to purchase competitive generation supply." *ARIPPA, et al. v. Pennsylvania Pub. Utility Comm'n*, Nos. 1462 C.D. 2001 *et al.*, Pennsylvania Public Utility Commission's Brief on the Merits at 26 (October 31, 2001) (included in the Appendix hereto).

Nor is there any support for the finding the Commonwealth Court attributes (erroneously) to the Commission that "GPU Energy is not in the retail market now." February 21 Order, slip op. at 37. Not only did the Commission never make an express finding that GPU "is not in the retail market now," no party even advanced such a claim.

¹¹ Essentially conceding this fatal flaw in Mr. Frame's testimony, the Applicants pointed below to Mr. Frame's assertion that a retail market could still be competitive with a small number of suppliers *if* it were easy for new competitors to enter the market. *ARIPPA, et al. v. Pennsylvania Pub. Utility Comm'n*, Nos. 1462 C.D. 2001 *et al.*, Definitive Brief for Intervenors Metropolitan Edison Company, Pennsylvania Electric Company, GPU, Inc. and FirstEnergy Corp. at 69 (October 31, 2001) (included in the Appendix hereto). The Applicants witness, however, never produced evidence that entry *is* easy in Pennsylvania retail markets or in the electric industry generally.

As the record shows, and as Mr. Frame acknowledged, GPU *was* in the retail market through its subsidiary GPU Advanced Resources.¹² *See* R. 1074a. Indeed, Mr. Frame specifically acknowledged that the merger would result in the loss of competition between the retail supplier subsidiaries of GPU and FirstEnergy. R. 545a. No party contended, nor could they have, that GPU was not in the retail market, and the Commission made no such finding. Obviously, such a non-finding cannot serve as substantial evidence in support of the PUC’s conclusion under 66 Pa. Cons. Stat. § 2811(e).

Finally, the Commonwealth Court also states that “the FERC had found that the merger would not have any anti-competitive effects.” February 21 Order, slip op. at 37. But FERC’s approval of the merger constitutes no evidence, let alone substantial evidence, about *retail* competition because FERC limited its review of the GPU/FirstEnergy merger to its effect on *wholesale* markets.¹³ Indeed, the very FERC order cited by the Commonwealth Court takes pains to observe that FERC was *not* deciding retail issues. *Ohio Edison Company, et al.*, 94 FERC ¶ 61,291 at 62,047 (2001); R. 471a. Thus, FERC’s order cannot support the finding required under the Competition Act that the merger would not “prevent *retail* electricity customers in this

¹² The Commonwealth Court defined “GPU Energy” to include the parent company, GPU, Inc., as well as the operating subsidiaries Met-Ed and Penelec. February 21 Order, slip op. at 2.

¹³ As Mr. Frame acknowledged, even assuming competitive wholesale markets, competitive concerns can be raised if a few sellers with market power can control retail markets. *See* R. 545a; R. 1102a. If a few suppliers can exert market power over prices, they can capture the benefits of competitive wholesale rates as lower costs, while charging prices above competitive levels at retail. Mr. Frame explained that, even assuming the existence of competitive wholesale markets, a merger could still have an adverse effect on retail prices. R. 545a; R. 1109a. Thus, to meet the statutory standard, retail markets must be studied to evaluate the merger’s effect on competition.

Commonwealth from obtaining the benefits of a properly functioning and workable competitive *retail electricity market*.” 66 Pa. Cons. Stat. § 2811(e)(2) (emphasis added).

In failing to consider evidence that ran counter to the PUC’s findings (or to analyze whether the agency had reviewed the record as a whole), the Commonwealth Court did not fulfill its self-described obligation under the substantial evidence test to determine “whether proper weight was given to the evidence.” *Greene Township v Pennsylvania Pub. Utility Comm’n*, 164 Pa. Commw. 88, 642 A.2d 541 (1994). As New Mexico’s highest court has observed, an administrative agency “*may not disregard those facts or issues that prove difficult or inconvenient or refuse to come to grips with the result to which those facts or issues lead*, nor may [it] select and discuss only that evidence which favors [its] ultimate conclusion or fail to consider an entire line of evidence to the contrary.” *Atlixco Coalition v. Maggiore*, 965 P.2d 370, 377 (N.M. Ct. App. 1998) (emphasis added). Here, the Commonwealth Court simply failed to address Citizen Power’s contention that the Commission had, in fact, disregarded evidence that contradicted its own findings.

VI. CONCLUSION

Citizen Power respectfully submits that the Court should grant the instant Petition for Allowance of Appeal, as there are special and important reasons to do so. The merger of GPU and FirstEnergy creates one of the largest utilities in the United States and has potentially profound ramifications for nascent electric competition in Pennsylvania. In this regard, the question of whether merger applicants bear the burden under 66 Pa. Cons. Stat. § 2811(e) of the Competition Act of proving that a merger is not likely to harm retail competition is a matter of first impression for this Court and a matter of great practical importance. Similarly, the Court should intervene to remedy the Commonwealth Court's sanctioning of the PUC's misapplication of the substantial evidence standard which, Citizen Power submits, resulted in approval of merger that was not shown to be competitively benign.

Respectfully submitted,

CITIZEN POWER, INC.

Kelly A. Daly (Reg. No. 57164)
Harvey L. Reiter
John E. McCaffrey
Morrison & Hecker L.L.P.
1150 18th Street, NW, Suite 800
Washington, DC 20036
(202) 785-9100
(202) 785-9163 (fax)

IN THE SUPREME COURT OF PENNSYLVANIA

Citizen Power, Inc.,	:	
	:	
Petitioner,	:	
	:	
v.	:	Case No. _____
	:	
Pennsylvania Public	:	
Utility Commission, et al.,	:	
	:	
Respondents.	:	

**PETITION OF CITIZEN POWER, INC.
FOR ALLOWANCE OF APPEAL**

Petition for Allowance of Appeal from the Order of the Commonwealth Court of Pennsylvania in *ARIPPA, et al. v. Pennsylvania Pub. Utility Comm'n*, Nos. 1462 C.D. 2001, *et al.* (February 21, 2002), affirming in part and reversing and remanding in part the order of the Pennsylvania Public Utility Commission in PUC Docket Nos. A-110300F0095, A-110400F0040, P-00001860, P-00001861 and C-00015085 to C-00015095

Kelly A. Daly (No. 57164)
Harvey L. Reiter
John E. McCaffrey
Morrison & Hecker L.L.P.
1150 18th Street, NW, Suite 800
Washington, DC 20036
(202) 785-9100
(202) 785-9163 (fax)

Dated: March 25, 2002

Attorneys for Petitioner
Citizen Power, Inc.

