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August 28, 2009

Secretary James J. McNulty
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company for Consolidation of Proceedings and Approval of Energy Efficiency and Conservation Plans - Docket Nos. M-2009-2092222, M-2009-2112952 and M-2009-2112956

Dear Secretary McNulty:

Enclosed for filing on behalf of Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company, is an original of the Motion to Strike Testimony in the above-referenced matter. This Motion has been e-filed at the Pennsylvania Public Utility Commission's website. Copies have been served in accordance with the attached Certificate of Service.

If you have any questions, please feel free to contact me.

Very truly yours,

STEVENS & LEE



Renardo L. Hicks, Esquire

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A PROFESSIONAL CORPORATION

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Joint Petition of Metropolitan Edison	:	
Company, Pennsylvania Electric Company	:	
and Pennsylvania Power Company for	:	Docket Nos. M-2009-2092222, M-
Consolidation of Proceedings and Approval	:	2009-2112952 and M-2009-2112956
of Energy Efficiency and Conservation	:	
Plans	:	

**METROPOLITAN EDISON COMPANY, PENNSYLVANIA ELECTRIC COMPANY,
AND PENNSYLVANIA POWER COMPANY’S MOTION TO STRIKE PORTIONS OF
TESTIMONY FILED ON BEHALF OF UGI UTILITIES, INC., UGI PENN NATURAL
GAS, INC., UGI CENTRAL PENN GAS, INC., THE PEOPLES NATURAL GAS
COMPANY D/B/A DOMINION PEOPLES, NATIONAL FUEL GAS DISTRIBUTION
CORPORATION, AND COLUMBIA GAS OF PENNSYLVANIA, INC.**

Pursuant to 52 Pa. Code §§5.103 and 5.401, Metropolitan Edison Company (“Met-Ed”), Pennsylvania Electric Company (“Penelec”) and Pennsylvania Power Company (“Penn Power”) (collectively referred to as the “FirstEnergy Companies”), by and through their counsel in the above-captioned matter, hereby move for an order striking certain portions of the Direct Testimony filed on behalf of UGI Utilities, Inc.- Gas Division, UGI Penn Natural Gas, Inc., UGI Central Penn Gas, Inc, The Peoples Natural Gas Company D/B/A Dominion Peoples, National Fuel Gas Distribution Corporation, and Columbia Gas Of Pennsylvania, Inc. (collectively referred to as “the NGDCs”). As will be further described below, portions of the NGDCs Direct Testimony attempt to address the issue of “fuel substitution” even though the Commission and the ALJ have repeatedly determined that this issue is outside the scope of this proceeding. Therefore such portions of the Direct Testimony are inadmissible, and should be stricken from this proceeding. In support of this Motion, the FirstEnergy Companies aver as follows:

I. BACKGROUND

1. On October 15, 2008, Governor Rendell signed House Bill 2200 into law as Act 129 of 2008 (“Act 129”). Act 129 became effective on November 14, 2008, and imposed new requirements on Pennsylvania’s EDCs in the areas of energy efficiency and conservation, smart meters, electricity procurement and alternative energy sources.

2. Among other things, Act 129 created a requirement for the design and implementation of Energy Efficiency and Conservation Programs. 66 Pa. C.S. §§ 2806.1 and 2806.2. Act 129 requires an EDC with at least 100,000 customers to adopt and implement a plan, approved by the Commission, to reduce energy demand and consumption within its service territory. Pursuant to Act 129, the EDC plan must be designed to allow the EDC to achieve the following specific reductions in energy consumption and peak demand:

- Reduce electric consumption by at least 1% by May 31, 2011, 66 Pa. C.S. §2806.1(c)(1);
- Reduce electric consumption by at least 3% by May 31, 2013, 66 Pa. C.S. §2806.1(c)(2); and
- Reduce demand by a minimum of 4.5% of the EDC’s annual system peak demand for the 100 hours of highest demand by May 31, 2013, 66 Pa. C.S. §2806.1(d)(1).

3. Following the passage of Act 129, the Commission conducted an extensive process to implement the new law. On January 15, 2009, the Commission adopted an Implementation Order establishing standards for the EE&C Plans. The Implementation Order provided details and specific directives and guidance on Act 129 and the procedures for submitting, reviewing and approving the EDC EE&C plans.

4. On May 7, 2009, the Commission issued a Secretarial Letter which was developed in accordance with the Commission's Implementation Order, and provided an EE&C Plan template to be used by each EDC in preparing and filing their respective EE&C Plans with the Commission.¹ The template provided a standardized format for an EDC to present and file all the information required by Act 129 and the Commission's Implementation Order relating to an EDC's EE&C Plan.

5. On May 28, 2009 the Commission adopted standards for an updated Technical Reference Manual to guide the evaluation of savings impacts. (Docket No. M-00051865, Order entered June 1, 2009) ("TRM Order").

6. Further, on June 23, 2009 the Commission issued its final Order setting forth the nature of the Total Resource Cost ("TRC") test to be used to analyze the costs and benefits of the EE&C plans that EDCs are required to file. (Docket No. M-2009-2108601, Order entered June 23, 2009) ("TRC Order").

7. On July 1, 2009, the FirstEnergy Companies submitted their EE&C Plans pursuant to Act 129 and the Commission's Implementation Order, along with a Joint Petition for Consolidation of Proceedings and Approval of such plans.² The FirstEnergy Companies selected by competitive bid and entered into a contract with Black & Veatch Corporation ("Black & Veatch"), a Conservation Service Provider ("CSP") listed on the Commission's Registry of Approved CSPs³ to assist the Companies with the development of their EE&C plans.

¹ The Commission also issued Secretarial Letters and Orders seeking input from interested parties on other issues including: procedures for registering and approving conservation service providers and contracts; consumption forecasts and peak demand reduction targets; modification of the existing Technical Reference Manual for use in evaluating energy efficiency and conservation plans; and modification of the California Total Resource Cost test for ranking and prioritizing EE&C programs under Pennsylvania-specific criteria.

² See, Metropolitan Edison Company (Met-Ed) - Docket No. M-2009-2092222; Pennsylvania Electric Company (Penelec) - Docket No. M-2009-2112952; and, Pennsylvania Power Company (Penn Power) - Docket No. M-2009-2112956

³ See, www.puc.state.pa.us; *Implementation of Act 129 of 2008 Phase 2 – Registry of Conservation Service Providers*, Docket No. M-2008-2074154, Final Order entered February 5, 2009.

8. The FirstEnergy Companies utilized the template prescribed by the Commission in preparing and filing these EE&C plans. These plans outline the Companies' strategies and proposed programs developed to achieve the required reductions in energy consumption and peak demand in accordance with Act 129. Each plan includes a proposed tariff rider that would establish an Energy Efficiency and Conservation Charge Rider ("Tariff Rider") to be utilized to recover the costs associated with the FirstEnergy Companies' EE&C Plans.

9. In developing the proposed EE&C programs, the FirstEnergy Companies received significant input from various interested parties and stakeholders in Pennsylvania.

10. The FirstEnergy Companies evaluated numerous models to achieve the consumption reductions required by Act 129, and their filed EE&C plans include a custom-designed suite of programs which are expected to achieve the consumption reduction requirements of Act 129.

11. On July 10, 2009, the UGI companies filed a Petition to Intervene in this matter, for the stated purpose of "providing input regarding the significant benefits of including fuel substitution measures in Met-Ed's EE&C Plan."

12. On July 31, 2009 the presiding ALJ issued an *ORDER GRANTING PETITIONS TO INTERVENE OF UGI UTILITIES, INC.-GAS DIVISION, UGI PENN NATURAL GAS, INC. AND UGI CENTRAL PENN GAS, INC. AND DISMISSING THE REQUESTS TO INTERVENE OF COMPERIO ENERGY LLC D/B/A CLEARCHOICE ENERGY AND E CUBED COMPANY, LLC*. With respect to the subject of fuel substitution, the ALJ stated:

However, ALJ Colwell also warned that a grant of intervention does not equal an open invitation to discovery. The usual rules of relevance are in effect, meaning that objections to discovery requests which are outside the scope of the plans and their development will be upheld. **I agree with ALJ Colwell that it is not reasonable to expect Met Ed and Penelec to expend resources responding to discovery regarding what is not in their proposed plans when the time period**

involved in this litigation is already short and the subject matter of fuel-switching has been deferred to another proceeding.⁴

13. Subsequently, July 31, 2009, The Peoples Natural Gas Company D/B/A Dominion Peoples and National Fuel Gas Distribution Corporation filed their Petitions to Intervene in this proceeding. Dominion and National Fuel Gas requested permission to participate in this proceeding solely upon their desire to have gas fuel switching measures included in the Act 129 Energy Efficiency and Conservation (“EE&C”) plans of the FirstEnergy Companies. On August 7, 2009, ALJ Salapa issued an Order which granted the Petitions to Intervene of Dominion and National Fuel Gas.⁵ ALJ Salapa’s August 7, 2009 Order reiterated that “It is not reasonable to expect Met Ed, Penelec and Penn Power to expend resources responding to discovery regarding what is not in their proposed plans when the time period involved in this litigation is already short and the subject matter of fuel-switching has been deferred to another proceeding.” See August 7, 2009 Order, at p. 7.

14. On August 12, 2009, Columbia Gas filed its Petition to Intervene. FirstEnergy filed an Answer Opposing The Petition to Intervene of Columbia Gas on August 14, 2009. FirstEnergy opposed Columbia Gas’s Intervention because 1) it was unreasonably untimely and 2) because Columbia Gas sought to intervene solely for the purpose of addressing fuel switching. As of the date of filing of this Motion, the Petition to Intervene of Columbia Gas has not been ruled upon.

15. On August 7, 2009, the NGDCs served the written Direct Testimony of Paul H. Raab. The Direct Testimony consisted of 47 (forty-seven) pages and 6 (six) Exhibits. Large portions of Mr. Raab’s testimony and exhibits are devoted to the issue of fuel-switching, and why, in Mr. Raab’s

⁴ ORDER GRANTING PETITIONS TO INTERVENE OF UGI UTILITIES, INC.-GAS DIVISION, UGI PENN NATURAL GAS, INC. AND UGI CENTRAL PENN GAS, INC. AND DISMISSING THE REQUESTS TO INTERVENE OF COMPERIO ENERGY LLC D/B/A CLEARCHOICE ENERGY AND E CUBED COMPANY, LLC , at page 7, July 31, 2009. (Emphasis Added)

⁵ ORDER GRANTING PETITIONS TO INTERVENE OF REPRESENTATIVE CAMILLE GEORGE, COMPERIO ENERGY LLC, D/B/A CLEARCHOICE ENERGY, PEOPLES NATURAL GAS COMPANY D/B/A DOMINION PEOPLES, NATIONAL FUEL GAS DISTRIBUTION CORPORATION, ENERNOC, INC. AND CONSTELLATION NEW ENERGY, INC, August 7, 2009

opinion, the FirstEnergy EE&C Plans should be required to include programs to encourage fuel-switching (i.e., switching from electric to natural gas for heating). The portions of the NGDCs' Direct Testimony that relate to fuel substitution or fuel-switching are identified on Appendix A, attached hereto.

III. ARGUMENT

16. The NGDCs' Direct Testimony includes large sections that advocate for the inclusion of fuel-switching programs in the FirstEnergy Companies' EE&C Plans, despite the fact that the Commission has already concluded that the issue of fuel switching was not relevant to the evaluation of the EE&C plans.

17. "Fuel Switching" or "Fuel-Substitution" measures are not proposed by the FirstEnergy Companies and are not presented as an issue in the FirstEnergy Companies' EE&C plans. The NGDCs' have previously attempted to convince the Commission that gas and propane fuel switching measures should be interjected into Act 129 proceedings. The Commission has clearly and unequivocally rejected the NGDCs' prior attempts to raise this issue in the context of the Act 129 implementation process, and there is no legal basis that warrants a different result for this most recent attempt.

18. The NGDCs' Direct Testimony attempts to use Act 129 as leverage to force competing energy providers, such as the FirstEnergy Companies, to facilitate the NGDCs' own success in the utility competition for residential, commercial and industrial heating customers. Allowing testimony on the topic of fuel switching in these proceedings would be inconsistent with the intent of Act 129, and undermine the Commission's established procedures for the timely and reasonable evaluation of the FirstEnergy Companies' EE&C Plan. Nothing in Act 129 requires Electric Distribution Companies ("EDCs") to include "fuel-substitution" programs in their EE&C plans. Moreover, this Commission

has clearly indicated that fuel-substitution programs will be addressed by the Commission in an entirely separate proceeding unrelated to Act 129.

19. The Commission's regulations state that evidence may be excluded if:

- (1) It is repetitious or cumulative.
- (2) Its probative value is outweighed by:
 - (i) The danger of unfair prejudice.
 - (ii) Confusion of the issues.
 - (iii) Considerations of undue delay or waste of time⁶

20. The portions of the NGDC's Direct Testimony that relate to "fuel-switching" and or "fuel-substitution" should be stricken because they are irrelevant, outside the scope of this proceeding, have no probative value, and would unduly waste the Commission's and the parties' time and resources.

21. The Commission and the ALJ have already ruled that the issue of "fuel-switching" or "fuel-substitution" are not to be considered in the context of evaluating Act 129 Plans, and that information related to fuel switching and fuel substitution is not discoverable in this proceeding. These prior rulings by the Commission and the ALJ constitute the "law of the case", and preclude a finding that testimony on the issue of "fuel-switching" is relevant to this proceeding. The law of the case doctrine refers to a family of rules which embody the concept that a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter.⁷ The various rules which make up the law of the case doctrine serve not only to promote the goal of judicial economy but also operate (1) to protect the settled expectations of the parties; (2) to insure uniformity of decisions; (3) to maintain consistency during the course of a single case; (4) to effectuate the proper and streamlined administration of

⁶ 52 Pa. Code § 5.401

⁷ *Com. v. Starr*, 541 Pa. 564, 664 A.2d 1326 (Pa.1995)

justice; and (5) to bring litigation to an end.⁸ Departure from either of these principles is allowed only in exceptional circumstances such as where there has been an intervening change in the controlling law, a substantial change in the facts or evidence giving rise to the dispute in the matter, or where the prior holding was clearly erroneous and would create a manifest injustice if followed.⁹

22. ALJ Salapa has already ruled – twice- that the issue of “fuel substitution” or “fuel-switching” does not fall within the scope of this proceeding. Specifically, ALJ Salapa ruled that fuel-switching is not included in FirstEnergy’s EE&C plans, and that therefore, information regarding “fuel-switching” is not discoverable in this proceeding, and that the subject matter of fuel-switching has been deferred to another proceeding.¹⁰ In making this ruling, the ALJ noted that “The usual rules of relevance are in effect, meaning that objections to discovery requests which are outside the scope of the plans and their development will be upheld.”

23. The scope of discoverable material is clearly broader than the scope of admissible material. Therefore, if a topic has been determined to be non-discoverable for being irrelevant and outside the scope of the proceeding, it follows that testimony on the same topic is not admissible.

24. Previously, the Commission had clearly ruled that the issue of “fuel-switching” is not to be addressed in proceedings to evaluate EE&C Plans. On June 1, 2009, the Commission entered its TRM Order, outlining the standards by which energy savings associated with various energy efficiency and conservation measure are to be determined under the Plans. This Order directly and unequivocally rejected a request by the NGDCs to alter the TRM to quantify energy and demand savings when electric equipment is removed and replaced with equipment that uses natural gas. In rejecting the NGDC’s request to include “fuel switching” in the updated TRM, the Commission stated as follows:

⁸ *Id.*

⁹ *Id.*

¹⁰ *ORDER GRANTING PETITIONS TO INTERVENE OF UGI UTILITIES, INC.-GAS DIVISION, UGI PENN NATURAL GAS, INC. AND UGI CENTRAL PENN GAS, INC. AND DISMISSING THE REQUESTS TO INTERVENE OF COMPERIO ENERGY LLC D/B/A CLEARCHOICE ENERGY AND E CUBED COMPANY, LLC* , at page 7, July 31, 2009.

The Commission recognizes that fuel switching is a complicated topic that will require additional time and effort to fully address. As the TRM will provide vital guidance to EDCs in developing their EE&C plans, which are due to be filed by July 1, 2009, there is not enough time to convene a working group to address all the related issues, fuel switching will not be included in this TRM. The Commission will convene a fuel switching working group in the near future to identify, research and address issues related to fuel switching. Depending on the outcome of this working group, fuel switching may be incorporated into a future version of the TRM.¹¹

25. The Commission's express exclusion of "fuel switching" from the TRM and postponement of discussion of such matters until a future "fuel switching working group" is convened should preclude the NGDCs from even attempting to advance such issues in connection with the FirstEnergy Company's EE&C Plans.

26. While the Commission acknowledged that fuel switching is "complicated" and "will require additional time and effort to fully address," it must be noted that "fuel switching" or "fuel substitution" (as argued by the NGDCs to include gas and propane fuel substitutions) is not specifically listed as an "energy efficiency and conservation measure" under Act 129. As directed by this Commission and the Act, the FirstEnergy Companies' EE&C plans include energy and conservation measures to reduce energy consumption within its service territory. Section 2806.1(k)(2) of the Act states that "Energy efficiency and conservation measures shall include solar or solar photovoltaic panels, energy efficient windows and doors, energy efficient lighting, including exit sign retrofit, high bay fluorescent retrofit and pedestrian and traffic signal conversion, geothermal heating, insulation, air sealing, reflective roof coatings, energy efficient heating and cooling equipment or systems and energy efficient appliances and other technologies, practices or measures approved by the commission." Plainly, the Act's list of energy efficiency and conservation measures does not include "natural gas or propane fuel-switching".

¹¹ June 1, 2009 Order at 9.

27. As set forth above, the Commission's Implementation Order and TRM Order make it clear that analysis of alleged "fuel switching" savings has no part to play in the evaluation of EE&C Plans submitted under Act 129. Moreover, this Commission should conclude that causing FirstEnergy customers to pay for having other customers switch from electric service to gas and/or propane service is simply not an energy efficiency and conservation measure under Act 129.

28. There has been no change in circumstances that warrants a reversal of the Commission's determination that the issue of fuel switching is irrelevant to this proceeding, therefore, under the law of the case doctrine, the NGDCs's proposed testimony on the issue of fuel switching is irrelevant, not probative, and should be stricken.

29. The NGDC's distribute natural gas and propane to customers within the FirstEnergy service territories, and as such are direct competitors to the FirstEnergy Companies for heating customers. Clearly, the NGDCs have a competitive interest in seeking to have the FirstEnergy Companies required to include fuel switching proposals as part of their EE&C plans. Ironically, to do so would effectively cause FirstEnergy customers to pay to assist others with reducing electric consumption by replacing electric service with increased gas and/or propane consumption. This Commission should conclude that this result is not in the public interest and does not further Act 129's stated goals of reducing overall energy demand and consumption.

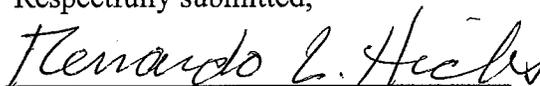
30. Exploration of the NGDC's competitive interests are not relevant to the scope of this proceeding and have no probative value. By submitting testimony advocating for the inclusion of "fuel-switching" measures in the FirstEnergy EE&C plans, the NGDCs are trying to cynically exploit the highly important Act 129 EE&C evaluation process for their own selfish benefit. The Commission should recognize that it is not in the public interest to have this Act 129 proceeding serve as a forum for the NGDCs' fuel-switching agenda, and reiterate its previous conclusion that fuel-switching is a

complicated topic that is best addressed in a separate proceeding, instead of wasting limited time and resources to evaluate it in this EE&C proceeding.

WHEREFORE, for all of the foregoing reasons, the FirstEnergy Companies respectfully request that the portions of the NGDCs' Direct Testimony identified on Appendix A be Stricken.

Dated: August 28, 2009

Respectfully submitted,



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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Metropolitan Edison Company Energy and Conservation Plan	:	Docket No. M-2009-209222
	:	
Pennsylvania Electric Company and Conservation Plan	:	Docket No. M-2009-2112952
	:	
Pennsylvania Power Company and Conservation Plan	:	Docket No. M-2009-2112956

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing by first class mail and electronic mail upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 and 1.55.

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Dated: August 28, 2009