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September 30, 2009

**VIA ELECTRONIC FILING**

James J. McNulty  
Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
P. O. Box 3265  
Harrisburg, PA 17105-3265

In re: Docket No. M-2009-2093218  
Petition of West Penn Power Company dba Allegheny Power

Dear Secretary McNulty:

We represent The Pennsylvania State University in the above matter. On September 28, 2009, we filed the Motion of the University to Strike Section II.B, Pages 3 through 5, of the Reply Brief of the West Penn Power Industrial Intervenors. We inadvertently did not attach a Notice to Plead to the Motion.

We have electronically refiled the Motion to Strike with a Notice to Plead. The original paper copy of the refiled Motion with the Notice is enclosed for filing along with the e-filing receipt. Copies of the refiled Motion were served upon the persons and in the manner set forth on the certificate of service attached to it.

Very truly yours,

THOMAS, LONG, NIESEN & KENNARD

By

Thomas T. Niesen

Encl.

cc: The Honorable Katrina L. Dunderdale (w/encl.)  
Certificate of Service (w/encl.)

090930-McNulty (Motion to Strike Incl Notice).wpd

Before The  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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Petition of the West Penn Power : Docket No. M-2009-2093218  
Company dba Allegheny Power for :  
Approval of its Energy Efficiency :  
and Conservation Plan :

**NOTICE TO PLEAD**

YOU ARE HEREBY NOTIFIED, PURSUANT TO 52 PA. CODE § 5.103, THAT YOU MAY FILE AN ANSWER TO THE ENCLOSED MOTION TO STRIKE SECTION II.B, PAGES 3 THROUGH 5, OF THE REPLY BRIEF OF THE WEST PENN POWER INDUSTRIAL INTERVENORS WITHIN TWENTY (20) DAYS OF THE DATE OF SERVICE HEREOF. YOUR ANSWER TO THE MOTION MUST BE FILED WITH THE SECRETARY OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION, P.O. BOX 3265, HARRISBURG, PA 17105-3265, WITH A COPY SERVED ON THE UNDERSIGNED COUNSEL FOR THE PENNSYLVANIA STATE UNIVERSITY.



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DATED: September 30, 2009

**Before The  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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**Petition of the West Penn Power : Docket No. M-2009-2093218  
Company dba Allegheny Power for :  
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**MOTION OF  
THE PENNSYLVANIA STATE UNIVERSITY  
TO STRIKE SECTION II.B, PAGES 3 THROUGH 5,  
OF THE REPLY BRIEF OF  
THE WEST PENN POWER INDUSTRIAL INTERVENORS**

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AND NOW, comes The Pennsylvania State University (“Penn State” or “University”), by its attorneys, and, pursuant to 52 Pa. Code § 5.71, moves to strike Section II.B, pages 3 through 5, of the Reply Brief of the West Penn Power Industrial Intervenors (“WPPII”). In support of its motion, Penn State submits as follows:

**I. INTRODUCTION**

1. This proceeding concerns the Energy Efficiency and Conservation Plan (“EE&C Plan”) filed by West Penn Power Company d/b/a Allegheny Power (“Allegheny”) pursuant to the requirements of Act 129 of 2008, P.L. 1492 (“Act 129”), 66 Pa.C.S. §§ 2806.1-2806.2. Penn State is a major generation, transmission, and distribution service customer of Allegheny at its University Park campus receiving service through Allegheny Tariff No. 37 (“Tariff 37”).<sup>1</sup>

2. Penn State intervened in the proceeding and participated as an active party. The focus of the University’s intervention and participation is the EE&C Plan services for Tariff 37. Penn State submitted the written direct testimony of Michael I.

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<sup>1</sup> The University also receives generation, transmission, and distribution service from Allegheny under Tariff No. 39 (“Tariff 39”) for approximately 100 additional accounts at the University Park campus and campuses at New Kensington, Fayette and Mont Alto.

Prinkey, P.E., and main and reply briefs explaining that Allegheny had inequitably and inappropriately identified Tariff 37 for participation in its proposed Lighting Efficiency Program and proposed Distributed Generation Program.

**II. THE COMMISSION SHOULD STRIKE  
SECTION II.B OF THE WPPII REPLY BRIEF**

3. WPPII is a coalition of ten Allegheny Tariff 39 customers.<sup>2</sup> Although it had full opportunity to do so, WPPII did not address the position of Penn State in either reply/rebuttal testimony or its main brief. Instead, for the first time, in Section II.B, pages 3 through 5, of its reply brief, WPPII argues in opposition to Penn State asking the Commission to reject what WPPII characterizes as Penn State's request to "opt-out" of the Lighting Efficiency Program and Distributed Generation Program.

4. What WPPII has done is different even than a party simply presenting an additional argument in support of a previously stated position. Here, the WPPII position itself is stated for the first time in a reply brief without any opportunity for the University either to offer responsive testimony or to cross examine the ten WPPII coalition members. Without the opportunity for responsive testimony and cross examination, the University has no opportunity for meaningful argument in response to WPPII. For these reasons alone, Section II.B of the WPPII reply brief should be struck.

5. Additionally, Penn State is not requesting to "opt-out" of specific EE&C programs as argued by WPPII. That arbitrary characterization, again presented for the first time by WPPII in its reply brief, has never been the position of the University and it is not even a characterization offered by Allegheny in response to Penn State's

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<sup>2</sup> WPPII members include Air Liquide Industrial U.S. LP; Air Products & Chemicals, Inc.; Allegheny Ludlum Corporation; Carbone of America; Ervin Industries; Excelsa Health; Latrobe Specialty Steel Company; Lehigh Specialty Melting Inc. (Whemco); Sheetz, Inc.; and World Kitchen LLC.

position. Penn State submitted testimony<sup>3</sup> and, based on that testimony, argued in brief as follows in regard to the Lighting Efficiency and Distributed Generation Programs:

The decision by Allegheny to classify Tariff 37 “similarly as” Tariff 39 Schedule 30 (Large) customers is inequitable, inappropriate and inconsistent with both Act 129 and Allegheny’s recent post-2010 default service proceeding to the extent that it results in Tariff 37 being included with Tariff 39, Schedules 20, 22, 30 (Small) and 30 (Large) in the Lighting Efficiency Program.

Tariff 37 should be reclassified and then excluded from the Lighting Efficiency Program since ***no opportunity exists for the University Park campus to participate in the [Lighting Efficiency] Program*** and, under the circumstances presented here, it would cause the University to unreasonably subsidize other customers, particularly small commercial customers, who would benefit from the Program. Tariff 39 Schedules 20 and 22 general service customers are not participants in any of the other EE&C Plan programs sponsored by Allegheny for Tariff 37.

Of the remaining four programs - - the Commercial and Industrial Drives Program, the Custom Applications Program, the Customer Load Response Program, and the Distributed Generation Program - - the University should be excluded from the Distributed Generation Program. ***The Distributed Generation Program is designed for customers with existing generators; however, Penn State’s generators cannot be used for the Program because of air quality permitting limitations.***<sup>4</sup>

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<sup>3</sup> The testimony of Penn State witness Prinkey was admitted into the evidentiary record as Penn State Statement No. 1. As previously noted, WPPIL did not address Mr. Prinkey’s testimony in either reply/rebuttal testimony or its main brief.

<sup>4</sup> The lack of opportunity for Tariff 37 to participate in these Programs is significant. Ignoring the University’s testimony, WPPIL argues in its reply brief that Tariff 37 would have opportunities to participate. Ignoring testimony is one thing but, in very troubling fashion, WPPIL, in footnote 15 of its reply brief, misleadingly shortens language from page 9 of the University’s main brief in support of its claim that Tariff 37 could participate in the Lighting Efficiency Program. The complete paragraph from page 9 is set forth below. The last sentence (not reproduced as part of the quote in WPPIL’s footnote 5) explains that any remaining lighting improvements at University Park would be outside of the Lighting Efficiency Program.

Few opportunities exist for University Park Tariff 37 to participate in the Lighting Efficiency Program. The University has already made large investments in the replacement of lighting at University Park. Any other lighting improvements would be outside of the incentives proposed in the Lighting Efficiency Program and would probably fall under the proposed Custom Applications Program. Penn State St. No. 1 at 7.

6. Without evidentiary support or timely prior argument, WPPIL also now argues in its reply brief that the University is attempting to “cherry pick” the programs for which it will bear cost responsibility. In fact, the situation is the reverse. What is presented by WPPIL is an attempt by WPPIL to “cherry pick” the University’s Tariff 37 into EE&C programs in which the University cannot participate and, thereby, have the University subsidize other customers, particularly in regard to the Lighting Efficiency Program as explained above. If WPPIL had presented this position in a timely fashion, the University could have inquired about the economic interest of each of the WPPIL coalition members in having Tariff 37 “cherry picked” into these Programs.

### **III. CONCLUSION**

7. What is presented to the Commission in Allegheny’s EE&C Plan is a subjective decision by the utility to group Tariff 37 in a certain way for its Plan purposes. The decision is not entitled to any special weight. It was made by Allegheny without input by or consultation with the University. Penn State submitted testimony explaining that Tariff 37 has no opportunity to participate in either the Lighting Efficiency Program or the Distributed Generation Program and, accordingly, respectfully requests that Tariff 37 be excluded from these Programs.

WHEREFORE, for the reasons aforesaid, The Pennsylvania State University requests that the Pennsylvania Public Utility Commission strike Section II.B, pages 3 through 5, of the Reply Brief of the West Penn Power Industrial Intervenors.

Respectfully submitted,

By

  
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Dated: September 30, 2009

PSU Motion to Strike WPPH Reply Brief (incl Notice).wpd

**Before The  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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**Petition of the West Penn Power : Docket No. 2009-2093218**  
**Company dba Allegheny Power for :**  
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**and Conservation Plan :**

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 30<sup>th</sup> day of September, 2009, served a true and correct copy of the Motion of The Pennsylvania State University to Strike Section II.B, Pages 3 through 5, of the Reply Brief of the West Penn Power Industrial Intervenors, upon the persons and in the manner set forth below:

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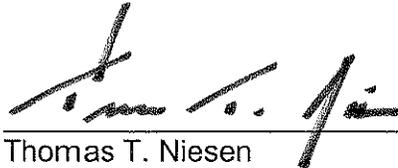
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