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Honorable James McNulty
Secretary, Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

RE: Petition of West Penn Power Company d/b/a Allegheny Power for
Expedited Approval of its Smart Meter Technology
Procurement and Installation Plan
PUC Docket No. M-2009-2123951

Dear Secretary McNulty:

Please find attached for electronic filing the Brief of the Commonwealth of Pennsylvania, Department of Environmental Protection in Opposition to the Petition for Interlocutory Review and Answer to a Material Question of West PennPower Company d/b/a Allegheny Power in the above referenced matter. Copies have been served on all parties listed on the enclosed Certificate of Service.

Sincerely,

/s/ Scott Perry

Scott Perry
Assistant Counsel

cc: Service List

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of West Penn Power Company :
d/b/a Allegheny Power for Expedited :
Approval of its Smart Meter Technology : **Docket No. M-2009-2123951**
Procurement and Installation Plan :

**Brief of the Commonwealth of Pennsylvania, Department of Environmental Protection
in Opposition to the Petition for Interlocutory Review and Answer to a
Material Question of West PennPower Company d/b/a Allegheny Power**

Pursuant to 52 Pa. Code § 5.302(b), the Commonwealth of Pennsylvania, Department of Environmental Protection files this brief in opposition to the Petition for Interlocutory Review and Answer to a Material Question of West PennPower Company d/b/a Allegheny Power (“Allegheny Power”).

I. Introduction

Pursuant to Act 129 of 2008 and the Pennsylvania Public Utility Commission’s (“Commission”) Smart Meter Procurement and Installation Order (“Implementation Order”) at Docket No. M-2009-2092655, on August 14, 2009, Allegheny Power filed its Petition for Expedited Approval of its Smart Meter Technology Procurement and Installation Plan (“Smart Meter Plan”).

On August 29, 2009 the Commission published a notice of Allegheny Power’s petition in the *Pennsylvania Bulletin* which required Petitions to Intervene and comments to the Smart Meter Plan to be filed by September 25, 2009. The Department filed its petition to intervene

and comments to the Plan on September 18, 2009. The Department's petition to intervene was granted October 5, 2009.

In its prehearing memorandum and at the prehearing conference in this matter held on September 30, 2009, Allegheny Power proposed two procedural schedules that would provide expedited consideration of its Smart Meter Plan. The first schedule pertained to what Allegheny Power terms "Initial Phase Activities" and sought Commission approval by December 3, 2009. See Interlocutory Petition Appendix A and page 2, paragraph 5. The second schedule pertained to the remainder of the Smart Meter Plan and sought a recommended decision by December 23, 2009 with the anticipation of final Commission approval of the Plan by January 29, 2010. *Id.*

Administrative Law Judge Mark A. Hoyer rejected Allegheny's proposed schedules and adopted a single schedule that allows for additional rounds of testimony and follows the time frame described in the Commission's Implementation Order with a recommended decision due January 29, 2010. Allegheny Power filed its Petition for Interlocutory Review on September 30, 2009.

II. Statement of the Case

The question presented by Allegheny Power in this matter is: "whether the decision to deny Allegheny Power's proposed procedural schedules was lawful and appropriate given the demonstrated need for a phase and expedited review and approval of the Company's SMIP." Interlocutory Petition at 2.

Recommended Answer: Yes. Allegheny Power has not provided compelling reasons why interlocutory review will prevent substantial prejudice to Allegheny Power.

II. Summary of Argument

The Commission should decline to answer Allegheny Power's question or in the alternative, answer the question in the positive. 52 Pa. Code § 5.302 requires Allegheny Power to present "compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding." 52 Pa. Code § 5.302(a). Allegheny Power has failed to meet this requirement.

Allegheny Power's argument that expedited approval of its Initial Phase Activities schedule "prevents the Commission from reviewing the reasonableness of the Initial Phase Activities before their implementation" is not compelling and does not evince a substantial prejudice that will befall Allegheny Power. Similarly, Allegheny Power's argument that delaying ALJ Hoyer's recommended decision by one month somehow threatens its plans to install 93,000 smart meters in 2010 and therefore the success of Allegheny Power's still unapproved Energy Efficiency and Conservation Plan is equally unconvincing.

In contrast, the tasks Allegheny Power proposes to undertake and the costs that its customers will incur under the currently proposed Smart Meter Plan are substantial. Although the Department has long championed expedited deployment of smart meters, it is mindful of the costs associated with the EDC Smart Meter Plans. As stated in the Department's comments to Allegheny Power's Smart Meter Plan filed with the Commission, "the Department fully supports a careful analysis of the costs and benefits of Allegheny Power's Smart Meter Plan." See, *Comments of the Department to Allegheny Power's Smart Meter Plan* at 4. As such, the Department believes that the hurried, bifurcated schedules proposed by Allegheny Power threaten the Commission's ability to appropriately examine and consider the full costs and benefits of Allegheny Power's Smart Meter Plan. Such a failure has the potential to harm

Allegheny Power's customers and even jeopardize smart meter deployment throughout Pennsylvania. Therefore, the Commission should decline to answer the material question or answer the question in the positive and uphold the schedule adopted by Administrative Law Judge Hoyer.

III. Argument

The Department has long championed expedited deployment of smart meters. Indeed, in comments filed with the Commission pertaining to the Act 129 Energy Efficiency and Conservation proceedings, the Department requested that the Commission require expedited deployment of smart meters and held Allegheny Power's EEC Plan out as a positive example. See e.g., *Comments and Recommendations of the Department to PECO Energy Company's Petition for Approval of its Energy Efficiency and Conservation Plan* at Docket No. M-2009-2093215 at pages 5-6. In addition, in comments filed with the Commission pertaining to the First Energy Companies' Smart Meter Plans, the Department again held Allegheny Power out as a positive example of a utility promising expedited deployment of smart meters. See, *Comments of the Department to Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company's Petition for Approval of Smart Meter Technology Procurement and Installation Plans* at Docket No. M-2009-2123950 at page 3.

While the Department believes that smart meters provide significant benefits to rate payers and the environment and that rapid deployment is necessary to realize those benefits, it has never advocated that such deployment occur at any cost. The Department's comments to Allegheny Power's Smart Meter Plan filed with the Commission reflect this.

[T]he Department believes that Allegheny Power has developed the most thorough Smart Meter Plan that is before the Commission. As a matter of providing smart meters with comprehensive functionality to consumers on an expedited basis, the Department has no objection to Allegheny Power's Smart

Meter Plan. However, the Department also recognizes that cost impacts associated with smart meter deployment can create adverse reactions by Allegheny Power's customers and potentially delay or prevent widespread deployment of smart meters. As such, the Department fully supports a careful analysis of the costs and benefits of Allegheny Power's Smart Meter Plan." *Department Comments to Allegheny Power's Smart Meter Plan* at 4.

In keeping with the Department's support of a careful analysis of Allegheny Power's Smart Meter Plan, the Department believes that the Commission should decline to answer Allegheny Power's question or in the alternative, answer the question in the positive. Allegheny Power has failed to meet the regulatory requirements for granting interlocutory review and the schedules proposed by Allegheny Power do not provide for a thorough examination of the costs and benefits of the Plan and could ultimately lead to unwarranted impacts to its customers.

52 Pa. Code § 5.302 requires Allegheny Power to present "compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding." 52 Pa. Code § 5.302(a). "The Commission does not routinely grant interlocutory review except upon a showing by the petitioner of extraordinary circumstances". *Re Structural Separation of Bell Atlantic-Pennsylvania, Inc. Retail and Wholesale Operations*, 2000 Pa. P.U.C. Lexis 59 (2000) citing *in re: Application of Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985). In determining whether "extraordinary circumstances" exist, the Commission focuses its inquiry on whether interlocutory review is necessary in order to prevent substantial prejudice that could not be satisfactorily cured during the normal Commission review process. *Id.* See also, *Objections of United Parcel Service, Inc.*, 2006 Pa. P.U.C. Lexis 38 (2006).

A. Allegheny Power will not be Prejudiced if Approval of the Initial Phase Activities Occurs as Part of the Overall Smart Meter Plan Approval Process

Allegheny Power has not provided compelling reasons why interlocutory review is

necessary to prevent substantial prejudice in this matter. Allegheny Power's argument that expedited approval of its Initial Phase Activities schedule "prevents the Commission from reviewing the reasonableness of the Initial Phase Activities before their implementation" is not compelling and does not evince a substantial prejudice that will befall Allegheny Power.

In its Smart Meter Plan, Allegheny Power asserts that the initial phase activities must occur regardless of which smart meter or smart meter vendor is ultimately selected. Plan at 40. Further, any costs associated with the initial phase activities would not be collected until after the Commission approves the entire Smart Meter Plan. *Id.* Finally, Allegheny Power's Interlocutory Petition phrases the harm as resulting from an inability to obtain Commission approval of the activities until *after* they are implemented. Interlocutory Petition at 1, 3. Based on these statements, it is clear that Allegheny Power intends to move forward with its initial phase activities now - regardless of the Commission's decision on this matter and had no intention of seeking cost recovery until a later date. Therefore, it is not clear what if any harm occurs by reviewing and acting upon Allegheny Power's Smart Meter Plan as a whole as envisioned by the schedule adopted by Judge Hoyer. Indeed, as stated by Allegheny Power, the only entity "prejudiced" by this approach appears to be the Commission because it will not have the opportunity to review the reasonableness of some of the activities until after they have occurred. Interlocutory Petition at 3.

In contrast to Allegheny Power's asserted need for expedited review of the initial phase activities, it appears that a thorough review of these costs and activities is warranted. For example, whether certain initial phase costs are more appropriately recoverable through base rates should be carefully evaluated. The surcharges proposed by Allegheny Power are considerable – starting at \$5.86 per month in February 2010 and ultimately escalating to \$15.77

in June 2013. Smart Meter Plan at 98. Examining how the initial phase activity costs are recovered should be done carefully as the result can mitigate the impact of these surcharges.

B. Allegheny Power will not be Prejudiced if a Recommended Decision is Provided by January 29, 2010 Instead of December 23, 2009.

Allegheny Power's argument that delaying ALJ Hoyer's recommended decision by one month somehow threatens its plans to install 93,000 smart meters in 2010 and therefore the success of Allegheny Power's still unapproved Energy Efficiency and Conservation Plan is not compelling. As noted above and made clear in Allegheny Power's Interlocutory Petition, Allegheny Power intends to move forward now with the initial phase activities and will seek to begin cost recovery after its Smart Meter Plan is approved. Therefore, the only way Allegheny Power's Energy Efficiency and Conservation Plan is truly jeopardized is if final Commission approval of the Smart Meter Plan is excessively delayed. Because the adopted schedule only delays the recommended decision by 37 days (including the winter holidays) it is difficult to see how the entire EEC Plan will be significantly impacted - if at all.

Perhaps the greatest change in the overall Plan approval schedule is the inclusion of additional rounds of testimony. Although the Department will not be presenting testimony in this matter, it supports a thorough evaluation of Allegheny Power's Smart Meter Plan so that the Commission has a complete record to review prior to making its decision.

Given the total costs of Allegheny Power's Smart Meter Plan (approximately \$620 million - See Plan, Table 4.1, at 94) and the surcharges described above, it would prudent to fully consider the costs and benefits associated with all aspects of the Plan. These issues could include the full deployment of in-home displays and the changes that result from implementing automated meter reading to name a few. Indeed, Commission interlocutory decisions support the development of a complete record that promotes informed decision making. See *Joint*

application of Equitable Resources, Inc., 2007 Pa. P.U.C. Lexis 32 (2007) (denying request for expedited review); *Re Structural Separation of Bell Atlantic-Pennsylvania, Inc. Retail and Wholesale Operations*, 2000 Pa. P.U.C. Lexis 59 (2000) (allowing additional information into the record to better inform the Commission's decision). Failure to fully investigate the costs associated with Allegheny Power's Plan has the potential to harm its customers and even jeopardize smart meter deployment throughout Pennsylvania.

IV. Conclusion

Wherefore, for the foregoing reasons, the Commission should decline to answer the material question or answer the question in the positive and uphold the schedule adopted by Administrative Law Judge Hoyer.

Respectfully submitted,

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Dated: October 13, 2009

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document, Brief of the Commonwealth of Pennsylvania, Department of Environmental Protection in Opposition to the Petition for Interlocutory Review and Answer to a Material Question of West PennPower Company d/b/a Allegheny Power, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a participant), in the manner upon the persons listed below:

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