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VIA E-FILING

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

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

Dear Secretary McNulty:

Attached is the Motion of West Penn Power Company d/b/a Allegheny Power to Strike Portions of the Supplemental Direct Testimony of The Office of Consumer Advocate in the above-referenced proceeding. Copies have been served on the parties to this proceeding as indicated in the attached Certificate of Service.

Very truly yours,


John F. Povilaitis

JFP/ck

Enclosures

- c. Certificate of Service
The Honorable Mark A. Hoyer

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**MOTION OF THE WEST PENN POWER COMPANY D/B/A ALLEGHENY
POWER TO STRIKE PORTIONS OF THE SUPPLEMENTAL DIRECT
TESTIMONY OF THE OFFICE OF CONSUMER ADVOCATE**

West Penn Power Company d/b/a Allegheny Power ("Allegheny Power"), by and through its counsel, files this Motion to Strike portions of the Supplemental Direct Testimony of the Office of Consumer ("OCA") in the above-captioned matter, pursuant to Section 5.103 of the Pennsylvania Public Utility Commission's ("Commission") regulations, 52 Pa. Code § 5.103. Specifically, Allegheny Power is moving to strike the following portions of the OCA's Supplemental Direct Testimony.

The Supplemental Direct Testimony of J. Richard Hornby:

- (1) Page 26, line 14 through page 27, line 2 of OCA Statement No. 1-Supp., which includes testimony about Direct Load Control programs;
- (2) Page 27, line 3 through page 28, line 6 of OCA Statement No. 1-Supp., which includes testimony about the Company's Programmable Communicating Thermostats (PCT) Program and Time of Use (TOU) rate offering;
- (3) Page 13, lines 5 through 23 and page 14, line 17 through page 15, line 8 of OCA Statement No. 1-Supp, which addresses the costs of Allegheny Power's proposed original deployment compared to other utilities;
- (4) Page 14, lines 1-16 of OCA Statement No. 1-Supp, which addresses the relationship of costs of the original SMIP deployment to the rural nature of Allegheny Power's service territory.

The Supplemental Direct Testimony of Nancy Brockway:

- (1) Page 2, line 1 through page 7, line 8 of OCA Statement No. 2-Supp., which addresses adverse customer reactions to improperly managed smart grid deployment;
- (2) Page 12, line 14 through page 14, line 20, which addresses demand reduction alternatives to smart grid and IHD deployment, including DLC programs.

In short, the above-identified portions of the testimony do not relate to the Company's Supplemental Direct Testimony, raise issues that have already been litigated and briefed before the Administrative Law Judge in this docket, or as in the case of issues relating to the previously approved Company EE&C/DR Plan programs, raise issues already decided by the Commission. As such, the testimony is outside the scope of the supplemental phase of this case. The parties should not be rearguing the merits of Allegheny Power's original Plan and its related smart meter deployment schedule. Allowing the OCA testimony that is the subject of this motion into the evidentiary record will impede administrative efficiency because it will confuse what issues should be the subject of the supplemental briefing and will make the Administrative Law Judge's task to render a decision much more difficult. As such, the above-identified portions of the OCA Supplemental Direct Testimony should not be considered in this proceeding. In support of its Motion, Allegheny Power avers as follows:

I. Background

1. Allegheny Power is an electric public utility authorized to provide electric service in southwestern, south-central and northern Pennsylvania. The Company serves approximately 713,000 customers in Pennsylvania in an area of about 10,400 square

miles with a population of approximately 1.5 million. The Company's corporate headquarters are in the City of Greensburg, Westmoreland County, Pennsylvania.

2. Act 129 of 2008 ("Act 129")¹ requires electric distribution companies with at least 100,000 customers in Pennsylvania to adopt a plan to reduce energy consumption and demand in their service territories.² On June 29, 2009, Allegheny Power filed its Energy Efficiency and Conservation and Demand Response ("EE&C/DR") Plan with the Commission. The EE&C/DR Plan measures, programs, and rate offerings will enable Allegheny Power customers to adjust their energy usage with the aim of reducing overall consumption and decreasing peak demand for electricity. Allegheny Power's EE&C/DR Plan was approved with minor revisions by the Commission, in an Order entered on October 23, 2009 at Docket No. M-2009-2093218.

3. Act 129 also requires the filing with the Commission of implementation plans to address the installation of smart meters and associated smart meter technology, along with "any system upgrades that the electric distribution company may require to enable the use of the smart meter technology". On August 14, 2009, Allegheny Power filed its Smart Meter Technology Procurement and Installation Plan ("SMIP") with the Commission. The Smart Meter Implementation Order, entered by the Commission on June 24, 2009 at Docket No. M-2009-2092655, required the Office of Administrative Law Judge to issue recommendation decisions by no later than January 29, 2010.

4. On or about December 18, 2009, Allegheny Power filed with the Commission a Petition to Modify a Prior Commission Order and to Reopen the Evidentiary Record. With its Petition, the Company sought to modify the Commission's

¹ Act 129 became effective November 14, 2008.

² Act 129 requires a 1% reduction in energy consumption by May 31, 2011, a 3% reduction in energy consumption by May 31, 2013, and a 4.5% peak demand reduction by May 31, 2013.

Smart Meter Implementation Order to extend the Recommended Decision due date and allow for the receipt of additional relevant, important evidence in this matter and to allow the Administrative Law Judge (ALJ) to issue one decision in this matter after receipt of that additional evidence and supplemental briefing.³

5. Substantively, the Company's Petition requested a very limited scope reopening to permit the admission of limited additional matter into the record for consideration by the ALJ and Commission. Through the reopening, Allegheny Power sought to modify its litigation position in a manner that was fair to all parties and to introduce modifications of the SMIP that were more sensitive to the concerns of the parties that were revealed in the course of this proceeding.

6. Specifically, Allegheny Power sought modifications in the following areas: Smart Meter deployment, deployment of In-Home Devices ("IHDs"), Asset Book Lives, Return on Equity, and SMT Surcharge Amount. As indicated in the Petition and in the Company's subsequent Supplemental Direct Testimony, Allegheny Power sought alternative meter deployment options to slow down the pace of Smart Meter deployment. The Company also sought to scale back the deployment of IHDs.⁴ As noted in the Petition, all of the Company's proposed modifications kept the fundamental nature of the SMIP intact, while at the same time, the modifications were intended to ease the cost burden from the SMIP on individual customers.

³ At the time of the Petition, the record in the proceeding was closed, and the briefing phase of the proceeding was under way, with main briefs due on December 18, 2009 and reply briefs due January 6, 2010. Of note, the ALJ extended the original briefing schedule to permit settlement negotiations among the active parties to the proceeding.

⁴ The term "IHD" when used by the Company in the SMIP filing includes three types of technologies: (1) the in-home display; (2) the programmable thermostat; and (3) the digital control unit.

7. By Secretarial Letter dated January 13, 2010, the Commission agreed to waive the requirement that an Initial Decision be rendered in this matter on or before January 29, 2010. The Commission then remanded the remaining issues in the Petition (including but not limited to the development of an appropriate procedural schedule) for disposition by the Presiding Officer.

8. The Presiding Officer subsequently adopted the following revised litigation schedule for the receipt of supplemental testimony, supplemental briefing and an ALJ decision covering both the initial and supplemental phases of the case:

Service of Company's written direct Testimony & work papers	January 29, 2010
Informal Discovery Session with Company witnesses	February 11, 2010
Service of other parties' direct testimony	March 2, 2010
Service of all parties' rebuttal written testimony	March 12, 2010
Further evidentiary hearing in Harrisburg	March 16, 2010
Main Briefs by close of business and record close	March 26, 2010
ALJ Initial Decision	April 23, 2010

9. On January 29, 2010, the Company submitted its Supplemental Direct Testimony. In AP Statement No. 1-SDT, the Company submitted alternative smart meter deployment schedules slowing down the pace of deployment. Under the alternative deployment schedules, the Company would reduce the number of Smart Meters deployed by mid-2012 from approximately 450,000 to 100,000. AP Statement No. 1-SDT indicated that the Company considered and found acceptable another slowed-down

deployment option; a reduction of deployed smart meters and IHDs to a level of approximately 375,000 Smart Meters by mid-2012.

10. With IHDs ("In Home Displays"), the Company via AP Statement No. 1-SDT sought to modify its proposed deployment of IHDs from deployment to all customers (unless the customer specifically opts out) to deployment of 100,000 IHDs for only those customers that request an IHD or to those customers for whom installation of an IHD is required to participate in the relevant EE&C/DR program.

11. On March 2, 2010, the OCA submitted Supplemental Direct Testimony from J. Richard Hornby (OCA Statement No. 1-Supp.) and Nancy Brockway (OCA Statement No. 2-Supp.).

12. Mr. Hornby's Supplemental Direct Testimony (p. 26, line 14 through page 27, line 2) includes testimony about Direct Load Control programs, which is an issue that is relevant to EE&C/DR Plan issues. Mr. Hornby's Supplemental Direct Testimony (p. 27, line 3 through p. 28, line 6) also includes testimony about the Company's Programmable Communicating Thermostats (PCT) Program and Time of Use (TOU) rate offering, which are EE&C Plan programs/rate offerings. In Mr. Hornby's Supplemental Direct Testimony, the witness also addresses several cost issues related to the original proposed SMIP deployment, including how the costs compare to other utilities (page 13, lines 5 through 23 and at page 14, line 16 through page 15, line 8) and the relationship of the costs to the rural nature of the Company's service territory (page 14, lines 1-16).

13. Ms. Brockway's Supplemental Direct Testimony addresses several issues, including adverse customer reactions to improperly managed smart grid deployment (p.

2, line 1 through p. 7, line 8) and demand reduction alternatives to smart grid and IHD deployment, including DLC programs (p. 12, line 14 through p. 14, line 20).

II. Argument

- A. **The Presiding Officer should strike the portions of OCA Statement No. 1-Supp. addressing DLC programs and the Company's PCT Program and TOU rate offering because the PCT program and TOU rate offering have already been approved by the Commission, are irrelevant to this SMIP case, and are outside the scope of the supplemental phase of this proceeding.**

14. Oral or documentary testimony that is irrelevant, immaterial, or unduly prejudicial is generally inadmissible. 66 Pa. C.S. § 332. Irrelevant evidence includes testimony that is beyond the scope of a proceeding. *See Re Gas Cost Rate Case No. 5*, 1983 Pa. PUC LEXIS 53. Meanwhile, a presiding officer is authorized to make evidentiary rulings, to establish discovery schedules and to otherwise regulate the course of the proceeding. 52 Pa. Code § 5.483. Thus, as part of an ALJ's authority to make evidentiary rulings and to regulate the course of a proceeding, the Presiding Officer is authorized to strike irrelevant testimony.

15. The above-identified portions of witness Hornby's testimony address EE&C Plan programs and rate offerings that have already been litigated, are irrelevant to this SMIP proceeding, and are outside the scope of the supplemental phase of this proceeding. The Company's PCT Program and TOU Rate were both approved by Final Commission Order back in October 2009 and thus, have been fully litigated before the Commission.⁵ The supplemental phase of this proceeding clearly was not intended to provide an opportunity for parties to re-litigate issues that have been previously litigated. Rather, as made clear by the Company's petition to reopen the record, the reopening was for the limited purpose of modifying the SMIP to make it more sensitive to the concerns of the parties that were revealed in the course of this proceeding, including concerns

⁵ *Petition of West Penn Power Company d/b/a Allegheny Power for Approval of its Energy Efficiency and Conservation Plan*, Docket No. M-209-2093218 (Order entered October 23, 2009).

raised about the pace of the Smart Meter and IHD deployments. In fact, the subject matter of the Allegheny Power Supplemental testimony was limited to alternative smart meter and IHD deployment schedules and showing the impact of those schedules on the estimated smart meter surcharge.

16. Moreover, the Company has not opened the door to re-litigate these EE&C Plan issues as part of the supplemental phase of this SMIP proceeding. Although the PCT Program and TOU Rate are Smart Meter-enabled programs, the Company was crystal clear in its Supplemental Direct Testimony that none of the alternative Smart Meter and IHD deployment schedules altered any of the programs/rate offerings in the EE&C Plan that rely on Smart Meters, including the PCT Program and the TOU Rate previously approved by the Commission.⁶ Consequently, the OCA's Supplemental Direct testimony addressing the DLC programs and the Company's Commission-approved PCT Program and Commission-approved TOU Rate should be stricken.

B. The Presiding Officer should strike the portions of OCA Statement No. 1-Supp. addressing the costs of Allegheny Power's original proposed SMIP deployment compared to the costs of other utilities because the testimony is unduly repetitious and cumulative and beyond the scope of the supplemental phase of this proceeding.

17. Oral or documentary testimony that is unduly repetitious is generally inadmissible. 66 Pa. C.S. § 332. Similarly, the Commission's regulations at Section 5.401(b) require repetitious or cumulative evidence to be excluded from the evidentiary record.

18. Under At page 13, lines 5-23 and at page 14, line 17 through page 15, line 8 of his Supplemental Direct Testimony, witness Hornby testifies about the costs of Allegheny Power's original proposed SMIP deployment as compared to the costs of other

⁶ AP Statement No. 2-SDT, p. 9.

utilities. Such testimony represents unduly repetitious evidence and should be stricken. Such testimony is cumulative, as Mr. Hornby provided the same testimony on the costs of the original SMIP deployment versus other utilities in OCA Statement No. 1, page 15, line 15 through page 16, line 6.

19. Meanwhile, Allegheny Power did not open the door for the OCA to re-address this issue. Allegheny Power's petition seeking to reopen the record was crystal clear that the reopening was for a very limited purpose, and the Company's Supplemental Direct Testimony did not address the overall costs of the original SMIP deployment. Thus, the comparison of the costs of the original SMIP deployment to other utilities is an issue that was the subject of prior testimony, has already been briefed, and need not be re-addressed as part of this supplemental phase. Reiterating cumulative testimony relating to the Company's original plan invites the parties to re-brief issues already addressed which should not be permitted.

C. The Presiding Officer should strike the portions of OCA Statement No. 1-Supp. addressing the impact of the rural nature of Allegheny Power's service territory on the original SMIP deployment costs because this issue is beyond the scope of the supplemental phase of this case.

20. At page 14, lines 1-16 of his Supplemental Direct Testimony, witness Hornby testifies in response to what he characterizes as an Allegheny Power statement made "earlier in the proceeding" that one of the reasons why Allegheny Power's original and alternative deployment costs are higher than other utilities is the more rural nature of its service territory. Mr. Hornby is correct that Allegheny Power made this statement regarding the rural nature of its service territory. However, the statement is from the original phase of this proceeding in Allegheny Power Statement No. 6-R and not from the

Company's Supplemental Direct Testimony. Thus, the OCA is inappropriately trying to inject an issue in this supplemental phase that should have been brought previously. The OCA's attempt to introduce this evidence through the "back door" should be rejected.

D. The Presiding Officer should strike the portions of OCA Statement No. 2-Supp. addressing adverse customer reactions to improperly managed smart grid deployment and addressing demand reduction alternatives to smart grid and IHD deployment, such as DLC programs because such testimony is irrelevant and is not within the scope of the supplemental phase of this proceeding.

21. The above-identified portions of Ms. Brockway's testimony addressing customer reactions to smart grid deployment is not within the scope of the supplemental phase of this proceeding. Such testimony is not specifically reactive or responsive to the alternative deployments raised in the Company's Supplemental Direct Testimony. Rather, this testimony that is generally applicable to any type of large-scale deployment, including the initial deployments proposed by the Company in its initial SMIP. Therefore, this testimony is of the type and nature that it should have been submitted as part of the OCA's initial Direct Testimony. It was not, and the OCA should not be permitted to do an end run around the rules of evidence and submit such testimony through the "back door" in the supplemental phase of this case.

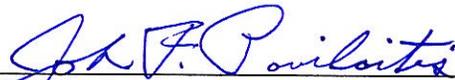
22. For the same reasons as discussed with Mr. Hornby's EE&C-related testimony discussed above, neither should Ms. Brockway's Supplemental Direct Testimony on demand reduction alternatives be part of the record in this case. Even assuming, *arguendo*, that the Company's Supplemental Direct Testimony on alternative deployments was in response to the Commission's request in EE&C Order for a less rapid meter deployment approach, and this opened the door to consider demand reduction alternatives in this proceeding, the Commission has clearly rejected this notion. The

Commission in its recent Order regarding Allegheny Power's amended EE&C/Dr Plan, entered on March 1, 2010 at the Company's EE&C Plan docket, clearly tied the back up EE&C/DR plan it encouraged Allegheny Power to prepare to the Company falling short on the "minimum EE&C requirements if its smart meter plan is not implemented during the initial EE&C plan period."⁷ Since all of the alternative deployment plans pre-date the measurement of reaching minimum EE&C/DR requirements, the Company's proposed slowed deployments cannot constitute the back up EE&C Plan less reliant on Smart Meters that the Commission contemplated when it made the request in the EE&C Order.

WHEREFORE, West Penn Power d/b/a Allegheny Power respectfully requests that the Presiding Officer grant this Motion and strike portions of the OCA Supplemental Direct Testimony.

Dated: March 11, 2010

Respectfully submitted,



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d/b/a Allegheny Power

⁷ Order, pp. 17-18.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing documents in accordance with the requirements of 52 Pa. Code § 1.54 et seq. (relating to service by a participant).

VIA FIRST CLASS AND
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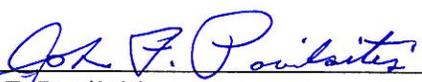
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