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November 18, 2010

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VIA E-FILE AND FIRST CLASS MAIL

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
400 North Street – 2<sup>nd</sup> 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 Chiavetta:

Enclosed are West Penn Power Company's Replies to Exceptions of the Office of Trial Staff filed today in the above-referenced proceeding. Copies have been served on each of the parties to this proceeding as indicated on the attached Certificate of Service.

Thank you for your attention to this matter.

Very truly yours,

  
John F. Povilaitis

EV:ck

Attachment

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

**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 :

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**REPLY TO EXCEPTIONS  
OF THE  
OFFICE OF TRIAL STAFF**

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It is the position of West Penn Power Company a/b/a Allegheny Power (“Allegheny Power” or “Company”) that neither Exceptions or Replies to Exceptions are due in this proceeding because a Settlement supported by or not opposed by the majority of parties to this case has been submitted on October 19, 2010 consistent with the July 21, 2010 Order of the Pennsylvania Public Utility Commission (“Commission”) at this docket.<sup>1</sup> Furthermore, the fact that the Office of Trial Staff (OTS) has submitted an Exception to the Administrative Law Judge's Initial Decision on the capital structure issue demonstrates that, contrary to OTS' position on the Settlement, this issue does not require further evidentiary hearings, because the evidentiary record on the issue is complete. The issue of interest, OTS' other Exception, is a question of ratemaking policy. It is important that the Commission recognize that, in its Exceptions, OTS is challenging the Company's litigation position, which has been modified with respect to the smart meter surcharge by the October 19, 2010 Joint Petition for Settlement.

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<sup>1</sup> Order at 12. (“That if West Penn Power Company and the Parties have not filed a proposed Settlement Agreement in this matter setting forth all of the proposed changes to the SMIP and any necessary changes to West Penn Power Company's EE&C Plan by ninety (90) days from the date of entry of this Opinion and Order, then Exceptions to the Initial decision will be due one hundred and ten (110) days after the entry date of this Opinion and Order with Reply Exceptions due one hundred and twenty (120) days after the entry date of this Opinion and Order without further action by the Commission.”).

Nevertheless, to fully protect its right to be heard on the issues raised in Exceptions by OTS, Allegheny Power submits the following Replies to Exceptions of OTS pursuant to Section 5.535(a) of the Commission's regulations. 52 Pa. C.S. § 5.535(a).

## **I. INTRODUCTION**

Act 129 of 2008 ("Act 129")<sup>2</sup> requires electric distribution companies ("EDCs") with at least 100,000 customers in Pennsylvania to adopt a plan to reduce energy consumption and demand in their service territories.<sup>3</sup> As an EDC, Allegheny Power filed its Energy Efficiency and Conservation and Demand Response ("EE&C/DR") Plan with the Commission in June of 2009. The EE&C/DR Plan measures, programs, and rate offerings designed to 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 by the Commission, in accordance with its order entered on October 23, 2009 at Docket No. M-2009-2093218 ("EE&C/DR Order").<sup>4</sup>

Act 129 also requires Allegheny Power, as an EDC with at least 100,000 customers in Pennsylvania, to file a Smart Meter implementation plan with the Commission to address the installation of Smart Meters and associated Smart Meter technology.<sup>5</sup> The Commission issued its Smart Meter Implementation Order on June 24, 2009 at Docket No. M-2009-2092655 ("Implementation Order"). On August 14, 2009,

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<sup>2</sup> Act 129 became effective November 14, 2008.

<sup>3</sup> As discussed in more detail below, 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.

<sup>4</sup> The Commission approved the Plan with minor revisions due to be filed by December 22, 2009.

<sup>5</sup> The Company uses the term "Smart Meter" and related technology as defined by Act 129 and the Commission's Implementation Order discussed herein.

Allegheny Power filed its Smart Meter Technology Procurement and Installation Plan ("SMIP") with the Commission.

## **II. HISTORY OF PROCEEDING**

As noted in the Introduction, Allegheny Power filed its SMIP with the Commission on August 14, 2009. The Company also filed supporting direct testimony. By Prehearing Conference Order dated September 3, 2009, Administrative Law Judge Mark A. Hoyer (the "ALJ") scheduled a prehearing conference for Wednesday, September 30, 2009 at 1:00 p.m. At the prehearing conference, the ALJ adopted a procedural schedule which, in addition to a timeline for the submission a testimony, provided for the submission of main briefs by December 3, 2009, and Reply Briefs by December 18, 2009. In adopting this procedural schedule, the ALJ rejected the Company's proposed multi-phase procedural schedule, which included a request for early Commission review and approval of initial activities that needed to be completed in 2009 so that the Company could implement the SMIP as originally proposed. Following the ALJ's denial of Allegheny Power's proposed procedural schedule, Allegheny Power filed a Petition for Interlocutory Review with the Commission, which was denied.

An evidentiary hearing was held in Hearing Room 2 in the Commonwealth Keystone Building, Harrisburg, PA, on November 9, 2009. At the hearing, the written testimony and exhibits presented by the Company and the active parties were admitted into the record. By interim order dated November 24, 2009, the ALJ modified the litigation schedule to extend the briefing schedule to provide an interval for the parties to

focus on settlement negotiations. Under the modified litigation schedule, main briefs were due December 18, 2009, with reply briefs due January 6, 2010

The OTS, the Office of Consumer Advocate ("OCA") and the Office of Small Business Advocate ("OSBA") each filed timely notices of intervention. Other parties seeking intervention included the West Penn Power Industrial Intervenors ("WPPII") (Petition to Intervene dated September 16, 2009), the Pennsylvania Department of Environmental Protection ("DEP") (Petition to Intervene dated September 18, 2009), The Pennsylvania Association of Community Organizations for Reform Now ("ACORN") (Petition to Intervene dated September 25, 2009), Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc. (collectively, "Constellation") (Petition to Intervene September 25, 2009) and Citizen Power, Inc. (Petition to Intervene dated September 25, 2009). Allegheny Power filed an answer in opposition to Citizen Power, Inc.'s Petition to Intervene.

At the prehearing conference on Wednesday, September 30, 2009 and by subsequent prehearing order, the ALJ granted the interventions of: the OCA, the OSBA, OTS, the WPPII, ACORN, DEP, and Constellation. The ALJ denied Citizen Power's Petition to Intervene.

In support of its SMIP, Allegheny Power submitted the following written direct testimony, which was admitted into evidence at the evidentiary hearing in the case:

- Allegheny Power St. No. 1, Direct testimony of Roger J. Heasley, which describes the Allegheny Power organization structure for the development of the SMIP and the stakeholder meetings that Allegheny Power held during the development of the previously submitted EE&C Plan;
- Allegheny Power St. No. 2, Direct Testimony of John C. Ahr, which also addresses the development of the SMIP, the necessary time table for procurement

and installation of smart meters and related technologies, and the cost effectiveness of the Plan;

- Allegheny Power St. No. 3, Direct Testimony of Richard C. Arthur, Jr., which addresses the smart meter infrastructure technology and its planned implementation;
- Allegheny Power St. No. 4, Direct Testimony of Raymond E. Valdes, which addresses the determination of SMIP costs, the allocation of those costs to customer classes, and the proposed cost recovery tariff mechanism.
- Allegheny Power St. No. 5, Direct Testimony of Ethan L. Cohen, which addresses the use of Advanced Metering Infrastructure, smart meters, and the EE&C Plan elements relating to that technology.

Also admitted into evidence were the SMIP itself and the verified Petition by the Company in support of the SMIP, which were marked and identified as Allegheny Power Hearing Exhibits Nos. 1 and 2, respectively.

Direct testimony and attached exhibits were admitted into the record from each of the following intervenors, individually: the OCA, the OSBA, the OTS, ACORN, and Constellation.

Rebuttal testimony from the Company and attached exhibits were admitted into the record from the following witnesses who also submitted direct testimony: Heasley (Allegheny Power Statement No. 1-R), Ahr (Allegheny Power Statement No. 2-R), Arthur (Allegheny Power Statement No. 3-R), Valdes (Allegheny Power Statement No. 4-R), and Cohen (Allegheny Power Statement No. 5-R). In addition, rebuttal testimony on behalf of the Company was admitted from the following three witnesses who did not submit direct testimony: Frank Graves (Allegheny Power Statement No. 6-R addressing the benefits of the SMIP), William E. Avera (Allegheny Power Statement No. 7-R addressing rate of return), and Rosemary Spoljarick (Allegheny Power Statement No. 8-R addressing low-income issues).

Surrebuttal testimony of the statutory advocates with attached exhibits was admitted into the record. Written rejoinder testimony<sup>6</sup> with attached exhibits was admitted on behalf of the Company from the following witnesses: Heasley (Allegheny Power Statement No. 1-RJ), Arthur (Allegheny Power Statement No. 3-RJ), Valdes (Allegheny Power Statement No. 4-RJ), Cohen (Allegheny Power Statement No. 5-RJ), Graves (Allegheny Power Statement No. 6-RJ), Avera (Allegheny Power Statement No. 7-RJ) and Spoljarick (Allegheny Power Statement No. 8-RJ).

By the interim order dated November 24, 2009, the ALJ also admitted into the record Allegheny Power Exhibit No. 6, which is a stipulation of fact dated November 7, 2009 between the Company and the OCA relating to the rejoinder testimony of Company witness Ms. Spoljarick.

In accordance with the revised litigation schedule set forth in the Interim Order dated November 24, 2009, the Company, OTS, OCA, OSBA, DEP, WPPII, ACORN and Constellation filed Main Briefs on December 18, 2009. On January 5, 2010, Allegheny Power, OTS, OCA, OSBA, WPPII and ACORN filed Reply Briefs. Neither DEP nor Constellation filed a Reply Brief.

Also on December 18, 2009, Allegheny Power filed a Petition to Modify a Prior Commission Order and to Reopen the Evidentiary Record. OCA, OTS, OSBA and ACORN filed answers to the Petition.<sup>7</sup> On January 13, 2010, Allegheny Power's Petition to Modify a Prior Commission Order and to Reopen the Evidentiary Record was granted by Secretarial Letter. The Commission waived the requirement that an Initial Decision

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<sup>6</sup> All of the parties and the ALJ agreed to permit the Company to file written rejoinder testimony in lieu of rejoinder outlines that were originally contemplated in the litigation schedule.

<sup>7</sup> Section 5.405 of the Commission's regulations, 52 Pa. Code § 5.405, governs the evidentiary effect of the Petition to Modify a Prior Commission Order and to Reopen the Evidentiary Record and the answers filed in response thereto.

be rendered in this matter on or before January 29, 2010, and remanded the remaining issues in the Petition for disposition by the presiding Administrative Law Judge.

A Further Conference was held on January 26, 2010, and ALJ Hoyer issued a Further Conference Order the same day. The Further Conference Order established, *inter alia*, a revised litigation schedule for the submission of Supplemental Direct and Rebuttal Testimony and Exhibits; scheduled a Further Evidentiary Hearing for March 16, 2010; and required filing and service of Supplemental Main Briefs on, or before, March 26, 2010.

In accordance with the Further Conference Order, a Further Evidentiary Hearing was held on March 16, 2010. The parties waived the right to cross-examination of the witnesses who prepared supplemental written statements and exhibits, and stipulated to the admission of certain supplemental statements and exhibits offered by the Company, the OCA and the OSBA. Supplemental Main Briefs were served by Allegheny Power, the OCA, the OSBA and the DEP on March 26, 2010.

On April 7, 2010, counsel for ACORN filed and served a request to withdraw ACORN's appearance in this proceeding. None of the parties submitted responses in opposition to this request.

On May 6, 2010, ALJ Hoyer issued his Initial Decision in this proceeding. On May 13, 2010, Allegheny Power filed a Petition to Stay the Exceptions Period ("Petition to Stay") arguing that an extension of time would allow the parties to consider the impact on the Company's smart meter plan of a pending merger between Allegheny Power's parent company and FirstEnergy Corporation. On Friday, May 14, 2010, the Secretary of the Commission issued a Letter indicating that the period to submit Answers to the



Petition to Stay would be shortened to Tuesday, May 18, 2010. On May 18, 2010, the OSBA filed an Answer opposing the Petition to Stay.

In an Order Adopted on July 15, 2010 and Entered on July 21, 2010, the Commission stated that, “[i]f West Penn and the Parties have not filed a proposed Settlement Agreement in this matter...by ninety (90) days from the date of entry of this Opinion and Order, then Exceptions to the Initial Decision will be due one hundred and ten (110) days after the entry date of this Opinion and Order with Reply Exceptions due one hundred and twenty (120) days after the entry date of this Opinion and Order.”<sup>8</sup>

On October 19, 2010, the Company and OCA submitted a Joint Petition for Settlement (“Joint Petition”) reflecting their agreement to settle all the issues in this proceeding and to make all reasonable efforts to obtain the Commission’s approval of the Settlement promptly so that the Company’s SMIP can be finalized. This document included a request for a shortened response period, which the Commission granted. On November 1, 2010, OTS submitted its Answer to the Joint Petition arguing, *inter alia*, that it does not satisfy the Commission’s Order Entered July 21, 2010. OSBA and WPPII also submitted Answers to the Joint Petition. On November 1, 2010, Pennsylvania Communities Organizing for Change filed a Petition to Intervene and Answer in support of the Joint Petition. The Petition to Intervene has not yet been acted upon. On November 7, 2010, Allegheny Power filed and served a Reply to the Joint Petition Answers in Opposition, asserting that further hearings were not required to adjudicate the Joint Petition and Settlement

On November 8, 2010, OTS filed Exceptions to ALJ Hoyer’s Initial Decision.

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8 Opinion and Order, Docket No. M-2009-2123951, Order Adopted July 15, 2010 and Entered July 21, 2010, p. 11.

### III. ALLEGHENY POWER'S REPLY TO OTS' EXCEPTIONS

It is worthy of note that OTS' Exceptions do not challenge the substantive proposals of Allegheny Power's smart meter plan. In fact, OTS clarifies that it does not oppose the recommendations of ALJ Hoyer in his Initial Decision issued on May 6, 2010, regarding smart meters. Rather, OTS maintains that Allegheny Power's proposed Cost Recovery Mechanism is inappropriate and requires modification.

#### **Reply to OTS Exception No. 1 – The ALJ's recommendation regarding capital structure is correct.**

In this Exception, OTS contends that the Company's capital structure is inconsistent with the Rate of Return determination, and that the Commission should instead use a representative capital structure for all EDC smart meter cost recovery based upon the barometer group that the Commission uses to calculate return on equity ("ROE") in the Quarterly Earnings Report.<sup>9</sup>

In the Initial Decision issued on May 6, 2010, ALJ Hoyer correctly concluded that, even if the OTS proposal for a representative capital structure were consistent with OTS' proposed use of the ROE published in the Quarterly Earnings Report, it is not a sufficient basis to reject the Company's actual capital structure.<sup>10</sup> Contrary to the OTS position, the Company has demonstrated that the use of a barometer group for this purpose is inappropriate and that its actual capital structure ought to be used for purposes of determining the return related to the SMT Surcharge. The Company's proposed reconciliation mechanism will determine *actual* costs incurred through the designated twelve month reconciliation period, which will include *actual* operation and maintenance

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<sup>9</sup> See OTS Exceptions, pp. 9-11; see also OTS Statement No. 1, pp. 13-14; 1-R, pp. 5-6; 1-SR, pp. 9-10.

<sup>10</sup> Initial Decision, p. 74.

("O&M") costs and a capital revenue requirement to reflect *actual* capital costs—that is, the most recently available pre-tax cost of capital, and any changes or updates to depreciation and accumulated deferred income taxes.

Not only is it inappropriate to use a capital structure of a barometer group that is not necessarily representative of Allegheny Power, it is inappropriate to mix the Commission-authorized return on equity ("ROE") with a barometer group's capital structure that would have financing that is dissimilar from Allegheny Power. Additionally, the administrative difficulties associated with the submittal of a ROE study at each quarterly filing are solved by using Allegheny Power's most recent quarterly earnings report that is already filed with the Commission.<sup>11</sup>

The ALJ correctly concluded that OTS failed to show that the use of representative capital structure would result in each EDC recovering its reasonable and prudent smart meter costs, a result permitted by section 2807(f). The OTS proposal to set ROE and capital structure on a rolling quarterly basis for smart meter cost recovery has not to date been accepted by the Commission in other SMIP proceedings. The Commission has given no indication it is receptive to such a standard when reviewing other EDCs' SMIPs, and such standards should not be solely applied to Allegheny Power's SMIP. The Company's proposal is reasonable and consistent with the reality of the financing needed for capital costs.<sup>12</sup>

**Reply to OTS Exception No. 2 – The ALJ's recommendation regarding interest is correct.**

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<sup>11</sup> Allegheny Power Statement No. 4-RJ, pp. 10-11.

<sup>12</sup> Allegheny Power Statement No. 4-RJ, p. 22-23.

The Company's proposed surcharge recovery mechanism does not include a provision for interest on over collections or under collections of its "SMT Surcharge." Under the Company's Plan, over collections of the SMT Surcharge would be credited against the next period's recovery, while under collections would result in an increase in the surcharge in the next period. The Company will not receive interest on top of under collections, nor will customers receive interest on refunds of over collections. Allegheny Power's position is consistent with the Commission's Order approving the Company's EE&C Plan, which held that over and under collections with the EE&C Surcharge would not bear interest in their recovery or refund.

OTS contends that in order for the Company's cost recovery mechanism to provide adequate protection to ratepayers, the inclusion of the computation of interest to over and under-collection, at the residential mortgage lending rate and in a one-directional manner, is necessary.

The OTS proposal for the imposition of interest rates apparently stems from its concern that EDCs will inflate over collections in order to profit from the time value of the over collected money. Of note, this same argument regarding inflation of over collections was raised by the OTS in the Company's EE&C/DR Plan proceeding and was rejected by the Commission. There, the Commission ruled that the EE&C Surcharge under Act 129 would not bear interest. The Commission ruled that Act 129 is silent on the issue of interest and that "[w]ith no statutory or case law requirement to impose interest, we conclude that over/under-collections related to EE&C Plans are not subject to interest."<sup>13</sup> The Commission's rationale and ruling in the EE&C Plan should also apply in the SMIP proceeding because both proceedings are directly related to Act 129 and

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<sup>13</sup> EE&C Order, p. 84.

closely aligned. In his Initial Decision, the ALJ agreed with the Company's position and correctly concluded that there is no reason to deviate from consistency in the proceedings, and the Commission's rationale that Act 129 does not impose interest on over and under collections is equally applicable in both the EE&C proceeding and the Smart Meter proceeding.<sup>14</sup>

To compute interest on the monthly over collections that occur in the reconciliation period, the OTS recommends using the monthly residential mortgage lending rate, as published in the Pennsylvania Bulletin by the Department of Banking.

As discussed above, the Company disagrees with the computation of interest on over collections of the SMT Surcharge and the ALJ agreed with the Company's position.<sup>15</sup> However, if the Commission determines that interest is appropriate, the monthly residential mortgage lending rate should not be used. It makes no sense to apply a residential mortgage interest rate to SMIP reconciliations, when considering that such reconciliations are not related to residential mortgages and the OTS has not made a clear connection between mortgage rates and electric metering costs. Rather, interest at the legal rate of six percent per annum<sup>16</sup> should be used, because it offers a known, unchanging foreseeable rate, as opposed to a fluctuating residential mortgage rate.

Finally, the OTS recommends a one-directional payment of interest, such that any cumulative over collection would be refunded to ratepayers, with interest, while any cumulative under collection would not bear interest when recovered from ratepayers. The OTS' alleged cost recovery basis for one-directional interest is fundamentally flawed on several fronts. First, the OTS attempts to justify its proposal for one-directional interest

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<sup>14</sup> Initial Decision, pp. 77-78.

<sup>15</sup> Initial Decision, pp. 77-78.

<sup>16</sup> 41 P.S. § 202.

by arguing that carrying costs of capital investments are already being recovered through the return component. However, under the Company's litigation position in this case, the O&M expense portion of SMIP costs does not have a return component, which means that carrying costs for under collections are not being recovered from ratepayers for that portion. In contrast, the proposed Settlement in this case does permit the collection of interest on amounts that are deliberately delayed from recovery in order to achieve a more levelized SMIP surcharge rate through the amortization of costs. In the context of the Settlement, the collection of interest is appropriate, because absent the rate levelization over an amortization period, these costs would be collected from customers on a current basis.<sup>17</sup>

Second, the OTS' proposal is incomplete, as the one-directional recommendation proposed by the OTS does not address carrying costs when revenues fall short of amortized capital costs.<sup>18</sup> Therefore, the OTS proposal for one-directional interest should be rejected.

The Company's litigation position to not apply interest is entirely consistent with the Code Section 1307(e) automatic adjustment clause mechanism applicable to EDCs, which does not require the accrual of interest. With its approval of the Company's

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<sup>17</sup> In the proposed Settlement, \$40 million of Phase 1 and 2 smart meter costs incurred between 2009 and 2010 are recovered via a levelized surcharge over a 10-year period (with interest on deferred amounts), so recovery of these amounts tracks the period over which smart meters are deployed. *See* Paragraph 18, pages 7-8 of the Joint Petition for Settlement. Similarly under the Settlement, \$11 million of O&M costs that will be amortized in the smart meter surcharge over 7 years will accrue interest due to the delay in recovery. *See* Paragraph 19, pages 8-9 of the Joint Petition for Settlement. Consistent with the Company's original SMIP filing, Allowance for Funds Used During Construction (AFUDC) will be collected during the period between incurrence of the capital costs and the capital in-service date. *Id.*

<sup>18</sup> Allegheny Power Statement No. 4-R, pp. 25-26.

proposed EE&C Surcharge, the Commission has indicated that an Act 129 surcharge mechanism should not bear interest, yet alone, one-directional interest.

#### IV. CONCLUSION

THEREFORE, in accordance with these Replies, Allegheny Power respectfully requests that the Commission deny the Exceptions of the Office of Trial Staff to the Initial Decision issued at the above-captioned docket.

Respectfully submitted,



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Date: November 18, 2010

Attorneys for West Penn Power Company  
d/b/a Allegheny Power

**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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Date: November 18, 2010

  
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