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February 17, 2010

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

RE: Petition of Duquesne Light Company for Approval of its
Smart Meter Procurement and Installation Program
PUC Docket No. M-2009-2123948

Dear Secretary McNulty:

Please find for electronic filing the Exceptions of the Commonwealth of Pennsylvania, Department of Environmental Protection to the Initial Decision issued on January 28, 2010 by the Honorable Robert P. Meehan in the above referenced matter. Copies have been served on all parties listed on the enclosed Certificate of Service.

Sincerely,

/s/ Kurt E. Klapkowski

Kurt E. Klapkowski
Assistant Counsel

cc: Service List

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of Duquesne Light Company :
for Approval of its Smart Meter : **Docket No. M-2009-2123948**
Procurement and Installation Program :

**EXCEPTIONS OF THE
COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

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Dated: February 17, 2010

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I. INTRODUCTION

In response to the January 28, 2010 Initial Decision issued by Administrative Law Judge Robert P. Meehan (“ALJ”) and in accordance with 52 Pa.Code § 5.533 (relating to procedure to except to initial, tentative and recommended decisions), the Commonwealth of Pennsylvania, Department of Environmental Protection (“Department”) files these Exceptions to Initial Decision in the above captioned matter.

This proceeding arises under Act 129 of 2008 (“Act 129”). Act 129 requires certain electric distribution companies (“EDCs”) to develop smart meter technology procurement and installation plans, and further requires EDCs to furnish smart meters upon request from a customer, in new building construction, and in accordance with a distribution schedule not to exceed 15 years. 66 Pa. C.S. § 2807(f). Act 129 also specifies the functions smart meters must provide. In order to be considered a smart meter, the meter and supporting infrastructure must 1) be capable of bidirectional communication, 2) record electricity usage on at least an hourly basis, 3) provide customers with direct access to and use of price and consumption information, 4) directly provide customers with information on their hourly consumption, 5) enable time-of-use rates and real-time-price programs and 6) effectively support the automatic control of the customer’s electricity consumption by one of the following as selected by the customer: the customer, the EDC, or a third party engaged by the customer or the EDC. 66 Pa. C.S. § 2807(g).

Through its Smart Meter Procurement and Installation Order (“Implementation Order”) at Docket No. M-2009-2092655, the Pennsylvania Public Utility Commission’s (“Commission”) established the process by which the Smart Meter Plans will be approved, the schedule under which smart meters are to be deployed, the minimum functions the meters are to provide, and the method by which the EDC may recover its costs.

The Implementation Order established a 30 month network and installation grace period during which EDCs are not required to deploy smart meters. Implementation Order at 7. The Implementation Order also required smart meters to provide nine additional functions unless the Commission determines that the function is not cost effective. Implementation Order, 30-31. Finally, the Implementation Order clarified that smart meters are to be deployed throughout the EDC's service territory in less than 15 years from the date the EDC's Smart Meter Plan is approved. Id. at 14-15.

The Department's primary interests in this matter relate to the timeframe in which the smart meter network will be developed, the timeframe in which smart meters will be deployed system-wide, and the functions the proposed smart meters and infrastructure will perform and support.

II. PROCEDURAL HISTORY

Pursuant to Act 129 and the Commission's Implementation Order, on August 14, 2009, Duquesne Light Company ("Duquesne") filed its Petition for Approval of its Smart Meter Procurement and Installation Plan ("Smart Meter Plan").

On August 29, 2009 the Commission published a notice of Duquesne's petition in the *Pennsylvania Bulletin* that required Petitions to Intervene and comments to the Smart Meter Plan to be filed by September 25, 2009. 39 *Pa. Bulletin* 5217. The Department filed its petition to intervene on September 18, 2009. On September 25, 2009, and in compliance with the Commission's *Bulletin* notice, the Department filed comments to Duquesne's Smart Meter Plan. On October 7, 2009 a prehearing conference was held in this matter and the Department's petition to intervene was granted. The Department filed its Main Brief ("M.B.") on December 8, 2009. On January 28, 2010, ALJ Meehan issued the Initial

Decision recommending approval of Duquesne's Smart Meter Plan as adjusted in the Initial Decision

III. DESCRIPTION OF DUQUESNE'S SMART METER PLAN

Duquesne's Smart Meter Plan describes the activities Duquesne will undertake during the 30 month grace to choose the smart meter technology it will deploy throughout its service territory. Based on the milestones specified in the Implementation Order, these activities include a smart meter capability cost benefit analysis; assessment of needs and technological solutions and selection of technologies and vendors; establishment of network designs; establishment of plans to design, test and certify EDI transactions, Web Access and Direct Access capability; installation, testing and rollout of support equipment and software and establishment of plans for installation of meters, outside communications and training personnel. Smart Meter Plan pages 10-13.

Overall, Duquesne's Smart Meter Plan presents a logical process for analyzing, selecting and implementing a smart meter and infrastructure system, and the Department appreciates that Duquesne is committed to meeting the deadlines established by the Implementation Order and Act 129. The Department raised two issues in its Main Brief, concerning whether or not Duquesne's proposed smart meter technology met the definition of the phrase in Act 129, and requesting that Duquesne be ordered to adhere to the deadlines contained in its Smart Meter Plan, Act 129 and the Implementation Order. Because the ALJ resolved those issues against the Department in the Initial Decision, the Department files the following exceptions.

IV. THE DEPARTMENT'S EXCEPTIONS TO THE INITIAL DECISION

A. DEP Exception No. 1 **The ALJ Erred in Not Explicitly Requiring That Duquesne's Smart Meters Meet the Definition of "Smart Meter Technology" in Act 129 and the Commission's Implementation Order.**
DEP M.B. at 6-8, Initial Decision at 33-34, 36 (Conclusion of Law 4) and 37 (Ordering Paragraph 1).

In order to meet the requirements of Act 129, the EDC's Smart Meter Plan must provide for the deployment of smart meters that meet the definition of "smart meter technology".

66 Pa. C.S. § 2807(g) defines "smart meter technology" as follows:

[T]echnology, including metering technology and network communications technology capable of bidirectional communication, that records electricity usage on at least an hourly basis, including related electric distribution system upgrades to enable the technology. The technology shall provide customers with direct access to and use of price and consumption information. The technology *shall* also:

- 1) Directly provide customers with information on their hourly consumption.
- 2) Enable time-of-use rates and real-time price programs.
- 3) Effectively support the automatic control of the customer's electricity consumption by one or more of the following *as selected by the customer*:
 - (i) the customer;
 - (ii) the customer's utility; or
 - (iii) or a third party engaged by the customer or the customer's utility.

(Emphasis added).

With regard to the enumerated functions mandated by Act 129, the critical element of the definition is allowing *the customer* to be in control of establishing the automatic control of their electricity consumption through the smart meter – whether it be on their own, through a conservation service provider, or through the EDC. Accord, 66 Pa.C.S. § 2807(g). The Implementation Order directly addresses these mandated functionalities as follows:

[T]he Commission will require EDC smart meters to have a capability to provide raw near real-time consumption data through a HAN or similarly capable method of open protocols. This delivery method should also be capable of providing pricing signals to support real-time and time-of use pricing programs, as well as energy efficiency and demand response

programs. Smart meters should support EDC and EGS time-of-use and real-time-pricing programs. Similarly, smart meters should support EDC, EGS and CSP energy efficiency and demand response programs.

Implementation Order at 23.

As made clear by the Implementation Order, the purpose of these functions is to effectively enable customers to control their energy consumption by responding to price signals sent directly to them through the meter system.

Given the clear benefits of these functions and the equally clear direction of the General Assembly and the Commission, the Department argued that it is critical that Duquesne deploy smart meters that enable Home Area Network (“HAN”) devices or similarly capable method with open protocols. DEP M.B. at 7. While Duquesne’s Smart Meter Plan does indicate that Duquesne will evaluate HANs, Duquesne has not expressly stated it will deploy smart meters with this functionality. Because the functions listed in Act 129 are mandatory and the Commission’s Implementation Order specifies how those requirements will be met, the Commission’s Order approving Duquesne’s Smart Meter Plan should explicitly require Duquesne to deploy smart meters that enable a HAN or similarly capable method with open protocols.

Duquesne mistakenly considers the capability for smart meters to provide raw near real-time consumption data through a HAN or similarly capable method of open protocols to be one of the extended capabilities that can be waived by the Commission later in the process if the company requests a waiver and if they prove to not be cost-effective. Duquesne Reply Brief at 6-7. As outlined above, however, the Department’s position is that this function is necessary under the terms of section 2807(g) of Act 129 and is not subject to the cost-benefit analysis allowed for by the Commission for the “non-mandatory” functions provided for in the Implementation Order. Implementation Order at 21(Section C.2.), 22 (Section C.6) and

31 (“This waiver authority does not extend to the minimum requirements delineated in 66 Pa.C.S. § 2807(g).”)

The ALJ did not include a resolution for this issue in the Initial Decision. Initial Decision at 33-34. Therefore, the Commission should include an explicit requirement for Duquesne’s Smart Meter Plan to include the use of a HAN or similarly capable method of open protocols.

B. DEP Exception No. 2

The ALJ Erred in Declining to Order Duquesne to Meet the Deadlines Established in the Company’s Smart Meter Implementation Plan, Act 129 and the Implementation Order.
DEP M.B. at 8-9, Initial Decision at 34-35, 36 (Conclusion of Law 4) and 37 (Ordering Paragraph 1)

As noted above, two of the primary interests of the Department relate to the timeframe in which the smart meter network will be developed and the timeframe in which smart meters will be deployed system-wide. None of the benefits that smart meters provide can be realized if the meters and the functions they support are not in the hands of the consumer.

Act 129 requires EDCs to furnish smart meters upon request from a customer who agrees to pay the incremental cost of the meter, in new building construction, and in accordance with a distribution schedule not to exceed 15 years. 66 Pa. C.S. § 2807 (f)(2). The Commission’s Implementation Order appropriately gives EDCs a 30 month grace period in which to complete an evaluation of smart meter technology and install the smart meter infrastructure network. Implementation Order at 7. As such, at the conclusion of the grace period, the network *must* be fully installed so that smart meters (that provide all the functions listed in Act 129 and those functions that have not been waived by the Commission) can be

provided. Absent the network, the meters will not provide the functions that make them “smart”.

1. DUQUESNE’S PLAN

Duquesne’s Smart Meter Plan and Petition for Approval states that Duquesne will complete the installation of the smart meter network by October 1, 2012, complete the roll out of 8,000 smart meters by December 31, 2013 and complete system-wide deployment of smart meters by December 31, 2018. See Petition at 12 and Plan at 13. However, Duquesne’s Smart Meter Plan also states that the “dates are approximate” and that it is simply Duquesne’s “intent” to meet the 15 year deployment schedule provided by Act 129. Petition at 10, Plan at 37.

While these statements are not necessarily inconsistent, they do create some confusion. Therefore, the Department requests that the Commission Order approving Duquesne’s Smart Meter Plan explicitly require Duquesne to complete the installation of the smart meter network by the end of the 30 month grace period, as required by the Implementation Order, and to complete system wide deployment of smart meters by January 1, 2019.

2. ALJ’S INITIAL DECISION

The ALJ declined to grant the Department’s request to hold Duquesne to firm dates for completing the tasks necessary to complete the installation of the smart meter network by the end of the 30 month grace period or to complete system-wide deployment of smart meters by January 1, 2019. Initial Decision at 34-35. Instead, the ALJ agreed with Duquesne’s argument that in “there are many matters that need analysis, evaluation and decisionmaking”, and that “like any large scale project with numerous interdependent components, the proposed schedule will not be exact.” Initial Decision at 34.

The Department believes that the 30 month grace period established by the Commission in the Implementation Order reflects these factors, and that the grace period represented a balancing between the difficulties associated with the design and installation of a smart meter network and the public interest in accomplishing the goals of Act 129 in a timely fashion. Implementation Order at 8-9. As the Commission noted, a fully functional smart meter involves more than just the meter hardware at the customer's premises. Implementation Order at 8. Finally, it seems clear that the 30 month grace period represents a period of time for the EDCs to both develop and *install* the smart meter network. Implementation Order at 7. The Department agrees that this is a reasonable maximum amount of time for the Commission to grant the EDCs to develop and install the smart meter network under Act 129.

The Commission should explicitly direct Duquesne to implement its Smart Meter Plan by a date certain to complete the installation of the smart meter network by the end of the 30 month grace period. The Department is simply requesting the Commission to hold the company to the terms of the Implementation Order and, indeed, the company's own Smart Meter Plan. If Duquesne requires additional time to develop and install the smart meter network, it can request that flexibility from the Commission at the time such need arises. The company itself appears to agree with this position. Duquesne Reply Brief, 3-4.

Similarly, the Department is requesting that the Commission explicitly adopt a firm deadline for Duquesne to complete its system-wide rollout of smart meters by January 1, 2019. Duquesne clearly believes at this time that accomplishing the task in that timeframe is achievable. As the Commission noted, Act 129 encourages EDCs to "expedite the deployment process if it will provide increased customer benefits in a cost-effective manner." Implementation Order at 14. Again, if circumstances are such that Duquesne cannot meet their target date, it can request relief from the Commission at the time such need arises, and

as noted above, the company appears to agree with the Department's position. Duquesne Reply Brief, 3-4.

3. DEP'S LACK OF WITNESSES

The Department believes that one additional point needs to be made regarding this exception, and specifically Conclusion of Law 4. Initial Decision at 36. In declining to hold Duquesne to the deadlines included in its own Smart Meter Plan and those established in the Commission's Implementation Order, the ALJ took exception with the fact that the Department did not provide any witnesses. Initial Decision at 35. The ALJ stated that this did not allow for "testing the reasonableness of [the Department's] position during the hearing or of addressing it in their respective Main Briefs." Id. Finally, the ALJ cited several rate-making proceedings of the Commission as support for the proposition that where an argument is made for the first time in briefs it "should be rejected because the other parties have been denied the opportunity to question and test the premises" of the position. Id. As a result, Conclusion of Law 4 states that "Adjustments, modifications, revisions to the proposed SMP made for the first time in briefs should be rejected." Initial Decision at 36.

In response, the Department believes that this is an overly broad Conclusion of Law given the facts in this proceeding. First, the Department notes that its positions with regard to the Duquesne Smart Meter Plan were set out quite plainly in the Comments the Department submitted on September 25, 2009, in accordance with the schedule set out in the Commission's Implementation Order. Further, the issues raised by the Department –the legal sufficiency of Duquesne's Smart Meter Plan in terms of compliance with mandatory requirements contained in Act 129 and requiring the company to meet firm deadlines to comply with Act 129 and the Commission's Implementation Order – are very different from those involved in a typical rate-making proceeding. The latter are necessarily fact-intensive and are therefore properly involve the give and take established through direct testimony and

cross-examination. To be frank, the Department cannot see the value in requiring a witness to state that deadlines exist in Act 129 and the Commission's Implementation Order and Duquesne's Smart Meter Plan does not unequivocally agree to comply with those deadlines. The Department does not generally dispute the facts in this proceeding, merely their legal effect, and therefore should not be penalized for not presenting witnesses proposing changes to the Duquesne Smart Meter Plan.

V. CONCLUSION

For the reasons set forth above, and in the Department's Main Brief, the Department respectfully submits that the ALJ erred in not explicitly requiring that Duquesne's smart meters meet the definition of "smart meter technology" in Act 129 and the Commission's Implementation Order, and in declining to order Duquesne to meet the deadlines established in the Company's Smart Meter Plan. The ALJ's Initial Decision on these issues should be rejected in favor of the positions supported by the Department in this proceeding as discussed above.

Respectfully Submitted,

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for Approval of its Smart Meter : **Docket No. M-2009-2123948**
Procurement and Installation Program :

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing documents, the Exceptions of the Commonwealth of Pennsylvania, Department of Environmental Protection, to the Initial Decision issued on January 28, 2010 by the Honorable Robert P. Meehan 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 indicated upon the persons listed below:

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