**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, Pennsylvania 17105-3265**

Public Meeting held July 15, 2010

Commissioners Present:

James H. Cawley, Chairman

Tyrone J. Christy, Vice Chairman

John F. Coleman, Jr.

Wayne E. Gardner, Dissenting Statement

Robert F. Powelson

In Re: Petition of West Penn Power Company Docket No. M-2009-2123951

d/b/a Allegheny Power for Expedited Approval

of its Smart Meter Technology and Installation

Plan

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Commission for consideration and disposition is the Petition to Stay the Exceptions Period in the above-referenced matter filed by West Penn Power Company d/b/a Allegheny Power (West Penn or Company) on May 13, 2010 (Petition to Stay). On May 18, 2010, the Office of Consumer Advocate (OCA) filed a letter supporting the Petition to Stay. An Answer to the Petition to Stay was filed on May 18, 2010, by the Office of Small Business Advocate (OSBA).

# History of the Proceeding

On August 14, 2009, West Penn Power filed its Smart Meter Procurement and Installation Plan (SMIP or Smart Meter Plan) pursuant to Section 2807(f) of the Public Utility Code (Code), 66 Pa. C.S. § 2807(f), and the *Smart Meter Procurement and Installation* Order entered by the Pennsylvania Public Utility Commission (Commission) on June 24, 2009, at Docket No. M-2009-2092655 (*Implementation Order*). West Penn is seeking Commission approval of its Smart Meter Plan, including expedited approval of the initial phase of its Smart Meter Plan, and its Smart Meter Technology (SMT) rates.

The Commission’s Office of Trial Staff (OTS) filed its Notice of Appearance on August 20, 2009. The OTS subsequently filed Comments on September 25, 2009. On September 1, 2009, the Office of Consumer Advocate (OCA) filed its Notice of Intervention and Public Statement in this matter. The OCA subsequently filed Comments on September 25, 2009. The West Penn Power Industrial Intervenors (WPPII) filed a Petition to Intervene dated September 16, 2009. The Pennsylvania Department of Environmental Protection (DEP) filed a Petition to Intervene dated September 18, 2009. The OSBA filed a Notice of Intervention and Comments and a Public Statement on September 25, 2009. Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc. (collectively, Constellation) filed a Petition to Intervene on September 25, 2009. Citizen Power, Inc. (Citizen Power) filed a Petition to Intervene on September 25, 2009.[[1]](#footnote-1) The Pennsylvania Association of Community Organizations for Reform Now (ACORN) filed a Petition to Intervene and Comments on September 25, 2009.[[2]](#footnote-2)

On November 9, 2009, an evidentiary hearing was held in Harrisburg, Pennsylvania before Administrative Law Judge (ALJ) Mark A. Hoyer.

On December 18, 2009, West Penn, the OTS, the OCA, the OSBA, DEP, WPPII, ACORN and Constellation filed Main briefs. On January 5, 2010, West Penn, the OTS, the OCA, the OSBA, WPPII and ACORN filed Reply briefs. Neither DEP nor Constellation filed a Reply brief.

Also on December 18, 2009, West Penn filed a Petition to Modify a Prior Commission Order and to Re-open the Evidentiary Record. The OCA, the OTS, the OSBA and ACORN subsequently filed Answers to the Petition.

On January 13, 2010, West Penn’s Petition to Modify a Prior Commission Order and to Re-open the Evidentiary Record was granted by Secretarial Letter. The Commission waived the requirement that an Initial Decision be rendered in this matter on or before January 29, 2010, and remanded the remaining issues in the Petition for disposition by the ALJ.

On March 16, 2010, a further hearing was held in this case.

On March 26, 2010, Supplemental Main briefs were filed by West Penn, the OCA, the OSBA and the DEP.

On May 6, 2010, an Initial Decision was issued by the ALJ.

On May 13, 2010, West Penn filed a Petition to Stay the Exceptions Period in this proceeding. Exceptions in this case were due May 26, 2010, with Reply Exceptions due June 7, 2010. West Penn averred that a Stay of the Exception period in this matter is necessary and appropriate so that the Parties may consider the impact on West Penn’s proposed SMIP given the proposed merger of Allegheny Power and its affiliates (including West Penn) into FirstEnergy Corporation.[[3]](#footnote-3)

On May 14, 2010, the Secretary of the Commission (Secretary) issued a letter advising the Parties that the Answer period to the Petition to Stay would be shortened to May 18, 2010.

On May 18, 2010, the OSBA filed an Answer opposing the Petition to Stay. The OCA filed a letter supporting the West Penn Petition.[[4]](#footnote-4) No other Party filed an Answer to the Petition.

On May 21, 2010, the Secretary issued a letter advising the Parties that the Commission was exercising its authority under 52 Pa. Code § 1.2(a) and (c) and 52 Pa. Code § 5.533(a) to stay the filing of Exceptions in this matter until the Commission has had an opportunity to consider the Petition and the Answer thereto filed by the OSBA, at a June, 2010, Public Meeting.

On May 27, 2010, West Penn filed a Reply to “New Matter” raised by the OSBA.

**The West Penn Petition**

West Penn cites our regulations at 52 Pa. Code §§ 5.41 and 5.533 in making its request to stay the Exceptions period in this proceeding. Petition at 1. 52 Pa. Code § 5.41 addresses petitions, generally. 52 Pa. Code § 5.533(a) states, in pertinent part:

In a proceeding, exceptions may be filed by a party and served within 20 days after the initial, tentative or recommended decision is issued unless some other exception period is provided.

West Penn contends that these regulations provide the basis for a Petition to Stay.[[5]](#footnote-5) West Penn does not raise or address the standards for granting a stay under *Pa. PUC v. Process Gas Consumers Group*, 502 Pa. 545; 467 A.2d 805 (1983), and we understand that no final Order has been issued in this matter pending appeal, which would have required West Penn to address those standards. Instead, the decision with respect to whether to grant a stay is discretionary with the Commission as we found in *Duquesne Interruptible Complainants v. Duquesne Light Company*, Docket No. C-913424 (Order entered May 14, 1993):

We note that the Company's Stay Petition seeks our discretionary relief because it "intends to file a Petition for Review in the Nature of an Appeal with the Commonwealth Court of Pennsylvania if the Commission fails to grant its Petition for Reconsideration." Stay Petition at 4. The Pennsylvania Rules apparently require that there be an actual appeal before a Stay Petition is filed. There is no explicit provision for granting a stay when, as here, the Stay Petition is premised on a statement of promised future action that is conditioned on an undecided Reconsideration Petition.  
  
Although dismissal of a Stay Petition might be warranted in certain circumstances, that is not the case here. Several reasons support that conclusion. First, Section 1.2(a) of our rules of practice, 52 Pa. Code § 1.2(a) requires liberal construction in order to accomplish the "just, speedy and inexpensive" determination of applicable matters. We are reluctant to dismiss the Stay Petition on this ground when doing so only adds an additional, unnecessary and expensive hurdle. *Big Apple Dinner Theater, Inc. v. Bell of Pennsylvania*, P.U.C. Docket No. C-00934817, (Order entered on April 30, 1993), Slip Op. at 3. Second, Pennsylvania courts have sustained our agency's authority under Section 1.2(a) of the Pennsylvania Code, 52 Pa. Code

§ 1.2(a) to disregard an error or defect of procedure which does not affect the substantive rights of the parties. *AT&T Communications of Pennsylvania v. Pennsylvania Public Utility Commission*, 130 Pa. Commonwealth Ct. 595, 568 A.2d 1362, 1364 (1990).[[6]](#footnote-6)

Id., at 7-8.

Having determined that the Petition to Stay is properly before us, we will continue with our analysis of the Petition.

West Penn points out that under the *Implementation Order*, an ALJ would have issued a decision in this matter by no later than January 29, 2010, but that in this case, and at West Penn’s request, the Commission waived that requirement and remanded the remaining issues in this case (including the development of a new procedural schedule) to the ALJ. Petition at 3, ¶ 6. We note, however, that this variation in the procedural schedule does not, in itself, justify further variations.

West Penn argues that a Stay of the Exception period in this case is necessary and appropriate so that the Parties may consider the impact of the proposed merger or acquisition of West Penn’s parent, Allegheny Power and its affiliates, with or by FirstEnergy Corp., on West Penn’s SMIP. West Penn states that, with the exception of the OSBA, the Parties in this case either concur with or do not object to this request. Petition at 1, 4, ¶ 9.

Having raised the merger/acquisition as the reason for its request, West Penn goes on to provide the following rationale for an indefinite stay:

FirstEnergy’s approach to deployment of Smart Meters is more conservative than Allegheny Power’s and does not contain the same level of back office investment required under Allegheny’s SMIP. Therefore, in lieu of the “exceptions” process, Allegheny Power [West Penn] requests an opportunity for the parties to evaluate the compatibility of the SMIP approved in the I.D. [Initial Decision] with FirstEnergy’s Smart Meter deployment approach, including how any changes to the SMIP approved in the I.D. may impact the Company’s Energy Efficiency & Conservation Plan. An evaluation of the timing of Allegheny Power’s installation of Smart Meters could lead to the avoidance of inefficiencies and an evaluation of potential cost savings for Allegheny Power’s customers, and thus, is in the public interest. This Petition does not presume approval of the FirstEnergy merger with Allegheny Energy, Inc., however further evaluation of the SMIP is prudent given the potential for that merger to occur.

Petition at 5, ¶ 14.

**The OSBA Answer**

In its Answer, the OSBA contends that, contrary to the claim of West Penn, 52 Pa. Code § 5.533 does not provide the basis for an indefinite stay of the Exceptions period. The OSBA cites the literal language of Section 5.533 that Exceptions to an Initial Decision are due within 20 days of issuance of the Initial Decision, “unless some other exception period is provided.” OSBA Answer at 3, ¶ 8. We infer from the OSBA’s argument that they would conclude that an indefinite “stay” is not the equivalent of the provision of “some other exception period.”

The OSBA also argues that the proposed merger/acquisition of Allegheny Power and FirstEnergy has been filed in multiple jurisdictions and that “because the merger/acquisition is far from being finalized, holding off on approving or disapproving Allegheny Power’s SMIP (based on a merger that may not happen) would be imprudent.” OSBA Answer at 3, ¶ 9.

The OSBA conjectures that Allegheny Power’s Energy Efficiency & Conservation (EE&C) Plan will most likely be affected if Allegheny power lessens its reliance on smart meters, which may shift more EE&C Plan costs to Small Commercial and Industrial customers. OSBA Answer at 4, ¶ 14.

The OSBA concludes by asking that we deny the Petition or, if we grant the Petition, that we set a date certain by which West Penn is required to file changes to its SMIP and EE&C Plan. OSBA asks that in the event that West Penn misses that date, then a date certain for the filing of Exceptions should be established.

**West Penn’s Reply to “New Matter”**

Although the OSBA did not expressly raise any “new matter” in its Answer, West Penn claims that the OSBA effectively raised “new matter” in several respects at Paragraph Nos. 9, 14, and 15 of its Answer. With respect to Paragraph No. 9, West Penn states that it is not requesting to suspend the Exceptions phase in the SMIP case indefinitely. West Penn Reply at 2, ¶ 2. However, we note that at Paragraph 8 in its Petition, West Penn clearly states (emphasis added):

The Commission’s regulations at Sections 5.41 and 5.533 allow a party to petition the Commission to request an alternative ‘exceptions’ period, *including an indefinite stay of the exceptions period*.

The clear implication of this statement and the lack of any firm date in the Petition for Stay save a date for a status report thirty days after the date of entry of an Opinion and Order resolving this matter fully supports the OSBA assertion that West Penn’s request is for an indefinite “stay.”

With respect to Paragraph No. 14 of the OSBA Answer, West Penn takes issue with the OSBA’s contention that Allegheny Power’s EE&C Plan will most likely be affected if Allegheny power lessens its reliance on smart meters, which may shift more EE&C Plan costs to Small Commercial and Industrial customers. Here, we agree with West Penn as noted above. The OSBA’s concerns in this regard are conjectural. However, the fact that they are conjectural does not lessen their importance to the OSBA or its constituency.

With respect to Paragraph No. 15 of the OSBA Answer, West Penn objects to the setting of any date certain for the filing of Exceptions because, “Neither the Commission nor any of the parties know at this time how the parties’ [sic] will respond to any proposed revisions to the SMIP and EE&C Plans, or precisely how long evaluation of those revisions will take. . . With sufficient time, the parties may reach a mutually agreeable SMIP that would avoid the need for an adjudication of widely disparate party positions. That process should be unfettered by an arbitrarily selected deadline when the Company has a strong interest in timely meeting its Act 129 deadlines.” West Penn Reply at 4-5, ¶ 4, 5. We would point out that it is difficult to understand how West Penn can argue that it is not asking for an indefinite stay on one hand when with the other it inveighs against “an arbitrarily selected deadline.”

**Discussion**

We have already determined that West Penn’s Petition is properly before us. As the proponent of a rule or order, West Penn has the burden of proof in this matter pursuant to 66 Pa. C.S. § 332(a).

West Penn has styled its pleading as a “Petition for Stay” under 52 Pa. Code §§ 5.41 and 5.533. We agree with the OSBA that neither 52 Pa. Code § 5.41 nor 52 Pa. Code § 5.533 of our regulations contemplate such a request, but despite this procedural irregularity, resolving the Petition is within our discretionary authority as explained above.

We do agree with the OSBA that what West Penn is seeking is not a temporary stay of the effect of a Commission order, and it is not a Petition for Stay pending an appeal. What West Penn is requesting is tantamount to an indefinite stay of this proceeding. By linking the evaluation of West Penn’s SMIP to the recently filed Allegheny/FirstEnergy merger application, resolution of West Penn’s SMIP case has the potential to be extended by months and possibly by more than a year, “the Company’s strong interest in timely meeting its Act 129 deadlines” notwithstanding. The only inducement that West Penn offers to grant its request is a “status report” to the Commission thirty days after the date of entry of an order in this matter.

Like the utilities that we regulate, this Commission also has responsibilities that it must meet in implementing the statutory mandates of Act 129 at 66 Pa. C.S.

§ 2807(e)-(g). While we are not insensitive to the added dimension of complexity the proposed acquisition/merger of Allegheny Power and FirstEnergy brings to the SMIP proceeding for both utilities, we are not inclined to grant an indefinite stay of this proceeding.

We believe that the OSBA’s alternative request for relief is reasonable at least in part: that a date certain should be set by which West Penn must file changes to its SMIP and, to the extent necessary, to its EE&C Plan[[7]](#footnote-7), as well as a date certain by which the Parties must file Exceptions if West Penn does not file such changes. OSBA Answer at 7. Taking into account the relative complexity of the issues involved as balanced against the need for progress in the resolution of this proceeding, we will grant a stay of ninety (90) days from the date of entry of this Opinion and Order to allow West Penn and the Parties to negotiate a mutually acceptable revised SMIP taking into account the proposed merger/acquisition of West Penn by FirstEnergy.[[8]](#footnote-8) If West Penn 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 its 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.

**Conclusion**

Based upon our consideration of the Petition to Stay the Exceptions Period filed by West Penn, the Answer of the OSBA and the positions of the other Parties, we will exercise our discretion to grant the Petition, in part, consistent with the terms of this Opinion and Order; **THEREFORE;**

**IT IS ORDERED**:

1. That the Petition to Stay the Exception Period filed by West Penn Power Company d/b/a Allegheny Power in this proceeding is hereby granted in part and denied in part, consistent with the terms of this Opinion and Order.

2. That a Stay of the Exceptions period in this proceeding is granted for ninety (90) days from the date of entry of this Opinion and Order.

3. 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.

** BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: July 15, 2010

ORDER ENTERED: **July 21, 2010**

1. The Petition to Intervene of Citizen Power was denied by Prehearing Order dated October 5, 2009. [↑](#footnote-ref-1)
2. On April 7, 2010, ACORN filed a letter withdrawing its appearance in this proceeding. No responses to the request were filed. [↑](#footnote-ref-2)
3. *Joint Application of West Penn Power Company d/b/a Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy Corp. for a Certificate of Public Convenience under Section 1102(a)(3) of the Public Utility Code approving A change of control of West Penn Power Company And Trans-Allegheny Interstate Line Company*, Docket Nos. A-2010-2176520, A-2010-2176732, (Filed May 17, 2010). [↑](#footnote-ref-3)
4. The letter states only that OCA supports the Petition to Stay. It does not offer any explanation or rationale for the support. [↑](#footnote-ref-4)
5. While West Penn claims that its Petition is not a Petition for Indefinite Stay, we disagree for the reasons which will be set forth in this Opinion and Order. [↑](#footnote-ref-5)
6. While the OSBA argues that the rights of its constituency may be impacted by the grant of a stay, we find that argument too conjectural, as noted elsewhere in this Opinion and Order. Further, by granting in part the OSBA’s alternative request for relief, we believe that the rights of OSBA’s constituency are properly addressed by our action. [↑](#footnote-ref-6)
7. *Petition of West Penn Power Company d/b/a Allegheny Power for Approval of its Energy Efficiency and Conservation Plan, Approval of Recovery of its Costs through a Reconcilable Adjustment Clause and Approval of Matters Relating to the Energy Efficiency and Conservation Plan*, Docket No. M-2009-2093218 (Order entered March 1, 2010) [↑](#footnote-ref-7)
8. Review and approval of any proposed Settlement will, of course, be separately considered by the Commission. [↑](#footnote-ref-8)