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February 17, 2010

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Honorable James McNulty
Secretary, Public Utility Commission
P.O. Box 3265
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RE: Joint Petition of Metropolitan Edison Company,
Pennsylvania Electric Company and Pennsylvania Power Company
For Approval of Smart Meter Technology Procurement and
Installation Plan PUC Docket No. M-2009-2123950

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 Susan D. Colwell 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

Joint Petition of Metropolitan Edison Company, :
Pennsylvania Electric Company and : **Docket No. M-2009-2123950**
Pennsylvania Power Company for Approval :
of Smart Meter Technology Procurement and :
Installation Plan :

**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 Susan D. Colwell (“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 (“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.

Significantly, 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. Equally significant, 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, Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company (collectively referred to as "First Energy") filed their Joint Petition for Approval of Smart Meter Procurement and Installation Plan ("Smart Meter Plan").

On August 29, 2009 the Commission published a notice of First Energy's petition in the *Pennsylvania Bulletin*, requiring Petitions to Intervene and comments to the Smart Meter Plan to be filed by September 25, 2009. 39 *Pa. Bulletin* 5218. 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 First Energy's Smart Meter Plan. On September 29, 2009 a prehearing conference was held in this matter and the Department's petition to intervene was granted. On December 11, 2009, the Department filed its Main Brief ("M.B."). ALJ Colwell issued an Initial Decision on January 28, 2010 recommending approval of the First Energy Smart Meter Plan, as modified in the Initial Decision

III. DESCRIPTION OF FIRST ENERGY'S SMART METER PLAN

First Energy's Smart Meter Plan presents a short term, "detailed" plan and a general long-term plan. Smart Meter Plan at 5.

The short-term plan will be implemented during the grace period. *Id.* The first 24 months of the grace period will be used as an "Assessment Period" to create a deployment plan that will be filed with the Commission. *Id.* During the Assessment Period, First Energy will evaluate its service territory characteristics (Plan at 8), evaluate the current distributions and metering system (Plan at 9), evaluate smart meter functions offered by various vendors (Plan at 10-11), select vendors (Plan at 11-12) develop a network design (Plan at 12), assess and train staff (*id.*) and develop installation, testing and rollout plans to be included in the Deployment Plan (Plan at 13). Also during the Assessment Period, First Energy will submit by January 1, 2010 a proposal for EDI capabilities, including target dates for testing and certification, to the Commission. Smart Meter Plan at 17.

The long-term plan will be provided approximately 24 months after the initial Smart Meter Plan is approved. Smart Meter Plan at 5. Approval of the Deployment Plan

is expected at approximately the same time that the grace period ends. Smart Meter Plan at 6. After First Energy obtains approval of its Deployment Plan, it will commence construction of the smart meter network infrastructure around April 1, 2013 with a completion date of March 31, 2016. Smart Meter Plan Exhibit A. Beginning approximately April 1, 2016, First Energy will deploy 60,000 smart meters to “de-bug” the system prior to beginning full deployment. *Id.*, Plan at 5. “Full scale deployment is expected to commence in April 2017, with such deployment completed no later than March, 2022. Met-Ed/Penelec/Penn Power Statement No. 1, page 9, see also Smart Meter Plan at 6.

The Department raised four issues in its Main Brief, concerning whether or not First Energy’s proposed smart meter technology met the definition of the phrase in Act 129, and several issues relating to First Energy’s deployment of the smart meter network and compliance with the deadlines contained in Act 129 and the Commission’s 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 Declining to Explicitly Order First Energy to Provide Meters that Meet the Definition of “Smart Meter Technology” under Act 129 and the Commission’s Implementation Order.
DEP M.B. at 7-8, Initial Decision at 9 (Finding of Fact 32), 55 (Conclusion of Law 1), 59 (Ordering Paragraph 2)

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 legislature and the Commission, the Department argued that it is critical that Duquesne deploy smart meters that enable HAN devices or similarly capable method with open protocols. DEP M.B. at 7-8. First Energy’s Smart Meter Plan indicate that HANs, may be provided as part of its plan (Smart Meter Plan at 18), and the company acknowledged in its Reply Brief that such functionality was required under Act 129 and would be provided (“the Companies confirm that they will provide smart meters that fully comply with the definition of smart meters in Section 2807(g) and the Implementation Order, including the capability to furnish data through “a HAN or a similarly capable method of open protocols.”” First Energy Reply Brief at 11.)

The functions listed in Act 129 are mandatory and the Commission’s Implementation Order specifies how those requirements will be met, and First Energy acknowledges the need for such functionality. Therefore, the Commission’s Order in this proceeding should explicitly require First Energy to deploy smart meters that enable HAN devices or similarly capable method with open protocols.

B. DEP EXCEPTION NO. 2

The ALJ Erred in Declining to Order First Energy to Install Its Smart Meter Network By the End of the 30 Month Grace Period.
DEP M.B. at 8-9; Initial Decision at 6 (Findings of Fact 15 and 16), 19-23,

The Implementation Order grants EDCs a 30 month “network development and installation grace period” with which to install the network necessary to provide smart meters after Commission approval of an EDC’s Smart Meter Plan. Implementation Order at 7. The reason for this network installation grace period is that “a fully functional smart meter that supports the capabilities required by Act 129 and as outlined below

(listing additional functions), involves an entire network, to include the meter, two-way communication, computer hardware and software, and trained support personnel.”

Implementation Order at 6. As such, absent the network a meter cannot provide the functions to make it a smart meter. Accord, id.

First Energy’s plan does not propose to complete the analysis of its current system until September 2010 (Plan at 9) or to “commence build out of necessary infrastructure” until April 2013 (Plan at 6), a full 6 months after the anticipated end of the grace period. Id. Indeed, network construction will not even be completed until March 2016. Id.

There is no “grace period” provided in Act 129 within which to avoid providing the statutorily mandated smart meters to requesting customers or in new construction.¹ The Department agrees that it would be unreasonable to expect EDCs to have the necessary infrastructure in place to support smart meters for these customers upon passage of the law or shortly thereafter. Given the fact that the Commission provided a grace period where none existed in Act 129, and extended the grace period to 30 months in the Implementation Order from 18 months in the Commission’s original draft staff proposal, and the fact that we are now 14 months past the effective date of Act 129, there is no excuse for failing to install a meter capable of providing the functions required by the Commission. However, due to the delayed installation of First Energy’s smart meter infrastructure, First Energy will not be able to deploy meters that provide the functions mandated by the Commission

¹ Indeed, as discussed below, the Implementation Order is a statement of policy only and arguably cannot be used to waive an explicit statutory requirement. First Energy appears to overlook this internal inconsistency in its arguments supporting the Smart Meter Plan.

In the Initial Decision, the ALJ found that First Energy’s “proposed use of the grace period is reasonable”. Initial Decision at 23. The ALJ made this finding even though on its face the First Energy Smart Meter Plan does not comply with the Commission’s Implementation Order in terms of deploying a system-wide smart meter network. To reach this conclusion, the ALJ quoted at length from the First Energy Reply Brief’s discussion of the status of the Implementation Order as a “statement of policy”, as opposed to a properly promulgated regulation, which would be binding as a matter of law. Initial Decision at 20-23.

First Energy’s argues that because the Commission’s Implementation Order is only a statement of policy, unlike a regulation it cannot “function as a pre-determination as the reasonableness of any aspect of the Company’s proposed Smart Meter Plan.” First Energy Reply Brief at 4; Initial Decision at 20. To support this argument the Company cites the Pennsylvania Supreme Court’s 1977 decision in *Pennsylvania Human Relations Commission v. Norristown Area School District*, 473 Pa. 334, 374 A.2d 671 (1977) (“*Norristown*”), as well as a 2005 Order of the Commission, *Chapter 14 Implementation – Declaratory Order*, Docket No. M-00041802F0002, 205 Pa. PUC LEXIS 20 (November 21, 2005) (“*Chapter 14 Order*”). Insofar as these precedents establish the broad principles outlining this issue, they do establish the legal framework that First Energy attributes to them.

What is interesting about these precedents, however, as well as the District of Columbia Circuit Court case quoted for support by the Pennsylvania Supreme Court in the *Norristown* opinion, *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 164 U.S.App.D.C. 371, (1974), is that in each case the adjudicating body reached a decision

that was generally consistent with the requirements of the statement of policy, and *in each case that decision was upheld upon review.*

In *Norristown*, the Pennsylvania Supreme Court stated:

... the Commission has chosen to proceed through individual adjudications consistent with its general statement of policy. We find no abuse of discretion in the Commission's actions. In light of the Commission's duty to resolve disputes by "conference, conciliation and persuasion," the adoption of statements of policy and guidelines can only aid the Commission's delicate task of correcting racial imbalance in the Commonwealth's schools. Moreover, general statements of policy encourage public dissemination of the Commission's views prior to their actual application.

Norristown, 473 Pa. at 351. Similarly, in a later case involving a Commission statement of policy relating to "take-or-pay" refunds, the Commonwealth Court upheld a Commission adjudication that reached the same result as an earlier statement of policy. *UGI Utilities, Inc. - Gas Division v. Pennsylvania Public Utility Commission*, 677 A.2d 882, 886 (Pa. Commw. 1996).

In the *Chapter 14 Order* adjudication the Commission went through the distinction between statements of policy and regulations as they related to Implementation Orders issued to implement Chapter 14 of the Public Utility Code after the passage of the Responsible Utility Customer Protection Act (Act 201 of 2004). After describing why the Implementation Orders were statements of policy and therefore did not establish binding norms, the Commission concluded by stating:

Accordingly, the Commission agrees with the argument of the [Philadelphia Gas Works] that the Implementation Orders at issue constitute policy statements setting forth how the Commission intends to interpret Chapter 14 in future adjudications and rulemakings. ***Nevertheless, the Implementation Orders provide guidance to affected parties by the agency charged with its implementation and, as such, any party that deviates from that guidance runs the substantial risk of being in violation of Chapter 14 and the initiation of appropriate enforcement measures to secure compliance with this new law.***

2005 Pa. PUC LEXIS 20, at *20 (emphasis added). In accordance with the statement of policy at issue, the Commission went on to issue an order declaring that Chapter 14 did not authorize the upfront payment requirements of Philadelphia Gas Works.²

The Commission engaged in a great deal of deliberation when developing the 30 month grace period in the Implementation Order. Implementation Order at 2, 6-9. Although the requirement may not have the binding force of law as a regulation does, it is certainly a reasonable deadline for the Commission to require smart meter network installation, especially given the fact that we will likely be 15 months past the effective date of Act 129 before the 30 month clock even begins to run. The Department notes that First Energy commented on the draft staff proposal and requested more flexibility in the deadlines for smart meter network installation, but the Commission chose instead to establish reasonable but firm deadlines for this requirement. Implementation Order at 8. It appears that the Commission took these comments into account when extending the grace period from 18 to 30 months. *Id.* As *Norristown* and the *Chapter 14 Order*, and similar cases establish, just because a requirement is contained in a statement of policy rather than a regulation does not mean that the Commission cannot establish it in an adjudicatory proceeding such as this.

Because the Implementation Order establishes a reasonable deadline for the network infrastructure to be in place at the end of the grace period so that fully functional meters can be deployed, the Department urges the Commission to reject the findings of

² The Department notes that both the emphasized sentence and the conclusion of the Commission in the *Chapter 14 Order* were absent from the First Energy Reply Brief. First Energy Reply Brief at 6, Initial Decision at 22.

the ALJ related to this Exception and order First Energy to submit a revised plan that requires the installation of the necessary infrastructure within the grace period.

C. DEP EXCEPTION NO. 3

The ALJ Erred in Finding that First Energy’s Smart Meters Will Be Deployed System-Wide in a Timely Fashion.
DEP M.B. at 11-12; Initial Decision at 6 (Finding of Fact 16), 19-23, 55 (Conclusion of Law 1)

The Pennsylvania General Assembly recognized the clear benefits of smart meters and the benefits of an educated energy consumer when it required Electric Distribution Companies to provide smart meters throughout their service territory and offer all customers the option of enrolling in real time or time of use pricing programs. 66 Pa. C.S. § 2807(f). However, and most importantly, 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.

First Energy’s Smart Meter Plan would provide smart meters on an expedited basis but for the company’s failure to install the smart meter network in a timely fashion. First Energy’s Smart Meter Plan calls for installation of 60,000 meters to “de-bug” the system in April 2016 and complete deployment of smart meters by April 2022. Smart Meter Plan at 6. If this process began at the conclusion of the grace period, as it should, smart meters would be fully deployed by October 2018. Accord, id.

Because the ALJ did not agree with the Department’s position outlined in Exception No. 2, above, the Initial Decision allowed for a system-wide deployment of smart meters to occur six years after the April 2016 “de-bugging.” Initial Decision at 19. As outlined above, the Department believes that going beyond the 30 month grace period is unreasonable. Because First Energy’s current deployment schedule envisions a six

year meter deployment period, the Commission should order First Energy to maintain that deployment schedule such that smart meters are deployed throughout First Energy's service territory no later than 10 years from the date of the Commission's Order in this matter.

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 First Energy's smart meters meet the definition of "smart meter technology" in Act 129 and the Commission's Implementation Order, declining to order First Energy to meet the deadlines established in the Act 129 and the Commission's Implementation Order and in declining to order First Energy to complete the system-wide deployment of smart meters within 10 years of plan approval. 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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Pennsylvania Power Company for Approval :
of Smart Meter Technology Procurement and :
Installation Plan :

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 Susan D. Colwell 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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