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November 1, 2010

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

VIA HAND DELIVERY

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

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission ("PUC" or "Commission") are the original and three (3) copies of the Answer in Opposition to the Non-Unanimous Joint Petition for Settlement of the West Penn Power Industrial Intervenors ("WPPII") in the above-referenced proceeding.

As reflected on the attached Certificate of Service, all parties to this proceeding are being duly served with copies of this filing. Please date stamp the extra copy of this transmittal letter and Answer, and kindly return it to us for our filing purposes. Thank you.

Very truly yours,

McNEES WALLACE & NURICK LLC

By

Carl J. Zwick

Counsel to the West Penn Power Industrial Intervenors

CJZ/sds

c: Administrative Law Judge Mark A. Hoyer (via First-Class Mail and E-Mail)
Certificate of Service

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**ANSWER IN OPPOSITION
TO THE NON-UNANIMOUS JOINT PETITION FOR SETTLEMENT
OF THE WEST PENN POWER INDUSTRIAL INTERVENORS**

Pursuant to the provisions of Sections 5.61 and 5.232(g) of the Pennsylvania Public Utility Commission's ("PUC" or "Commission") Regulations,¹ and consistent with the Commission's October 21, 2010, Secretarial Letter, the West Penn Power Industrial Intervenors ("WPPII") hereby answer and object to the non-unanimous Joint Petition for Settlement ("Joint Petition" or "Settlement") of the above-captioned proceeding, which is supported by the West Penn Power Company d/b/a Allegheny Power ("West Penn" or "Company") and the Office of Consumer Advocate ("OCA").² The Joint Petition seeks for the Commission to discard the smart meter plan previously approved by Administrative Law Judge ("ALJ") Mark A. Hoyer as just and reasonable in favor of a new plan that unreasonably constrains the Company's options in its Act 129 of 2008 ("Act 129") implementation at the expense of Commercial and Industrial ("C&I") customers. Given the interlocking nature of this proceeding with the Company's Act

¹ 52 Pa. Code §§ 5.61 and 5.232(g).

² Constellation NewEnergy, Inc., and Constellation Energy Commodities Group, Inc. ("Constellation") and the Department of Environmental Protection ("DEP") do not oppose the Settlement.

129 implementation,³ WPPII requests that the PUC reject the Joint Petition submitted by the Company and the OCA as the Settlement is not in the public interest.

I. INTRODUCTION AND BACKGROUND

A. SMIP Proceeding Procedural History

Consistent with the requirements of Act 129 and the Commission's Implementation Order,⁴ West Penn filed its Act 129 Smart Meter Technology Procurement and Installation Plan ("SMIP" or "Plan") with the Commission on August 14, 2009.⁵

On September 16, 2009, WPPII filed a Petition to Intervene in this proceeding in order to protect its members' interests.⁶ In particular, WPPII noted that it was primarily concerned about the proposed program costs, the allocation of those costs and the Company's proposed cost recovery mechanism.⁷ WPPII's Petition to Intervene was granted by ALJ Hoyer at the September 30, 2009, Prehearing Conference. Other active parties to the proceeding include: the OCA; the Office of Small Business Advocate ("OSBA"); the Office of Trial Staff ("OTS"); DEP; Constellation; and Association of Community Organizers for Reform Now ("ACORN").

WPPII did not submit Direct Testimony in the initial phase of this proceeding because WPPII supported the Company's cost-based allocation proposals. On October 27, 2009, however, WPPII did submit WPPII Statement No. 1-R, the Rebuttal Testimony of Mr. Richard A. Baudino, to support the Company's proposed cost recovery and allocation methodology and to

³ To the extent the Commission deems necessary, WPPII requests that the Commission take administrative notice of West Penn's Energy Efficiency and Conservation ("EE&C") Plan proceeding docketed with the PUC at: *West Penn Power Company d/b/a Allegheny Power, Pennsylvania Act 129 Energy Efficiency and Conservation Plan*, Docket No. M-2009-2093218 (Order entered June 23, 2010).

⁴ See *Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Order entered June 24, 2009) ("Implementation Order").

⁵ See 66 Pa. C.S. § 2807(f)(1); Implementation Order, p. 3.

⁶ A description and current composition of WPPII is listed in Paragraph 3 and Appendix A of WPPII's Petition to Intervene.

⁷ See Petition to Intervene, ¶ 6.

respond to the OCA proposal to adjust the manner in which West Penn would assign smart meter common costs to the Company's various customer classes.

On November 9, 2009, ALJ Hoyer conducted evidentiary hearings for the purposes of brief cross-examination of a limited number of witnesses and entering of testimony and exhibits of the expert witnesses into the formal record of the proceeding.

On November 17, 2009, West Penn, upon agreement of all of the parties, requested that the briefing schedule be extended to allow for an interval where parties could focus on settlement discussions. On November 24, 2009, ALJ Hoyer issued a First Interim Order modifying the litigation schedule and admitting into evidence Allegheny Power Exhibit No. 6, Stipulation of Facts.

In accordance with the revised procedural schedule, WPPII submitted a Main Brief on December 18, 2009, and a Reply Brief on January 5, 2010.

Also on December 18, 2009, the Company filed a Petition to Modify a Prior Commission Order and to Reopen the Evidentiary Record. On January 13, 2010, West Penn's Petition to Modify a Prior Commission Order and to Reopen the Evidentiary Record was granted by Secretarial Letter. To allow for supplemental testimony and briefs, the Commission waived the requirement that an Initial Decision ("I.D.") be rendered in this matter on or before January 29, 2010.

The parties agreed, at a further prehearing conference held on January 26, 2010, that the issues of cost allocation and rate design would not be re-litigated in the supplemental phase of this proceeding. Rather, in supplemental testimony and briefs, only the alternative deployment schedules proposed by the Company were at issue. Because Large C&I customers have already invested in the type of metering infrastructure contemplated by Act 129 (*e.g.*, for access to

consumption information and dynamic pricing mechanisms), WPPII did not submit supplemental testimony and briefs to address the alternative deployment schedules. ALJ Hoyer held a further evidentiary hearing on March 16, 2010.

By Secretarial Letter dated May 6, 2010, the Commission issued ALJ Hoyer's I.D. and provided a timeframe for the filing of Exceptions and Reply Exceptions. On May 13, 2010, West Penn filed a Petition to Stay the Exception Period. According to West Penn, the Company filed the Petition to Stay the Exceptions Period to allow parties time to consider the impact that the proposed merger of Allegheny Energy, Inc. ("Allegheny Energy"), the parent company of West Penn, with FirstEnergy Corp. ("FirstEnergy")⁸ might have on the Company's SMIP. By Order entered July 21, 2010, the Commission stayed the Exceptions period for 90 days.

On October 19, 2010, West Penn and the OCA filed their non-unanimous Settlement and requested expedited consideration thereof.

B. EE&C Plan Proceeding Procedural History

On June 29, 2009, West Penn submitted a Petition for Approval of an Energy Efficiency and Conservation Plan, Approval of Recovery of Costs through a Reconcilable Adjustment Clause, and Approval of Matters Relating to the Energy Efficiency and Conservation Plan ("EE&C Plan").⁹ To protect its members' interests, WPPII filed a Petition to Intervene in this proceeding on July 15, 2009. WPPII's Petition to Intervene was granted by ALJ Katrina Dunderdale at the July 28, 2009, Prehearing Conference.

⁸ See *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 and A-2010-2176732 (May 10, 2010).

⁹ See *West Penn Power Company d/b/a Allegheny Power, Pennsylvania Act 129 Energy Efficiency and Conservation Plan*, Docket No. M-2009-2093218 (June 30, 2009).

On July 23, 2010, the Company's EE&C Plan, as refiled, was approved by the Commission.¹⁰ On September 10, 2010, West Penn filed a Petition to Amend its EE&C Plan. According to the Company, the changes proposed in its Amended EE&C Plan are intended "to meet the requirements of Act 129, [and are] *based on changes to Smart Meter programs . . .* as well as on additional experience gained since the Company filed its original EE&C Plan."¹¹ At a basic level, West Penn's Amended EE&C Plan seeks to shift substantial costs (*i.e.*, approximately \$8.1 million) from the Residential class to the C&I classes.¹² As a result of West Penn's proposed reallocation of EE&C program costs, the Company proposes to increase the EE&C Surcharge for customers on Rate Schedule 30 (large) by approximately 39% and for customers on Rate Schedules 40, 41, 44 and 46 by approximately 26%.¹³

WPPII submitted an Answer, on September 30, 2010, to oppose the Company's Amended EE&C Plan and to request that the Commission require West Penn to provide substantial and compelling evidence to affirmatively demonstrate that the Company's proposed redistribution of EE&C program costs will not produce discriminatory rates for C&I customers and result in an unreasonable burden.

II. ANSWER AND OBJECTION TO THE NON-UNANIMOUS SETTLEMENT

The Commission should reject the non-unanimous Settlement, which is supported by only two parties to the SMIP proceeding, as the Commission's approval of the Settlement would significantly affect the Company's PUC-approved EE&C Plan without due consideration being given to the changes requested therein. Specifically, while the Joint Petition suggests that the "[S]ettlement does not bind any party to any position relative to the amended EE&C/DR Plan

¹⁰ The Commission addressed West Penn's EE&C Plan in Orders entered October 23, 2009, March 1, 2010 and June 23, 2010.

¹¹ Petition to Amend EE&C Plan, ¶ 6 (emphasis added).

¹² See Amended EE&C Plan, pp. 231-32.

¹³ See *id.* at 238.

filing before the Commission[,]"¹⁴ the Commission's approval of the SMIP Settlement would, in effect, substantiate at least a portion of the cost-shifting proposals set forth in the Company's Amended EE&C Plan. The Settlement is not in the public interest and should be rejected by the Commission.

The Joint Petition, if approved, would require West Penn to diverge from the smart meter deployment schedule approved by ALJ Hoyer's I.D, by significantly decelerating the deployment of smart meters throughout the Company's service territory.¹⁵ Through the Joint Petition, West Penn and the OCA seek to obtain Commission approval to reduce the number of smart meters that will be deployed to the Company's customers in 2012 and 2013 from 375,000, as approved by ALJ Hoyer, to only 25,000. The Settlement provides no substantive or confirmable evidence that such a significant scale-back in the deployment of smart meters will serve the Commonwealth's objectives and benefit West Penn customers. Rather, the Joint Petition simply asserts that "[a]dopting a less rapid smart meter deployment schedule together with the Amended EE&C/DR Plan filed on September 10, 2010[,] will allow [West Penn] and its Pennsylvania customers to avoid certain near term expenditures, as well as provide time for analysis of whether a less costly smart meter deployment can be designed."¹⁶

In suggesting that a less rapid smart meter deployment schedule will allow the Company to avoid certain expenditures, the Joint Petition presumably relies on the potential savings that West Penn might encounter if the proposed merger between FirstEnergy and Allegheny Energy is approved by the necessary regulatory agencies and ultimately consummated.¹⁷ Specifically, if the merger is consummated, West Penn alleges that it might be able to achieve a significant

¹⁴ Joint Petition, ¶ 31.

¹⁵ *Id.*

¹⁶ *Id.* at ¶ 14.

¹⁷ The proposed merger is conditioned upon approvals from not only the PUC, but also by the Federal Energy Regulatory Commission ("FERC"), Securities and Exchange Commission ("SEC"), and public utility commissions of Maryland, Virginia and West Virginia.

reduction in the costs to upgrade the Company's customer information system ("CIS") by relying in some unspecified way on FirstEnergy's existing CIS.¹⁸ These savings are speculative, not only because the proposed merger must gain the approvals of multiple regulatory agencies,¹⁹ but also because neither FirstEnergy nor the Company has positively identified how the savings might be obtained if the merger is consummated.

In West Penn's Petition to Amend its EE&C Plan, the Company readily acknowledges that the changes requested in the Amended EE&C Plan are *based on changes to Smart Meter programs*.²⁰ West Penn's EE&C Plan has already undergone PUC scrutiny and gained the Commission's approval. With the PUC's approval, on June 23, 2010, the Commission ruled that the Company's EE&C Plan meets the requirements of Act 129. Because a connection exists between West Penn's PUC-approved EE&C Plan and the scale of West Penn's smart meter deployment, if the Commission approves the non-unanimous Settlement, then West Penn's EE&C Plan will necessarily be affected. Specifically, if the Commission approves the Settlement, the Company asserts that its EE&C Plan will require modification to reduce reliance on smart meter technology and to expand other conservation programs. West Penn claims these modifications will be needed to allow the Company to achieve the reductions in consumption mandated by Act 129.²¹

The modifications proposed by West Penn in its Amended EE&C Plan would replace numerous smart meter programs with other programs that are not dependent on smart meter

¹⁸ See Petition for Stay of Exception Period, ¶¶ 13-14.

¹⁹ WPPII supports consummation of the proposed merger and is a signatory to the Joint Petition for Partial Settlement reached by certain parties to the merger proceeding. See *supra* note 8.

²⁰ See *supra* note 11.

²¹ See Petition to Amend EE&C Plan, ¶ 6. Act 129 requires electric distribution companies ("EDCs") with at least 100,000 customers to adopt a plan, approved by the Commission, to reduce electric consumption by at least 1% by May 1, 2011, and by at least 3% by May 31, 2013, adjusted for weather and extraordinary loads. In addition, by May 31, 2013, peak demand is to be reduced by a minimum of 4.5% of the EDC's annual system peak demand in the 100 hours of highest demand, measured against the EDC's peak demand during the period of June 1, 2007 through May 31, 2008. 66 Pa. C.S. § 2806.1(c)-(d).

technology. In doing so, the Company's Amended EE&C Plan seeks to shift approximately \$8.1 million in EE&C costs from the Residential class to the C&I classes.²² As a result of West Penn's proposed redistribution of EE&C program costs, the Company proposes to increase the EE&C Surcharge for customers on Rate Schedule 30 (large) by approximately 39% and for customers on Rate Schedules 40, 41, 44 and 46 by approximately 26%.²³ WPPII objects to this significant reallocation of EE&C program costs to Large C&I customers, which results from the Company's proposed deceleration of its smart meter deployment schedule, without West Penn's offering substantial and compelling evidence to affirmatively demonstrate that the Company's proposed redistribution of EE&C program costs will not produce discriminatory rates for Large C&I customers and result in an unreasonable burden.

WPPII is concerned that the terms of the non-unanimous SMIP Settlement and associated changes proposed to the Company's Amended EE&C Plan may not further the objectives of Act 129. Moreover, WPPII members are concerned that the Company's proposed Amended EE&C Plan may produce rates that are not only unjust and unreasonable but also discriminatory against Large C&I customers. Because the deceleration of the Company's smart meter deployment schedule is inseparably linked to the significant redistribution of EE&C costs proposed in the Company's Amended EE&C Plan, the members of WPPII submit that the Commission should reject the non-unanimous SMIP Settlement. In the alternative, if the Commission grants the Settlement (which WPPII submits it should not), WPPII members request that the Commission expressly deny West Penn's proposal to shift approximately \$8.1 million in EE&C costs from the Residential class to the C&I classes because of the decelerated smart meter deployment schedule.

²² See Amended EE&C Plan, pp. 231-32.

²³ See *id.* at 238.

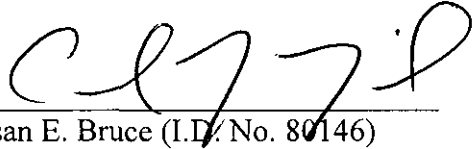
III. CONCLUSION

WHEREFORE, the West Penn Power Industrial Intervenors respectfully request that the Commission consider the foregoing Answer and Objection to the Non-Unanimous Joint Petition for Settlement and reject the Joint Petition for Settlement. In the alternative, if the Commission grants the Joint Petition for Settlement (which WPPII submits it should not), the West Penn Power Industrial Intervenors respectfully request that the Commission expressly disallow West Penn's proposed shift of an estimated \$8.1 million in EE&C costs from the Residential class to the C&I classes because of the deceleration of smart meter deployment.

Respectfully submitted,

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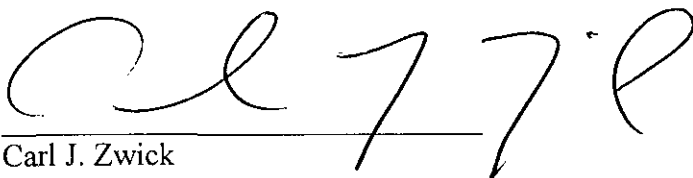
Counsel to the West Penn Power Industrial
Intervenors

Dated: November 1, 2010

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA)
)
COUNTY OF DAUPHIN) ss:

Carl J. Zwick, being duly sworn according to law, deposes and says that he is counsel to the West Penn Power Industrial Intervenors, and that in this capacity he is authorized to and does make this affidavit for them, and that the facts set forth in the foregoing Answer in Opposition to the Non-Unanimous Joint Petition for Settlement are true and correct to the best of his knowledge, information, and belief.



Carl J. Zwick

SWORN TO and subscribed
before me this 1st day
of November 2010.



Notary Public

(SEAL)

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Mary A. Sipe, Notary Public
City of Harrisburg, Dauphin County
My Commission Expires March 18, 2013

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true copy of the foregoing document upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a participant).

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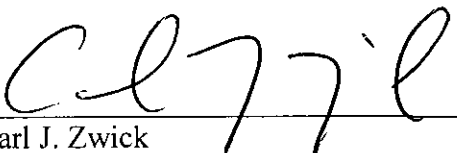
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Counsel to the West Penn Power Industrial
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Dated this 1st day of November, 2010, at Harrisburg, Pennsylvania.