



The Bureau of Investigation and
Enforcement

Enforcement Division

I&E Overview: Process and
Jurisdiction

September 8, 2022
2022 Pipeline and Electric Safety Seminar

Structure of Presentation

- Overview of I&E
- Overview of Enforcement Process
- Pipeline Safety Enforcement

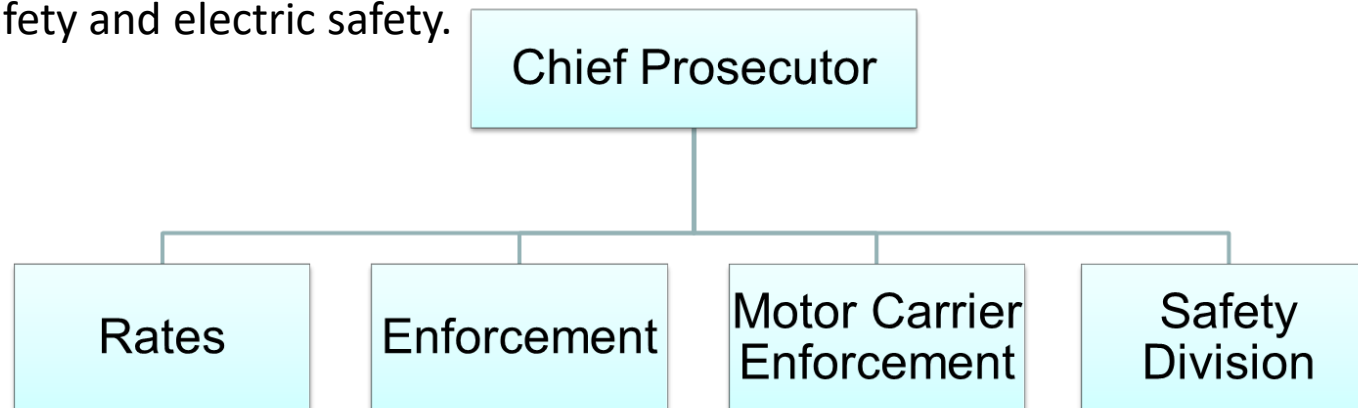


The Bureau of Investigation and Enforcement

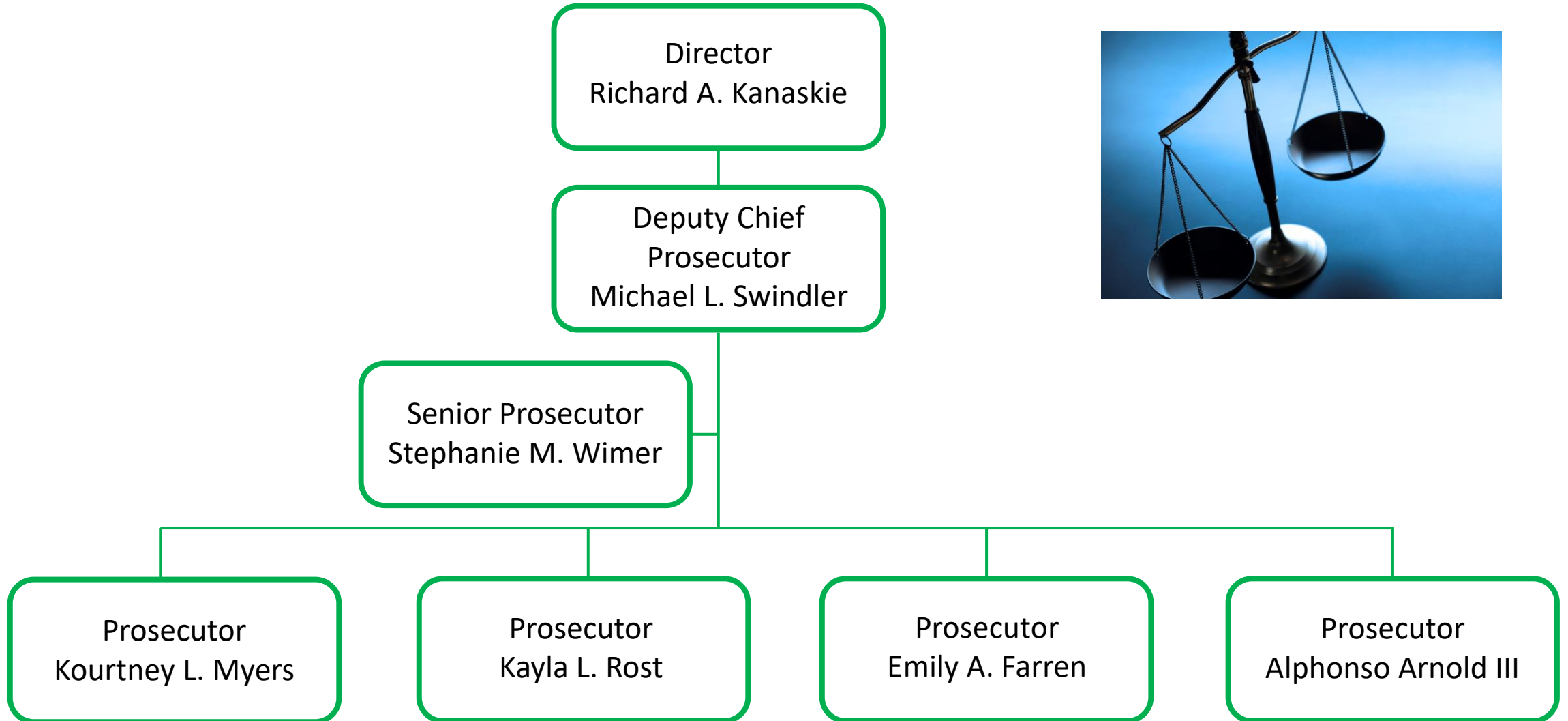


The Bureau of Investigation and Enforcement, commonly referred to as I&E or BIE, is the prosecutory or enforcement arm of the Public Utility Commission. *Delegation of Prosecutory Authority to Bureaus with Enforcement Responsibilities*, Docket No. M-00940593 (Order entered September 2, 1994), as amended by Act 129 of 2008, 66 Pa.C.S. § 308.2(a)(11). While a part of the Commission, I&E is considered independent and the Commission does not have the authority to require or instruct I&E to complete an investigation or institute an action.

I&E handles multiple areas of public utility law, including but not limited to ratemaking, service complaints, rail safety, electric safety, and state and federal motor carrier and gas safety laws and regulations. I&E has a rates division, an enforcement division, a motor carrier enforcement division, and a safety division. The safety division includes pipeline safety and electric safety.



Enforcement



Lyness v. Commonwealth, State Board of Medicine, 605 A.2d 1204 (Pa. 1992)

It is important to note that I&E attorneys exercise prosecutorial discretion when reviewing and investigating any referral.

- Supreme Court addressed the question of whether a violation of due process occurs under the Pennsylvania Constitution when an administrative board, such as the State Board of Medicine, both determines that a professional licensing prosecution should be initiated, and then acts as the ultimate fact-finder in determining whether a violation has occurred.
- Supreme Court found that the commingling of prosecutorial duties and adjudicatory duties was a violation of due process.
 - “What our Constitution requires, however, is that if more than one function is reposed in a single administrative entity, walls of division be constructed which eliminate the threat or appearance of bias.”



The Process

I&E is responsible for representing the public interest and enforcing compliance with state and federal pipeline safety, electric safety, and motor carrier laws, in addition to all Commission regulations and Orders.

Generally, I&E Enforcement receives referrals from the Bureau of Technical Utility Services, Bureau of Consumer Services, and Audits.

I&E Enforcement will also receive internal referrals based upon investigations and inspections made by I&E personnel.

The Process continued...

When a prosecutor from I&E receives a referral, the prosecutor reviews the materials provided and initially determines whether the allegations or information provided in the referral substantiate a violation.

If the information provided does not substantiate a violation, then the prosecutor has the discretion to terminate the investigation.

If the information provided does substantiate a violation, then the prosecutor has the discretion to continue the investigation.

Informal Investigation

- Generally, when a matter is referred to Enforcement from the gas safety or electric safety divisions, the majority, if not all, of the investigation is already completed by the engineer/inspector assigned to the case.
- Other times, the prosecutor may be brought in to help develop data request(s) or to aid in the deposition/interviews of the interested parties.
- It is important to note that the company will have a prescribed amount of time to respond to the data requests or other inquires from I&E, and if they fail to respond, then the prosecutor has the ability to pursue civil penalties for failure to respond. 66 Pa.C.S. § 505 (relating to duty to furnish information to commission).

The Decision

If the informal investigation supports a finding of a violation, the prosecutor has the discretion to either file a complaint and initiate the formal litigation process or enter into settlement discussions.

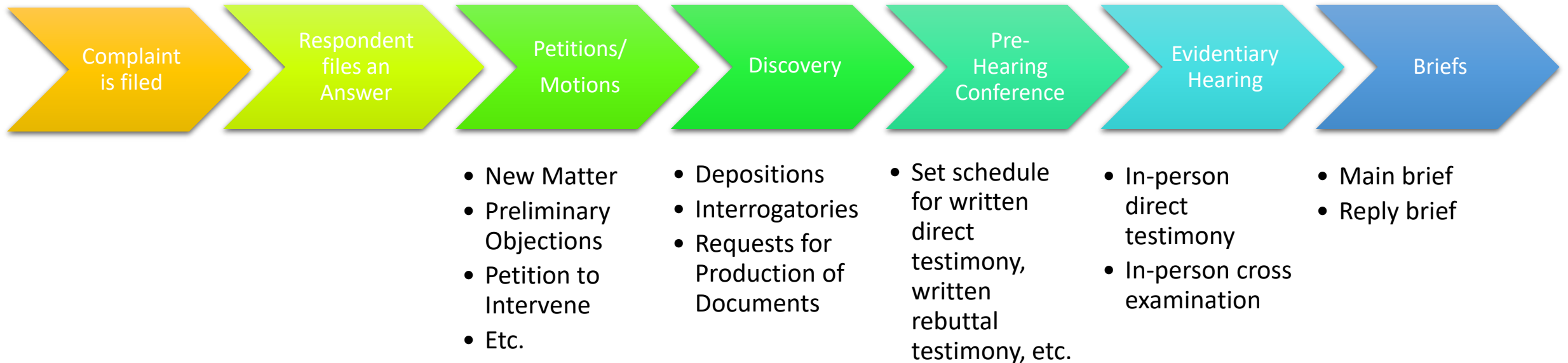
If the informal investigation does not support a finding of a violation, the prosecutor has the discretion to terminate the informal investigation.

The Settlement Process

- If the prosecutor determines that settlement is the more appropriate path to resolve the informal investigation, then the prosecutor will draft a settlement memo or letter to the company indicating its intention to begin settlement discussions. The memo or letter will include the factual and legal basis for the violations alleged, and proposed settlement terms to resolve the alleged violation(s). The settlement terms could include a civil penalty, remedial action, a change in policy or procedure, etc. Possible remedial measures included in a settlement will be discussed in more detail later in the presentation.
- If a settlement is reached, a Joint Petition for Approval of Settlement will be filed with the Commission. The Commission will either issue an Order requesting comments on the settlement or will issue an Order and Opinion on the merits of the settlement.

The Complaint/Formal Litigation Process

- If the prosecutor determines that a complaint is the appropriate path, he/she will draft a complaint.



Evidentiary Standard

“Burden of proof”

- 66 Pa.C.S. § 332(a): the party seeking relief from the Commission has the burden of proof.

Burden of proof: the duty to establish a fact by a “preponderance of the evidence.”

“Preponderance of the evidence”

- To offer the greater weight of the evidence, or evidence that outweighs, or is more convincing than, by even the smallest amount, the probative value of the evidence presented by the other party.

Resolution of the Litigation Process

- It is important to note that after briefs are submitted and the record is closed for a decision to be rendered, there is no prescribed time-frame in the Commission's regulations or procedures by which the ALJ is required to issue his/her decision.
- If the Commission's Opinion and Order is appealed to the Commonwealth Court, I&E's role in the formal litigation process ends. I&E does not have the ability to appeal or defend a Commission Opinion and Order before the Commonwealth Court. The Commission's Law Bureau is responsible for representing the Commission before the Commonwealth Court and any other court outside of the Commission.



- Initial Decision
 - If no exceptions are filed, the Decision becomes final by operation of law.
- Recommended Decision
 - Must be acted on at a Public Meeting, cannot become final by operation of law

- Rehearing
- Reconsideration
- Clarification
- Etc.

- I&E's role ends when a Commission Order is appealed
- Law Bureau is responsible for defending the Commission Order before the Commonwealth Court



Pipeline Safety

Jurisdiction

The Commission has only such power as is clearly conferred upon it by statute. *Pittsburgh Railways Co. v. Pa. Pub. Util. Comm'n*, 237 A.2d 602 (Pa. 1967).

The law is clear that the Commission must act within its jurisdiction. *City of Pittsburgh v. Pa. Pub. Util. Comm'n*, 43 A.2d 348 (Pa. Super. 1945).

Jurisdiction must be conferred upon the Commission by the legislature or arise by necessary implication. *Feingold v. Bell of Pa.*, 383 A.2d 791 (Pa. 1977).

Sources of Jurisdiction

The Public Utility Code,
66 Pa.C.S. §§ 101 *et. seq.*

The Gas and Hazardous
Liquids Pipelines Act, 58
P.S. §§ 801.101 *et seq.*
("Act 127")

Definition of Public Utility

“Public Utility.”

(1) Any person or corporations now or hereafter owning or operating in this Commonwealth equipment or facilities for:

(i) Producing, generating, transmitting, distributing or furnishing natural or artificial gas . . . to or for the public for compensation.

(v) Transporting or conveying natural or artificial gas, crude oil, gasoline, or petroleum products . . . by pipeline or conduit, for the public for compensation.

66 Pa.C.S. § 102(1)(i), (v).

Definition of Public Utility (cont'd)

“Public Utility.”

(2) The term does not include:

(iii) Any producer of natural gas not engaged in distributing such gas directly to the public for compensation.

66 Pa.C.S. § 102(2)(iii).

Types of Public Utilities



Major Gas Public Utilities – annual gas operating revenues of greater than \$1,000,000.

52 Pa. Code § 59.41(1)



Nonmajor Gas Public Utilities – annual gas operating revenues of less than \$1,000,000.

52 Pa. Code § 59.41(2)



Public Utilities providing intrastate pipeline transportation of hazardous liquids.

66 Pa.C.S. § 102

Characteristics of a Public Utility

52 Pa. Code § 69.1401 (Guidelines for determining public utility status – statement of policy)

(c) *Fact based determination.* The Commission will consider the status of a utility project or service based on the specific facts of the project or service and will take into consideration the following criteria in formulating its decision:

- (1) The service . . . is merely incidental to nonutility business with the customers which creates a nexus between the provider and customer.
- (2) The facility is designed and constructed only to serve a specific group of individuals or entities, and others cannot feasibly be served without a significant revision to the project.
- (3) The service is provided to a single customer or to a defined, privileged and limited group when the provider reserves its right to select its customers by contractual arrangement so that no one among the public outside of the selected group is privileged to demand service, and resale of the service is prohibited. . .

Characteristics of a Public Utility - Pipeline Examples

Not a Public Utility:

- *Nutmeg Energy, Inc., Gas City Oil and Gas Corporation, Exley Oil and Gas Corporation*, Docket No. P-00062204, (Order entered February 26, 2007). Natural gas producer serving only property owners on whose land the gathering line traverses, subject to easement agreements and mineral leases.

Determined to be a Public Utility:

- *Petition of Blue Flame Gas, Inc.*, Docket No. P-2018-3006118 (Order entered April 22, 2021). Company formed to provide natural gas upon abandonment of facilities by previous natural gas distribution company. The number of customers expanded over time, the company had no non-utility relationship with its customers, and the company had no control over who occupies the dwellings connected to its system.

Application of Pipeline Safety Laws and Regulations to Public Utilities

§ 59.33. Safety.

(b) **Safety code.** The minimum safety standards for all natural gas and hazardous liquid public utilities in this Commonwealth shall be those issued under the pipeline safety laws as found in 49 U.S.C.A. §§ 60101–60503 and as implemented at 49 CFR Parts 191–193, 195 and 199, including all subsequent amendments thereto. Future Federal amendments to 49 CFR Parts 191–193, 195 and 199, as amended or modified by the Federal government, shall have the effect of amending or modifying the Commission’s regulations with regard to the minimum safety standards for all natural gas and hazardous liquid public utilities. The amendment or modification shall take effect 60 days after the effective date of the Federal amendment or modification, unless the Commission publishes a notice in the *Pennsylvania Bulletin* stating that the amendment or modification may not take effect.

52 Pa. Code § 59.33(b).

Act 127 Definitions

“Pipeline Operator”

A person that owns or operates equipment or facilities in this Commonwealth for the transportation of gas or hazardous liquids by pipeline or pipeline facility regulated under Federal pipeline safety laws. The term does not include a public utility or an ultimate consumer who owns a service line on his real property.

“Pipeline Facility”

A new or existing pipeline, right-of-way and any equipment, facility or building used in the transportation of gas or hazardous liquids or in the treatment of gas or hazardous liquids during the course of transportation. The term does not include a pipeline facility subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission.

58 P.S. § 801.102.

Applicability of Pipeline Safety Laws and Regulations to Pipeline Operators

58 P.S. § 801.302. Adoption of Federal pipeline safety laws.

(a) General rule.--The safety standards and regulations for pipeline operators shall be those issued under the Federal pipeline safety laws as implemented in 49 CFR Subtitle B Ch. I Subch. D (relating to pipeline safety).

(b) Amendments to Federal law.--

(1) Amendments to Federal pipeline safety laws shall have the effect of amending or modifying the safety standards and regulations for the transportation of gas and hazardous liquids in this Commonwealth.

(2) An amendment or modification under paragraph (1) shall take effect 60 days after its effective date.

Governing Pipeline Safety Laws and Regulations for Pipeline Operators

58 P.S. § 801.501. General powers of Commission.

(a) Commission authority.--The commission shall have general administrative authority to supervise and regulate pipeline operators within this Commonwealth consistent with Federal pipeline safety laws. . . The commission shall have the following duties:

* * *

(7) To enforce the Federal pipeline safety laws and, after notice and opportunity for a hearing, impose civil penalties and fines and take other appropriate enforcement action.

Types of Pipeline Operators

Operators engaged in the transportation of gas.

• ***Transportation of gas*** means the gathering, transmission, or distribution of gas by pipeline in or affecting interstate or foreign commerce. 49 CFR 191.3

• ***Gas*** means natural gas, flammable gas, or gas which is toxic or corrosive. 49 CFR § 191.3

• ***Petroleum gas*** means propane, propylene, butane, (normal butane or isobutanes), and butylene (including isomers), or mixtures composed predominantly of these gases, having a vapor pressure not exceeding 208 psi (1434 kPa) gage at 100 °F (38 °C). 49 CFR § 192.3

Types of Pipeline Operators (cont'd)

Operators that use pipeline facilities to transport hazardous liquids.

- **Operator** means a person who owns or operates pipeline facilities. 49 CFR § 195.2
- **Pipeline facility** means new and existing pipe, rights-of-way and any equipment, facility, or building used in the transportation of hazardous liquids or carbon dioxide. 49 CFR § 195.2
- **Hazardous liquid** means petroleum, petroleum products, anhydrous ammonia, and ethanol or other non-petroleum fuel, including biofuel, which is flammable, toxic, or would be harmful to the environment if released in significant quantities. 49 CFR § 195.2

Pipeline Safety Enforcement before the Commission

Investigation of I&E Pipeline Safety Inspectors



Referral to I&E Enforcement



If Jurisdictional and Violation is Substantiated, a Joint Petition for Approval of Settlement or Formal Complaint is Filed

Relief

Payment of a civil penalty.

Performance of corrective measures.


Relief - Civil Penalty

- For Public Utilities: 66 Pa.C.S. § 3301(c) (providing a maximum civil penalty of \$200,000 per violation per day, not to exceed \$2,000,000 for any related series of violations *or* subject to a penalty provided under Federal pipeline safety laws, whichever is greater).
- For Pipeline Operators: 58 P.S. § 801.502 (a) (providing for a penalty established under Federal pipeline safety laws or 66 Pa.C.S. § 3301(c), whichever is greater).
- PHMSA's 2022 civil penalty adjustments: \$239,142 per violation maximum, not to exceed 2,392,413 for a related series of pipeline safety violations. *Department of Transportation; Revisions to Civil Penalty Amounts*. 87 Fed. Reg. 15859, 15866 (March 21, 2022).

Factors Used to Determine Civil Penalty Amounts

52 Pa. Code § 69.1201(c)(1)-(10).

- (1) Seriousness of conduct.
- (2) Whether serious consequences resulted.
- (3) Whether conduct was intentional or negligent.
- (4) Whether company modified practices or procedures to address conduct.
- (5) The number of customers affected and duration of violation.
- (6) Company's compliance history.
- (7) Whether company cooperated in investigation.
- (8) The amount of civil penalty needed to deter future violations.
- (9) Past Commission decisions in similar situations.
- (10) Other relevant factors.



Relief - Corrective Measures

Corrective measures are typically designed to prevent a future reoccurrence of the same violation

A Settlement Agreement offers the parties greater flexibility



Thank you!

If you have any questions, please
feel free to contact us:

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