**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

Public Meeting held November 8, 2012

Commissioners Present:

 Robert F. Powelson, Chairman

 John F. Coleman, Jr., Vice Chairman

 Wayne E. Gardner

 James H. Cawley

 Pamela A. Witmer

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| Pennsylvania Public Utility Commission,Bureau of Investigation and Enforcement  v.PECO Energy Company | M-2012-2205782 |

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is a proposed Settlement Agreement (Settlement) filed on December 2, 2011, by the Commission’s Bureau of Investigation and Enforcement (Prosecutory Staff or BI&E) and PECO Energy Company (PECO or Company). The Parties have also filed a Joint Statement in Support of Settlement Agreement (Joint Statement). Also before the Commission are the Comments filed by PECO on July 2, 2012. For the reasons set forth herein, we find that the Settlement should be modified, consistent with this Opinion and Order.

History of the Proceeding

On or about November 1, 2010, the Prosecutory Staff formed an investigative team for the purpose of conducting an investigation into PECO’s conduct prior to and following a “low level explosion and house fire” at a residence in Swedeland, Montgomery County, Pennsylvania on December 26, 2009. Settlement at 6. The informal investigation was conducted pursuant to Section 331(a) of the Public Utility Code (Code), 66 Pa. C.S. § 331(a), and Section 3.113 of the Commission’s Rules of Practice and Procedure, 52 Pa. Code § 3.113. Throughout the investigation, the Prosecutory Staff and PECO remained active in informal discovery and continued to explore the possibility of resolving this investigation through a settlement agreement. Settlement at 9. On December 2, 2011, the Prosecutory Staff and PECO filed the Settlement and the Joint Statement.

In the Order entered June 12, 2012 (*June 2012 Order*), the Commission reviewed PECO’s actions and the related circumstances, as presented in the Settlement, and noted its preliminary determination to amend the Settlement to provide for a civil penalty of $75,000 instead of the $35,000 civil settlement amount that was proposed by the Prosecutory Staff and PECO. *June 2012 Order* at 8-9. The *June 2012 Order* also provided interested parties with the opportunity to file comments on the proposed Settlement and the determination to amend the Settlement to establish a $75,000 civil penalty. *Id*. at 9. In order to be considered timely, comments were to be filed within twenty days of the date of entry of the *June 2012 Order*. *Id*. at 10. PECO filed timely Comments on July 2, 2012.

# Background

An on-site inspection by the Commission’s Gas Safety Division Inspectors (Commission Inspectors) determined that the explosion that occurred on December 26, 2009, was caused by “the complete circumferential crack resulting in the failure of the four-inch cast iron natural gas pipeline main serving structures in the vicinity” (four-inch main). The gas main crack was near the joint of the service line in the rear of the residence, “sending gas laterally twenty-seven feet - up slope, and through the foundation wall of the crawl space,” resulting in the fire. Settlement at 5.

Two days before the fire and explosion, on December 24, 2009, the local fire company was on the scene to investigate a gas odor. PECO was not informed of the fire department inspection until after the fire and explosion on December 26, 2009. Also, on December 26, 2009, a call was made by the Montgomery County 911 Center to PECO’s call center regarding a house fire. Initially, PECO was not advised that the fire was associated with PECO’s gas facilities. *Id.* at 4.

After the fire and explosion, PECO excavated and repaired a crack in the four-inch main, approximately thirty feet from the west wall of the residence. *Id*. A Commission Inspector arrived at 6:15 p.m. on December 26, 2009, and requested that PECO test the service line that connects the residence to a two-inch main (two-inch main) that runs perpendicular to the four-inch main. PECO excavated and conducted a pressure test and determined that the service line was intact with no leaks. *Id*. at 4-5.

A second Commission Inspector joined the investigation on December 27, 2009. The Commission Inspector noticed that PECO had drilled bar holes over the four-inch main, but not the two-inch main. *Id*. at 5. The Commission Inspector smelled gas in the area, and his gas detection equipment detected gas in two manholes in the area. He requested that PECO bar hole over the two-inch main and sample for gas. PECO found a leak on the two-inch main due to corrosion of the bare steel main. *Id*. at 5-6. Based on these findings, the Commission’s Gas Safety Division requested that the Commission’s Law Bureau[[1]](#footnote-1) initiate an informal investigation to determine whether the Company violated its tariff or the Code. *Id*. at 6.

**Terms of the Settlement**

PECO and the Prosecutory Staff state that they desire to terminate the informal investigation and settle this matter completely without further litigation. PECO submits that, although it may dispute or disagree with the Prosecutory Staff’s allegations, it fully acknowledges the seriousness of the allegations. PECO also recognizes the need to prevent such violations and the benefits of amicably resolving these issues. PECO and the Prosecutory Staff stipulate to the following terms solely for the purposes of this Settlement:

1. PECO will, within sixty (60) days of the date of the Order approving this Settlement Agreement, retrain its emergency response crews to maintain written records during an incident and to perform additional bar hole testing to determine whether natural gas is migrating as a result of a pipeline failure. PECO will revise its internal procedural manual to reflect this policy.
2. PECO will, within sixty (60) days of the date of the Order approving this Settlement Agreement, retrain its emergency response crews to assume in response to an incident where there is suspicion of an explosion, that natural gas is the primary source of the incident until proven otherwise and to proceed accordingly. PECO will revise its internal procedural manual to reflect this policy.
3. PECO will, within sixty days of the date of the Order approving this Settlement Agreement, retrain its emergency response crews to address 49 C.F.R. § 192.615(a)(l-3), (5-7). PECO will revise its internal procedural manual to reflect this policy.
4. PECO will pay a civil settlement amount of thirty-five thousand dollars ($35,000) to resolve the alleged violations uncovered by this informal investigation. Said payment shall be made by check to “Commonwealth of Pennsylvania” and presented to the Commission within thirty (30) days of the date of the Order approving this Settlement Agreement.
5. The Prosecutory Staff agrees not to institute any formal complaint relating to PECO’s gas service outage that is the subject of this Settlement Agreement.
6. [The Parties also agree that] the terms and conditions in the Settlement Agreement cannot be used and will not be admissible in any future proceeding, including, but not limited to, the Commission, the Pennsylvania court system or the federal court system, relating to this or any other matter as proof of unlawful behavior, or as an admission of unlawful behavior by PECO.

Settlement at 10-11.

In addition, the Settlement states that, in consideration of the Company’s payment of a civil settlement amount, Prosecutory Staff agrees not to initiate a formal complaint that relates to the Company’s conduct as described in the Settlement. The Parties also agree that nothing contained in this Settlement shall adversely affect the Commission’s authority to receive and resolve any informal or formal complaints filed by any affected party with respect to the incident, except that no further civil penalties may be imposed by the Commission for any actions identified in the Settlement. *Id*. at 11-12.

**Discussion**

Initially, we note that any issue or argument that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the Parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *also see, generally*, *University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

**Comments in Response to the *June 2012 Order***

In its Comments, PECO states that, while it believes the Settlement as submitted to the Commission is fair and in the public interest, it accepts the proposed increase in the amount it is required to pay in order to settle this matter and move forward with its business. Nevertheless, PECO requests that the Commission reconsider the characterization of the payment as a “penalty” as opposed to a “civil settlement amount.” Comments at 2. PECO avers that the Settlement was reached by the Parties as a result of a compromise of positions and an agreement to resolve alleged violations without an admission by PECO of any culpability. PECO does not believe that a penalty should be imposed since it did not admit to any violations. PECO believes that a “settlement payment” is a more appropriate characterization of the payment that the Parties included in the Settlement. *Id*. at 3.

PECO avers that, based on its interpretation of the Policy Statement at 52 Pa. Code § 69.1201, *Factors and standards for evaluating litigated and settled proceedings involving violations of the Public Utility Code and Commission regulations—statement of policy* (Policy Statement), and the Order adopting the Policy Statement, it is clear that the Commission believed there should be flexibility for parties in determining the resolution of a matter and that the Commission did not intend that conditions or obligations included within a settlement must be included as a “penalty.” Comments at 3. PECO indicates that the issue of how to characterize the “civil settlement amount” was a material component of the Settlement, and reduced flexibility to address PECO’s concern about this characterization would have made a settlement more difficult, if not impossible. *Id*. at 3-4. PECO additionally requests that the Commission confirm that, other than the proposed change of the $35,000 civil settlement amount to a $75,000 civil penalty, there have not been any additional changes to the Settlement.

Upon our review of the Comments submitted by PECO, we are not persuaded by PECO’s arguments that it should pay a $75,000 civil settlement amount, instead of a $75,000 civil penalty, as was proposed in our *June 2012 Order*. Our Policy Statement provides that “[t]he parties in settled cases will be afforded flexibility in reaching amicable resolutions to complaints and other matters *so long as the settlement is in the public interest*.” 52 Pa. Code § 69.1201(b) (emphasis added). Under the Policy Statement, we have the authority to determine whether “a proposed settlement for a violation is reasonable and approval of the settlement agreement is in the public interest.” 52 Pa. Code § 69.1201(a). In cases such as this one, which involve serious allegations of violations of gas safety regulations, we have modified both the amount and the nature of the payment that the parties had agreed to in their settlements in order to ensure that the settlements were in the public interest. We have also assessed civil penalties in these types of cases, as opposed to civil settlement amounts. *See, Pa. PUC v. Equitable Gas Company, LLC*, Docket No. M-2009-1505395 (Order entered March 2, 2012) (determining that it was reasonable to assess a civil penalty of $130,000, rather than the $65,000 penalty agreed to by the parties, because the alleged violations of federal and state gas safety regulations warranted a greater penalty); *Pa. PUC v. The Peoples Natural Gas Company, d/b/a, Dominion Peoples*, Docket No. M-2009-2086651 (Order entered May 11, 2010) (modifying a $5,000 increment to the company’s Low-Income Usage Reduction Program to a $30,000 civil penalty due to the serious nature of the alleged violations of federal and state gas safety regulations).

As we stated at page 8 of our *June 2012 Order*:

[w]e believe that the nature of the incident and the alleged violations of federal and state gas safety regulations merit a greater penalty. Of particular concern is the fact that PECO was aware of numerous leaks in the area but failed to take steps to remediate the underlying active corrosion problems. Furthermore, PECO failed to follow its procedures for identifying and classifying leak migration and failed to document the actions taken during the incident. We also note that a day after the incident, an undocumented, ungraded leak existed directly in front of the same residence that had just experienced an explosion and fire. Although there were no injuries, there was property damage and the value of the property alone is estimated to have exceeded $150,000, not including the contents of the home and personal belongings.

Based on PECO’s actions and the related circumstances, as presented in the Settlement, we believe that a civil penalty of $75,000 is warranted. Additionally, as requested by PECO, we confirm that the change of the $35,000 civil settlement amount to a $75,000 civil penalty is the only modification to the Settlement.

**Analysis of the Settlement under the Policy Statement**

Pursuant to our Regulations at 52 Pa. Code § 5.231, it is the Commission’s policy to promote settlements. The Commission must review proposed settlements to determine whether the terms are in the public interest. *Pa. PUC v. Philadelphia Gas Works*, Docket No. M-00031768 (Order entered January 7, 2004).

After a review of the terms of the Settlement, we find that the Settlement, as modified to provide for a civil penalty of $75,000 rather than a civil settlement of $35,000, is in the public interest. The Commission has promulgated a Policy Statement at 52 Pa. Code § 69.1201 that sets forth ten factors that we may consider in evaluating whether a civil penalty for violating a Commission order, regulation or statute is appropriate, as well as if a proposed settlement for a violation is reasonable and approval of the settlement agreement is in the public interest. The Policy Statement sets forth the guidelines we use when determining whether, and to what extent, a civil penalty is warranted. In this case, application of these guidelines supports approval of the Settlement, as modified.

The first factor we may consider is whether the conduct at issue is of a serious nature. 52 Pa. Code § 69.1201(c)(1). “When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.” *Id*. In this case, we believe that PECO’s actions during a natural gas leak, resulting in an explosion and fire, constitute conduct of a serious nature. We are particularly concerned that PECO was aware of numerous leaks in the area but failed to take steps to remediate the underlying active corrosion problems. Settlement at 8-9. PECO also failed to follow its procedures for identifying and classifying leak migration and failed to document the actions taken during the incident. *Id*. at 7. Furthermore, a day after the incident, an undocumented, upgraded leak was detected directly in front of the residence that had just experienced an explosion and fire. *Id*. at 6. For these reasons, we find that a higher civil penalty is warranted, rather than the $35,000 civil settlement amount that was proposed in the Settlement.

The second factor we may consider is whether the resulting consequences of the conduct are of a serious nature. 52 Pa. Code § 69.1201(c)(2). “When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.” *Id.* We find that the resulting consequences of the conduct were serious in this case. While there were no personal injuries, there was property damage. The value of the damaged property is estimated to exceed $150,000, not including the contents of the home and personal belongings. Settlement at 3-4. As the consequences here resulted in significant property damage and placed the public’s safety at risk, this factor also supports a greater civil penalty than the civil settlement amount proposed by the Parties.

The third factor pertains to litigated cases only. 52 Pa. Code
§ 69.1201(c)(3). Because this proceeding was settled prior to an evidentiary hearing, this factor is not applicable to this Settlement.

The fourth factor we may consider is whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered. 52 Pa. Code § 69.1201(c)(4). In this case, PECO has agreed to revise several of its internal operating procedures to avoid recurrence of this type of incident. Settlement at 10-11. Additionally, PECO informed the Commission during the Commission’s June 2, 2011 Pennsylvania Gas Infrastructure Roundtable of PECO’s intention to accelerate the repair and replacement of PECO’s highest priority gas infrastructure by substantially increasing its annual capital investment for infrastructure maintenance. *Id*. at 14. This demonstrates that PECO is taking appropriate action to address infrastructure concerns and to avoid similar incidents in the future.

The fifth factor we may consider is the number of customers affected and the duration of the violation. 52 Pa. Code § 69.1201(c)(5). On December 26, 2009, one customer was significantly affected by the low level explosion and house fire. Settlement at 3-4.

We may also consider the compliance history of the regulated entity which committed the violation. 52 Pa. Code § 69.1201(c)(6). We have reviewed our records regarding complaints against, and investigations of, PECO. Given the size of PECO, we find that its compliance history is satisfactory and poses no barrier to approval of a Settlement between the Parties.

Another factor we may consider is whether the regulated entity cooperated with the Commission’s investigation. 52 Pa. Code § 69.1201(c)(7). According to the Prosecutory Staff, the Settlement was amicably negotiated, and PECO has made good faith efforts to comply with the Commission’s Regulations. Settlement at 14.

In addition, we may consider the amount of the civil penalty necessary to deter future violations as well as past Commission decisions in similar situations. 52 Pa. Code § 69.1201(c)(8) and (c)(9). Given the serious nature of the allegations in this case, we find that a $75,000 civil penalty should be imposed, rather than the $35,000 civil settlement amount proposed by the Prosecutory Staff and PECO. This amount is not to be included for recovery in future ratemaking proceedings. We find that this amount will be sufficient to deter future violations and is consistent with our prior decisions as well as the Code.[[2]](#footnote-2)

The tenth factor we may consider is other relevant factors. 52 Pa. Code

§ 69.1201(c)(10). We believe that it is in the public interest to settle this matter so as to avoid the expense of litigation. In addition, PECO has indicated that it intends to implement proactive remediation measures. Nevertheless, the nature of the incident and the alleged federal and state gas safety violations merit a greater penalty than the civil settlement amount proposed in the Settlement. The Legislature has entrusted us with the important task of ensuring that our public utilities operate safely, and we intend to use the authority given to us by the Code and our Regulations to deter unsafe practices. We believe that a higher civil penalty in this case will deter PECO from unsafe operational practices in the future.

For the reasons set forth above, after reviewing the terms of the Settlement, we find that approval of the Settlement, as modified, is in the public interest and is consistent with the terms of our Policy Statement and our past decisions. We note, however, that the Settlement is conditioned on the Commission’s approval of the Settlement without modification, and the Parties can withdraw from the Settlement by filing a response within twenty days of the entry date of an Order modifying or disapproving the Settlement. Settlement at ¶¶ 45 and 46. We will therefore permit the Parties twenty days from the entry date of this Opinion and Order to file a response, at this docket number, withdrawing from the Settlement. If neither Party withdraws from the Settlement, the Settlement, as modified, shall be approved without further action by this Commission. If either Party withdraws from the Settlement, the Settlement shall be disapproved without further action by this Commission, and this matter will be referred to BI&E for such further action as may be warranted.

**Conclusion**

It is the Commission’s policy to promote settlements. 52 Pa. Code § 5.231. The Parties herein have provided the Commission with sufficient information upon which to thoroughly consider the terms of the proposed Settlement. Based on our review of the record in this case, including the Settlement, the Joint Statement, and PECO’s Comments, we find that the proposed Settlement between the Prosecutory Staff and PECO, as modified, is in the public interest and merits approval. We will therefore approve the Settlement, as modified, subject to the Parties’ right to withdraw from the Settlement within twenty days of entry of this Opinion and Order; **THEREFORE**,

**IT IS ORDERED:**

1. That, within twenty days of the entry of this Opinion and Order, the Parties may file at this docket number a response withdrawing from the Settlement Agreement entered into between the Pennsylvania Public Utility Commission’s Bureau of Investigation and Enforcement and PECO Energy Company, and filed with this Commission on December 2, 2011.

2. That, if any Party withdraws from the Settlement Agreement pursuant to Ordering Paragraph No. 1, the Agreement shall be disapproved without further action by this Commission and this matter shall be referred to the Bureau of Investigation and Enforcement for such further action as may be warranted.

3. That, if no Party withdraws from the Settlement Agreement pursuant to Ordering Paragraph No. 1:

a. The Settlement Agreement entered into between the Pennsylvania Public Utility Commission’s Bureau of Investigation and Enforcement and PECO Energy Company, filed on December 2, 2011, shall be approved without further action by this Commission, as modified, consistent this Opinion and Order.

b. In accordance with Section 3301 of the Public Utility Code, 66 Pa. C.S. § 3301, within fifty (50) days of entry of the Commission’s final Opinion and Order, PECO Energy Company shall pay a civil penalty in the amount of $75,000. Said check or money order shall be made payable to:

Pennsylvania Public Utility Commission

P.O. Box 3265

Harrisburg, PA 17105-3265

c. The civil penalty assessed in this Opinion and Order shall not be included for recovery in future ratemaking proceedings.

 d. A copy of this Opinion and Order shall be served upon the Financial and Assessment Chief, Office of Administrative Services.

 e. The Secretary’s Bureau shall mark this proceeding closed upon payment of the penalty.



 **BY THE COMMISSION,**

 Rosemary Chiavetta

 Secretary

(SEAL)

ORDER ADOPTED: November 8, 2012

ORDER ENTERED: November 8, 2012

1. Effective August 11, 2011, the Commission’s Gas Safety Division and the prosecutory functions of the Law Bureau were transferred to the BI&E pursuant to the Commission’s reorganization. *See, Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered August 11, 2011). [↑](#footnote-ref-1)
2. Pursuant to Section 3301(c) of the Code, 66 Pa. C.S. § 3301(c), any public utility that violates any gas pipeline safety provisions of the Code “shall be subject to a civil penalty of not to exceed $200,000 for each violation for each day that the violation persists, except that the maximum civil penalty shall not exceed $2,000,000 for any related series of violations, or subject to a penalty provided under federal pipeline safety laws, whichever is greater.” [↑](#footnote-ref-2)