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March 18, 2013

**VIA E-FILING**

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

Re: Pennsylvania Public Utility Commission, Bureau of Investigation & Enforcement v.  
West Penn Power Company; Docket No. C-2012-2307244

Dear Secretary Chiavetta:

On behalf of West Penn Power Company, I have enclosed for filing West Penn Power Company's Answer in Opposition to the Late-Filed Petition to Intervene of Michael Goretzka and Joann Goretzka in the above-captioned matter.

Copies have been served on all parties as indicated in the attached certificate of service.

Very truly yours,



John F. Povilaitis

JFP/kra  
Enclosure  
cc: Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission, Bureau :  
of Investigation and Enforcement,

Complainant,

v.

West Penn Power Company,

Respondent

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Docket No: C-2012-2307244

**WEST PENN POWER COMPANY’S ANSWER IN OPPOSITION TO THE LATE-  
FILED PETITION TO INTERVENE OF MICHAEL GORETZKA AND JOANN  
GORETZKA**

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

West Penn Power Company (“West Penn”), in accordance with 52 Pa. Code §§ 5.66 and 5.75(b), respectfully submits this Answer in Opposition to the late-filed Petition to Intervene (“Petition”) filed on February 26, 2013<sup>2</sup> by Michael Goretzka and JoAnn Goretzka (collectively, “Petitioners”), by and through their counsel. This proceeding was initiated by the Pennsylvania Public Utility Commission’s (“Commission” or “PUC”) Bureau of Investigation and Enforcement (“I&E”) in May 2012, about ten months ago, but the Petitioners took no steps to participate in this proceeding until the last possible moment when final Commission action is anticipated. Over the last ten months, West Penn and I&E have filed pleadings, conducted numerous meetings and successfully negotiated, drafted and filed a comprehensive settlement. However, at no time during this period and despite having clear knowledge of the proceeding and the ongoing activities between the parties, did the Petitioners elect to intervene or otherwise formally participate in the proceeding.

Now, at this advanced stage of the proceeding and long after the difficult challenge of reaching a mutually acceptable settlement has been completed, the Petitioners seek not only to intervene, but also to disrupt this Commission proceeding by alleging, among other things, that the Commission's investigation of West Penn was defective (i.e., "not vigilant") and that the PUC itself should be investigated.<sup>1</sup>

As explained further below, the Petitioners' request is untimely and should be denied because: (i) it will cause unnecessary delay in concluding a matter that is now ripe for final Commission action; (ii) it will undermine the substantial time and effort expended by I&E and West Penn to craft a mutually acceptable settlement of a contested matter that is clearly in the public interest; (iii) it is unnecessary since the Commission, in ultimately ruling on the Settlement, will establish a process for interested parties to comment on a tentative order, thereby affording all stakeholders a proper opportunity to address the merits of the settlement<sup>2</sup>; (iv) it seeks at least one remedy (i.e., a further independent investigation of the PUC) that will not only significantly undermine the Commission's investigatory authority, conduct and operations, but also is arguably outside the Commission's scope of authority; and (v) it raises issues that would have a significant impact upon parties that were not put on notice or in any way involved in this proceeding and would prejudice I&E and West Penn if such requested relief were granted, particularly at this late juncture.

## **I. BACKGROUND**

1. After a lengthy informal investigation phase of this matter, on May 30, 2012, I&E filed a Formal Complaint with the Commission against West Penn ("Complaint") at the

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<sup>1</sup> See Petition, ¶¶ 13-14 ("... someone from outside the PUC should be appointed to conduct a thorough investigation into the PUC's activities and response to Carrie Goretzka's death").

<sup>2</sup> The Commission's regulations at Section 3.113 require that before it makes a final decision to adopt a settlement resolving a Commission staff initiated on-the-record proceeding, it will provide potentially affected persons the opportunity to present their views. 52 Pa. Code § 3.113.

above-captioned docket. The Complaint is an outgrowth of an accident that occurred on June 2, 2009 at 23 West Hempfield Drive, Irwin, Pennsylvania (“Goretzka Property”), when the Company’s electric distribution line fell onto a tree located on the Goretzka Property. Carrie Goretzka, now deceased, ultimately came into contact with the line during the accident.

2. On October 9, 2012, West Penn answered and denied the allegations in I&E’s Complaint and pleaded New Matter. In addition, West Penn filed Preliminary Objections with respect to certain of I&E’s allegations.

3. I&E answered West Penn’s New Matter on November 6, 2012.

4. During the course of this exchange of pleadings, West Penn consistently provided I&E with the information it requested.

5. On January 22, 2013, West Penn and I&E signed a Joint Petition For Full Settlement of Proceeding (“Settlement”), which contains the detailed settlement terms and conditions negotiated by the parties and under which they agreed to terminate this Complaint proceeding in exchange for a comprehensive set of commitments made and future actions to be taken by West Penn.

6. On February 13, 2013, West Penn and I&E filed with the Commission both the signed Settlement and separate Statements in Support of the Settlement.

7. Until the filing of the Petition, no party other than West Penn and I&E had participated in this proceeding.

## **II. ANSWER IN OPPOSITION TO THE LATE-FILED PETITION TO INTERVENE**

8. The Petition was not filed until the pleadings in this case had closed and the parties, over a period of nine months, negotiated and drafted a comprehensive Settlement. Although the Petitioners and their counsel were well aware of this proceeding since at least early

June of 2012, the Petitioners did not previously seek to intervene and participate in this proceeding.

9. Since the Commission never established an alternative formal deadline by order or notice for intervening in this proceeding, any party seeking to intervene – including the Petitioners – was required under 52 Pa. Code § 5.74 to do so by the date fixed for the filing of responsive pleadings.<sup>3</sup> I&E’s complaint was filed on May 30, 2012, and West Penn was provided leave to file an Answer to the complaint no later than October 9, 2012. The Petitioners were therefore required to seek intervention by no later than October 9, 2012, or request and obtain an extension of that deadline. Because they failed to do so, the Petition is late and should be rejected.

10. The Petitioners claim their request is timely because the Settlement was not filed until February 13, 2013.<sup>4</sup> This obscures the fundamental point that the Petitioners took no action to participate at all in the proceeding for nine months when the matter was pending, preferring instead to jump in at the last minute in an attempt to not only challenge the substance of the Settlement, but call into question the PUC’s investigation,<sup>5</sup> as well as implicate numerous other non-party jurisdictional utilities.<sup>6</sup> This “lying in wait” tactic is not only unfair and prejudicial to

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<sup>3</sup> Under 52 Pa. Code Section 5.74(b)(1), petitions to intervene are required to be filed “[no later than the date fixed for the filing of responsive pleadings...].” 52 Pa. Code § 5.74(b)(1). However, this direction is provided in the context of a proceeding involving a protest where an order or notice was issued setting a due date for interventions and cross-references Section 5.53 of the Commission’s regulations. Section 5.53 in turn provides “[a] protest shall be filed within the time specified in the published notice of the application. If no protest is specified, the protest shall be filed within 60 days of publication of the notice.” 52 Pa. Code § 5.53. In this case, setting October 9, 2012 as the due date for interventions fulfills the requirement under Section 5.74(b)(1) that interventions be filed no later than the due date for responsive pleadings, as well as the direction in Section 5.53 that a protestant have at least 60 days to submit a pleading.

<sup>4</sup> Petition, ¶ 16. The Petition erroneously refers to the date February 13, 2003, an obvious typographical error.

<sup>5</sup> See Petition, ¶ 14, where the Petitioners allege in part that “... someone from outside the PUC should be appointed to conduct a thorough investigation into the PUC’s activities and response...”

<sup>6</sup> See Petition at 3-4, where it is argued that the Settlement should be modified to require West Penn to retrain linemen and inspect all grid splices on an annual basis. Moreover, the Petitioners argue that annual inspection of splices should be mandated for all electric utilities.

I&E, West Penn and its counterpart Pennsylvania electric distribution companies (“EDCs”), but is a direct and unsupported attack on the Commission’s investigatory process.

11. The Commission has on numerous occasions articulated the standards for permitting a late intervention. The Petitioners’ counsel never acknowledges these standards in the Petition, let alone attempts to demonstrate how they have been satisfied in this case.

12. To justify late intervention, the Petitioners must show compliance with all four of the following criteria:

1. The petitioner has a reasonable excuse for missing the protest due date;
2. The proceeding is contested at the time of the filing of a petition for intervention;
3. A grant of intervention will not delay the orderly progress of the case; and
4. The grant of intervention will not broaden significantly the issues, or shift the burden of proof.<sup>7</sup>

13. Consideration of these criteria demonstrates that granting the Petitioners’ request to intervene would be highly prejudicial to I&E and West Penn, as well as other jurisdictional EDCs, and would be contrary to the public interest.

14. First, the Petitioners never provide an excuse or even any discussion in the Petition about why they failed to intervene in this proceeding within the time provided for an answer to the complaint filed by I&E in May 2012, or at least at some other point in the nine months prior to a settlement being filed. It certainly could not be for lack of actual notice. Indeed, in an article dated June 6, 2012, the Pittsburgh Post-Gazette quoted Michael Goretzka as

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<sup>7</sup> *Joint Application of Pennsylvania-American Water Company and Thames Water Aqua Holdings GmbH*, Docket Nos. A-212285F0096, A-230073F0004 (Opinion and Order entered May 9, 2002), slip op. at 6.

being “heartened” by a complaint recently filed by the Commission against West Penn.<sup>8</sup> Merely assuming it was “timely” to wait nine months until a settlement was reached to raise new issues for consideration in this proceeding and object to the Settlement clearly does not satisfy the requirement of providing a reasonable excuse for such delay.

15. Second, as a result of the filing of the Settlement, this matter is no longer contested. Accordingly, the Petitioners have failed to satisfy the second criteria justifying late-filed interventions.

16. Third, granting the Petition would most assuredly delay this proceeding. The Settlement by the parties that have been properly before the Commission for nine months is currently pending before the Commission and, after months of investigation, an exchange of pleadings, discussion and ultimate agreement, the proceeding is ripe for final Commission action. However, the Petition not only challenges the Settlement on the merits,<sup>9</sup> but seeks an independent investigation of “the PUC’s activities,”<sup>10</sup> as well as improperly seeks to modify requirements applicable to all jurisdictional EDCs. Any consideration of these requests will turn this proceeding into a distinctively different matter that could take months – if not years – to resolve.

17. Finally, as noted above, the ultimate relief requested in the Petition, not only on the merits of the Settlement but also in its request for an independent investigation of the

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<sup>8</sup> See article by Pittsburgh Post-Gazette, June 6, 2012, “Family applauds complaint filed by PUC on power line that killed Irwin woman,” available at <http://www.post-gazette.com/stories/local/region/family-applauds-complaint-filed-by-puc-on-power-line-that-killed-irwin-woman-639188/#ixzz2MasICLXK> <http://www.post-gazette.com/stories/local/region/family-applauds-complaint-filed-by-puc-on-power-line-that-killed-irwin-woman-639188/> (last retrieved March 4, 2013).

<sup>9</sup> Petition, ¶ 12b.

<sup>10</sup> Petition, ¶¶ 12e, 14. The Petitioners allege that “were it not for our investigation of this incident and the making public of the results of that investigation *along with our complaint to the PUC*, there is no indication that the PUC would have taken any action at all.” Petition, ¶ 13 (emphasis added). Here, the Petitioners essentially accuse the Commission of comingling its adjudicatory and prosecutory functions by attributing the filing of the Complaint by I&E to some “complaint” they made directly to the Commission, which in fact was only a letter sent by their counsel.

Commission and modifications to requirements regarding industry practices, substantially and materially alters the scope and nature of this proceeding. Any such alteration of this proceeding would undoubtedly impact West Penn's due process rights, let alone those of other non-party jurisdictional EDCs, and would delay the implementation of the benefits of the Settlement.

18. Here, a Settlement supported by all Parties is already pending before the Commission. It is well-accepted that where a late intervenor's request for party status is granted, the late intervenor must accept the status of the proceeding as it stands, and cannot use late intervention as a tool to disrupt or delay Commission action. Consistent with this principle, the Commission can allow the Petitioners the opportunity to comment on any tentative order addressing the Settlement without granting the Petitioners party status and the full relief they seek. Granting the relief the Petitioners seek would set an unreasonable and inappropriate precedent, effectively rewarding petitioners who were well aware of the initiation of a complaint proceeding but wait until a settlement is pending before the Commission to obtain party status for the purpose of producing evidence supporting an alternative outcome and substantially delaying any final resolution of the proceeding – the very delay that the Petitioner's counsel has himself been very vocal in opposition of<sup>11</sup> and which the Petition specifically criticizes.<sup>12</sup> Such an approach is completely inconsistent with the letter, spirit and purpose of the rules permitting intervention, as well as the stated purpose of the very Petition now seeking intervenor status, and must therefore be denied.

19. Apart from the lateness of the Petition, the Petitioners' counsel has failed to demonstrate that the grant of the Petition would protect an interest that is not sufficiently represented by the existing parties to the proceeding. The Court of Common Pleas action

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<sup>11</sup> Pittsburgh Post-Gazette, December 17, 2012 (“The bigger concern that I have today is when are they going to fix the power lines?...They need to get about the business of fixing their problems.”) (quoting Shanin Specter).

<sup>12</sup> Petition, ¶ 12.

between the Petitioners and West Penn has already been fully resolved, so any findings under the Public Utility Code are irrelevant to an issue of damages that might otherwise present a basis for demonstration of a unique interest in this case that is separate and distinct from the public safety concerns already represented and advocated by the I&E. According to the Commission's eligibility requirements for intervention, it is not sufficient that the person have a directly affected interest. They must also show that the interest is not adequately represented by existing participants.<sup>13</sup> I&E is one of the Bureaus established by the Commission to represent the public interest in ratemaking and service matters.<sup>14</sup> This delegation of authority was made pursuant to the Commission's statutory authority to establish bureaus whose role is to "[i]nsure adequate maintenance, safety and reliability of utility networks."<sup>15</sup> The safety of utility networks is squarely within I&E's mandate. West Penn does not dispute the Petitioners' interest in the safety aspect of their service; however, given the initiation and active participation of I&E in this matter, they have not made a showing that their interest is not adequately represented by an existing party.

20. For all of the foregoing reasons, the Petition fails to satisfy any of the Commission's standards justifying a late-filed intervention. Granting the Petition would be highly prejudicial to West Penn and I&E, both of which have worked together for nine months to craft the Settlement that balances the interests of all stakeholders, including most assuredly West Penn's customers and the public. It also would significantly intrude upon other jurisdictional EDCs' due process rights.

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<sup>13</sup> 52 Pa. Code § 5.72(a)(2).

<sup>14</sup> *Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, M-2008-2071852 (Order adopted August 11, 2011).

<sup>15</sup> 66 Pa.C.S. § 308.2(a)(6).

### **III. THE RELIEF REQUESTED BY THE PETITION IS PREMATURE AND IMPROPER**

21. To the extent the Petition takes issue with any aspect of the substantive components of the Settlement or the Commission’s investigative process, the requested relief is both premature and unnecessary at this stage of the proceeding. Further, for Petitioners to call for revised requirements that would be applicable to all jurisdictional EDCs is wholly improper within the context of this proceeding. Such an industry-wide requirement is only lawful in the context of a rulemaking that amends the Commission’s maintenance and inspection regulations.

22. In matters arising from I&E-initiated complaints and settlements, the Commission routinely issues a “tentative order” with its findings and opinion on the proposed settlement, thereby allowing the immediate parties and other stakeholders with standing to “comment” on the Commission’s tentative findings.<sup>16</sup> There is no reason to believe the Commission will proceed any differently in this matter, which would allow the Petitioners — to file “comments” in response to any tentative order addressing the Settlement. As such, any discussion of the merits or components of the Settlement (including direct attacks on I&E’s investigation) in the context of the Petition is premature and inappropriate, should be disregarded, and treated as “stricken” at this stage of the proceeding.

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<sup>16</sup> See, for example, *Pennsylvania Public Utility Commission, Law Bureau Prosecutory Staff v. PPL Electric Utilities Corporation*, M-2008-2057562 (Order entered March 31, 2009) and *Pennsylvania Public Utility Commission, Law Bureau Prosecutory Staff v. PPL Electric Utilities Corporation*, M-2011-2196342 (Order entered October 14, 2011); *Pennsylvania Public Utility Commission, Law Bureau Prosecutory Staff v. UGI Utilities, Inc.*, M-2008-2036549 (Order entered November 6, 2008). Accord, *Pennsylvania Public Utility Commission Law Bureau Prosecutory Staff v. Covista*, M-2009-2067766 (Order entered August 3, 2010) (“Before we conduct this review and rule on the Settlement, we must provide other potentially affected persons with the opportunity to submit comments thereon or to take other action provided for under the law. 52 Pa. Code § 3.113(b)(3).”).

#### IV. ANSWER TO SPECIFIC ELEMENTS OF THE PETITION

23. The Petitioners seek to intervene for the alleged purpose of submitting evidence on the proposed Settlement terms.<sup>17</sup> This procedurally absurd request is completely inconsistent with the current posture of this Complaint proceeding and is the administrative law equivalent of a new party seeking admission to the Petitioner's civil action after the case had gone to the jury. Moreover, West Penn notes that in attempting to justify their interest in this proceeding, the Petitioners focus on the Settlement terms rather than the issues raised by I&E in their Complaint. Thus, a fair reading of the arguments raised by the Petitioners against specific Settlement terms proposed to the Commission is that they are new allegations and issues which should be stricken at this point in time since they were not previously raised in this proceeding. If, as expected, the Commission makes the Settlement available for comment as part of its review process, there is no need for the Petitioners to intervene and address the Settlement terms at this juncture. Moreover, West Penn is astonished by the Petitioners' apparent change in position as to the adequacy of the Settlement terms. In fact, upon learning of the Settlement and the details of its various terms, counsel for the Petitioners was publicly reported as touting elements of the Settlement terms reached in this matter, specifically the retraining of linemen and infrared inspections of splices,<sup>18</sup> which is one of the points that the Petitioners now seek to oppose as insufficient.

24. It is also significant that the Petitioners' intervention in this proceeding is not needed for the establishment of any findings by the Commission relative to the adequacy of

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<sup>17</sup> Petition, ¶ 12 (“Specifically, Petitioners intend to submit evidence regarding the following points.....”).

<sup>18</sup> Pittsburgh Post-Gazette, February 21, 2013 (“That’s why he [Shanin Specter] touted the part of the agreement that requires that West Penn linemen be retrained within one year, and that infrared inspections be made of the splices within three years.”). Tribune-Review, February 13, 2013 (“Specter hailed the tentative agreement. ‘This is a good day for the people of Southwestern Pennsylvania,’ Specter said. ‘I’m heartened by the agreement to fix the power lines...’”).

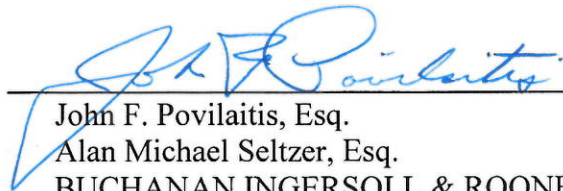
service under the Public Utility Code so that a civil forum may make a judgment as to whether West Penn was negligent or that damages are owed, as the civil proceedings associated with the accident are fully concluded. Belatedly, the Petitioners now seek to intervene in this proceeding and inject into the Settlement new operations and maintenance requirements that would not only impact West Penn, but the entire Pennsylvania jurisdictional electric distribution industry. This untimely and improper request should be denied.

V. **CONCLUSION**

For all of the foregoing reasons, West Penn Power Company respectfully requests that the Commission deny the late-filed Petition to Intervene of Michael Goretzka and JoAnn Goretzka and grant West Penn Power Company such other relief as may be just and reasonable under the circumstances.

Respectfully submitted,

Dated: March 18, 2013



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**BEFORE THE  
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Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement,	:	
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v.	:	Docket No.: C-2012-2307244
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West Penn Power Company,	:	
	:	
Respondent.	:	

**CERTIFICATE OF SERVICE**


I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

**Via First Class Mail**

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Dated this 18<sup>th</sup> day of March, 2013.

  
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John F. Povilaitis, Esq.