



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

March 20, 2013

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

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

Dear Ms. Chiavetta:

Enclosed for filing is the original copy of the Answer in Opposition to the Petition to Intervene of Michael Goretzka and JoAnn Goretzka on behalf of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission in the above-referenced case. Copies have been served on the parties of record in accordance with the Certificate of Service.

Sincerely,

Heidi L. Wushinske
Prosecuting Attorney
Attorney ID No. 93792

Counsel for the Bureau of
Investigation and Enforcement

Enclosures

cc: As per Certificate of Service

RECEIVED
2013 MAR 20 PM 2:44
PA PUC
SECRETARY'S BUREAU

2. On July 13, 2009, a civil action for damages due to the June 2, 2009 accident was filed in the Court of Common Pleas of Allegheny County, Pennsylvania. In 2011, a second civil action based on the same accident was filed in Allegheny County, expanding the number of defendants. These actions were consolidated and treated as one matter. *Court of Common Pleas of Allegheny County, Michael Goretzka et al. v. Allegheny Energy, Inc. et al.*, at GD-09-012754 and GD-11-009919 (collectively “Goretzka Action”).

3. On October 9, 2012, West Penn filed an Answer and New Matter to the Complaint and Preliminary Objections to selected counts in the Complaint. In its Answer and New Matter, West Penn denied the material allegations in the Complaint.

4. On February 13, 2013, I&E and West Penn filed a Formal Settlement Agreement with the Commission.

5. On February 26, 2013, thirteen days after the Settlement Agreement was filed, Petitioners Michael Goretzka and JoAnn Goretzka, by and through their counsel Shanin Specter, filed a Petition to Intervene in this case.

PETITIONERS DO NOT HAVE STANDING TO INTERVENE

6. Pursuant to 52 Pa. Code § 5.72, a petition to intervene may be filed by a person claiming a right to intervene or an interest of such a nature that intervention is necessary or appropriate to the administration of the statute under which the proceeding is brought. The right or interest may be one in which the person is directly affected by the proceeding, *but such right or interest is not adequately represented by the existing parties, and to which the*

petitioner may be bound by the action of the Commission in the proceeding. Alternatively, petitioner can claim another interest of such a nature that participation of the petitioner may be in the public interest.

7. Further, in order to confer standing in a proceeding, the interest must be substantial, immediate **and** direct. *William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269 (1975).

8. A "substantial" interest is an interest in the outcome of the litigation that surpasses the common interest of all citizens in procuring obedience to the law. A "direct" interest requires a showing that the matter complained of caused harm to the party's interest. An "immediate" interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it and is shown where the interest the party seeks to protect is within the zone of interest sought to be protected by the statute or the constitutional guarantee in question. *George v. Pa. Publ. Util. Comm'n*, 735 A.2d 1282 (Pa. Cmwlth. Ct. 1999).

9. Petitioners are not able to show that they have a substantial interest in the outcome of this litigation that surpasses the common interest of all citizens in having safe and reliable utility service. Petitioners have no prospect of obtaining relief, even if the Commission reaches a decision in Petitioners' favor because the Commission cannot award monetary or any other damages to Petitioners. Rather, the Commission can award civil penalties, which must be paid to the General Fund, and order the implementation of measures

to enhance safety of electric lines for the benefit of all citizens. Both a civil penalty and extensive safety measures were agreed upon and set forth in the February 13, 2013 Settlement Agreement.

10. Simply put, the Commission cannot provide relief to Petitioner that is more substantial or specific than what may be realized to benefit the common interest of all citizens.

11. Arguably for this very reason, Petitioners filed and prevailed in a civil suit against West Penn for wrongful death stemming from the same July 13, 2009 incident (Goretzka Action). This is the remedy provided by law to protect Petitioners' personal interests.

12. Petitioners do not have standing to intervene in this case. Petitioners sole stated interest in their Petition to Intervene is the safety of their public utility service because of West Penn's alleged noncompliance with the Commission's regulations. Petitioners have already fully litigated their civil claim and would not be bound by the Commission's determinations. Therefore, there is no conflict between I&E's representation and Petitioners' compensation for the damages they suffered. For these reasons, Petitioners do not have standing to intervene in this proceeding before the Commission.

13. At Paragraph 13 of their Petition to Intervene, Petitioners state that "[p]etitioners intend to file public objections in an effort to strengthen the remedial measures that West Penn must follow as a result of Carrie Goretzka's death and this proposed settlement before the Commission."

THE PARTICIPATION OF THE PETITIONERS IS NOT IN THE PUBLIC INTEREST

14. Pursuant to the Commission's regulations, a petition to intervene may be filed by a person who has an "interest of such nature that participation of the petitioner may be in the public interest." 52 Pa. Code § 5.72(c).

15. The proceeding currently before the Commission involves alleged violations of the Public Utility Code. Pursuant to 66 Pa.C.S. § 308.2(a)(11), I&E is the entity tasked with protecting the interests of the public by investigating, and if necessary, prosecuting such violations. *See Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, M-2008-2071852 (Ordered adopted August 11, 2011). The public interest is not protected or better served in any way by allowing Petitioners to intervene in this matter. Furthermore, the Commission is the entity with the technical expertise to interpret and evaluate alleged violations of the Public Utility Code. Petitioners do not contend that they bring any expertise, whatsoever, relating to violations of the public utility code.

16. Petitioners' interests in this matter were adequately protected in the Court of Common Pleas by way of their civil claim, and such interests are not affected by the outcome of this case.

17. Petitioners have raised no specific grounds for granting intervention, other than that the proposed settlement "will affect the safety" of their public utility service. Contrary to Petitioner's assertion, this interest in public safety is adequately represented both by I&E, and the Commission. Furthermore, accepting the Petitioners' argument would set the

unworkable precedent that every customer of a public utility has standing to intervene in every case involving that utility.

18. Similar to a criminal proceeding in which a district attorney represents the government in the prosecution of criminal offenses, I&E represents the Commission and the public interest in the prosecution of regulatory violations and violations of the Public Utility Code. Just as in a criminal proceeding, where the victim of the criminal offense cannot intervene, the same holds true in Commission proceedings. The Bureau of Investigation and Enforcement is charged with representing the safety of the public at large as is being done in this case. Correspondingly, individuals who have been injured or harmed by a public utility may seek relief in civil proceedings, which has also been done in this case.

THE PETITION TO INTERVENE IS UNTIMELY

19. The Petition to Intervene is also untimely. As relevant to this proceeding, 52 Pa. Code § 5.74 states that petitions to intervene may be filed following the filing of a complaint seeking Commission action, and shall be filed: (1) no later than the date fixed for the filing of responsive pleadings in an order or notice with respect to the proceedings, but not less than the protest period established under §§ 5.14 and 5.53, absent good cause shown; (2) no later than the date fixed for filing protests as published in the Pennsylvania Bulletin except for good cause shown; and (3) in accordance with § 5.53 if no deadline is set in an order or notice with respect to the proceedings.

20. I&E's Complaint was filed on May 30, 2012. However, West Penn sought, and received extensions of time to file its Answer until October 9, 2012. Therefore, Petitioners were required to seek intervention no later than October 9, 2012. Petitioners were in regular contact with the Commission during this time period and were aware that the Complaint was filed, that West Penn was required to file an Answer within twenty days, and that West Penn received several extensions of time to file its Answer. Even giving Petitioners the benefit of the doubt and taking a very liberal interpretation of the deadline in which they should have filed, the Petition to Intervene should have been filed no later than sixty (60) days from the date the Answer was due (October 9, 2012), pursuant to 52 Pa. Code § 5.53, which would have been December 8, 2012. Petitioners filed their intervention on February 26, 2013, without providing adequate grounds for intervention and without providing good cause for its untimeliness.

21. Petitioner has not, and in fact, cannot show good cause for filing the Petition to Intervene at such a late time. The Complaint was filed on May 30, 2012, and Petitioners, by and through their counsel, were aware of the Complaint prior to its filing, and obtained a copy of the Complaint shortly after it was filed. Petitioners, by and through their counsel, were awaiting West Penn's Answer to the Complaint and were in regular communication with Commission staff regarding extensions and Answer deadlines.

22. It should be mentioned that I&E was somewhat perplexed by this Petition and the allegations contained in it because we had been working in the spirit of cooperation

with Petitioners during their civil case and our investigation. In fact, since before the Complaint was filed, Petitioners, by and through their counsel, have been in regular communication with I&E Prosecutory Staff. Petitioners, through their counsel, have made statements regarding the Commission's investigation to the media. This is not a situation where Petitioners were unaware of the proceedings; Petitioners have had nearly three months to make an informed decision on the appropriateness of intervention in this matter, yet Petitioners failed to do so in a timely manner.

23. Even if the Commission grants Petitioners' Petition to Intervene, despite its untimeliness, the Commission should order that Petitioners take the record as it exists at the time of the order granting their Petition to intervene. *Final Rulemaking for the Revision of Chapters 1, 3 and 5 of Title 52 of the Pennsylvania Code Pertaining to Practice and Procedure Before the Commission*, Docket No. L-00020156 (Order entered January 4, 2006) (*Final Rulemaking Order*). Pursuant to the *Final Rulemaking Order*, any party intervening after the expiration of an established protest period takes the record as it exists. Therefore, Petitioners' attempts to enter new evidence into the record should be denied.

**PETITIONERS' REQUEST THAT THE COMMISSION BE INVESTIGATED
SHOULD BE DENIED**

24. In Paragraph 14, Petitioners also claim the Commission's activities and response to Carrie Goretzka's death should be investigated. In Paragraph 13, Petitioners assert that "there is no indication that the PUC would have taken any action at all" were it not for Petitioners' investigation of the incident and the making public of the results of that

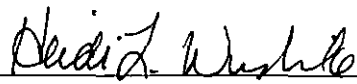
investigation. As the proposed Settlement Agreement states, and Petitioners admit, the Commission contacted West Penn to obtain an accident report two days after the accident, on June 4, 2009. The investigation into this matter continued until and after the PUC timely filed a formal Complaint against West Penn on May 30, 2012.¹ It must be remembered that, unlike plaintiffs' attorneys and civil matters, I&E does not have the luxury of paid consultants who are readily available to analyze and testify on short notice. Nonetheless, I&E filed a timely Complaint in this matter and satisfied its mission in protecting the public interest. Therefore, the Commission acted in a timely matter and Petitioners' request that the Commission's actions should be investigated should be denied.

25. Petitioners' request that the Commission's actions be investigated should also be denied because such a request is outside the form and content of a petition to *intervene*, as set forth in 52 Pa. Code § 5.73. The Commission should decline Petitioners' invitation to expand the scope of petitions to intervene to include requests for other information and investigations. This would not serve the public interest and would unnecessarily delay investigations.

¹ Although Petitioners complain about the length of time that the Commission's investigation took, it should be noted that Petitioners' civil trial in this matter followed a similar timeline, with a jury verdict reached in December 2012. Had the Commission and West Penn not engaged in extensive settlement negotiations, it is likely that a hearing on this matter would have occurred in close proximity to the Goretzka action.

WHEREFORE, for the foregoing reasons, I&E respectfully requests that the Commission DENY the Petition to Intervene.

Respectfully submitted,



Heidi L. Wushinske, Esq.
Prosecutor
Bureau of Investigation and Enforcement

Dated: March 20, 2013

RECEIVED
2013 MAR 20 PM 2:45
PA FUC
SECRETARY'S BUREAU

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 52 Pa. Code § 1.54 (relating to service by a party).

Notification by First Class Mail:

John F. Povilaitis, Esq.
Alan Michael Seltzer, Esq.
Buchanan Ingersoll & Rooney PC
409 North Second Street, Suite 500
Harrisburg, PA 17101

Tori Giesler, Esq.
FirstEnergy Services Company
2800 Pottsville Pike
Reading, PA 19610

Shanin Spector, Esq.
Dominic C. Guerrini, Esq.
Kila B. Baldwin, Esq.
Kline & Spector
The Nineteenth Floor
1525 Locust Street
Philadelphia, PA 19102



Heidi L. Wushinske
Prosecuting Attorney
PA Attorney ID No. 93792

Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
P.O. Box 3265
Harrisburg, PA 17105-3265

Dated: March 20, 2013

RECEIVED
2013 MAR 20 PM 2:45
PA PUC
SECRETARY'S BUREAU