



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

IN REPLY PLEASE
REFER TO OUR FILE
C-2012-2325083

July 8, 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. Steven J. Butts;
Docket No. C-2012-2325083

Dear Secretary Chiavetta:

Enclosed for filing is the original of the **Exceptions** of the Bureau of Investigation and Enforcement in the above-captioned proceeding. Copies of the Exceptions have been served in accordance with the attached Certificate of Service.

Sincerely,

Stephanie M. Wimer
Prosecutor

Enclosures

cc: Honorable Susan D. Colwell
Per Certificate of Service

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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SECRETARY'S BUREAU**

Pennsylvania Public Utility Commission :
Bureau of Investigation and Enforcement :

v. :

Docket No. C-2012-2325083

Steven J. Butts

**EXCEPTIONS OF THE
BUREAU OF INVESTIGATION AND ENFORCEMENT**

Pursuant to Section 5.533 of the Commission's regulations, 52 Pa. Code § 5.533, the Pennsylvania Public Utility Commission's ("Commission") Bureau of Investigation and Enforcement ("I&E") files the following Exceptions to the Initial Decision ("I.D.") of Administrative Law Judge ("ALJ") Susan D. Colwell issued on June 18, 2013.

- (1) The ALJ Erred In Applying Factors That Are Established In A Policy Statement For The Purpose Of Evaluating Whether The Civil Penalty Is In The Public Interest**
- (2) The ALJ Erred In Reducing I&E's Civil Penalty**

I. Introduction

I&E is the entity responsible for enforcing compliance with the Public Utility Code and Commission regulations. *See* 66 Pa. C.S. § 308.2(a)(11) and *Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered August 11, 2011).

This proceeding began on September 19, 2012, when I&E filed a complaint against Steven J. Butts (“Respondent”). Respondent provides a jurisdictional public utility service as he is engaged in transporting passengers in the Commonwealth of Pennsylvania for compensation. I&E’s complaint alleged that Respondent violated Section 510(c) of the Public Utility Code, 66 Pa. C.S. § 510(c), in that he failed to pay the amount he was assessed for the July 1, 2010 to June 30, 2011, and July 1, 2011 to June 30, 2012 fiscal years. I&E sought \$1,231 as payment for the delinquent assessments and a civil penalty of \$180, or 15% of the outstanding amount due, for this violation. In addition, I&E’s complaint alleged that Respondent violated Section 510(b) of the Public Utility Code, 66 Pa. C.S. § 510(b), in that he failed to file assessment reports to demonstrate his gross intrastate operating revenues for the 2009 and 2010 calendar years. For this violation, I&E sought a \$2,000 civil penalty, or \$1,000 for each year that the Commission did not receive an assessment report from Respondent.

On October 6, 2012, Respondent’s wife filed a letter in response to the complaint, which explained that Respondent moved to Florida in April 2009. Respondent’s wife admitted that there are unpaid assessments and expressed a desire to maintain Respondent’s Certificate of Public Convenience in his absence.¹ Respondent’s wife sought complete forgiveness from the outstanding assessment and civil penalty.

An Initial Hearing in this matter was held on May 16, 2013. Respondent did not attend. (I.D. 2). At the hearing, I&E presented one witness and six exhibits, which were admitted into evidence, to show that Respondent owed the assessments, received notice of those assessments, and failed to pay those assessments within 30 days after receiving

¹ Respondent’s wife also requested a waiver of the age requirement so that her daughter, who is 18, would be permitted to transport passengers under Respondent’s certificate.

notice. I&E also presented testimony to show that Respondent failed to file assessment reports with the Commission that would show his operating revenues for the 2009 and 2010 calendar years.

The presiding ALJ subsequently issued the I.D., which held that I&E established that Respondent failed to file assessment reports and pay assessments for the 2010-2011 and 2011-2012 fiscal years. (I.D. 2). The ALJ then analyzed I&E's proposed civil penalty by applying each factor and standard of the Commission's Policy Statement for evaluating litigated and settled proceedings. *See* 52 Pa. Code § 69.1201(c)(1)-(10).² (I.D. 6-11). After this analysis, the ALJ concluded that a \$200 civil penalty is reasonable under the applicable standards. (I.D. 12, Conclusion of Law, 10). The \$200 civil penalty is \$1,980 less than what I&E had proposed.

I&E files these Exceptions because we disagree with the application of the factors in these guidelines to cases alleging a failure to pay the Commission's assessment and submit an assessment report. I&E also takes exception to the amount of the civil penalty that was imposed.

II. Exceptions

I&E Exception No. 1: The ALJ Erred In Applying Factors That Are Established In A Policy Statement For The Purpose Of Evaluating Whether The Civil Penalty Is In The Public Interest

I&E excepts to the ALJ's application of factors and standards that are set forth in the Commission's Policy Statement at 52 Pa. Code § 69.1201 in this case, because: (1) I&E routinely requests the same civil penalty in cases involving a failure to pay an

² This standard was developed in *Joseph A. Rosi v. Bell-Atlantic – Pennsylvania, Inc. and Sprint Communications, L. P.*, Docket No. C-00992409 (Order entered March 16, 2000).

assessment and file an assessment report; and (2) the Commission has upheld the civil penalty. Though some may opine that the *Rosi* standards must be considered in all cases, this is clearly not the law. I&E contends that the *Rosi* standards should not be considered with respect to the civil penalty in assessment prosecutions because the Commission's Policy Statement is not a binding regulation. *See Borough of Pottstown v. Pa. Mun. Ret. Bd.*, 712 A.2d 741 (Pa. 1998) (holding that "statements of policy" or agency pronouncements are not intended to bind the public and agency personnel, but rather, merely express an agency's tentative and future intentions). For the reasons that are explained in greater detail below, I&E respectfully submits that the factors in the Policy Statement should not be interpreted to be binding or considered to be relevant when determining a civil penalty in cases involving a failure to pay an assessment and file an assessment report.

A. Significance of Failing to Pay a Commission Assessment and File an Assessment Report

I&E asserts that assessment prosecutions should be viewed differently from prosecutions alleging other regulatory violations, such as motor carrier safety violations, due to the financial ramifications to the Commission's budget. Each year, the Commission's budget is appropriated before assessments are issued. *See* 66 Pa. C.S. § 510. The Commission depends on receiving assessments to fund its operations and if a public utility fails to pay its assessment, the Commission's budget is adversely affected.

Shortly after I&E was created,³ it began working with the Fiscal Office of the Commission's Bureau of Administrative Services to enforce the collection of delinquent

³ *See Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered August 11, 2011).

assessments. When the Fiscal Office gave I&E a list of over one hundred utilities that failed to pay their assessments, it was imperative for I&E to initiate enforcement proceedings to seek collection of the assessments, no matter how small the outstanding amount may be, because the Commission's budget relies on receiving this money.

Of equal importance to a public utility's obligation to pay the Commission's assessment is its duty to file an assessment report. On or before March 31 of each year, public utilities are required to submit a statement, under oath, showing their gross intrastate operating revenues for the prior year. *See* 66 Pa. C.S. § 510(b). When a utility fails to file an assessment report, the Commission is authorized to estimate its revenues. *Id.* However, the use of an estimate does not satisfy the requirement for the utility to file an assessment report. Moreover, when using estimated revenues, sometimes a utility receives an assessment that is lower than what it would have been required to pay by reporting its actual revenues. (N.T. 12). In addition, the intent of the Commission's assessment process is for each public utility to pay its reasonable share of the cost of the Commission's operations. *See* 66 Pa. C.S. § 510(f). When a utility fails to submit an assessment report and estimated revenues are utilized, that utility is not paying its fair share. (N.T. 12).

B. Commission Precedent Exists to Impose Civil Penalties of 15% of the Outstanding Assessment Amount and \$1,000 for Failing to File an Assessment Report

Since 2012, I&E has filed numerous complaints against public utilities that failed to pay their assessment and file an assessment report. I&E consistently sought a civil

penalty of 15% of the unpaid assessment amount and frequently requested a civil penalty of \$1,000 for each year that an assessment report was not submitted.

I&E argues that a civil penalty of 15% of the outstanding amount due is a reasonable fit for the violation because it is enough to deter a utility from failing to pay the Commission's assessment in the future, but not so much as to interfere with a utility's business. *See F.R. & S. v. Dep't of Env'tl. Res.*, 761 A.2d 634, 639 (Pa. Cmwlth. 2000) (noting that a penalty does not reasonably fit the violation where it would strike at one's conscience as being unreasonable).

I&E also asserts that a civil penalty of \$1,000 for each year that a utility fails to file an assessment report is a reasonable fit for the violation. A utility may financially benefit from receiving a lesser assessment that is based on estimated revenues, to the detriment of other utilities that accurately report their revenues, which must account for non-reporting utility's fair share. A \$1,000 civil penalty sends a strong and necessary message that neglecting to submit an assessment report will not be tolerated.

I&E's civil penalty of 15% of the outstanding assessment amount and \$1,000 for

failing to file an assessment report was upheld by the Commission on many occasions,⁴ including an assessment prosecution that was litigated.⁵ Thus, a strong Commission precedent exists in finding that these civil penalties are appropriate and in the public interest.

C. Application of the Factors and Standards for Evaluating a Civil Penalty in Assessment Prosecutions is Illogical Since the Only Variable Even Remotely Applicable is the Utility's Compliance History

I&E submits that the two questions that need to be answered with relation to the civil penalty in assessment prosecutions is: (1) whether the respondent timely paid the assessment; and (2) filed an assessment report. Once that is established, no further inquiry is necessary. However, even if one would attempt to apply the other factors, a practical application of the standards for evaluating a civil penalty in assessment prosecutions demonstrates that the sole factor that will vary is a utility's compliance

⁴ *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Wills Trucking, Inc.*, Docket No. C-2012-2318070 (Order entered December 20, 2012); *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Eugene R. Mowery*, Docket No. C-2012-2318088 (Order entered December 20, 2012); *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Andres Rolando Hernandez Diaz*, Docket No. C-2012-2317467 (Order entered December 20, 2012); *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Floyd C. Matthews t/a F.C. Matthews Trucking*, Docket No. C-2012-2316193 (Order entered November 8, 2012); *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Ralph J. Knott*, Docket No. C-2012-2316006 (Order entered December 5, 2012); *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Hathaway Specialized Hauling, Inc. t/a Fantasia Machinery Transport*, Docket No. C-2012-2325066 (Order entered March 14, 2013); *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. North East Transfer, Inc.*, Docket No. C-2012-2315998 (Order entered December 20, 2012); *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Beverly A. Hall and Rich Lengel t/a Lemirage Limousine*, Docket No. C-2012-2315795 (Order entered January 24, 2013); *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Eastern Connection Operating, Inc.*, Docket No. C-2012-2313522 (Order entered February 28, 2012); and *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Trimac Transportation East, Inc.*, Docket No. C-2012-2311750 (Order entered December 20, 2012).

⁵ See *Bureau of Investigation and Enforcement v. Ultimate Medical Services, Inc.*, Docket No. C-2012-2310173 (Order recognizing finality of Initial Decision entered March 26, 2013).

history. This is so because the factors in the Policy Statement are largely used to determine whether a civil penalty is appropriate compared to the alleged misconduct. In all cases alleging a failure to pay assessments and file assessment reports, the conduct is the same.

Whether a utility modifies its internal practices and procedures, such as training and improving company techniques, is not relevant in cases alleging a failure to pay the Commission's assessment and file an assessment report. The only modification that a utility needs to undertake is to **pay the assessment invoice and submit the assessment report.** 52 Pa. Code § 69.1201(c)(4). No customers are or will be affected. 52 Pa. Code § 69.1201(c)(5). *A civil penalty based on a percentage of the utility's outstanding assessment balance will coincide with the size of the utility and the revenues that it earns.* Further, a civil penalty of \$1,000 will likely deter a utility from neglecting to submit an assessment report in the future. 52 Pa. Code § 69.1201(c)(8). The civil penalties in assessment prosecutions have been routinely consistent and have been upheld in numerous Commission decisions, which are mentioned above. 52 Pa. Code § 69.1201(c)(9).

The sole variable is consideration of a utility's compliance history, pursuant to 52 Pa. Code § 69.1201(c)(6). I&E respectfully submits that this factor should bear no weight in prosecutions alleging a failure to pay the Commission's assessment and file an assessment report. A utility's obligation to pay the Commission's assessment and submit an assessment report each year directly impacts the Commission's budget. The presence or absence of any past regulatory misconduct should not impact this obligation.

Similarly, the presence or absence of prior regulatory violations should not increase or lessen the civil penalties for failing to pay an assessment and file an assessment report.

When an individual or business fails to pay its federal income tax or file a return, the Internal Revenue Service (“IRS”) does not consider whether this person or business has timely paid taxes or filed returns in previous years when determining whether to assess a penalty. The IRS also does not consider whether an individual or business has a criminal history or committed other unlawful conduct in determining the amount of the penalty. Rather, the IRS imposes a penalty that consists of a percentage of the amount of the tax. *See* 26 USCS § 6651(a). The same standards should apply to the Commission’s assessments.

Like unpaid federal income taxes, assessment prosecutions lend itself to a consistent civil penalty for several reasons. First, the conduct in all assessment prosecutions is the same and a consistent civil penalty is equitable in proceedings alleging identical violations. Secondly, since the number of these prosecutions is often *quite large*, it is *administratively more efficient for I&E to request a uniform civil penalty*. Third, new public utilities and other regulated entities come under the Commission’s jurisdiction each year. These companies have no compliance history and should not be in a better position than companies that have been certificated or licensed for longer periods of time with respect to the same violations - failing to pay the Commission’s assessment and failing to submit an assessment report.

I&E also believes that a proceeding involving a failure to pay an assessment is no different from other enforcement proceedings in which companies fail to pay statutorily required fees and submit associated paperwork to the Commission. Recently, the

Commission received responsibility for overseeing new duties that could lead to enforcement proceedings seeking the collection of fees. Under Act 13 of 2012, the Unconventional Gas Well Impact Fee Act, (“Act 13”) producers with spud unconventional gas wells are required to pay an impact fee to the Commission by April 1 of each year. 58 Pa. C.S. § 2303. The Commission is then responsible for distributing fees to state and local governments. 58 Pa. C.S. § 2314. The Commission has the authority to enforce the producer’s obligation to pay impact fees, including civil penalties, without considering compliance history. 58 Pa. C.S. § 2310.

Similarly, under Act 127 of 2011, the Gas and Hazardous Liquids Pipelines Act (“Act 127”), the Commission is charged with the duty to maintain a registry of all pipeline operators. 58 P.S. § 801.301. Pursuant to 58 P.S. § 801.301, the Commission developed an annual registration form and directed payment of a registration fee. Failing to register and pay the fee subjects the pipeline operator to civil penalties, again, without considering compliance history. 58 P.S. § 801.502.

I&E believes that all prosecutions seeking collection of the same fee, whether it be a fee under Act 13 or Act 127, should carry a uniform civil penalty that is a reasonable fit for the violation and is designed to deter a company’s failure to pay the fee in the future. Application of the factors and standards set forth in the Commission’s Policy Statement at 52 Pa. Code § 69.1201 does nothing to assist in the evaluation of whether a civil penalty in fee-based cases is in the public interest. Act 13 producers and Act 127 pipeline operators have no compliance history with the Commission and compliance history should not have a place in the consideration of assessment prosecutions, such as the case at bar.

Finally, I&E respectfully submits that the practical effect of the Commission considering compliance history in these types of cases is to require I&E to research the compliance history of each utility that failed to pay a Commission assessment, or file an assessment report, prior to issuing a complaint. This, in turn, would create a significant burden and unnecessary expense, not only on I&E, but the Fiscal Office as well. Moreover, this would cause further delay in the Commission's receipt of the money.

Exception No. 2: The ALJ Erred In Reducing I&E's Civil Penalty

The ALJ reduced the civil penalty to \$200 after analyzing each factor and standard that is established in the Commission's Policy Statement at 52 Pa. Code § 69.1201. (I.D. 9-10). I&E submits that each factor is not binding in the determination of whether I&E's civil penalty is appropriate and each factor should not be treated as if it were a necessary element in proving the need for a civil penalty. Even if the Commission concludes that it must evaluate the factors set forth in the Policy Statement in assessment prosecutions in lieu of applying a consistent civil penalty, which is recommended above, the ALJ misapplied certain factors in reaching the conclusion that a \$200 civil penalty is in the public interest.

First, the ALJ noted that some factors support a higher civil penalty while others support a lower civil penalty. Among the factors that support a lower civil penalty are the absence of personal or property damage and the fact that no customers were affected. 52 Pa. Code § 69.1201 (c)(2), (c)(5). (I.D. 9, 10). As noted above, these factors will never be relevant in assessment prosecutions and should not be influential in determining

the civil penalty amount. The prosecutor simply does not have “evidence” that would pertain to these factors in assessment prosecutions.

Secondly, in analyzing whether the regulated entity cooperated with the Commission’s investigation, pursuant to 52 Pa. Code § 69.1201(c)(7), the ALJ found that Respondent has not responded to Commission mailings and “this neither supports or mitigates against the imposition of a penalty.” (I.D. 10). I&E disagrees. While I&E is capable of investigating assessment prosecutions using records provided by the Fiscal Office, it is clear that Respondent has not been cooperative by failing to complete and return the assessment reports that were mailed to him, pay the Commission’s assessments, answer I&E’s complaint and appear at the hearing. Even if the Commission concludes that using the factors in 52 Pa. Code § 69.1201 are necessary to evaluate the civil penalty in assessment prosecutions, this factor warrants the imposition of a greater civil penalty under these circumstances.

Third, pursuant to 52 Pa. Code § 69.1201(c)(6), the ALJ examined the compliance history of Respondent, which I&E provided at the hearing. The ALJ also considered whether the regulated entity made efforts to modify internal practices and procedures, pursuant to 52 Pa. Code § 69.1201(c)(4) and concluded that no evidence was available. (I.D. 10). However, I&E would not have evidence pertaining to Respondent’s internal practices and Respondent did not appear at the hearing. Strict application of both of these factors place I&E, as the party with the burden of proof, in a position to provide evidence that could mitigate I&E’s requested civil penalty. I&E should not be required to mitigate its own proposed civil penalty, especially when Respondent does not appear at a hearing.

Fourth, the ALJ considered the factor at 52 Pa. Code § 69.1201(c)(8), which provides the following:

The amount of the civil penalty or fine necessary to deter future violations. The size of the utility *may be considered* to determine an appropriate penalty amount. (emphasis added).

The ALJ determined that due to the small size of the utility that Respondent provides, a large civil penalty is not warranted. (I.D. 10). However, this analysis ignores whether the civil penalty is large enough to deter future violations. A civil penalty of \$200 for failing to pay \$1,231 in assessments and file assessment reports for two consecutive years is not strong enough to deter future misconduct. Upholding this civil penalty will establish a precedent that will allow utilities to neglect to file assessment reports, while possibly receiving a lesser assessment under estimated revenues, ignore Commission assessment invoices and pay a nominal civil penalty for these violations. A \$200 civil penalty does not provide sufficient incentive for a utility to comply with the Public Utility Code by paying its assessment on-time and accurately reporting its revenues.

Lastly, the ALJ examined past Commission decisions in similar situations, pursuant to 52 Pa. Code § 69.1201(c)(9), and noted that the Commission regularly approves a civil penalty of 15% of the outstanding assessment in similar cases. (I.D. 10). No analysis was provided with respect to I&E's request for a \$1,000 civil penalty for each year that Respondent failed to submit an assessment report. In addition, the ALJ noted that the Commission has approved I&E's civil penalties in unopposed assessment prosecutions that were not subject to litigation. (I.D. 6, 7). The ALJ stated that I&E's civil penalties were granted without further analysis. I&E disagrees with these

statements to the extent that they imply that the Commission's Opinions and Orders upholding I&E's civil penalties in assessment-related cases cannot be used as precedent to establish the appropriateness of the civil penalty if those cases were not litigated. Section 69.1201(c)(9) simply requires an analysis of past Commission decisions in similar situations, of which there are many that grant I&E's proposed civil penalties.

In the event that the Commission determines that whether a case was litigated is material to this factor of the Policy Statement, the ALJ overlooked that the Commission has granted I&E's civil penalty of 15% of the outstanding balance and \$1,000 for failing to file an assessment report in a litigated case. *See Bureau of Investigation and Enforcement v. Ultimate Medical Services, Inc.*, Docket No. C-2012-2310173 (Order recognizing finality of Initial Decision entered March 26, 2013). I&E submits that this factor, which considers Commission precedent, is the strongest and should carry more weight in evaluating whether a civil penalty is in the public interest if the Commission determines that the factors are applicable in assessment prosecutions.

Finally, it should be noted that is precisely this type of analysis that illustrates the problem with attempting to fit the "square peg" of *Rosi* into the "round hole" of assessment cases. These cases are different than the violations that *Rosi* addresses. Should the Commission adopt this I.D., it will seriously hamper the Commission's new efforts to address utilities who fail to pay their assessments or file assessment reports. I&E submits that a sure and certain penalty in these cases is a just, reasonable and effective way to ensure that utilities will pay attention to their responsibilities to the Commission.

III. Conclusion

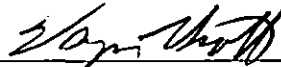
I&E respectfully requests that the Commission grant the foregoing Exceptions and apply the civil penalty requested in assessment prosecutions, notwithstanding the Commission's Policy Statement at 52 Pa. Code § 69.1201. I&E also respectfully requests that its proposed civil penalty of 15% of the outstanding assessment balance and \$1,000 for each failure to submit an assessment report be upheld in the present case.

Respectfully submitted,



Stephanie M. Wimer
Prosecutor
PA Attorney ID No. 207522

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Wayne T. Scott
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Counsel for the
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Dated: July 8, 2013

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document, Exceptions, 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:

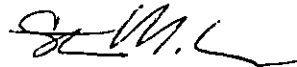
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Stephanie M. Wimer
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Pennsylvania Public Utility Commission
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Dated: July 8, 2012