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October 28, 2013

VIA UPS OVERNIGHT DELIVERY

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

Re: Marlene Broman v. West Penn Power Company
Docket No. C-2013-2356237

Dear Secretary Chiavetta:

On behalf of West Penn Power Company, I have enclosed for filing the Exceptions of West Penn Power Company to the Initial Decision served on October 8, 2013 with regard to the above-captioned matter.

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

Very truly yours,

Brian C. Wauhop

BCW/tlg
Enclosure
cc: Office of Special Assistants (via email only)
Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

MARLENE BROMAN	:	
	:	
v.	:	**DOCKET NO. C-2013-2356237**
	:	
WEST PENN POWER COMPANY	:	

EXCEPTIONS OF WEST PENN POWER COMPANY

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Date: October 28, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Other Authorities

I. INTRODUCTION

On October 8, 2013, the Pennsylvania Public Utility Commission ("Commission") served the Initial Decision ("Initial Decision" or "ID") of Administrative Law Judge Katrina L. Dunderdale ("ALJ") in connection with the April 2, 2013 formal complaint ("Complaint") filed by Marlene Broman ("Complainant" or "Ms. Broman") against West Penn Power Company ("West Penn" or the "Company").[1] In the Complaint, Ms. Broman alleges a dispute with the Company over its tree trimming and removal practices, including concerns about the condition and appearance of the Company's right-of-way on her property located at 4136 Patterson Road, Butler, Pennsylvania 16002 ("Service Location"). (ID at 1).

On April 18, 2013, the Company filed a timely Answer to the Complaint asserting, among other things, that its transmission vegetation management and maintenance program ("TVM Program") is reasonable, adequate and consistent with its responsibilities under the Commission's rules and regulations. (ID at 1). In New Matter, the Company asserted that the Commission did not have jurisdiction to hear this matter because the Complainant's claims stemmed from the Company's attempts to exercise rights granted to it by the Complainant pursuant to a written easement ("Easement") between the Complainant and the Company. (ID at 1). The Easement was entered into the record as Complainant's Exhibit No. 2, and excerpts of the relevant text is attached to these Exceptions as Appendix A.

On May 10, 2013, the Company filed a Motion for Judgment on the Pleadings, renewing its argument that this dispute is beyond the Commission's jurisdiction to consider because the claims stem from the Company's lawful exercise of its rights under the Easement. The ALJ denied the Company's Motion on May 14, 2013.

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[1] West Penn Power Company is one of four affiliated public utility operating companies in Pennsylvania directly or indirectly owned by FirstEnergy Corp.

The initial telephonic evidentiary hearing was held on May 22, 2013, during which the Complainant and the Company presented testimony and exhibits. (ID at 2). In the "Third Interim Order"[2] issued on July 22, 2013, the ALJ admitted into evidence certain Company exhibits that were inadvertently not admitted into the record at the May 22, 2013 evidentiary hearing. The Third Interim Order also closed the record as of July 8, 2013. (ID at 4).

The Initial Decision correctly found that (i) Section 1501 of the Public Utility Code ("Code"), 66 Pa. C.S. § 1501 requires public utilities to furnish and maintain adequate, efficient, safe, and reasonable service and facilities as are necessary or proper for the accommodation, convenience and safety of its patrons, employees and the public (ID at 11); (ii) under 66 Pa. C.S. § 332(a), the Complainant, as the party seeking affirmative relief from the Commission, has the burden of proof by a preponderance of evidence (ID at 11); (iii) the Commission does not have the jurisdiction to determine the scope and validity of any easement (ID at 14)[3]; and that West Penn has the right to manage and apply its right-of-way for its transmission system.[4] (ID at 18).

However, the Initial Decision was far from correct in the balance of its analysis. The Initial Decision (i) completely failed to properly apply the law regarding the jurisdiction of the Commission in transmission vegetation management disputes arising from easements, (ii) ignored federal law preempting states from asserting jurisdiction over transmission vegetation management, and (iii) erred in imposing civil penalties upon the Company based on the erroneous conclusions that the Company did not provide the Complainant adequate notice of its

[2] The Second Interim Order was issued by the ALJ on May 23, 2013. This order marked for admission the Company's exhibits from the May 22, 2013 evidentiary hearing and provided the Complainant time to indicate any objections to the proffered exhibits. (ID at 2).

[3] This latter finding led the ALJ to properly dismiss the Complainant's claims/allegations that the Company moved the centerline of the easement granted to it with respect to the Complainant's property or otherwise misapplied the right-of-way. (ID at 14).

[4] This case is not about distribution lines, which supplies electricity at relatively low voltages, but about transmission lines, which have voltages in excess of 69 kilovolts ("kV") (at issue herein, 138 kV) and provide the backbone service and source of supply to the distribution system.

intention to enter her property to cut vegetation to protect the integrity and reliability of its electric transmission line and render safe and adequate service, and the that Company failed to provide reasonable and adequate service under Code Section 1501 in applying its TVM Program to the specific circumstances at the Service Location. (ID at 17).

Not only does the Initial Decision make erroneous factual findings, it ignored the Company's evidence and seasoned experts who addressed the nature, scope and rationale of its TVM Program that is designed to prevent vegetation caused outages on transmission facilities and balance the interests of private landowners with the public need for safe, adequate and reasonable service free of unreasonable and preventable service outages. Instead, the Initial Decision adopts the Complainant's lay and uninformed opinion about what she believed was reasonable vegetation management on her own property. The Company is ultimately responsible for the adequacy and reliability of the service it provides to all customers, and adopting the Complainant's subjective beliefs about vegetation maintenance impedes the Company's provision of adequate service to other customers. The Complainant's individual interests cannot trump the Company's obligation to provide adequate and safe service to all customers including, but not limited to, those served by this transmission line. The Commission must reject and reverse the Initial Decision because, if it is sustained, electric utilities in Pennsylvania will be forced to manage all vegetation threatening transmission facilities according to the individual and subjective opinion of each impacted landowner, with total disregard of utility property rights as set forth in easements. This new "standard" is not a standard at all, but an ad hoc, case-by-case approach that will leave all electric utilities uncertain, in any given situation, about what vegetation it can lawfully cut and/or remove in order to maintain safe, adequate and reasonable service.

The Initial Decision erroneously ignored substantial record evidence demonstrating that the Company's TVM Program is a reasonable, prudent, proactive and science-based preventative maintenance program that seeks to balance the property interests of landowners with the public's right to safe, reasonable and adequate service.

The Company's Exceptions to the Initial Decision can be separated into two categories: (1) exceptions relating to the Commission's jurisdiction to hear and adjudicate this matter; and (2) exceptions relating to the Initial Decision's erroneous findings of fact and conclusions of law.

West Penn respectfully excepts to the following findings in the Initial Decision including, without limitation, those relating to alleged unreasonable customer service and the imposition of any civil penalty in connection therewith.

II. EXCEPTIONS

West Penn Exception No. 1: West Penn excepts to the Initial Decision's consideration of issues arising from the interpretation of the scope and validity of a written easement agreement because the Commission does not have the jurisdiction to consider those types of issues. (ID at 14, 18-20).

This case is, and always has been, a dispute about easement rights. Both parties agree that the Easement defines the parties' rights and obligations among each other. (N.T. at 18:8-11, 108; Complainant's Exhibit No. 2). The Company believes the Easement means one thing, and the Complainant believes it means something else. But the Commission is not the proper forum to decide and resolve disputes concerning the scope and validity of the Easement.

The Commission should never have entertained this matter *ab initio* because issues relating to the scope and validity of an easement between a utility and another entity are undeniably beyond the Commission's jurisdiction. The Company raised its concerns about the Commission's jurisdiction to hear this dispute in its Motion for Judgment on the Pleadings filed on May 10, 2013. The ALJ denied the Company's Motion mainly on procedural grounds, declining to address the jurisdictional challenge except to state that the "process and procedure which a utility uses in order to maintain its right-of-way free of debris is a customer service issue and potentially a safety issue . . . squarely within the Commission's purview."[5] The ALJ incorrectly denied the Company's Motion, and the Complainant's challenges to the rights granted to the Company by the Easement should never have been examined by the Commission.

The Commission has only those duties, powers, responsibilities and jurisdiction as are expressly or by necessary implication given to it by the Legislature.[6] The Commission must act within, and cannot exceed, its jurisdiction.[7] Jurisdiction may not be conferred by the parties

[5] *See* First Interim Order, May 14, 2013 at 2.
[6] *Rogoff v. The Buncher Company*, 395 Pa. 477, 151 A.2d 83 (1959); *Western Pennsylvania Water Company*, 311 A.2d 370 (Pa. Cmwlth. 1973).
[7] *City of Pittsburgh v. Pa. P.U.C.*, 43 A.29 348 (Pa. Super. 1945).

where none exists.[8] A challenge to subject matter jurisdiction is never waived; this jurisdictional question may be raised at any stage of the judicial process.[9]

It is well-established that the Commission's jurisdiction regarding property issues stemming from a written easement is strictly limited. The Pennsylvania Supreme Court has held that the Commission does not have jurisdiction to determine the scope and validity of an easement.[10] Commission opinions confronting this issue consistently follow that precedent.[11]

The Initial Decision ignores longstanding precedent in Pennsylvania, which is binding on the Commission in this dispute, by considering the Complainant's challenges to the Easement. The ALJ's statements at the beginning of the hearing help illustrate her misunderstanding of the Commission's jurisdiction regarding these types of disputes:

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[8] *Roberts v. Martorano*, 427 Pa. 581, 235 A.29 602 (1967).

[9] *Commonwealth v. Atlantic & Gulf Coast Stevedores, Inc.*, 221 A.2d 128 (Pa. 1966); *see also Lydine Dutton v. Cordia Communications Corporation*, Docket No. F-2010-2201413 (Final Order entered September 22, 2011) ("...jurisdictional issues are never waived...").

[10] *Fairview Water Company v. Pa. P.U.C.*, 509 Pa. 384, 393,502, A.2d 162, 167 (1985).

[11] *See, i.e. Fulmer v. Metropolitan Edison Company*, Docket No. C-2013-2348757 (Final Order sustaining preliminary objections and dismissing complaint entered May 6, 2013) (the Commission is not the proper forum to determine the validity of a right-of-way or to resolve a controversy which will determine property rights); *Tomb v. Pennsylvania Electric Co.*, Docket No. C-2008-2036378 (Opinion and Order entered December 8, 2008) (the Commission is not the proper forum to resolve a controversy which will determine property rights; that is a matter for a court of general jurisdiction); *Stavnicky v. PPL Electric Utilities Corporation*, Docket No. C-20043368 (Final Order entered July 13, 2005) ("subject matter jurisdiction in right-of-way disputes extends only to cases wherein there is no written documentation of an easement....The Commission is without subject matter jurisdiction to rule upon the validity or scope of that easement, as such jurisdiction is exclusively within the Courts of Common Pleas."); *Anne E. Perrige v. Metropolitan Edison Co.*, Docket No. C-00004110 (July 11, 2003) (in a dispute regarding the location of right-of-way, the Commission had no jurisdiction to interpret the meaning of the written right-of-way); *Boczar v. PPL Electric Utilities Corporation*, Docket No. C-20016332 (Final Order entered February 10, 2003) (concluding that the Commission was without jurisdiction to determine property rights concerning these easements); *Fiorillo v. PECO Energy Co.*, Docket No. C-00971088 (September 15, 1999) (real property issues such as trespass and whether or not utility facilities are located pursuant to valid easements or rights of way are within the exclusive jurisdiction of the Courts of Common Pleas of the Commonwealth); *Messina v. Bell Atlantic-Pennsylvania*, Docket No. C-00968225, (Final Order entered September 23, 1998) (the Commission could only adjudicate cases involving the existence, rather than the scope and validity, of an easement); *In re: Lou Amati/Amati Service Station v. West Penn Power Company and Bell Atlantic-Pennsylvania, Inc.*, Docket No. C-00945842 (Final Order entered October 25, 1996) (questions involving trespass and whether or not utility facilities are located pursuant to valid easements are exclusively within the jurisdiction of the Courts of Common Pleas). The same result was reached in transmission right-of-way disputes where the complaints were dismissed by other pre-hearing motions. *Mauro v. Pennsylvania Electric Company*, Docket No C-2009-2114087 (Final Order entered July 16, 2010) and *Dengler v. Metropolitan Edison Company*, Docket No. C-2009-2112197 (Final Order entered September 25, 2009).

> . . . although the Public Utility Commission does not have jurisdiction over easements and how they are to be characterized and where they are actually located on a piece of property, we do have jurisdiction over how a company provides customer service through its maintenance of an easement or a right-of-way and also if there are any safety issues that come out of that.

(N.T. at 7:1-7). In this case, the proposed "maintenance" of the right-of-way at issue is based on the rights granted to the Company in the Easement. The Initial Decision draws conclusions about the rights granted to the Company by the Easement in direct violation of existing Pennsylvania law that prohibits the Commission from exercising its jurisdiction in this manner. The Initial Decision holds:

> Utilities do not have an unlimited right to enter onto property and remove all vegetation (from ground to sky) which the utility finds to be unacceptable or incompatible. Certainly, West Penn's insistence on complete removal (versus trimming) is compatible with FirstEnergy's practices but the Commission is concerned with whether removal (or trimming) is compatible with the safe operation of the transmission line itself . . . West Penn is incorrect to assume it has the right to remove all vegetation from the centerline of its transmission line to Complainant's residence.

(ID at 20) (emphasis added). The language cited above is a conclusion about the validity of an easement, because it specifically states that the Company does not have a right expressly granted to it by the Easement—that is, to cut, trim and remove trees and shrubs within the right-of-way. The Initial Decision declares that the Company's belief about the rights granted to it by the Easement is "incorrect." Reaching that conclusion necessarily requires an interpretation of the validity of the Easement itself, for without reference to the Easement, there is no way to determine what "rights" West Penn has or does not have, or how to evaluate West Penn's conduct or belief with respect to those rights.

The Initial Decision committed an error of law and reflected an abuse of discretion by entertaining challenges to the scope and validity of rights granted to the Company via the

Easement. The Commission is not the forum empowered to hear and evaluate matters concerning parties' rights granted by an easement.

West Penn Exception No. 2: West Penn excepts to the Initial Decision's conclusion that the Company does not have the right to enter the right-of-way and remove all vegetation. (ID at 18-20).

West Penn contends in Exception No. 1 that the ALJ unlawfully interpreted the Easement at issue in this proceeding. However, in the alternative, if one accepts that the type of Easement review the ALJ conducted was lawful, that review was flawed and erroneous. Without prejudice to or waiving the Company's arguments contained in Exception No. 1 above, the Company excepts to the Initial Decision's conclusion that it does not have the right to clear the vegetation in the right-of-way at the Service Location in the manner it has done so.

Pennsylvania law regarding the interpretation of written documents is straightforward and well-established. The same rules of construction that apply to contracts are applicable in the construction of easement grants.[12] In ascertaining the scope of an easement, the intention of the parties must be advanced.[13] "Such intention [of the parties] is determined by a fair interpretation and construction of the grant and may be shown by the words employed construed with reference to the attending circumstances known to the parties at the time the grant was made."[14] Where the grant of an easement is unrestricted, the grantee is given such rights as are necessary for the reasonable and proper enjoyment of the thing granted.[15]

The Easement is a private document between a single landowner and the Company. It speaks only to the rights and obligations of those two entities to each other. The Easement provides in pertinent part:

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[12] *Zettlemoyer v. Transcon. Gas Pipeline Corp.*, 540 Pa. 337, 344, 657 A.2d 920, 924 (1995).
[13] *Lease v. Doll*, 485 Pa. 615, 621, 403 A.2d 558, 561 (1979); *Sigal v. Manufacturers Light and Heat Company*, 450 Pa. 228, 234, 299 A.2d 646, 649 (1973).
[14] *Lease*, 485 Pa. at 623, 403 A.2d at 561.
[15] *Taylor v. Heffner*, 359 Pa. 157, 163, 58 A.2d 450, 453 (1948); *Hammond v. Hammond*, 258 Pa. 51, 56, 101 A. 855, 856 (1917).

> West Penn Power Company is also granted the right to cut, trim, and **remove all trees within the limits of said easement** as well as any trees beyond said limits which may interfere or threaten to interfere with said transmission systems, and the right to control the undergrowth thereon, by such methods as West Penn Power Company may determine.

(Complainant's Exhibit No. 2) (emphasis added). The plain language of the easement gives the Company an unqualified right to cut, trim and remove all trees located within the right-of-way. The Company is even granted the right to remove trees located beyond the right-of-way if those trees interfere or threaten to interfere with the Company's transmission systems. The Easement's language could not be more straightforward and clear that West Penn has a broad, unqualified right to remove all trees in the right-of-way, and those beyond it, if trees beyond the right-of-way will interfere or threaten to interfere with Company's facilities.

The Initial Decision refuses to recognize the unqualified rights granted to the Company by the Easement. According to the Initial Decision, testimony presented at the hearing proved that "a few trees should be trimmed consistent with industry practice in order to secure more reliable and safe service to all Respondent's customers," (ID at 19), and "the vegetation still in contention does not need to be removed in its entirety." (ID at 20). The Easement contains no qualifications whatsoever limiting the method used by the Company to determine which trees to remove. On the contrary, West Penn is granted sole and exclusive discretion regarding the methods to remove and control the vegetation in the right-of-way: "West Penn Power Company is also granted the right to cut, trim, and remove all trees . . . by such methods as West Penn Power Company may determine." (Complainant's Exhibit No. 2) (emphasis added). The Initial Decision wrongly and unlawfully substitutes its discretion (apparently based on the Complainant's lay opinion) for West Penn's in determining which trees need to be removed at the Service Location.

The Initial Decision also reasons that it was wrong for the Company to cut down trees in the right-of-way unless the trees pose "a direct and immediate threat to the reliability of the transmission line." According to the Initial Decision, the "mere fact that a species of tree "might" grow to sufficient height and/or width to touch a transmission line does not automatically lead to the conclusion that Respondent has no option but to remove the tree completely," (ID at 19), and "the trees that remain in contention . . . pose no present and current threat to West Penn's transmission line . . ." (ID at 20). The Easement contains no qualification limiting tree removal only to those trees within the right-of-way that currently pose a direct threat to the facilities. The limitations pertain solely to the vegetation beyond the right-of-way that "may interfere or threaten to interfere" with Company facilities. The Easement contains no mention of "options" that the Company must consider or complete before exercising its rights. Here again, the Initial Decision unlawfully invalidates the Company's lawful exercise of its exclusive right to determine which trees to remove under the Easement.

Finally, the Initial Decision reasons that West Penn should have delayed exercising its lawful rights until some indistinct future moment. (ID at 19). There is simply no limitation in the Easement restricting the timing of the Company's exercise of its rights. The practical effect of the Initial Decision's holding is to subordinate and transfer the Company's exercise of its lawful easement rights to the Commission under threat of civil penalty.

In sum, the Initial Decision is simply wrong in concluding that the Company does not have the right to enter onto the Complainant's property and remove all vegetation located there pursuant to its lawfully granted Easement. The Initial Decision cites no legal support for its holding that West Penn does not have the lawful rights granted to it by the Easement. Indeed, no such support exists. On the other hand, the plain language of the Easement clearly grants the

Company an unqualified right to cut, trim and remove all trees located in the right-of-way–just as it has done. The Commission should reverse the Initial Decision's erroneous holding that examines, interprets and then invalidates the rights granted to the Company by the Easement.

West Penn Exception No. 3: West Penn excepts to the Initial Decision's conclusion that it has jurisdiction to hear issues regarding vegetation management of the transmission right-of-way because existing federal law preempts the Commission's jurisdiction in this field. (ID at 14, 18, 19, 20.)

The Initial Decision properly found that the Company facilities involved in this dispute are 138 kV transmission lines. (Finding of Fact No. 3) However, the Initial Decision failed to consider that West Penn's transmission line operations and maintenance—including associated vegetation management plans and practices—are governed exclusively by federal law, and the Commission is preempted from asserting jurisdiction into this field. The Initial Decision erred by asserting jurisdiction over issues concerning the safety and reliability of this transmission line because those issues are within the sole jurisdiction of federal authorities.

The concept of "federal preemption" is recognized throughout the United States. The Pennsylvania Supreme Court explained the contours of this concept as follows:

> Simply stated, federal law is paramount. More specifically, Article VI, cl. 2, of the United States Constitution, the Supremacy Clause, provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Thus, according to the United States Supreme Court, laws that are in conflict with federal law are "without effect." Questions concerning the span of this constitutional matter of preemption, however, are not always easily answered.[16]

The starting point for an analysis of this issue is Federal Power Act ("FPA") Section 201, which gives the Federal Energy Regulatory Commission ("FERC") exclusive jurisdiction over "the transmission of electric energy in interstate commerce."[17] FERC's authority under FPA

[16] *Dooner v. DiDonato*, 601 Pa. 209, 218, 971 A.2d 1187, 1193 (2009) (internal citations omitted).
[17] *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982).

Section 201 is plenary and applies to "all facilities for such transmission or sale of electric energy."[18] This is true "without regard to whether the electricity transmissions are sold to a reseller or directly to a consumer."[19]

Importantly, there is no "presumption against preemption" in cases involving FERC's authority to regulate transmission,[20] because "interstate transmission of electric energy has never been 'subject to regulation by the states."[21] In addition, FPA Section 205 gives FERC broad authority to regulate contracts, rules and practices affecting rates for transmission service.[22] In short, FERC's authority over West Penn Power's transmission facilities, and West Penn Power's operations and maintenance of the transmission facilities in question, fully occupies the field and does not permit regulation by state regulators.[23]

Any doubt about Congress's intent to regulate operations and maintenance of the transmission system, including vegetation management practices on the transmission system, ended in 2005 when Congress added a new Section 215 to the FPA. FPA Section 215 describes FERC's jurisdiction and mandate to develop and enforce reliability standards for the transmission system through FERC's designated Electric Reliability Organization, the North

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[18] 16 U.S.C. § 824(b).
[19] *New York v. FERC*, 535 U.S. 1, 23-24 (2002).
[20] 535 U.S. at 18.
[21] *Id.* at 21.
[22] 16 U.S.C. § 824d; *see also, e.g., Miss. Power & Light Co.*, 487 U.S. at 374; *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986) (explaining that FERC's authority is "not limited to 'rates' *per se*").
[23] Preemption derives from the Supremacy Clause of the United States Constitution, which provides that validly enacted federal laws take precedence over state and local laws on the same subject and may displace such laws entirely. U.S. Const. art. vi, § 2. There are three types of preemption: 1) *express preemption* which occurs when Congress expressly states that state and local laws are preempted; 2) *field preemption*, which occurs when the federal regulatory scheme is so comprehensive that there is no room left for state or local law; and 3) *conflict preemption*, which occurs when it is impossible to comply with both the federal and state law or where the state or local regulation stands as an obstacle to fully achieving the federal objective. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300 (1988). The Initial Decision can be viewed as trespassing into federal jurisdiction in all three ways. FERC occupies the field of interstate transmission under FPA sections 201 and 205. FPA section 215 and FERC's rulemaking orders thereunder expressly establish the limits of federal and state authority over practices affecting transmission reliability. And the Initial Decision conflicts with both FERC's order under FPA section 215 and the PJM tariff.

American Electric Reliability Corporation ("NERC").[24] Acting pursuant to this Congressional mandate, NERC proposed and FERC approved numerous reliability standards that do in fact regulate all aspects of transmission system operations and maintenance.

As the Commission is aware, NERC's reliability standards include the FAC-003 standard for transmission vegetation management. This standard requires the Company to develop and implement a TVM Program, and West Penn Power has done so. (N.T. at 170). The TVM Program calls for complete clearing of all trees within the transmission right-of-way that is the subject of this proceeding.[25] As such, West Penn is acting entirely within the scope of federal jurisdiction in performing operations and maintenance—including vegetation management—on the transmission systems and properties that are the subject of this proceeding. As such, the Initial Decision's analysis and conclusions regarding West Penn's vegetation clearing practices and actions are preempted by federal law.

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[24] *Rules Concerning Certification of the Electric Reliability Organization; Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, Order No. 672, 71 Fed. Reg. 8662 (Feb. 17, 2006), FERC Stats. & Regs. ¶ 31,204 (2006), *order on reh'g*, Order No. 672-A, 71 Fed. Reg. 19814 (Apr. 18, 2006), FERC Stats. & Regs. ¶ 31,212 (2006).

[25] There is potential for some party to observe that the FAC-003 standard is only mandatory for transmission facilities that are rated 200 KV and higher because those lines are always part of the bulk power transmission system. The observing party then could attempt to argue that the Commission therefore can regulate vegetation management practices on transmission lines that are rated less than 200 kV, despite the fact that FERC has expressly reserved jurisdiction over any line that is actually part of the bulk power transmission system including the 138 kV lines at issue here. Any such argument must fail, however, in light of the rule that when Congress occupies the field (field preemption) there is no room left for regulation by the states, even in circumstances similar to this where the federal agency involved has chosen not to regulate fully within the scope of its jurisdiction. *See, e.g., Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 50 (2003) ("[T]he 'view that the pre-emptive effect of FERC jurisdiction turns on whether a particular matter was actually determined in the FERC proceedings' has been 'long rejected.") (citation and alterations omitted) (quoting *Miss. Power & Light Co. v. Miss.*, 487 U.S. 354, 374 (1988); *cf. e.g., Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd. of Miss.*, 474 U.S. 409, 422-23 (1986); *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) ("[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much preemptive force as a decision *to* regulate.") (citations omitted). West Penn respectfully requests that the Commission, pursuant to 52 Pa. Code § 5.408, take administrative notice that the 138 kV transmission line in question (Bull Creek Junction-Cabot 138kV and the Cabot-Lawson Junction 138kV transmission lines) is in the Company's FERC jurisdictional rate base as evidenced by PJM's Transmission Provider's Facilities List. This information is publicly available and can be found at www.pjm.com/pub/account/trans-fac/ap_ca.xls. This information can also be found in the Company's FERC Form 1.

To the extent that further question about the preemptive scope of federal law remains, the Company notes that all aspects of West Penn's transmission operations and maintenance are governed extensively by the FERC-jurisdictional PJM tariff. As such, there is no opportunity to regulate West Penn's actions in this proceeding.[26] Section 4.5 of the PJM Transmission Owners Agreement obligates West Penn to operate and maintain its transmission facilities in accordance with, among other requirements, Good Utility Practice. Section 1.10 of the same agreement defines "Good Utility Practice" as:

> The practices, methods, and acts engaged in or approved by a significant portion of the electric utility industry during the relevant time period, or any of the practices, methods, and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition.

The question was not presented and thus the Initial Decision did not address whether floor-to-ceiling clearing of vegetation from transmission right-of-way is Good Utility Practice under the PJM tariff. The Company respectfully submits that its vegetation management practices are Good Utility Practices, as evidenced by the TVM Program and by the FAC-003 reliability standard. For example, the TVM Program is used by West Penn's transmission owning affiliates, and is applied within the affiliates' footprint across seven states, over more than 20,000 line miles of transmission facilities, and across three PJM transmission zones. (N.T. at 160:1-17). As such, the TVM Program constitutes practices engaged in a significant portion of the utility industry as contemplated by the PJM tariff's Good Utility Practice standard.[27] And, as observed herein, the FAC-003 reliability standard likewise calls for significant clearing of

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[26] *See, e.g., Yorty v. PJM Interconnection, L.L.C.*, 2013 PA Super 265, slip op. at 15 (Oct. 2, 2013) (holding that state tort action was preempted by liability provisions in PJM's FERC-approved tariff because "PJM's Tariff is the equivalent of a federal regulation").

[27] On information and belief, numerous other utilities in the northeastern United States also conduct floor-to-ceiling clearing of vegetation within transmission rights of way.

transmission rights of way and is of national application, including for all transmission-owing affiliates in PJM.

The Commission should evaluate the Initial Decision in light of this demonstration of federal field preemption for transmission system operations.[28] Specifically, the Commission's consideration should be framed by the fact that West Penn was acting entirely within the scope of FERC's exclusive jurisdiction when it engaged in the vegetation management practices that are the subject of this proceeding. As such, there was no room for the Initial Decision to suggest that the Commission should regulate or to attempt to regulate West Penn's vegetation management practices that are the subject of this proceeding.[29]

West Penn Exception No. 4: West Penn excepts to the Conclusion of Law that the TVM Program is unreasonable or that West Penn failed to provide reasonable and adequate customer service because of the way that it implemented its TVM Program on the Complainant's property. (Conclusion of Law No. 3; Findings of Fact Nos. 7, 8, 10, 12, 15, 16; ID at 13, 17-20).

The Initial Decision, without citing any authority, concludes that the Company's application of its TVM Program in conformity with its Easement rights is unreasonable. (ID at 20). This finding (i) is not supported by any law or Commission policy; (ii) fails to consider the extensive industry expertise that forms the basis of the vegetation management policy; and (iii) violates the express provision contained in the Easement granting the Company the right to clear trees in the right-of-way.

A. The Initial Decision erred in finding that the TVM Program is unreasonable.

[28] The Initial Decision cites three cases for the proposition that West Penn erred as a matter of state law. None of those cases addressed preemption. Moreover, two of those cases were decided prior to the enactment of FPA Section 215, and the more recent case did not involve a vegetation management plan filed in accordance with FAC-003.

[29] *See California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 839 (9th Cir. 2004), cert. denied, 544 U.S. 974 (2005); *Transmission Agency of N. Cal. v. Sierra Pac. Power Co.*, 295 F.3d 918, 928 (9th Cir. 2002) (holding that petitioner's "tort and property claims for inverse condemnation, nuisance, trespass, and conversion," in addition to other state law claims, "are preempted by the Federal Power Act").

Conceptually, and in direct contrast to the evidence presented by the Company at hearing, the Initial Decision adopts the Complainant's characterization of the TVM Program as a "ground to sky approach to vegetation management." (ID at 19). The Initial Decision concludes that the Company's policy is inconsistent with the Commission's rules and regulations requiring the Company to "provide for vegetation management, not vegetation eradication." (ID at 19). The Initial Decision essentially holds that the TVM Program is *per se* unreasonable because the Company removes vegetation it has determined to be incompatible with the safe and reliable operation of its facilities located within a lawful right-of-way granted to the Company by the Easement that allows, without restriction, for the removal of all trees. (ID at 20). The Initial Decision cites absolutely no authority whatsoever to support this conclusion; nor does it cite any authority to support the conclusion that the Complainant knows better than the Company how to manage the vegetation in transmission rights-of-way. The Initial Decision's conclusion that the TVM Program is unreasonable on its face is wholly unsupported by the facts and constitutes a legal error.

First, the Initial Decision erroneously concludes that the utility should trim and prune vegetation only when the vegetation becomes a clear danger or imminent threat to the reliability of the transmission line. As explained in Exception No. 3 above, the Company must maintain the reliability of its transmission lines in compliance with Section 215 of the Federal Power Act, NERC standards and the PJM Tariff.

In light of its duty to maintain reliability of transmission lines, West Penn (and the other operating companies of FirstEnergy) developed the TVM Program for vegetation maintenance. West Penn's inspection cycle for transmission lines provides for inspection once per year by air and every five years on the ground. (N.T. at 136, 175). The transmission line at issue was last

inspected on the ground in 2012 and the next ground inspection is scheduled to occur in 2017. (N.T. at 175-176).

The TVM Program defines "incompatible vegetation" as "[a]ll vegetation that will grow tall enough to interfere with overhead electric facilities." (N.T. at 130, West Penn Exhibit No. 8). The TVM Program also provides that the vegetation clearance for 138 kV lines is 25 feet. (N.T. at 171, 203-204). West Penn's witness explained the technical rationale for the Company's clearance specifications. He testified that several elements underlie the Company's maintenance specifications. First, he testified that electricity can "arc" from the energized conductor to vegetation. The arc occurs through the air and does not require direct contact between the conductor and the vegetation. Arcing depends on many factors, such as the humidity of the air and the moisture content of the vegetation. (N.T. at 138). He testified further that the specifications consider the growth rate of the tree and its mature height of the vegetation. The Company relies on information provided by the Arbor Day organization to determine the mature height of trees. (N.T. at 165). The growth rate of particular tree species is a consideration when determining the frequency of inspections and trimming cycles. (N.T. at 203-204). Another factor underlying the specifications is that transmission conductors move given wind and temperature variations. (N.T. at 204). The lines sway significantly in the wind and sag significantly due to expansion in summer temperatures. (*Id*).

The Initial Decision erroneously adopts the Complainant's preference that West Penn prune and trim trees within its transmission corridor even when the mature height of the trees could interfere with the conductors. The Company's expert witness testified that pruning or "topping" such trees is a poor vegetation management practice because it does not address the ultimate problem that an incompatible tree has the eventual capability of physical contact, or

contact through arcing, with the electrical conductor, thus resulting in a transmission outage. (N.T. at 192).

The Company's specifications do not equate vegetation maintenance with a monolithic approach that transmission corridors should be completely cleared of all trees. West Penn's specifications are consistent with the ongoing and developing NERC and FERC policy.[30] The evidence presented at hearing established that the Company favors "compatible vegetation that does not interfere with transmission facilities..." (West Penn Exhibit No. 3). The goal is further described in a brochure provided by West Penn to landowners: "A diverse mixture of grasses, low-growing shrubs and other ground cover preferred by birds, deer and small animals promotes a thriving wildlife habitat within many corridors. In this way, well-managed transmission rights-of-way can provide necessary food and cover for wildlife, while maintaining compatible with safety and reliability concerns associated with our transmission facilities." (*Id.*).

The Initial Decision incorrectly characterizes West Penn's vegetation management policy as a "ground to sky" or "eradication" approach to trees within transmission rights-of-way. To the contrary, the evidence presented at hearing clearly establishes that West Penn's approach is consistent with FERC and NERC's developing policies, industry best practices for rational vegetation control and transmission reliability, and landowner concerns.

B. The Initial Decision erred in finding that the TVM Program, as applied by the Company to the Complainant, was unreasonable.

[30] In FERC's recent revisions to its standards for Transmission Vegetation Management issued March 21, 2013, at Docket No. RM12-4-000; Order No. 777, FERC stated: "We understand that, as explained by Trade Associations and other commenters, best practices call for the removal of tall-growing vegetation from the right-of-way and replacement with a sustainable plant community. In many circumstances, this is a reasonable approach. However, we also believe that a transmission owner should not monolithically equate vegetation management with tree removal." West Penn's TVM Program is not a monolithic tree-removal program; rather, the objective of the TVM Program is to evaluate the transmission corridor, identify incompatible vegetation, define the timeframe the vegetation must be controlled and select the best control option for the site and vegetation that is present. This is accomplished through either removal by mechanical means or the application of herbicides.

From an "as applied perspective," the Initial Decision mistakenly and vastly overstates the number of trees that West Penn proposed to remove within its right-of-way at the Service Location. In fact, West Penn proposed to leave extensive vegetation untouched as compatible with its transmission right-of-way.

The Initial Decision found that "[a]mongst the vegetation slated for complete removal by West Penn were five-foot-tall pear tree saplings, a magnolia tree, Rose of Sharon bushes, a dogwood tree, and various blue spruce and cedar trees that ranged in height from 12 feet to 22 feet." (ID at 18). The Initial Decision incorrectly found that West Penn intended to remove all of these trees. Similarly, in Finding of Fact No. 7 the Initial Decision incorrectly states that West Penn intended to cut down "five four-foot high pear trees, an apple tree, a magnolia tree, unnumbered blue spruce trees, unnumbered pine trees, various shrubbery, a dogwood tree and a pin oak tree." By contrast, West Penn's Exhibit 9 provides a graphic aerial photo of the trees in question, along with a description of West Penn's intention with respect to the trees. Exhibit 9 and witness testimony established that after extensive communication with the Complainant, West Penn amended its final work plan to leave an apple tree, a magnolia tree, a dogwood tree and various shrubberies in place. (N.T. at 124, 176, 183-184).

West Penn used different color tags to mark which trees should be removed, and which trees were compatible and should remain. The Company's witness testified that trees slated for removal were marked with red paint while trees that were compatible with the transmission right-of-way and could remain were marked with yellow tape. (N.T. at 158-159).[31]

The Complainant testified that the first time West Penn contractors arrived at the Service Location, they placed yellow ribbons on some of the trees, including the small pear saplings and

[31] West Penn's Mr. Scott testified: "Generally when they use a yellow ribbon, they will put a yellow ribbon on shrubs to indicate not to cut the tree. It's a clarifying ribbon that says that the vegetation is compatible."

a magnolia tree. (N.T. at 18). The Complainant, however, was under the mistaken idea that trees marked with yellow ribbon were to be removed. (N.T. at 32). A dogwood tree, mentioned by the Initial Decision as slated for removal, was also marked with a yellow ribbon according to the Complainant, who apparently believed yellow tags meant removal. (N.T. at 32:20-21).[32] West Penn's witness also testified that the pear trees and the low growing trees were compatible with the transmission lines and would not be removed. (N.T. at 190).

The Initial Decision also incorrectly states that West Penn's "insistence that five-foot pear trees would grow too close to the transmission line within five years is contrary to common sense." (ID at 13). Contrary to the Initial Decision, West Penn presented evidence that it did not intend to remove the pear trees. West Penn's witness told the Complainant on December 6, 2012, that the pear trees were compatible with the right-of-way and would not be removed. (N.T. at 190). There is no evidence in the record to support the Initial Decision's conclusion that West Penn insisted on removing the pear trees. Moreover, at hearing, the ALJ specifically stated that she did not want to "hear about trees that West Penn doesn't want to remove. Let's move it along." (N.T. at 184:16-18). This is another example of the way the Initial Decision selectively rejects relevant facts in order to reach what appears to be a foregone conclusion that West Penn's TVM Program is unreasonable. The pear trees—and a number of other plant species compatible with the TVM Program growing at the Service Location—were never slated for removal.

West Penn's vegetation brochure (West Penn Exhibit No. 3, p 4-6) provides an extensive list of trees and shrubs that are considered compatible with transmission rights-of-way. Many of the Complainant's low-growing species are among the listed species, including magnolia, dogwood, and Rose of Sharon (West Penn Exhibit No. 3, p. 6 of 6).

[32] The Complainant testified: [s]o why don't you just go around my dogwood tree? But, no, they marked it. It (Complainant's Exhibit 1-B photograph) shows that yellow tag on it."

West Penn's Exhibit No. 9 succinctly describes, and shows, the trees to be removed and the trees to stay. The transmission easement is 50 feet horizontally on either side of the transmission center line, and the conductors at their lowest point are 47 feet above the ground. (N.T. at 180). The Company's witness testified that although the Easement establishes a right-of-way 180 feet wide, the Company only maintained a 50-foot area extending out from either side of the centerline of the transmission line. (N.T. at 180), Clearly, the Company never intended a "ground to sky" vegetation management approach to this particular property, and the Initial Decision's conclusion to the contrary is not supported by the evidence.

The Initial Decision finds that the Company advised the Complainant that it intended to cut down a number of trees outside of the right-of-way. (Finding of Fact No. 7). No facts were presented at the hearing to establish a basis for this Finding. On the contrary, the Company's work plan centered solely on vegetation growing within the right-of-way. (N.T. at 131). The Initial Decision incorrectly found that the Company intended to trim or remove trees located outside of the right-of-way.

In addition, West Penn attempted to cooperate with the Complainant and to obtain her assent, though not required, to the removal of incompatible trees. As noted in the Initial Decision, West Penn found the condition of the Complainant's trees created such a severe, prohibitive risk of a transmission outage due to arcing that the Company had to take immediate corrective action. After sending a letter to the Complainant on August 21, 2012 indicating that the Company intended to perform vegetation maintenance, including "tree removal" at the Service Location, the Company removed a pin oak on October 23, 2012. (N.T. at 121; West Penn Exhibit No. 3). The Company's witness testified that the pin oak removed on October 23, 2012, was only 9.86 feet from the tree top to the conductor as of August 30, 2012. (N.T. at 185-

186; Exhibit No. 14). The Company's witness testified that given the certainty of tree growth of several feet in the growing season, combined with the certainty of line sag, the remaining pin oak tree posed "imminent concern" to the threat of an outage. (N.T. at 186:14).

The Initial Decision acknowledged that the condition of the trees at the Service Location was so severe that West Penn was compelled to take immediate action. The Company's urgency was driven by the fact that the remaining pin oak ("Tree F" as described on page 9 of the Initial Decision; West Penn Exhibit No. 14) was approximately 40 feet tall and the lowest conductor was approximately 47.5 feet from the ground. (N.T. at 187). Again, the Company's witness testified that Tree F could grow another several feet in the spring growing season and that the transmission conductors would likely sag several feet in hot weather. (N.T. at 187:3-8). The Company's witness testified that these conditions created the potential for a transmission outage due to arcing from conductor to the tree. (N.T. at 191-192). With the ALJ's facilitation, and with the Complainant's approval and in her presence, West Penn conducted vegetation maintenance on the property on June 21, 2013. (Finding of Fact No. 27; Company Status Memorandum dated June 26, 2013; Company Status Memorandum dated June 26, 2013) Thus, after extensive negotiations with Complainant for over a year, the Company finally conducted vegetation management on June 21, 2013.

In contrast, the Complainant offered no evidence, other than her own opinion, to show how the Company's policies regarding tree maintenance and removal are unreasonable. The Complainant offered no expert testimony or report to challenge the TVM Program. The Complainant opined that the Company should only have to trim or "top" trees that approach the Company's transmission lines, and return every five years to trim. The Initial Decision erroneously adopts the Complainant's lay opinions as the reasonable policy, a result that could

significantly jeopardize to electric utility facilities and service throughout the Company's service territory.

C. The Initial Decision Erred in Finding that the Company Did Not Provide Adequate Notice to the Complainant

Numerous Findings of Fact in the Initial Decision misstate, ignore and flatly contradict substantial evidence presented regarding the way that West Penn notified the Complainant that the Company planned to manage the vegetation growing in the right-of-way. Instead, the facts presented at hearing—corroborated by the Complainant's own testimony—clearly established that the Company personally notified Complainant of the planned vegetation management and responded to her concerns over a period of months prior to trimming any vegetation at the Service Location.

First, the Initial Decision erroneously finds that the Company's vegetation contractors "arrived at the premises in early 2012 and began cutting trees." (Finding of Fact No. 8). Absolutely no evidence was presented at hearing to support this finding. The Complainant testified that she was first made aware of the Company's intention to manage the vegetation in the right-of-way when a contractor personally visited her property "last spring" to discuss the issue. (N.T. at 18:19-24). The Company's witness clarified that the initial contact between the Complainant and the Company's representative occurred on February 14, 2012 during the planning stage of the work to be performed on the line that crosses Complainant's property. (N.T. at 116:14-20). The Complainant testified that during that meeting, the Company's representative identified the plants to be trimmed or removed. (N.T. at 18:25, 19:1-5, 19:11-17). She offered no evidence or testimony that any plants were trimmed or removed on that date. In fact, she specifically testified that a Company representative visited her property a second time and again acknowledged and recorded her refusal to the proposed work. (N.T. at 19:13-14). The

Company's witnesses confirmed there was no trimming on the right-of-way until October 23, 2012 because the Complainant had been made aware of the planned maintenance and had voiced opposition to it. (N.T. at 116:16-25, 117:1-20, 121:21-25). Moreover, when the ALJ asked the Complainant this precise question, the Complainant confirmed no maintenance was done until the "fall of 2012." (N.T. at 44:11-13, 45:4-10). There was no trimming in the right-of-way until October 23, 2012, and the Initial Decision's finding to the contrary is unsupported by the factual record developed at the hearing.

Second, the evidence and testimony presented by both parties at hearing clearly established that the Company completed numerous telephone contacts and personal meetings with the Complainant prior to any trimming or cutting of the trees in the right-of-way. For example, the Company's witness testified that the Complainant personally met with Company representatives regarding the proposed vegetation management on February 14, 2012, June 11, 2012 and July 16, 2012. (N.T. at 116:22-25, 117:1-20). The Complainant testified that she could not remember the specific dates but she admitted that she met with Company representatives at least that many times. (N.T. at 40:16).

The Complainant's son, William Broman, also testified at the hearing that he had "a number" of phone conversations with Company representatives in late summer and fall of 2012. (N.T. at 88-89).

The Complainant testified that Company representatives and the Complainant, with both parties' attorneys present, also met at the Complainant's property in the winter of late 2012 or early 2013. The Complainant recalled that her attorney and West Penn's attorney met at the site and "talked and talked." (N.T. at 40:21-25).[33] The Complainant further recalled that the

[33] The Complainant admitted she could not recall the exact date this meeting occurred. The Company's witness testified it took place on December 6, 2012. (N.T. 124:17-24).

Company representative and her attorney "huddled" around various trees discussing the trees. (N.T. 48).

The Complainant testified that she spoke with various Company representatives numerous times over the telephone about the proposed vegetation management. (N.T. at 41:16-19). The parties even exchanged detailed written correspondence regarding the issue. (West Penn Exhibit Nos. 3, 4). Clearly, the evidence presented at hearing established that the Complainant had actual and adequate notice of the vegetation management the Company planned to complete in the right-of-way on her property.

In addition, the Company's witness testified that a Company representative personally notified the Complainant of the upcoming vegetation management during the very first phase of the Company's notification process. (N.T. at 117:21-25, 118:1-9). That notification process occurs from January to June during which time Company representatives assess transmission rights-of-way. (N.T. at 117:21-25, 118:1-9). Simultaneously thereafter, the Company's policy is to make personal contact with landowners to discuss the planned maintenance. (*Id.*). If a landowner is not home when personal contact is attempted, the Company's policy is to leave a written notice indicating a field representative visited the landowner to discuss upcoming vegetation management on the right-of-way. (N.T. at 118:10-19). The written notice includes a contact number so the landowner can call the Company and begin a dialog about the vegetation maintenance. (N.T. at 118:17-19).

In this case, the parties each testified that the Complainant first met and spoke with a Company representative in February 2012. Thus, the Complainant was personally contacted during the very first part of its landowner notification process. There was no need to leave written follow up information with the Complainant because the Company had reached her the

first time it made the attempt to do so, which is entirely reasonable. Despite the detailed record evidence provided by both parties documenting the dates and times the Complainant met with and spoke to Company representatives about the planned work in the right-of-way, the Initial Decision found that West Penn "did not provide testimony about its specific attempts to notify Complainant." (N.T. at 17). The Initial Decision's finding in this regard is clearly against the preponderance of the evidence of record in this matter.

Third, the record is completely clear that the Company announced its presence on the Complainant's property. As late as August 21, 2012, the Company sent a letter to the Complainant that included a copy of its proposed maintenance of the vegetation growing in the right-of-way. (West Penn Exhibit No. 3, p. 1-2). That letter requested[34] that the Complainant sign and return a copy of the work plan, and specifically advised that the Company would proceed with the work plan in the event the Complainant decided not to sign it. (West Penn Exhibit No. 3 p.1). On October 23, 2012 the Company's contractor visited the Service Location to perform the vegetation management in the right-of-way. (N.T. at 208:2-8). The Company's contractor specifically testified that as he was walking up to the Complainant's door to meet her, the Complainant "came out and met us outside." (N.T. at 208:9-12). This testimony, which was

[34] Contrary to Finding of Fact No. 14, the letter does not state that the "Complainant must agree to the Work Plan provided by the letter." (Finding of Fact No. 14). This yet another distortion of the facts presented at hearing. The letter delivers the Company's request that a landowner sign the work plan. The relevant portion of that letter provides as follows:

> Even though our easement rights provide sufficient right for the work that is planned, we want to be certain that you are aware of this work and acknowledge reviewing the work plan. Therefore, we are requesting that you sign the work plan and return it to our office by August 28th, 2012. This will help us ensure that we have communicated the work plan to you. We will use the work plan to instruct our contractors, further ensuring your expectations and our expectations will be met. FirstEnergy Service Company would prefer to have your signed acknowledgment prior to starting the work. Should you decide not to sign the work plan, FirstEnergy Service Company will still proceed with the work according to our easement rights noted above.

(West Penn Exhibit No. 3) (emphasis added).

corroborated by the Complainant at hearing,[35] directly contradicts the Initial Decision's finding that the Company's representatives failed to announce their presence at the Service Location.

There is no practical difference between knocking on a person's door and meeting them right outside that door if the person comes out before the knock occurs. The Initial Decision completely ignores the testimony of both the Complainant and the Company in order to find that the Company's contractor did not make reasonable efforts to announce its presence at the Service Location.

According to the Initial Decision, multiple personal meetings, numerous telephone discussions, and written correspondence with a landowner prior to commencing tree trimming does not constitute "adequate notice." The Initial Decision never defines or describes what constitutes "adequate notice," despite determining that West Penn failed to provide it. The Initial Decision cites no legal support for its concept of "adequate notice." Importantly, the Easement, the source of the parties' rights and obligations to each other relative to the right-of-way, contains no notice provisions that the Company must follow when exercising its rights. (West Penn Exhibit No. 2, Easement Agreement dated October 16, 1967, Butler County Deed Book 883, Page 485).

The Initial Decision errs by finding that West Penn did not provide adequate notice without explaining the standard that was allegedly violated The Initial Decision's finding that West Penn did not provide "adequate notice" is wholly unsupported by the evidence presented at hearing.

In sum, it is clear that the ALJ simply rejected most of the evidence provided by the Company and some of the evidence presented by the Complainant in order to reach her

[35] *See* N.T. 81:10-12 (Q. (by Mr. Munsch) Did you go out to greet [the contractors]? A. (by Complainant) Yeah, I went out and said, "what are you doing here?").

conclusions. While the ALJ is the initial fact finder in Commission proceedings, the Commission is the ultimate fact finder:

> . . . the Commission, not the administrative law judge, is the ultimate finder of fact and arbiter of witness credibility. Therefore, an assessment of fact or witness credibility made by an administrative law judge which is contrary to that made by the Commission is of no legal significance.[36]

Given the substantial evidence contrary to the Initial Decision's findings that was improperly ignored, the Commission, as the ultimate fact finder, must exercise its authority to reverse the ALJ and set the record straight in connection with the notice provided to the Complainant and the scope of the Company's vegetation maintenance activities at the Service Location.

West Penn Exception No. 5: West Penn excepts to the Conclusion of Law that the Complainant met its burden of proving that the Company did not provide reasonable service. (Conclusion of Law No. 4; ID at 12, 13, 17, 18, 19, 20).

The Initial Decision recites the correct standards regarding the Complainant's burden of proof in this proceeding. (ID at 11). The Initial Decision then misapplies those standards by discrediting and refusing to consider the Company's evidence, which inevitably results in a finding that the Complainant carried her burden. The Initial Decision reads as if the Company never appeared at the hearing and did not produce any documentary or testimonial evidence in support of the issues in this proceeding. As demonstrated throughout these Exceptions, the Company produced substantial and compelling evidence of every aspect of its vegetation management program and its reasonable application to the Service Location. If given fair and proper consideration, it is clear that the Complainant failed to carry her burden in this proceeding.

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[36] *Re: Application of PPL*, Docket Nos. A-110500F040, A-110500F061, A-110500F062, at 10-11 (Order Entered April 15, 1991) (citing 66 Pa. C.S. §§ 335(a), 703(c)).

The Initial Decision found the testimony of the Complainant to be entirely "credible," while not particularly "clear and concise." (ID at 12). On the other hand, the Initial Decision proclaimed that it found exactly none of the Company's witnesses to be credible, as their testimony was "contrary to common sense . . . w[as] not accepted as credible . . ." and so forth. (ID at 13). Notably, the Initial Decision appears to take issue with the substance of the testimony presented by the Company's witnesses, and not the witnesses' credibility. The Complainant did not challenge the credibility of any of the Company's witnesses, except for a brief exchange near the end of the hearing. That exchange involved a discussion between the Complainant and Company representatives on October 23, 2012. The Complainant herself was confused about which individuals she spoke with in October 2012, and the Company's witness answered the Complainant's questions. (N.T. at 215).

Crucially, the Complainant provided absolutely no expert report or expert testimony to refute the Company's evidence regarding the TVM Program. In stark contrast, the Company provided expert testimony of Richard Scott, a Supervisor of Transmission Vegetation management for the Company. (N.T. 106). Mr. Scott has a Bachelor of Science degree, and is certified as an International Society of Arboriculture Utilities Specialist. (ID at 106-107). Mr. Scott provided detailed testimony regarding the TVM Program and its application in to this case. (ID at 105-167). The Company also provided expert testimony of Jerry Swink, a General Supervisor of Transmission Vegetation Management for the Company. (ID at 168). Mr. Swink has a Bachelor of Science degree and is certified by the International Society of Arboriculture as an Arborist, a Utilities Specialist. (ID at 169). Mr. Swink is certified by the Pennsylvania Department of Agriculture as a Right-of-Way Commercial Applicator. (ID at 169). Mr. Swink provided additional expert testimony regarding the TVM Program, its goals and purposes, and

the manner that the Company evaluates managing vegetation in transmission rights-of-way. (ID at 169-206). The overwhelming evidence provided by Mr. Scott and Mr. Swink thoroughly and definitively established that the TVM Program is based on sound scientific principles and industry standards that are reasonable.

Moreover, the Company submitted eighteen exhibits into the record in this matter.[37] West Penn's exhibits included data regarding the Company's TVM Program clearance specifications and correspondence to and from the Complainant. Importantly, West Penn Exhibits Nos. 9-18 provided detailed descriptions of the vegetation at issue in the right-of-way and how the Company planned to manage it. Exhibit No. 13 lists the vegetation the Complainant misunderstood would be removed and specifically states the apple tree and magnolia will not be removed. The totality of the testimonial and documentary evidence presented by the Company in this case overwhelmingly rebutted the Complainant's allegations that the Company did not provide reasonable customer service in how it provided notice to her or in the way it applied the TVM Program to its right-of-way.

The Complainant did not carry her burden here. As explained in Exception No. 4 above, the Initial Decision adopts the Complainant's numerous factual errors and misconceptions regarding the trees that the Company needed to trim or remove. To the degree the Complainant may have established a *prima facie* case that the Company provided unreasonable service (which she did not do here), the evidence submitted by the Company successfully rebutted the Complainant's case.

West Penn Exception No. 6: West Penn excepts to the Ordering Paragraph that "West Penn Power Company within thirty (30) days of the Commission's Order in this case shall pay a civil penalty in the amount of Six Thousand Dollars ($6,000) by sending a check or money order payable to the Pennsylvania Public Utility Commission . . ." (ID at 25, Ordering Paragraph No. 3).

[37] *See* Third Interim Order entered July 8, 2013.

Pursuant to 66 Pa. C.S. § 3301, the Commission may impose civil penalties for, among other things, "violations" of the Code. The Initial Decision imposes a $6,000.00 penalty on West Penn for violating Code Section 1501 (Character of Service and Facilities) by "failing to provide reasonable and adequate customer service in how it implemented its vegetation maintenance program on Complainant's property." (ID at 25, Ordering Paragraph No. 2). Thus, without a "violation" of the Code, no civil penalty can be imposed under Code Section 3301.

As described in and demonstrated by Exception No. 4 above, West Penn did not provide unreasonable customer service or violate Code Section 1501 in maintaining the vegetation in the right-of-way over the Complainant's property. To the extent necessary, West Penn incorporates herein the entirety of Exceptions 1 through 5.

Moreover, the rationale employed by the Initial Decision in its evaluation of the factors and standards for determining civil penalty amounts under 52 Pa. Code § 69.1201(c) is flawed and should be rejected. First, the Initial Decision asserts in support of its civil penalty analysis that "West Penn entered onto Complainant's land without announcing their presence and immediately began to cut down vegetation." (ID at 21). As explained in Exception No. 4, this conclusion is completely inconsistent with the evidence presented by both parties at hearing that (i) the Complainant and the Company engaged in discussion for over eight (8) months before any trimming occurred at the Service Location; and (ii) on October 23, 2012, the date a tree was removed, the Company's representative met the Complainant outside her residence as he was approaching her front door to announce his presence. A fair reading of the totality of the evidence presented at hearing confirms that the Company acted reasonably in notifying the Complainant of the planned maintenance and announcing its presence at the Service Location.

The Initial Decision justifies the civil penalty in part based upon its assertion that "West Penn removed or proposed to remove vegetation which posed no present danger to the transmission line and would not present a danger within the next five years." (ID at 21). The facts of record demonstrate that the TVM Program is designed to eliminate vegetation that currently threatens or has the potential to interfere with transmission line. In order to further characterize the nature of the alleged violation as "serious," the Initial Decision appears to substitute the guidelines of the Company's TVM Program with a loose standard of its own making—removal only of vegetation that poses a current threat or would do so within five years. It is not a violation of Code Section 1501 for the Company to adopt and execute a TVM Program that helps ensure safe, efficient and reliable service through proactive tree trimming and removal.

The Initial Decision also erroneously adopts the Complainant's mistaken understanding that the Company "intended" to remove trees considered compatible with the TVM Program, and ignores the fact that no compatible vegetation was ever removed from the right-of-way. (ID at 13, 15). There is no Code violation in West Penn's actions here, much less a "serious" violation. Moreover, there is no statute, regulation, case or rule authorizing the Commission to find violations of the Code based on allegations that a utility "intended" to do something. Until the utility does an act in violation of the Code or fails to act in violation of the Code, there is no conduct to punish. There is no basis in law to impose civil penalties upon West Penn based on an allegation that it "intended" to do something.

The Initial Decision asserts that "many of the Complainant's trees and shrubs" were removed or so badly damaged that they needed to be removed. The record evidence does not support this assertion either. The Company removed four trees at the Complainant's property since February 2012. All of them had either grown large enough to interfere with the

Company's lines or had the potential to do so at maturity. In contrast, numerous trees and shrubs still remain at the Service Location, including trees that the Complainant considered "windbreaks."

In finding that West Penn's conduct was "intentional" for purposes of applying one of the civil penalty criterion in 52 Pa. Code § 69.1201(c), the Initial Decision states that "[i]n light of the 1990 appellate decision concerning West Penn's tree removal program, I conclude the conduct was not negligent but intentional." (ID at 21). The Initial Decision was referring to a prior Commission case on utility vegetation management cases, *West Penn Power Company v. Pa. P.U.C.*, 578 A.2d 75 (Pa. Cmwlth. 1990) ("*West Penn*") referenced earlier on page 14 of the Initial Decision. But as demonstrated in Exception No. 3 above, the Company's TVM Program followed by the Company in this case was developed many years after the *West Penn* case was decided, and applies to transmission lines, not the lower voltage distribution facilities at issue in *West Penn*. The specifications the Company follows now are different from the ones in place in 1990. No evidence was presented establishing that the Company's representatives intentionally committed violations of the Code by following the Company's TVM Program.

The Initial Decision reasons that because the Company provided no testimony acknowledging an error with the TVM Program, this lack of evidence does not justify mitigation against a higher penalty. (ID at 21). The Initial Decision's reasoning places the burden on the wrong party to defend its conduct because, as outlined in Exception No. 5 above, the Complainant never established a *prima facie* case of a violation of the Code. Leaving that issue aside, as explained in Exception Nos. 3 and 4, West Penn's transmission vegetation management program employs integrated vegetation management best practices and is consistent with industry standards. Moreover, it is designed to balance the rights of landowners that have

Company transmission facilities on their property with the needs of customers served by the transmission lines. Only from the Initial Decision's distorted view of that program would an acknowledgment of "error" be considered appropriate.

Certain criteria are not particularly relevant to the civil penalty analysis, for example, only one customer was affected, and there was no Commission investigation here.

Regarding West Penn's compliance history, the amount of civil penalty and review of prior Commission decisions, the Initial Decision again relies on the *West Penn* case from 1990. First, the Initial Decision acknowledges there was no record evidence submitted to support a finding that the Company has a poor compliance record. (ID at 22). But apparently, the Initial Decision is not limited to considering merely the record evidence generated by this proceeding when considering whether West Penn has a poor compliance record and must be subjected to a civil penalty. Rather, the Initial Decision invokes the *West Penn* case and reasons that because the Company "was the subject of one of the few reported appellate decisions in this jurisdiction regarding tree trimming," it has "treated the Commissions' requirements for reasonable customer service—and maintaining a reasonable and appropriate vegetation maintenance program—in a hapless manner as if that adverse decision never occurred." (ID at 22). The fact that the Company was a party to an appellate case on a distribution-related tree trimming case 23 years ago was not presented into evidence at the May 22, 2013 hearing in this proceeding, regarding vegetation management in connection with a transmission line right of way. As such, the Initial Decision considers facts beyond the record in and not relevant to this proceeding. The Initial Decision's consideration of and reliance on extra-record facts is inappropriate and is not a valid basis on which to predicate any amount of civil penalty.

In determining the amount of civil penalty, the Initial Decision triples the fine ultimately imposed in the *West Penn* case. This finding erroneously fails to recognize the significant differences between the *West Penn* case and this proceeding. In *West Penn* the subject utility was not able to provide prior notice of vegetation management to the landowner prior to cutting down 74 trees. The Court found that the property in the *West Penn* case was uninhabited and the utility's contractor had difficulty locating the landowner to provide notice of the upcoming substantial vegetation removal. Consequently, the contractor cut down 74 trees on the landowner's property without any notice whatsoever to the landowner. The facts are exactly the opposite in this case. Here, the Company and the landowner engaged in at least eight months of discussion and negotiation about vegetation removal prior to the removal of any vegetation. The communications involved letters, phone calls and face-to-face meetings at the property, including a meeting at the property with both parties' attorneys. In *West Penn*, the utility removed 74 trees all at one time; here, only four (4) trees were removed and two (2) trees were trimmed in the 2012-2013 maintenance cycle, and most of them were cut or trimmed with the consent and supervision of the Complainant and the ALJ. (ID at 3).[38] There is no credible way to conclude that the facts of this case are three times worse than the facts of *West Penn* and therefore warrant triple the fine imposed in *West Penn*.

Since West Penn did not violate Code Section 1501 or otherwise render unreasonable customer service in this matter, there is no legal basis for imposing a civil fine of any amount.

[38] Page 3 of the Initial Decision explains that the presiding office "conducted a brief telephonic conference with Complainant and Respondent on the morning of June 21, 2013 at which time the parties agreed Respondent's agent could trim or remove selected vegetation." *Finding of Fact No. 27 specifically states that the Company removed* two trees and "topped" one tree on June 21, 2013 "with Complainant's approval and in her presence." (Finding of Fact No. 27).

III. CONCLUSION

As explained above, there is no basis in law or fact supporting a finding that West Penn provided unreasonable customer service, violated Code Section 1501, or should be charged a civil penalty for any conduct in connection with the Complaint. But reach of the Initial Decision stretches far beyond this particular proceeding and affects Pennsylvania electric utilities' lawful right and ability to manage their transmission corridors. The Initial Decision declares that the Commission has "concerns" with "whether removal (or trimming) is compatible with the safe operation of the transmission line itself." (ID at 20). The Initial Decision essentially nullifies the Company's TVM Program because the Company's exercise of its lawful Easement rights is now subject to the Commission's "concerns" about whether tree trimming versus tree removal is "compatible with the safe operation of the transmission line." The Initial Decision provides no guidelines to discern what the Commission's "concerns" are or how they can be adequately addressed prospectively in any particular situation. This holding places all future vegetation management in Pennsylvania on trial by creating an environment wherein landowners can enlist the Commission (via the Formal Complaint process) to challenge and ultimately restrict the utility's lawful exercise of its easement rights in the right-of-way. This absurd result is not the proper function of the Commission and cannot be sustained.

The Initial Decision misapplies Pennsylvania law, refuses to follow jurisdictional law regarding the issues raised in this dispute, ignores credible evidence in support of the Company's proper and lawful vegetation management program, and commits numerous errors in its findings of fact, and therefore must be reversed.

Respectfully submitted,

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Harrisburg, PA 17101

Attorneys for West Penn Power Company

Dated: October 28, 2013

APPENDIX A

FORM ..18

17-W

WILLIAM F. BROMAN ux to WEST PENN POWER COMPANY

RIGHT OF WAY AGREEMENT

In consideration of the payment of the sum of One Dollar by West Penn Power Company, a corporation of the Commonwealth of Pennsylvania, the receipt of which is acknowledged, and of the covenants and agreements hereinafter mentioned, I/we, grantor S herein, do grant unto the said West Penn Power Company, subject as hereinafter provided, a right of way or easement 180 feet in width, to construct, operate, repair, maintain, remove, and rebuild a portion of two electric transmission systems consisting of such towers, wires, cables, telephone wires and fixtures as the said West Penn Power Company may deem necessary, including the right from time to time to install additional wires, cables, telephone wires and fixtures, over, under, and upon land situate in Jefferson Township, Butler County, Pennsylvania, adjoining properties of W. A. Patterson, William Hamlan, John Lawson and Bartley

West Penn Power Company is also granted the right to cross land of grantor S, including use of roads, if any, by foot or vehicle, for the purposes of exercising this easement. West Penn Power Company is also granted the right to cut, trim, and remove all trees within the limits of said easement as well as any trees beyond said limits which may interfere or threaten to interfere with said transmission systems, and the right to control the undergrowth thereon, by such methods as West Penn Power Company may determine.

West Penn Power Company agrees to pay all damage to property of grantor S, including fence and crop damage, caused by the operation, additions to, repairing, maintaining, removing, and rebuilding of said transmission systems provided notice in writing is given to the said company within thirty (30) days after such damage occurs.

BK 883 PG 485

WILLIAM F. BROMAN Sr. ux to WEST PENN POWER CO.

RIGHT OF WAY AGREEMENT

In consideration of the payment of the sum of One Dollar by West Penn Power Company, a corporation of the Commonwealth of Pennsylvania, the receipt of which is acknowledged, and of the covenants and agreements hereinafter mentioned, I/we, grantors herein, do grant unto the said West Penn Power Company, subject as hereinafter provided, a right of way or easement variable feet in width, to construct, operate, repair, maintain, remove, and rebuild a portion of two electric transmission systems consisting of such wires, cables, telephone wires and fixtures as the said West Penn Power Company may deem necessary, including the right from time to time to install additional wires, cables, telephone wires and fixtures, over, under, and upon land situate in Jefferson Township, Butler County, Pennsylvania, adjoining properties of W. D. Patterson, William Hanlan, John Lawson and Barkley

West Penn Power Company is also granted the right to cross land of grantor s , including use of roads, if any, by foot or vehicle, for the purposes of exercising this easement. West Penn Power Company is also granted the right to cut, trim, and remove all trees within the limits of said easement as well as any trees beyond said limits which may interfere or threaten to interfere with said transmission systems, and the right to control the undergrowth thereon, by such methods as West Penn Power Company may determine.

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BOOK 889 PAGE 536

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

MARLENE BROMAN	:	
	:	
v.	:	**Docket No. C-2013-2356237**
	:	
WEST PENN POWER COMPANY	:	

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 UPS Overnight Delivery

Marlene Broman
4136 Patterson Road
Butler, PA 16002

Dated this 25th day of October, 2013.

Brian C. Wauhop, Esq.

UPS CampusShip: View/Print Label

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2. **Fold the printed sheet containing the label at the line so that the entire shipping label is visible. Place the label on a single side of the package and cover it completely with clear plastic shipping tape. Do not cover any seams or closures on the package with the label.** Place the label in a UPS Shipping Pouch. If you do not have a pouch, affix the folded label using clear plastic shipping tape over the entire label.

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