

Buchanan Ingersoll & Rooney PC

Brian C. Wauhop

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July 16, 2015

VIA EFILING

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-2015-2485454

Dear Secretary Chiavetta:

On behalf of West Penn Power Company, I have enclosed for electronic filing the Motion for Summary Judgment of West Penn Power Company in 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: Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

MARLENE BROMAN

v.

WEST PENN POWER COMPANY

:
:
:
:
:

Docket No. C-2015-2485454

NOTICE TO PLEAD

TO: Marlene Broman
4136 Patterson Road
Butler, PA 16002

Pursuant to 52 Pa. Code § 5.102(a), you are hereby notified that, if you do not file a written response to the Motion for Summary Judgment of West Penn Power Company (“Motion”) within **twenty (20) days** from service of this Notice, the Motion may be granted. All pleadings in response to the Motion must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served to counsel for West Penn Power Company, and the presiding Administrative Law Judge as follows:

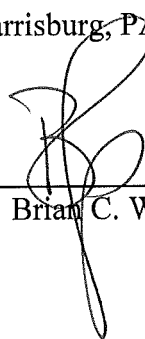
File with:

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

With a copy to:

Brian C. Wauhop, Esq.
Buchanan Ingersoll & Rooney PC
409 N. Second Street
Suite 500
Harrisburg, PA 17101

Dated: July 16, 2015



Brian C. Wauhop, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

MARLENE BROMAN :
 :
 v. : **Docket No. C-2015-2485454**
 :
WEST PENN POWER COMPANY :

MOTION FOR SUMMARY JUDGMENT

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

West Penn Power Company (“West Penn” or the “Company”) by and through its counsel, Brian C. Wauhop, Alan Michael Seltzer, and Buchanan Ingersoll & Rooney PC, files this Motion for Summary Judgment, pursuant to Section 5.102(a) of the Pennsylvania Public Utility Commission’s (“Commission”) regulations, 52 Pa. Code § 5.102(a), and in connection therewith avers as follows:

I. Introduction

1. Through this Motion for Summary Judgment (“Motion”), West Penn seeks the dismissal of a Formal Complaint filed on May 22, 2015 (“2015 Formal Complaint”) by Marlene Broman (“Complainant”) disputing the Company’s plans to remove vegetation from the lawful right-of-way granted to the Company that crosses the Complainant’s at 4136 Patterson Road, Butler, Pennsylvania 16002, (“Service Location”). See 2015 Formal Complaint, ¶ 5. As a matter of law, the 2015 Formal Complaint is barred by and therefore should be dismissed under the principle of *res judicata* because the Complainant has raised these precise issues in a previous Formal Complaint, and the Commission has definitively ruled that the Complainant’s claims are completely without merit.

2. Because the pleadings demonstrate there is no genuine issue of fact and the Company properly followed the Code and the Commission’s regulations, West Penn is entitled

to relief as a matter of law. Accordingly, West Penn requests that this Motion be granted and the 2015 Formal Complaint be dismissed with prejudice.

II. Background

3. West Penn is an EDC that is certificated as a public utility in Pennsylvania.

4. On or about April 2, 2013, the Complainant filed a Formal Complaint with the Commission at Docket No. C-2013-2356237 (“2013 Complaint”), alleging an ongoing dispute over the Company’s transmission vegetation maintenance program. A copy of the 2013 Formal Complaint is attached here as “Exhibit A.” The 2013 Complaint requested the Commission review the matter and prevent the Company from removing incompatible vegetation growing in the right-of-way at the Service Location.

5. On May 22, 2013, Administrative Law Judge Katrina L. Dunderdale (“ALJ Dunderdale”) conducted an initial telephonic hearing in connection with the 2013 Formal Complaint. At the hearing, the Complainant disputed argued that the vegetation growing in the right-of-way did not interfere with the Company’s facilities, and the Commission should prevent the Company from removing the trees.

6. On October 1, 2013, ALJ Dunderdale issued an Initial Decision sustaining the 2013 Formal Complaint, concluding that the Complainant carried her burden of proof that the Company provided unreasonable service, and that the Company’s Transmission Vegetation Maintenance Program (“TVMP”) was not reasonable or reasonably applied to the Complainant. A copy of the October 1, 2013 Initial Decision is attached hereto as “Exhibit B.”

7. On October 28, 2013, the Company timely filed Exceptions to the Initial Decision.

8. On April 24, 2014, the Commission entered an Opinion and Order modifying the Initial Decision and dismissing the 2013 Formal Complaint. Specifically, the Commission held that the Company's conduct following its TVMP was reasonable, and reasonably applied to the Complainant. The Commission reversed the Initial Decision's holding that the Complainant sustained her burden of proof in the dispute. A copy of the Commission's April 24, 2014 Opinion and Order is attached hereto as "Exhibit C."

9. The Commission's April 24, 2014 Opinion and Order was a final order disposing of all issues and claims raised in the 2013 Formal Complaint.

10. The Complainant did not appeal the Commission's April 24, 2014 Opinion and Order.

11. On May 22, 2015, the Complainant filed the 2015 Formal Complaint with the Commission. Like the 2013 Formal Complaint, the 2015 Formal Complaint contains allegations of and requests for relief from the Company's plans to remove incompatible vegetation located on the Complainant's property.

12. On June 24, 2015 West Penn filed an Answer with New Matter to the 2015 Formal Complaint.

13. On July 10, the Company received materials from the Complainant purporting to respond to the Company's Answer and New Matter filed June 24, 2015.

III. Argument

A. Summary Judgment Standard

14. The Commission's Rules of Administrative Practice and Procedure permit parties to file preliminary motions. 52 Pa. Code §§ 5.101-103. Specifically, the Commission's regulations at 52 Pa. Code § 5.102(a) permit any party to move for summary judgment after the pleadings are closed, but within such time as not to delay a hearing. A motion for summary

judgment must be based on the pleadings, depositions, answers to interrogatories, admissions and supporting affidavits. 52 Pa. Code § 5.102(c). The presiding officer must grant a motion for summary judgment if the pleadings, depositions, answers to interrogatories, admissions and affidavits show that there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. 52 Pa. Code § 5.102(d)(1). The Commission's preliminary motion practice is analogous to Pennsylvania's civil practice regarding preliminary objections. *See Equitable Small Transportation Intervenors v. Equitable Gas Co.*, Docket No. C-00935435, 1994 Pa. PUC Lexis 69 (Order entered July 18, 1994).

B. The 2015 Formal Complaint Should be Dismissed under the Principles of Res Judicata and Collateral Estoppel.

15. The legal doctrine of *res judicata* prohibits parties from raising certain issues that have already been addressed in a prior case between those parties. *Res judicata* means, literally, a thing adjudged or a thing judicially decided. *Del Turco v. Peoples Home Sav. Ass'n*, 478 A.2d 456, 461 (Pa. Super. 1984) (internal citation omitted). “*Res judicata* encompasses two related, yet distinct principles: technical *res judicata* and collateral estoppel.” *Stilp v. Cmwlth*, 910 A.2d 775, 783 (Pa. Cmwlth. 2006) (citing *Henion v. Workers' Comp. Appeal Bd. (Firpo & Sons, Inc.)*, 776 A.2d 362 (Pa. Cmwlth. 2001)).

16. Technical *res judicata* provides that where a final judgment on the merits exists, a subsequent lawsuit on the same cause of action is precluded. *Id.* To invoke technical *res judicata*, both actions must contain the same (1) identity of the thing sued upon or for; (2) identity of causes of action; (3) identity of the parties or persons to the action; and (4) identity of the quality or capacity of the parties suing or being sued. *Id.* The principle applies both to claims that were actually litigated and to those claims that should have been litigated in the first

place. *Id.* When the subject matter and the ultimate issues are the same in both the old proceeding and the new proceeding, the causes of action are considered identical. *Id.*

17. Collateral estoppel bars subsequent litigation on a particular issue where (1) an issue decided in a prior action is identical to one presented in a later action; (2) the prior action resulted in a final judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to the prior action or is in privity with a party to the prior action; and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action. *Stilp*, 910 A.2d at 783.

18. *Res judicata* could not be more applicable to a case than this one. Both the subject matter and the ultimate issues are the same in the 2013 Formal Complaint and the 2015 Formal Complaint. First, the Commission resolved the Complainant's vegetation management dispute in its April 24, 2014 Opinion and Order. The Complainant did not appeal the Commission's April 24, 2014 Opinion and Order, and that decision became a final Commission action pursuant to 52 Pa. Code § 5.536(a) for *res judicata* purposes. *See Johnson*, 487 A.2d at 813. The 2013 Formal Complaint was clearly dismissed on the merits. Thus, the 2015 Formal Complaint is barred by technical *res judicata* and should be dismissed with prejudice because both the 2013 Formal Complaint and the 2015 Formal Complaint (1) contain the same allegations regarding vegetation maintenance and request the same relief; (2) are formal complaints filed with the Commission; (3) contain the same parties; and (4) contain parties having identical quality and capacity. *Stilp*, 910 A.2d at 783.

19. The 2015 Complaint is also barred by the principle of collateral estoppel. The issues presented in the 2015 Formal Complaint are exactly the same as those raised and decided against the Complainant in the 2013 Formal Complaint. The Complainant had a full and fair

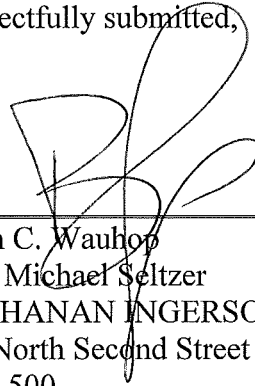
opportunity to litigate the issues raised in the 2013 Formal Complaint, including an evidentiary hearing, before ALJ Dunderdale and further Commission review. The Commission dismissed the 2013 Formal Complaint on the merits subsequent to that evidentiary hearing. As a result, the Complainant is barred from raising issues disputing vegetation maintenance, application of the Company's TVMP to the Complainant's property, and requests for further Commission review of vegetation maintenance against West Penn in the 2015 Formal Complaint, because she raised those issues in the 2013 Formal Complaint and they were fully adjudicated and resolved against her. *Stilp*, 910 A.2d at 783.

20. Because the 2015 Formal Complaint should be dismissed based on the principles of *res judicata* and collateral estoppel, in accordance with 52 Pa. Code § 5.102(d)(1), there are no genuine issues of material fact in this proceeding, and West Penn is entitled to a judgment as matter of law.

IV. Conclusion

WHEREFORE, for the foregoing reasons, West Penn Power Company, respectfully requests that the Commission grant its Motion for Summary Judgment, dismiss the Formal Complaint of Marlene Broman with prejudice, and grant the Company such other relief as may be just and reasonable under the circumstances.

Respectfully submitted,



Dated: July 16, 2015

Brian C. Wauhop
Alan Michael Seltzer
BUCHANAN INGERSOLL & ROONEY PC
409 North Second Street
Suite 500
Harrisburg, PA 17101
(717) 237-4975

*Attorneys for
West Penn Power Company*

Exhibit A



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

IN REPLY PLEASE
REFER TO OUR FILE

DATE SERVED: APRIL 5, 2013

C-2013-2356237

BRADLEY A BINGAMAN
FIRSTENERGY SERVICE COMPANY
WEST PENN POWER COMPANY
76 SOUTH MAIN STREET
AKRON OH 44308-1890

Dear Mr. Bingaman:

A complaint has been filed against you before the Pennsylvania Public Utility Commission by MARLENE BROMAN. To defend yourself against the claims stated in the following pages, you must act within twenty (20) days by filing in writing with the Commission, either personally or through your attorney, your defenses or objections to the claims stated against you. Or, you may satisfy the complaint by settling the matter with the Complainant and submitting proof of settlement to the Commission within twenty (20) days.

IF YOU FAIL TO RESPOND WITHIN TWENTY (20) DAYS, THE CASE MAY GO FORWARD IN YOUR ABSENCE AND A JUDGEMENT MAY BE ENTERED AGAINST YOU BY THE COMMISSION WITHOUT FURTHER NOTICE.

CUSTOMER OF A UTILITY

A payment schedule may be prescribed or a termination of utility services may be authorized. You may lose money or property or other rights important to you.

COMPANY/UTILITY

An Administrative Law Judge may revoke or suspend any certificate or permit held by you, or impose a fine, or any other appropriate penalty or remedy authorized by the Public Utility Code. You may lose money or property or other rights important to you.

Detailed instructions on how to proceed are contained in the attached pages. You are advised to read them carefully.

APR 5 2013

APRIL 5, 2013

Unless you are a corporation or other organization, you may proceed without a lawyer. However, if you want a lawyer and do not have one or cannot afford one, the office listed below can tell you where you can get legal help:

Pennsylvania Lawyer Referral Service
Pennsylvania Bar Association
P.O. Box 186
Harrisburg, PA 17108
(800) 692-7375

Very truly yours,

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive style with a large initial "R".

Rosemary Chiavetta
Secretary

JB

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

DATE SERVED: APRIL 5, 2013

MARLENE BROMAN
Complainant

v.

WEST PENN POWER COMPANY
Respondent

Complaint Docket
No: **C-2013-2356237**

FORMAL COMPLAINT NOTICE TO RESPONDENT TO ANSWER OR SATISFY

TO: WEST PENN POWER COMPANY

TAKE NOTICE:

That a complaint in the above entitled matter, of which the attached is a true and correct copy, has been presented and filed of record with the Pennsylvania Public Utility Commission. Section 702 of the Public Utility Code, 66 Pa. C.S. Section 702, requires the Commission to serve on each party named in a complaint a copy of the complaint and notice calling upon each party to satisfy the complaint, or to answer the same in writing within a specified time; THEREFORE,

1. You have twenty (20) days from the date on which this complaint is served to either satisfy this complaint or to file with the **Secretary of the Pennsylvania Public Utility Commission, P. O. Box 3265, Harrisburg, PA 17105-3265**, an answer (original and three copies), in writing, under oath, which, as required by Section 5.61 of the Commission's Rules of Practice and Procedure, 52 Pa. Code Section 5.61, either affirms or specifically denies the allegations in this complaint. You must also serve a copy of the answer upon the complainant. The date of service is the mailing date as indicated by the date at the top of this Notice. Section 1.56(a) of the Commission's Rules of Practice and Procedure, 52 Pa. Code Section 1.56(a).

2. If you fail to either satisfy this complaint or to file answer or other responsive pleading within twenty (20) days, you will be deemed to have admitted all the allegations in this complaint in accordance with Section 5.61 of the Commission's Rules of Administrative Practice and Procedure, 52 Pa. Code Section 5.61. In that event, the Commission may, without hearing, enter an order which either revokes or suspends any certificate or permit held by you or which imposes a fine or any other appropriate penalty or remedy authorized by the Public Utility Code, 66 Pa. C.S. Section 101, et seq.; and, if

you are a customer of a utility, an order may be entered which prescribes a payment schedule or which authorizes termination of utility services. The Commission is not limited to the relief sought by the complainant in paragraph 4 of the attached complaint.

3. If you elect to satisfy this complaint you must file, within twenty (20) days from the date on which this complaint is served, affidavits executed by each complainant that this complaint has been satisfied. Such affidavits must describe the basis on which this complaint was satisfied; any settlement agreement between the parties must be reduced to writing and attached to the affidavit. Such affidavits are to be filed with the Secretary of the Commission at the address set forth in paragraph 1. Upon receipt of affidavits of satisfaction from all complainants, this complaint may be dismissed by the Commission in accordance with Section 703(a) of the Public Utility Code, 66 Pa. C.S. Section 703(a), unless the Commission determines that such dismissal would be contrary to the public interest, in which event the Commission may direct that hearings be held upon the complaint.

4. If you file an answer which admits the allegations in this complaint, or which fails to specifically deny the allegations in this complaint, the Commission may, without hearing, enter an order which either revokes or suspends any certificate held by you or which imposes a fine or any other appropriate penalty or remedy authorized by the Public Utility Code, 66 Pa. C. S. Section 101, et seq.; and, if you are a customer of a utility, an order may be entered which prescribes a payment schedule or which authorizes termination of utility services. The Commission is not limited to the relief sought by the complainant in paragraph 4 of the attached complaint.

5. If you file a timely answer which specifically denies the allegations in this complaint, or which raises material questions of law or fact, this matter shall be referred to the Office of Administrative Law Judge for hearing and decision. If, after hearing on the issues raised by that answer, you are found to have committed any of the violations alleged in the complaint, the Administrative Law Judge may render a decision which either revokes or suspends any certificate or permit held by you or which imposes a fine or any other appropriate penalty or remedy authorized by the Public Utility Code, 66 Pa. C. S. Section 101, et seq.; and, if you are a customer of a utility, an order may be entered which prescribes a payment schedule or which authorizes termination of utility services. In the imposition of a penalty after a hearing the Administrative Law Judge is not bound by the relief sought by the complainant in paragraph 4 of the attached complaint.



Rosemary Chiavetta
Secretary

(SEAL)

Certified Mail
Return Receipt Requested

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Formal Complaint Form

RECEIVED

2013 MAR 25 PM 12:13

PA P.U.C. SECRETARY'S BUREAU

Please print in ink or type.

1. CUSTOMER (COMPLAINANT) INFORMATION

Your name, mailing address, county, telephone number, utility account number and service address:

Name MARLEAE BROMAN

Street/P.O. Box 4136 Patterson Rd. Apt # _____

City Butler State Pa Zip 16002

County Butler

Daytime Telephone Number Where We Can Contact You: (724) 352 2489

E-mail Address (optional): bromarL@AOL.com

Utility Account Number 100 095 553 960
(from your bill)

If your complaint involves utility service provided to a different address than your mailing address, please list this information below.

Name _____

Street/P.O. Box _____

City _____ State _____ Zip _____

2. FULL NAME OF UTILITY COMPANY (RESPONDENT):

West Penn Power First Energy

RECEIVED

3. TYPE OF UTILITY (check one)

ELECTRIC

STEAM HEAT

APR 02 2013

GAS

WASTE WATER

PA PUBLIC UTILITY COMMISSION SECRETARY'S BUREAU

WATER

MOTOR CARRIER

(e.g., taxi, moving company, limousine)

TELEPHONE
(local, long distance)

Marlene Broman

RECEIVED

4. COMPLAINT (check one)

A. In general, what is your complaint?

- I want to oppose the company's proposed rate increase.
- There are incorrect charges on my bill.
- There is a reliability, safety or quality problem with my utility service.
- I received a notice that my utility service is being terminated.
- I would like a payment agreement.
- Other (explain). *See Pictures & remarks on reverse side.*

APR 02 2013

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

B. State the facts of your complaint.

Include any specific dates, times or places that may be important. If the complaint is about a bill, tell us about any charges that you believe are not correct. Use additional paper if you need more space. Provide copies of all relevant documents you believe will support your complaint.

West Penn representative did contact me about my approval to cut down my trees that are weather barriers for my home. I am enclosing a few photos to show my trees are NOT interfering with anything. Without my trees my home will be open to this bare field. I need them for protection against blowing snow, harsh summer sun & oxygen & natural beauty. See lines in my pictures.

West Penn did cut down a beautiful Maple, large pine & a smaller pine tree before my son was able to get a Supervisor who told the men to stop cutting. They now are wanting MORE ROW! to remove all my beautiful trees. They were UNSURE how high the growth is allowed - 15'-25' below the wires where 180' ends West Penn did send their Attorney, Supervisor, forester & several men in 3 different vehicles to discuss this with my attorney & me. I think they want to make me a R.O.W. case to cut instead of prune.

5. RELIEF

How do you want your complaint to be resolved? Use additional paper if you need more space.

I want PUC to look at rule in the 1960's & protect my property right. I know this ROW lowered my property value & we only signed when they threatened Coirated Domain. When we built our garage a West Kern supervisor came out & measured & told us where we were allowed to build it.

I don't think the intent of the ROW was to keep 180' of my property bare & available to West Kern if & when they wanted it. It has been kept cut & open all these years. "Ground to Sky" cutting is NOT in my best interest.

I can show you where a house was built in the 70's right under wires & right behind a tower.

Thank you,

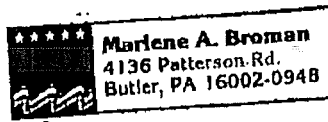
Marlene Broman

4 Pictures Enclosed & remarks are on the back.

RECEIVED

APR 02 2013

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU



6. PROTECTION FROM ABUSE

Answer the following question if your complaint is against a natural gas distribution utility, an electric distribution utility or a water distribution utility AND your complaint is about a billing problem, a request to receive service, a security deposit request, termination of service or a request for a payment agreement.

Has a court granted a "Protection from Abuse" order for your personal safety or welfare?

YES

NO

7. PRIOR UTILITY CONTACT

I filed an informal complaint - No one ever came & checked it out.

Answer the following question only if you are a residential customer and your complaint is against an electric distribution utility, natural gas distribution utility or a water distribution utility.

Have you spoken to a utility company representative about this complaint?

YES (includes appeals of BCS determinations) #3050674

NO

If you tried to, but could not speak to a utility company representative about your complaint, please explain why.

RECEIVED

APR 02 2013

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

8. LEGAL REPRESENTATION (IF ANY)

If you are represented by a lawyer in this matter you must provide your lawyer's name, address, telephone number, and e-mail address, if known.

Lawyer's Name _____

Street _____

City _____ State _____ Zip _____

Area Code/Phone Number _____

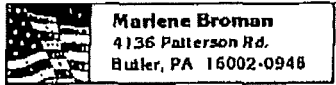
E-mail Address (If Known) _____

9. VERIFICATION AND SIGNATURE

You must print or type your name below on the line provided for the verification paragraph, and you must sign and date (in ink) this form on the lines provided.

Verification: I MARLENE BROMAN, hereby state that the facts above set forth are true and correct (or are true and correct to the best of my knowledge, information and belief) and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

Marlene Broman (Homeowner) 3-20-13
(Signature) (Date)



Title of authorized employee or officer

10. FILING

Please return the completed form to one of the addresses listed below:

If using U.S. Postal Service: If using overnight delivery service:

Secretary Pennsylvania Public Utility Commission P.O. Box 3265 Harrisburg, PA 17105-3265	Secretary Pennsylvania Public Utility Commission 400 North Street Commonwealth Keystone Building, 2 nd Floor Harrisburg, Pennsylvania 17120
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Facsimiles and/or electronic filings of the complaint will not be accepted.

If you have any questions about filling out this form, please contact the Secretary's Bureau at 717-772-7777.

717 787 0974

Keep a copy of your complaint for your records.

RECEIVED

APR 02 2013

[Handwritten signatures and initials]

Also 4 photos enclosed

FILED
APR 1 1968
CLERK
R.D. 4
BUTLER
PA

The grantors, however, reserve the right and privilege to use the land affected by this easement for agricultural and all other purposes, provided such use will not interfere with the use or occupation of said easement by West Penn Power Company; and that no buildings or structures other than fences will be located or constructed by grantors on said easement.

This agreement provides for the overhead of wires and fixtures outside the 180-foot wide right of way or easement granted October 16, 1967, by grantors herein, and of record in the office of the Recorder of Deeds of Butler County, Pennsylvania, in Deed Book 883, Page 486.

In the event West Penn Power Company exercises the rights herein granted, it shall, before doing so, pay to the grantors the sum of Three Hundred and No Dollars (\$ 300.00), and if said sum is not paid on or before October 16, 1968 West Penn Power Company shall not thereafter exercise said rights and all rights and obligations hereunder shall cease, end, and determine, and this agreement shall be null and void.

This document evidences the entire agreement between the parties hereto and shall be binding upon and inure to the benefit of said parties, their heirs, successors, and assigns, the parties hereto agreeing to be legally bound by it.

Signed, sealed, and delivered this 2nd day of April

19 68.

WITNESSED

Willard M. Russell
Willard M. Russell

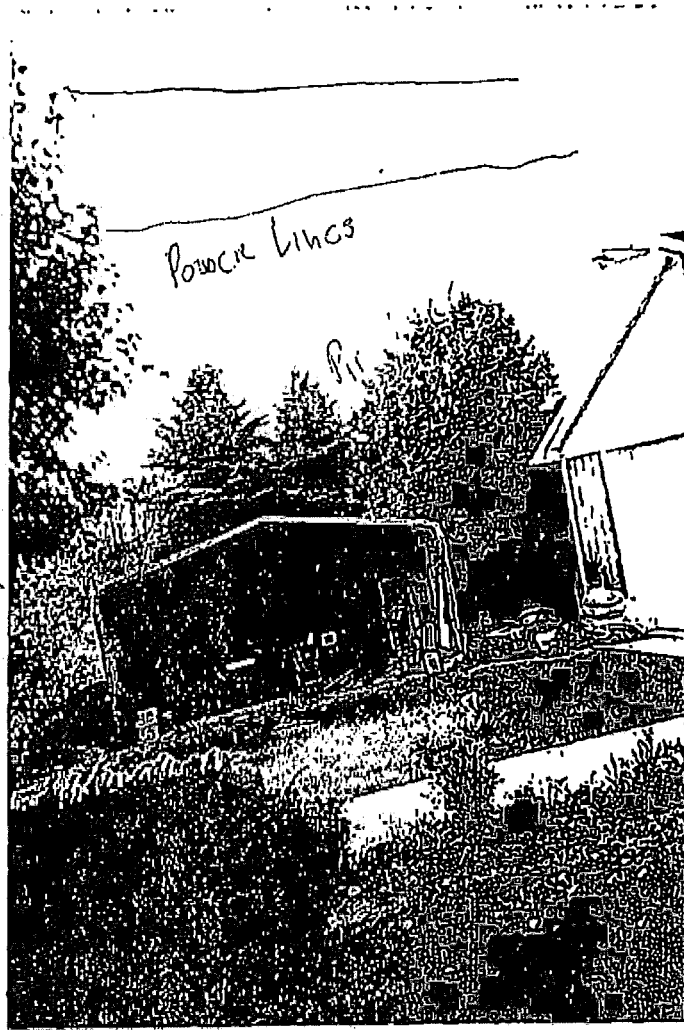
William A. Roman (SEAL)
William Roman (SEAL)

Address of Grantors R. D. 4, Butler, Pa. 16001

RECEIVED

APR 02 2013

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU



See Pine trees - they are over
20 yrs old. They block wind
& snow from my driveway & home.
They also provide shelter for birds.

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00452467 803 N N N N

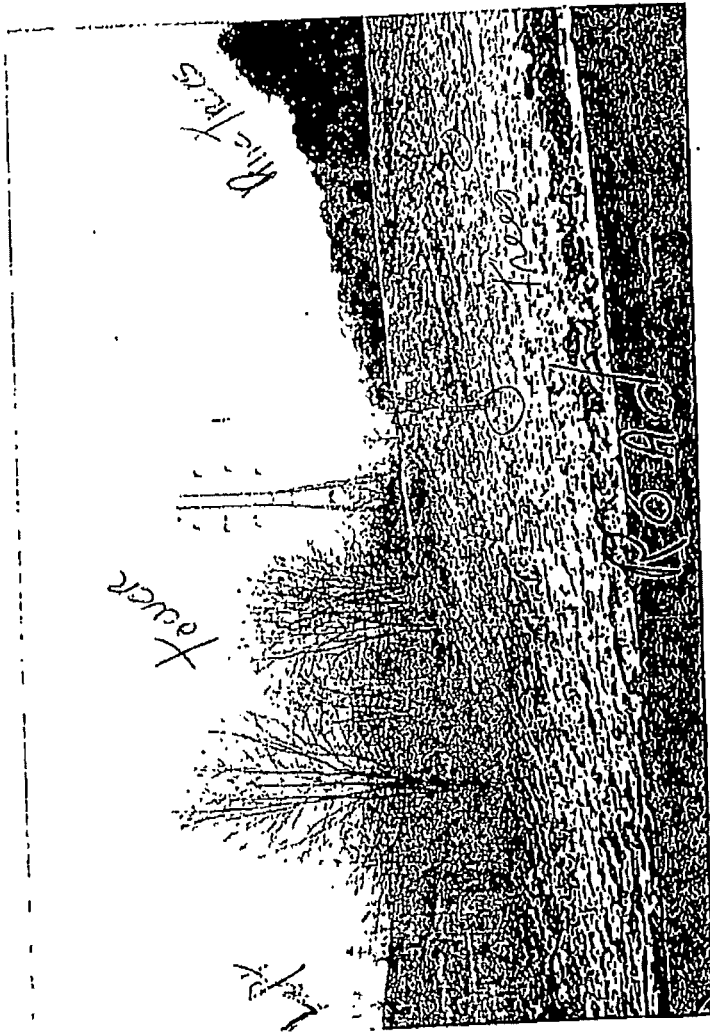
①



Notice Power Line - there is No. Antelope
See electric pole (down left) they were marked
a dog wood tree there to be cut down. If the pole
is not interfering with access, why cut down that tree?
That's poor.

See the woodpile below the tree. That's poor.
What they cut down in October 2012.

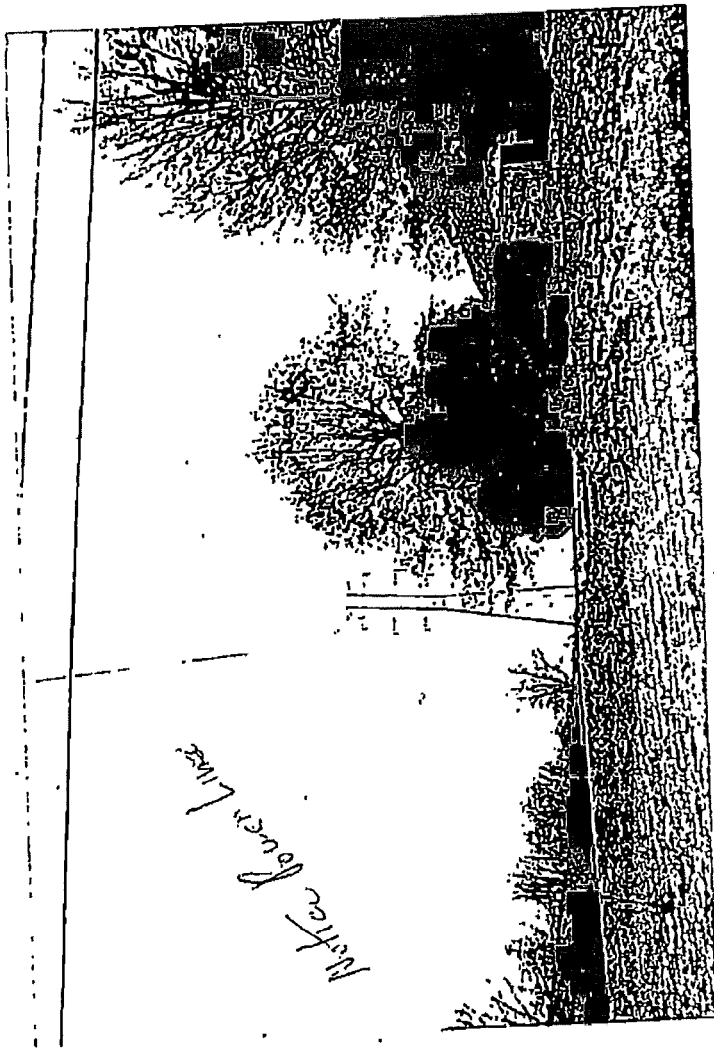
(2)



① Notice clear row to tower. May
house & garage are on the right. Sea Pine trees
I told them they could cut on the left side
I bet not on my driveway side. Notice small
Oleander trees - 34 tall ³ bushes ² mowed to cut also
There is plenty of room to access the tower.

FOR APPROVAL
11 11 83

③



See cut trees at tree base.

All trees showing are marked for

cut down - No topping or trimming

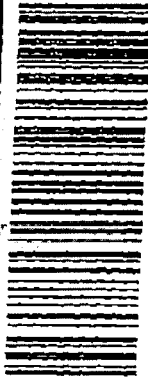
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441183

4

Markene A. Broman
4136 Patterson Rd.
Butler, PA 16002-0948



CERTIFIED MAIL™

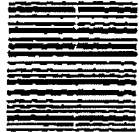


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AIRMAIL WITH TRACKING



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U.S. POSTAGE
PAID
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APR 02 '13
AMOUNT

\$3.76
0055865-09

RECEIVED

APR 02 2013

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

*Commonwealth of Pa
Att Rosemary Charetta
P.O. Box 3265
Holt, Pa 17105-3265*

Exhibit B

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Marlene Broman

v.

West Penn Power Company

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:

C-2013-2356237

INITIAL DECISION

Before
Katrina L. Dunderdale
Administrative Law Judge

HISTORY OF THE PROCEEDING

On April 2, 2013, Marlene Broman (Ms. Broman or Complainant) filed a formal complaint with the Public Utility Commission (Commission) against West Penn Power Company (West Penn) alleging an ongoing dispute with West Penn over the utility's tree trimming and tree removal practices. Ms. Broman also averred West Penn wanted to widen the right-of-way over her property. Complainant requested the Commission's assistance concerning the condition and appearance of the right-of-way. The hearing record closed on July 8, 2013.

On April 18, 2013, Respondent filed an Answer to the formal complaint in which West Penn made detailed factual statements concerning the right-of-way on Complainant's property and Respondent's vegetation management procedures using herbicides. In the Answer, Respondent included a lengthy discussion concerning the Commission's "narrow, limited jurisdiction over issues concerning the validity and location of utility rights-of-way and easements," and cited numerous cases in support of its averments. Overall, Respondent alleged its vegetation maintenance program was reasonable, adequate and consistent with the utility's responsibilities under the Commission's rules and regulations.

On April 22, 2013, the Office of Administrative Law Judge scheduled the above-captioned matter for an Initial Telephonic Hearing on Wednesday, May 22, 2013, at 10:00 a.m. and the presiding officer issued a Prehearing Order which explained certain procedural matters to the parties on April 23, 2013.

On May 10, 2013, Respondent filed a Motion for Judgment on the Pleadings and Motion to Continue Hearing, which the presiding officer denied on May 14, 2013 based on procedural and substantive grounds.

On May 22, 2013, the presiding officer conducted the Initial Telephonic Hearing at which both parties appeared and presented testimonial and documentary evidence. Complainant represented herself and submitted seven (7) exhibits for admission, of which six (6) exhibits were admitted into the hearing record. In addition, Respondent appeared represented by counsel and presented the testimony of three witnesses in addition to presenting seventeen (17) documents. Both parties elicited testimony from the sponsoring witnesses of each document. The witnesses and proposed exhibits were subject to extensive cross-examination by Complainant. However, at the conclusion of presenting its case, Respondent inadvertently neglected to move for the admission of its proposed exhibits into the hearing record.

On May 23, 2013, the presiding officer issued the Second Interim Order in which the proffered exhibits were marked for admission but Complainant was provided with time in which to indicate if she had objections to the admission of any proffered exhibit. Complainant was ordered to provide that objection in writing and to specify why any particular exhibit was objectionable.

By letter dated June 5, 2013, Complainant submitted a one-page document in which she challenged the admission of two proposed exhibits – Respondent Exhibit 3 and Exhibit 8 – on the basis that the utility created these documents that only benefit the utility. Complainant specified the following: “Her [Complainant] objection is the bases [sic] for this complaint. Simple [sic] put WPP [West Penn Power] has created documents/procedures that only benefits their company thought [sic] based on little if any fact. Without anything but a

Right of Way agreement they have chosen to nullify her right to her property without providing any Clear and Present danger. She would request that you review these two Exhibits.”

On June 11, 2013, Respondent submitted a written response to Complainant’s correspondence dated June 5, 2013 in which Respondent averred Complainant did not object to the admission of the two documents. Respondent argues that the “objections” were actually argument questioning the reasonableness of Respondent’s vegetation program. Respondent moved that its exhibits – marked and discussed at the hearing – be admitted into the hearing record.

On June 14, 2013, Respondent sent a letter to Complainant in which Respondent indicated that because of “the close encroachment of the Pin Oak tree situated on the north side of the transmission conductors on the 138 kV transmission line and the start of the 2013 growing season for deciduous vegetation, it is necessary for FirstEnergy to react to this vegetation. FirstEnergy will assign its contractor, Davey Tree, to trim the tree rather than fully remove it within the next 14 days of this letter. Due to the ongoing PUC complaint, it will be trimmed to achieve 25 feet of clearance rather than removed. This is a temporary accommodation to address an immediate issue.” Respondent did not copy the presiding officer on its June 14, 2013 letter.

On June 20, 2013, the presiding officer received a letter from Complainant which included the letter of Respondent dated June 14, 2013. In her letter, Complainant asserts she received the letter on Monday, June 17, 2013 and on June 19, 2013 she received a call from Respondent notifying her that Respondent would be at her residence the next day to perform the work. Complainant alleged Respondent told her that she had agreed to this trimming at the hearing on May 22, 2013 but Complainant denied she had agreed to have any trees cut or trimmed. Complainant repeated her objections concerning Respondent’s tree and vegetation maintenance program.

As a result of Complainant’s correspondence, the presiding officer 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.

On June 25, 2013, Complainant submitted a one-page letter in which she responded to the telephonic conference on June 21, 2013. She acknowledged Respondent came to her home on June 21, 2013 and cut the pin oak tree and cut down the trees that Respondent had "hacked in October 2012". Complainant's letter also contained her objections to Respondent's tree maintenance program and to the contractor being unable to show her proof of insurance prior to cutting trees on her property.

On June 26, 2013, Respondent filed a Status Memorandum with the Secretary's Bureau, in which Respondent detailed the actions it took on the afternoon of June 21, 2013 when Respondent's agents met with Complainant at her residence and removed or trimmed three trees with Complainant's consent and in her presence. Respondent provided Photographs with the Status Memorandum marked as Status Report Exhibits No. 1 through 3.

On July 22, 2013, the presiding officer issued the Third Interim Order which admitted the exhibits of Respondent discussed and used during the evidentiary hearing but which Respondent failed to move into the hearing record. By the same Interim Order, the presiding officer closed the hearing record as of July 8, 2013.

FINDINGS OF FACT

1. Complainant, Marlene Broman, resides at 4136 Patterson Road, Butler, Pennsylvania and has been the sole owner since her husband's death. (Tr. 77).
2. Respondent, West Penn Power Company, provides electric service to Complainant at the service address.
3. Respondent owns and maintains a 138 kV transmission line, referred to as TMU 729, which crosses over Complainant's property pursuant to two rights-of-way purchased by Respondent from Complainant and her late husband in 1967 and 1968. TMU 729 is not designated as a critical part of the national electric grid. (Tr. 18, 79, 107-111, 173; Complainant Exhibit 2; Respondent Exhibit 2).

4. The rights-of-way purchased by Respondent permit Respondent to enter onto the real estate in order to “construct, operate, repair, maintain, remove, and rebuild a portion of two electric transmission systems”. (Complainant Exhibit 2; Respondent Exhibit 2).

5. Complainant and her late husband gave West Penn 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 may determine.” (Tr. 78; Complainant Exhibit 2).

6. Prior to 2012, Complainant maintained the area in and around the easement and no disputes or problems arose between Complainant and West Penn about the maintenance and/or vegetation program on the right-of-way. (Tr. 18).

7. On February 14, 2012, Respondent’s agents approached Complainant at her home without prior notice and advised her Respondent intended to cut down vegetation located within the right-of-way and outside the right-of-way, specifically 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. (Tr. 18, 19, 31-34, 39).

8. West Penn did not provide notice to Complainant of its intention to cut or trim on Complainant’s land until Respondent’s agents arrived at the premises in early 2012 and began cutting trees. (Tr. 40, 116, 117, 219; Respondent’s Exhibit 3).

9. On February 14, 2012 and since that date, Complainant repeatedly has told Respondent the trees between her driveway and the farm field are a necessary windbreak and requested Respondent to top any trees West Penn deemed were too close to the transmission lines. Respondent refused each time, citing financial feasibility. (Tr. 19, 39-45).

10. The trees and shrubs next to Complainant’s garage and shed operate as a windbreak for Complainant’s residence, which is located next to a plowed/mowed field used for

agricultural purposes. (Complainant Exhibits C-1c, C-1i, C-1j and C-1h; Respondent Exhibit 18).

11. The transmission line runs in a diagonal line across the field and near the windbreak located near Complainant's garage. (Tr. 72; Complainant Exhibit C-1g; Respondent Exhibits R-9, R-12 and R-18).

12. Complainant's garage is outside the right-of-way. (Tr. 72-74; Respondent Exhibit 18).

13. Respondent sent letters to Complainant on June 11, 2012 and July 16, 2012 which notified Complainant about Respondent's intent to conduct vegetation management. (Tr. 116).

14. On August 21, 2012, Respondent's Forestry Specialist sent a letter to Complainant advising her of Respondent's intention to spray herbicide on Complainant's property instead of permitting Complainant to cut or mow the grass and shrubbery. The letter stated Complainant must agree to the Work Plan provided with the letter in which Respondent indicated it would trim, remove, cut, spray or lop off vegetation "as deemed necessary." The Work Plan did not specify which vegetation on Complainant's land West Penn would trim, remove, cut, spray or lop off. (Respondent Exhibit 3).

15. On August 27, 2012, Complainant's son and attorney-in-fact, William Broman, Jr., sent a letter to Respondent's Forestry Specialist indicating chemical spray would aggravate Complainant's asthma and COPD [Chronic Obstructive Pulmonary Disease] conditions and objecting to West Penn's "sky to ground clearing of the right a way." The letter indicates the tree line is used as a fence by Complainant for crops, livestock, privacy and protection from the weather. (Respondent Exhibit 4).

16. In October 2012, West Penn's agents entered onto Complainant's property and started cutting down trees without prior notice to Complainant who lives alone. When

confronted by Complainant, the agents informed Complainant there was nothing she could do to stop them from cutting down her trees. The agents would not allow her to see their work order. (Tr. 44-47, 80-81; Respondent Exhibit 6)

17. In October 2012, Respondent's contractors cut down numerous trees and shrubs before Complainant's calls to the State Police and Complainant's son's calls to Respondent succeeded in getting Respondent to stop the contractors. (Tr. 22, 23, 45-47, 116, 117, 219).

18. Respondent initially indicated it would cut down all the trees and shrubs located between Complainant's nearby field and her driveway including cutting vegetation located outside the right-of-way. (Tr. 73).

19. On November 13, 2012, Respondent's Forestry Supervisor sent a letter to Complainant's son indicating the vegetation would be cut by Townsend Tree on or after November 26, 2012. The work plan, dated November 13, 2012 and included with the letter, specified the work Respondent intended to perform on Complainant's property. The work Respondent proposed to do was:

- a. Remove one ash tree, one pine tree, three oak trees, one magnolia, one apple tree, four cedar trees and five spruce trees.
- b. Cut brush along the fence row from Patterson Road to the structure [garage] and any brush around the shed.
- c. Apply herbicide on the stumps of all cut vegetation.
- d. Chip all work done in the yard and grind all stumps.

(Respondent Exhibit 5).

20. On November 27, 2012, Respondent sent a letter to Complainant in which Respondent included copies of two easements entered into between both parties in 1967 and 1968. (Respondent Exhibit 7).

21. On April 2, 2013, Complainant filed a formal complaint against Respondent with the Commission.

22. Respondent's transmission vegetation management program is currently on a five-year cycle, i.e., Respondent checks the vegetation under and around its transmission lines every five years. (Tr. 175).

23. Part of Respondent's standard resource material made available to Complainant and its ratepayers includes a list of suggested trees, bushes and shrubs which can be planted on one of Respondent's rights-of-way, which non-inclusive list includes Japanese maples, boxwoods, dogwoods, Rose of Sharons, magnolia bushes, crabapple trees, and yews. (Tr. 115; Complainant Exhibit 4).

24. Respondent's standard resource material made available to its ratepayers includes information about its preventative vegetation maintenance program which indicates Respondent prefers to remove trees taller than ten feet when the tree is located within the right-of-way corridor. (Complainant Exhibit 5).

25. In order to maintain a distance of at least 25 feet in radial distance from vegetation to the lowest conductor on a 138 kV transmission line, Respondent planned to remove all vegetation from Complainant's property for which the mature height for that specific species can grow to be 40 feet high or higher. (Tr. 172).

26. At the hearing on May 22, 2013, Respondent proposed the following actions:

a. Remove a 13-foot tall ash tree (Tree A) located 48 feet from the centerline. (Respondent Exhibits 9 and 10).

b. Remove five (5) blue spruce trees (Trees B), the tallest of which was 22 feet tall. The blue spruce tree farthest from the centerline was located 38 feet away. (Respondent Exhibits 11 and 12).

c. Remove four (4) cedar trees (Trees C) standing 12 to 13 feet tall and located an unknown distance from the centerline. (Respondent Exhibit 11).

d. Leave one apple tree (Tree D) and one magnolia tree (Tree E) due to consistent trimming by Complainant for fruit production, and as “compatible” vegetation due to location and species, respectively. (Respondent Exhibit 13).

e. Remove one remaining pin oak tree (Tree F) standing 40 feet tall and located next to Complainant’s field and 13.5 feet from the centerline. (Respondent Exhibits 14 and 15).

f. Remove one pin oak tree (Tree G) standing 51 feet tall and located next to Complainant’s driveway and 42.5 feet from the centerline. (Respondent Exhibit 16).

g. Remove one white pine tree (Tree H) standing 37 feet tall and located along Complainant’s driveway and 42 feet from the centerline. (Respondent Exhibit 17).

h. Leave seven (7) Cleveland pear trees (Trees I) standing approximately five feet tall because the trees were compatible due to species and wire height. (Respondent Exhibits 9 and 18).

i. Leave one dogwood tree (Tree J) along Patterson Road because it was compatible with the transmission line. (Respondent Exhibit 9).

j. Remove one white ash tree (Tree K) standing 44 feet tall and located 42 feet from the centerline which was infested with the Emerald Ash Borer. (Respondent Exhibit 17).

27. On June 21, 2013, Respondent took the following actions with Complainant's approval and in her presence:

- a. Removed Tree K (an ash tree);
- b. Removed Tree H (a white pine tree);
- c. Removed the east side leader branch of Tree F and top trimmed the west side leader branch of Tree F;
- d. Removed all wood including limbs from Trees H and K;
- e. Chipped or cut into firewood size and stacked all limbs removed from Tree F.

(Status Memorandum dated June 26, 2013).

DISCUSSION

On April 2, 2013, Complainant filed a formal complaint with the Commission alleging Respondent cut down her trees without prior notice, even though the trees were not interfering with Respondent's transmission line. Complainant requested the Commission require Respondent to stop its "ground to sky" vegetation practices on her property.

Responsibility to Provide Service

"Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations,

substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the Commission. Subject to the provisions of this part and the regulations or orders of the Commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service....” 66 Pa.C.S.A. § 1501.

Service is defined in 66 Pa.C.S.A. § 102 as: “Used in its broadest and most inclusive sense, includes any and all acts done, rendered, or performed, and any and all things furnished or supplied, and any and all facilities used, furnished or supplied by public utilities, ..., in the performance of their duties under this part to their patrons, employees, other public utilities, and the public, as well as the interchange of facilities between two or more of them,” Therefore, a public utility’s service, as required under 66 Pa.C.S.A. § 1501, includes any and all actions related to the function of distributing electrical energy to its ratepayers and reliable electrical energy to all end-users on its transmission system.

Burden of Proof

As the party seeking affirmative relief from the Commission, Complainant bears the burden of proof by substantial evidence. 66 Pa.C.S.A. § 332(a). Substantial evidence is defined as such evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk & Western Ry. Company v. Pa. Pub. Util. Comm’n, 489 Pa. 109, 413 A.2d 1037 (1980); Erie Resistor Corp. v. Unemployment Board of Review, 194 Pa. Superior Ct. 278, 166 A.2d 96 (1961); Murphy v. Department of Public Welfare, 480 A.2d 382 (Pa. Cmwlth. 1984).

Reasonable Customer Service

The Commission has the authority and responsibility to define reasonable service under 66 Pa.C.S.A. § 1501 and § 1502. The Commission has exclusive jurisdiction to determine the reasonableness, adequacy and sufficiency of a public utility's services and facilities.¹ The term "service" should be "used in its broadest and most inclusive sense, including any and all acts done, rendered, or performed, and any and all things furnished or supplied...by public utilities...in the performance of their duties under the Public Utility Code...."²

Witness Credibility

In assessing the credibility of witnesses, the presiding officer must consider their manner of testifying, their apparent candor, intelligence, personal interest and bias or lack of it when determining what weight shall be given to their testimony.³ A trier of fact may consider such factors as a witness' appearance, his/her general bearing, conduct on the stand, demeanor, manner of testifying, such as candor or frankness or clearness of statements, intonation of voice, and positiveness of the witness and his/her uncertainty as to facts.⁴ An opportunity to observe the demeanor and appearance of a witness in many instances becomes the touchstone of credibility.⁵

I find the testimony of Complainant's son to be clear, unequivocal and certain of the facts with a hint of frustration over Respondent's handling of the conflict and apparent intractable posture but without any hint of personal bias or *animus* towards Respondent. I found Complainant's testimony to be less clear and concise but also found it to be without any hint of personal bias or *animus* towards Respondent. Complainant presented as someone who saw the

¹ Elkin v. Bell of Pa., 491 Pa. 123, 420 A.2d 371 (1980).

² 66 Pa.C.S.A. § 102.

³ Danovitz v. Portnoy, 399 Pa. 599, 161 A.2d 146 (1960).

⁴ In re Gaston's Estate, 361 Pa. 105, 62 A.2d 904 (1949).

⁵ Connor v. Connor, 168 Pa. Superior Ct. 339, 77 A.2d 697 (1951).

importance of maintaining a safe transmission line corridor but could not quite understand West Penn's inflexible attitude.

In contrast, I did not accept as credible the testimonies of Respondent's witnesses as those testimonies concerned the likely growth patterns of the disputed vegetation. Complainant never contested the need to keep trees below a certain height and remained willing to work with Respondent to find an equitable solution that would permit her to maintain the windbreak needed for her home located amongst fields. Respondent's insistence that five-foot pear trees would grow too close to the transmission line within the next five years is contrary to common sense. In addition, many of the trees and shrubs listed in Respondent's brochure about suggested vegetation to plant conflicts with the vegetation Respondent insisted Complainant had to allow it to remove.

Furthermore, Complainant's evidence weighs in favor of finding Respondent acted in an unreasonable manner as it applied the vegetation management system on Complainant's property. Many of the trees or bushes West Penn cut down or planned to cut down were more than 20 feet below the transmission line. The statements of West Penn's witnesses – that these tree species would grow into the transmission lines within the next five years – were not accepted as credible. West Penn's original plan to remove five-foot tall Cleveland pear trees because those pear trees would be approaching the transmission line within the next five years was specious at best. West Penn's plan to remove the pin oak tree which is located off the right-of-way, instead of trimming it back evidences, along with the totality of the other evidence, that West Penn did not comply with a public utility's duty under the Public Utility Code to provide reasonable service to the public. 66 Pa.C.S.A. § 1501.

Jurisdiction Concerning Use of Easement

Complainant challenged the lawfulness of Respondent cutting or proposing to cut trees in or alongside the easement, as exceeding the grant of easement. She also challenged the location of the center line of the right-of-way and contested the disputed trees were within the

right-of-way. The Commission does not have jurisdiction to determine the scope or the validity of Complainant's claim concerning the right-of-way.

As a creature of legislation, the Commission possesses only the authority the State Legislature has specifically granted to it in the Public Utility Code, 66 Pa.C.S.A. § 101, *et seq.* Its jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom.⁶ The Commission, however, does not have jurisdiction to determine the scope and validity of an easement. Only the Court of Common Pleas for the county in which Complainant lives, can hear an easement claim.⁷ Therefore, Complainant's claims – that Respondent has moved the centerline of the easement or misapplied the right-of-way granted to it – can receive no consideration in this forum.

Vegetation Management Practices

How a public utility engages in its vegetation maintenance practice falls within the parameters of its service obligation under the Public Utility Code.⁸ In West Penn Power Co. v. Pa. Pub. Util. Comm'n, 578 A.2d 75 (Pa. Cmwlth. 1990), West Penn appealed a Commission decision in which the Commission ruled West Penn violated 66 Pa.C.S.A. § 1501 when it removed a large number of trees from a landowner's property. The Court acknowledged West Penn had an existing right-of-way permitting it to maintain the integrity and safety of its transmission line through vegetation management but West Penn was required to conduct that management like any other service performed by a public utility: in a manner that was adequate, efficient, safe and reasonable. West Penn's actions to clear the entire right-of-way plus remove trees located outside that right-of-way constituted unreasonable and inadequate service, in addition to also failing to notify the landowner about the pending removal.

⁶ Feingold v. Bell of Pa., 477 Pa. 1, 383 A.2d 791 (1977); Allegheny County Port Authority v. Pa. Pub. Util. Comm'n, 427 Pa. 562, 237 A.2d 602 (1967); Behrend v. Bell of Pa., 257 Pa. Superior Ct. 35, 390 A.2d 233 (1978); Pa. Department of Highways v. Pa. P.U.C., 198 Pa. Superior Ct. 87, 182 A.2d 267 (1962); City of Erie v. Pa. Electric Co., 383 A.2d 575 (Pa. Cmwlth. 1978).

⁷ Fairview Water Company v. Pa. Pub. Util. Comm'n, 509 Pa. 384, 502 A.2d 162 (1985). Anne E. Perrige v. Metropolitan Edison Co., Docket No. C-00004110 (Order entered July 3, 2003); Fiorillo v. PECO Energy Co., Docket No. C-00971088 (Order entered September 15, 1999).

⁸ PECO Energy Co. v. Twp. of Upper Darby, et al, 922 A.2d 996 (Pa. Commw. 2007).

In Roger McCall v. Pennsylvania Electric Company, Docket No. C-2009-2105240 (Final Order entered December 6, 2010), Complainant alleged Respondent excessively trimmed a tree on his property and as relief he wanted the utility to replace the tree. The Administrative Law Judge sustained the Complaint in part concerning Complainant's allegation the utility excessively trimmed Complainant's maple tree and ordered the utility to replace the tree with a 15-18 foot tall deciduous tree at the utility's expense.

In Gary and Florence Burek v. Pennsylvania Electric Company, Docket No. C-20028132, (Final Order entered June 27, 2003), Complainant alleged high voltage destroyed Complainant's appliances and the utility removed too many trees from the property during routine vegetation maintenance. The Administrative Law Judge sustained the Complaint, in part, and found the utility improperly removed too many trees from Complainant's property and ordered the utility to cease and desist from further violations.

Complainant's Position

Complainant argues West Penn created its own vegetation plan and it is unclear to Complainant whether the Commission reviewed the plan and the impact the implementation of that plan has on property owners such as Complainant. Specifically, Complainant asks the Commission to order Respondent to only trim back trees used in her windbreak that may interfere with the transmission line wires. Complainant contends Respondent's use and maintenance of the right-of-way has changed over the decades and Respondent's right to enter onto her property and do whatever it wants has been unchecked. Complainant contends she has a right to a windbreak for her property located out in the middle of a field as long as the vegetation does not interfere with the transmission lines. Complainant maintains most of her trees and shrubs did not interfere with the transmission lines and those trees and shrubs which might have been too high should have been trimmed down to a safe height.

Ms. Broman agrees West Penn must undertake some manner of tree trimming in order to maintain safe, reliable electrical service to its ratepayers and to the electrical grid which relies on the transmission system. She acknowledges that clearance of vegetation for public

safety and reliability of service is the prudent course to follow. Complainant contends the extent of this clearance operation was too extensive on her property and Respondent should be held responsible to trim the trees to ensure the continued safety and reliability of the transmission line.

Respondent's Position

Respondent argues it takes its duty of maintaining its transmission right-of-way seriously because of the catastrophic consequences if a transmission line fails due to interference from vegetation. Respondent contends the Commission does not have any regulations regarding vegetation maintenance of transmission facilities. Respondent acknowledges that the Commission promulgated standards, on May 22, 2008 at Docket No. L-0040167, on the inspection and maintenance of vegetation by electric distribution companies and proposed the utilities should inspect transmission lines every four or five years, but the Commission later withdrew its inspection and maintenance proposals for transmission facilities. Respondent contends its method of contact and communications with Complainant was appropriate with multiple contacts Respondent considers to be "in-person". Respondent argues it needs at least a 25-foot radial distance in order to avoid electrical arcing, to allow room for the tree to grow until the next scheduled inspection (in 4 or 5 years) and to allow for conductor movement (i.e., sag and sway) in the transmission lines. Complainant contends she needs the trees as a windbreak for her home in order to conserve energy costs during the year, especially since her land is located amongst open fields, and the trees act as a barrier between her home and fields used for agricultural purposes.

Respondent claims notice would have been provided sometime from January to June when it generally does its initial vegetation assessments and generally might contact property owners to discuss upcoming work in that area. West Penn contends it generally leaves a door hanger notice if the owner is not home which notice contains contact information and perhaps a description of the work to be done. (See Tr. 118). However, West Penn did not provide evidence concerning the notice provided specifically to Complainant.

Conclusion

West Penn did not provide reasonable, adequate customer service in two ways: (1) it did not provide Complainant with adequate notice of its intention to enter onto her property for the purpose of cutting vegetation on her property; and (2) its vegetation management practices, as applied to Complainant's property, did not qualify as reasonable and adequate customer service.

Notice to Complainant

First, West Penn provided generalized testimony concerning what its typical and usual practices are when notifying landowners concerning upcoming vegetation management visits. West Penn did not provide testimony about its specific attempts to notify Complainant. In addition, West Penn did not even provide any evidence regarding when it sent a letter notifying local residents or what week(s) its agents might have visited in the area to knock on doors or place door hanger notices on the affected landowners' residences. West Penn is not expected to have its employees or witnesses remember precisely when notification activities took place to specific landowners but it should have known down to the day and/or week when its employees or agents were in the neighborhood knocking on doors and/or issuing notices.

On the other hand, Complainant testified credibly that she was unaware West Penn would be visiting her property to clear the right-of-way. In fact, she was surprised to look outside and see trucks and men in her yard, cutting down vegetation. West Penn's agents had not announced themselves to Complainant when entering onto her property. West Penn did not provide any evidence to the contrary that sufficiently rebutted Complainant's testimony. Furthermore, the first time West Penn sent Ms. Broman correspondence indicating its vegetation management work plan, that work plan was sent months after the initial visit and lacked any detail other than to indicate West Penn intended to come onto the property to cut or trim vegetation.

West Penn has the right to enter onto real property in order to manage or maintain a right-of-way for its transmission system. Ms. Broman does not contest West Penn has the right to keep the transmission lines free from interference by vegetation on her property. However, West Penn does not have an unqualified right to enter onto property and commence cutting and removing vegetation without, at the least, notifying the landowner of the proposed visit and notifying a landowner once on the property in order to eliminate a situation where a landowner is frightened to find strangers with big trucks and chainsaws in the front yard.

Therefore, West Penn was in error when it failed to provide Complainant with notice of its intention to come onto her property in the near future and it was also in error when its agents failed to knock on the door and announce their presence.

Vegetation Management Practices on Complainant's Property

Herein, West Penn insisted it has the right to remove a pin oak tree that stands outside the right-of-way because the height of the tree places the branches on one side too close to the transmission line when the electric line is at its lowest point. West Penn insists it should be allowed to remove the second pin oak tree entirely. Complainant contends the tree provides a windbreak for her home, which in turn reduces her energy consumption in the winter when the wind tends to blow harder, in addition to shading her home in the summer, which in turn reduces her energy consumption in hot weather. This tree is one of a pair of pin oak trees. West Penn's agent cut down one pin oak tree in 2012 when its agents appeared without notice at Complainant's residence. The remaining pin oak tree (Tree F) was trimmed back on the side in June 2013 with Complainant's approval.

Although West Penn did not specify in its work plan which trees and bushes were to be removed, by the summer of 2012 West Penn indicated to Complainant all of the trees and bushes which West Penn contended were interfering with the safe operation of the transmission line would be removed. Amongst 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. Some of this

vegetation was outside the right-of-way. The transmission line conductors, at all relevant locations herein, were at least 40 feet from the ground. West Penn insisted all the vegetation earmarked as incompatible with the transmission line must be chopped down and removed entirely, because trimming the vegetation was not acceptable to West Penn.

The testimony presented sufficiently proved a few trees should be trimmed consistent with industry practice and in order to secure more reliable and safe service to all Respondent's customers. However, the evidence clearly showed the trees which Respondent chopped down previously, plus the ones it proposed to remove, did not directly and immediately impact the safety or reliability of the transmission line.⁹ 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. Certainly the fact that a tree located outside the right-of-way might someday impact the transmission line is not *a fait accompli* that removal is a foregone conclusion.

Such a drastic "ground to sky" approach to vegetation management does not qualify as adequate, efficient, safe and reasonable customer service, pursuant to 66 Pa.C.S.A. § 1501. Landowners, such as Complainant herein, have a right to use trees and bushes for agriculture, fencing, privacy and windbreaks. At issue for any vegetation management system is whether specific trees impact negatively upon a transmission line, currently or at a point in the near future.

Unfortunately, West Penn refused to consider trimming the taller trees or waiting until it next viewed this section of the transmission line (within five years) before taking drastic action. West Penn insisted tree trimming was contrary to the management practices of West Penn's parent company, the FirstEnergy Corporation. In addition, West Penn would have the Commission believe that its vegetation management permits it to eliminate all vegetation in Complainant's yard. West Penn's theory runs counter to the Commission's rules and policy which require public utilities to provide for vegetation management, not vegetation eradication.

⁹ The exception to the statement is two pin oak trees which could have created a reliability hazard with the lowest conductor due to their height and/or location. One pin oak was removed prior to the hearing and the other pin oak tree (Tree F) was trimmed after the hearing and no longer poses any current concern.

Herein, Complainant proved the trees that remain in contention (Trees A, B, C, F and G) pose no present and current threat to West Penn's transmission line or West Penn's obligation to provide safe and reliable electrical energy to its ratepayers and/or to the electric grid. Due to West Penn's overzealous behavior in June 2013 following the hearing, some trees originally in contention have now been trimmed or removed and no longer pose a current danger to the integrity of the transmission line. Complainant met her burden of proving Respondent violated the Commission's regulations by failing to provide reasonable and adequate customer service in how Respondent removed vegetation on her property from the easement or from encroaching on the easement, and in how Respondent notified Complainant about the impending work. In addition, Complainant proved affirmatively that the vegetation still in contention does not need to be removed in its entirety.

West Penn has failed to comply with the Commission's rules, regulations and precedents with respect to its vegetation management practices. West Penn has the right to enter onto property and ensure vegetation does not impede or endanger the safe operation of the transmission line. However, that right is not unfettered or unlimited. 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 the removal (or trimming) is compatible with the safe operation of the transmission line itself. Landowners must allow utilities to maintain the vegetation around the transmission line but 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.

Civil Penalty

When appropriate due to violation of the Commission's statutes or regulations, Sections 3301(a) and (b) of the Public Utility Code, 66 Pa.C.S.A. § 3301(a) and (b), authorize the Commission to impose a maximum civil penalty of \$1,000 per day for violations of its statutes, regulations and orders. The Commission has adopted certain standards that are to be applied in determining the amount of civil penalties when violations are admitted or determined

to have occurred. There are ten standards which the Commission first articulated in Joseph A. Rosi v. Bell Atlantic-Pa., Inc. and Sprint Communications Company, Docket No. C-00992409 (Order entered February 10, 2000) (“Rosi”) and which are now published at 52 Pa.Code § 69.1201(c) in the Commission’s Policy Statements and Guidelines.

Review of Factors under 52 Pa.Code § 69.1201(c)

The first criterion to consider is whether the violation was of a serious nature or whether it was less egregious, such as an administrative or technical error. West Penn entered onto Complainant’s land without announcing their presence and immediately began to cut down vegetation. This behavior constitutes a serious violation. In addition, 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. This behavior also constitutes a serious violation. Thus, I conclude these violations are serious in nature and warrant a higher penalty.

The second criterion is whether the resulting consequences of the conduct were of a serious nature, such as personal injury or property damage. Many of Complainant’s trees and shrubs used as windbreaks were removed or so badly trimmed that removal became necessary. Thus, I conclude the consequences are of a serious nature and warrant a higher penalty.

The third criterion is whether the conduct at issue was deemed intentional or negligent. In light of the 1990 appellate decision¹⁰ concerning West Penn’s tree removal program, I conclude the conduct was not negligent but was intentional. Thus I conclude the conduct warrants a higher penalty.

The fourth criterion is whether the utility made efforts to modify internal practices and procedures to address the conduct and prevent similar conduct, and the amount of time it took for the implementation of these measures. No testimony was provided that West Penn acknowledges an error with its vegetation management program. Thus I conclude this criterion does not justify mitigation against a higher penalty.

¹⁰ See West Penn Power Co. v. Pa. Pub. Util. Comm’n, supra.

The fifth criterion is the number of customers affected. According to the record evidence, only Complainant was impacted. This criterion would justify mitigating against a higher penalty.

The sixth criterion is a consideration of West Penn's compliance history. No evidence was presented that West Penn has a poor compliance record, however, the fact remains West Penn was the subject of one of the few reported appellate decisions in this jurisdiction concerning the issue of tree trimming. Still West Penn treated the Commission's 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. Therefore, I conclude a higher penalty is warranted.

The seventh criterion is whether the regulated entity cooperated with the Commission's investigation. There was no investigation by the Commission and therefore this criterion works neither to mitigate nor to aggravate the penalty to be imposed.

The eighth criterion is the amount of the civil penalty or fine necessary to deter future violations, with consideration of the size of the utility. West Penn is a large utility with an extensive territory. In addition, West Penn engaged in extensive litigation involving almost the identical issues (cutting down trees instead of trimming trees and without proper notice). In that previous proceeding, the Commission fined West Penn the sum of \$2,000 (after reducing the presiding officer's decision to fine the utility the sum of \$16,000). In light of West Penn's size and its callous disregard for the Commission's directives, I find the penalty should be triple the sum imposed previously. Therefore, in consideration of all relevant factors, I conclude a penalty of \$6,000 is sufficient to deter future violations.

The ninth criterion is past Commission decisions. No party cited to any prior Commission decisions involving unreasonable customer service in how a utility conducts its vegetation maintenance program, however, as stated previously, this public utility was the subject of a Commission proceeding at Docket No. C-882130 which resulted in a \$2,000 civil penalty and

later resulted in a reported appellate decision at West Penn Power Co. v. Pa. Pub. Util. Comm'n, 578 A.2d 75 (Pa. Commw. 1990). This criterion warrants a higher penalty.

The tenth criterion is other relevant factors, and none have been suggested or considered other than those previously discussed.

In any case in which a civil penalty is assessed, these ten factors must be considered when calculating the amount of the penalty. The factors are meant to ascertain, in general, how serious was the conduct and intention of the utility, how the individual consumer was affected and how the utility's conduct may bode for similar future situations. In this proceeding, West Penn's actions – to enter onto Complainant's property without notice as to the day or even to announce themselves on the day, failure to notify Complainant as to the extent of the proposed removal, and then to refuse to trim or "top" trees in the windbreak – were serious and warrant a higher penalty. In addition, the resulting consequences from these actions were of a serious nature and warrant a higher penalty.

A civil penalty is necessary to deter similar future violations, especially in light of the serious consequences and the similarity in facts between this proceeding and the 1990 proceeding. In that proceeding, the Administrative Law Judge assessed \$16,000 in penalties for two similar violations. The Commission, in its Final Order, reduced that sum to \$2,000. Given the factual similarities in conduct seen with the same utility, this repeat violation should be treble the amount assessed in 1990. Because the evidence presented and taken as a whole proves a civil penalty is necessary, I am assessing a Six Thousand Dollar (\$6,000) civil penalty against Respondent.

Accordingly the complaint is sustained in the ordering paragraphs below and Respondent is ordered to pay a civil penalty.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter of this proceeding. 66 Pa.C.S.A. § 701.

2. Complainant carries the burden of proving Respondent did not provide reasonable and adequate service. 66 Pa.C.S.A. § 332(a).

3. Respondent failed to provide reasonable and adequate customer service in how it implemented its vegetation maintenance program on Complainant's property.

4. Complainant met the burden of proving Respondent did not provide reasonable and adequate service.

5. The Commission is without jurisdiction to consider the validity or scope of an easement in real estate. Fairview Water Company v. Pa. Pub. Util. Comm'n, 509 Pa. 384, 502 A.2d 162 (1985).

6. The Commission is authorized to consider and impose civil monetary penalties against a public utility company. 52 Pa.Code § 1201 *et seq.*

7. Under the circumstances, imposition of a civil penalty upon Respondent is warranted. 66 Pa.C.S.A. § 3301 and 52 Pa.Code § 69.1201.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the complaint of Marlene Broman versus West Penn Power Company at Docket No. C-2013-2356237 hereby is sustained in that, pursuant to Pa.C.S.A. § 1501, Respondent did not provide reasonable and adequate service in how it implemented its vegetation management program at her residence.

2. That West Penn Power Company is hereby assessed the penalty of Six Thousand Dollars (\$6,000) because Respondent failed to provide reasonable and adequate customer service in how it implemented its vegetation maintenance program on Complainant's property.

3. 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 certified check or money order payable to the Pennsylvania Public Utility Commission addressed to:

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

4. That Respondent, West Penn Power Company, is hereby directed to cease and desist from further violations of the Public Utility Code, 66 Pa.C.S.A. §§ 101, *et seq.*, and the regulations of this Commission, 52 Pa.Code §§ 1.1, *et seq.*

Exhibit C

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg PA 17105-3265**

Public Meeting held April 23, 2014

Commissioners Present:

Robert F. Powelson, Chairman
John F. Coleman, Jr., Vice Chairman
James H. Cawley
Pamela A. Witmer
Gladys M. Brown

Marlene Broman

C-2013-2356237

v.

West Penn Power Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of West Penn Power Company (West Penn or the Company), filed on October 28, 2013, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Katrina L. Dunderdale, issued October 8, 2013, in the above-captioned proceeding. No Replies to Exceptions were filed. For the reasons set forth herein, we shall grant, in part, and deny, in part, West Penn's Exceptions and modify the ALJ's Initial Decision accordingly.

History of the Proceeding

On April 2, 2013, Marlene Broman (Complainant) filed a Formal Complaint (Complaint) against West Penn. The Complainant stated that West Penn contacted her to cut down trees in the right-of-way. She refused. The Complainant alleged that West Penn did cut down three trees on her property before her son got there to stop the cutting, and that West Penn wants more right-of-way than they are granted. The Complainant stated that “ground to sky” cutting is not in her best interest, and requested that the Commission direct West Penn to prune the trees.

On April 18, 2013, West Penn filed an Answer, denying the material allegations in the Complaint. In the Answer, West Penn indicated that it has transmission facilities located on a right-of-way on the Complainant’s property. The Company stated that the Complainant and her husband granted West Penn a right-of-way agreement on April 9, 1968. The agreement provides West Penn with 180 feet in width to construct, operate, repair, maintain, remove and rebuild a portion of a transmission line or lines. The agreement also grants West Penn the right to cut, trim and remove all trees within the limits of the right-of-way by such methods as West Penn may determine.

West Penn averred that, on February 14, 2012, its vegetation maintenance contractor contacted the Complainant to discuss the work on the property. The Complainant refused to allow the contractor to cut trees on the right-of-way. On June 11, 2012, the contractor again made contact with the Complainant and the Complainant agreed that some, but not all, trees on the right-of-way could be removed.

On July 16, 2012, West Penn asserted that another of its vegetation maintenance contractors met with the Complainant to review the vegetation control work plan. The work plan included right-of-way tree removal as well as tree trimming, bush cutting, and herbicide application.

On August 21, 2012, a West Penn forestry specialist mailed a letter to the Complainant explaining the vegetation work planned for the property. The letter advised that an herbicide would be used to treat the woody vegetation along West Penn's right-of-way. The letter continued to explain that cutting brush is an unacceptable maintenance practice because cutting brush increases stem density and allows for rapid growth that hinders safety, accessibility and reliability. West Penn stated that it performs vegetation maintenance along the transmission line on a five-year schedule. West Penn planned to treat the Complainant's vegetation on or after August 28, 2012. According to West Penn, numerous attempts were made with the Complainant to obtain concurrence about the extent of the vegetation maintenance.

West Penn additionally stated that the Complainant filed an informal complaint with the Commission's Bureau of Consumer Services (BCS) in late 2012. BCS dismissed the complaint on February 26, 2013, finding no violations.

West Penn averred that the Commission has narrow, limited jurisdiction over issues concerning the validity and location of utility rights-of-way and easements. It further asserted that vegetation maintenance is necessary for the reliability of its transmission facilities and that it attempted to reach concurrence with the Complainant about vegetation maintenance along the right-of-way. West Penn attested that its conduct with respect to the Complainant had been reasonable and consistent with its service obligations as a Pennsylvania utility under Section 1501 of the Public Utility Code (Code), 66 Pa. C.S. § 1501. Accordingly, West Penn requested that the Commission dismiss the Complaint.

ALJ Dunderdale issued a Prehearing Order on April 23, 2013, which advised the Parties that a telephonic hearing was scheduled for May 22, 2013.

On May 10, 2013, West Penn filed a Motion for Judgment on the Pleadings and a Motion to Continue Hearing. The Motion for Judgment on the Pleadings requested dismissal of the Complaint for lack of subject matter jurisdiction.

On May 14, 2013, ALJ Dunderdale issued a First Interim Order to address West Penn's Motion for Judgment on the Pleadings and Motion to Continue Hearing. ALJ Dunderdale found that the Motion for Judgment on the Pleadings was untimely filed. The ALJ stated that less than twenty days existed prior to the commencement of the hearing on May 22, 2013, and issuing a motion on May 10, 2013, left no time for the Complainant to respond to the motion without delaying the hearing.

ALJ Dunderdale conducted an initial telephonic hearing on May 22, 2013. The Complainant appeared *pro se* and submitted seven exhibits, of which six were admitted into record. West Penn was represented by counsel and presented three witnesses and seventeen exhibits. However, at the conclusion of presenting its case, West Penn inadvertently neglected to move for the admission of its proposed exhibits into the hearing record.

On May 23, 2013, ALJ Dunderdale issued a Second Interim Order in which West Penn's exhibits were marked for admission. The Complainant was provided time in which to file objections to the admission of any of the exhibits.

By letter dated June 5, 2013, the Complainant challenged the admission of two proposed exhibits. On June 11, 2013, West Penn filed a response to the Complainant's letter in which West Penn averred that the Complainant did not object to the admission of the two documents; rather the Complainant was questioning the reasonableness of West Penn's vegetation program. West Penn moved that its exhibits be admitted into the record.

On June 20, 2013, ALJ Dunderdale received a letter from the Complainant which included a letter she received from West Penn, dated June 14, 2013. West Penn's letter indicated that a pin oak tree was in close encroachment to the transmission line and that, due to the ongoing Complaint, West Penn intended to trim it rather than fully remove at this time. The Complainant averred that she received a phone call on June 19, 2013, notifying her that the work would be done the next day. The Complainant alleged that West Penn told her that she had agreed to this trimming at the hearing on May 22, 2013. The Complainant denied having agreed to have any trees cut or trimmed.

As a result of the Complainant's letter, ALJ Dunderdale conducted a telephonic conference with the Complainant and West Penn on June 21, 2013. An agreement was reached between the Parties whereas West Penn's contractor could trim or remove selected vegetation.

On June 26, 2013, West Penn filed a Status Memorandum which detailed the actions it took when its contractor met with the Complainant on her property and removed or trimmed trees with Complainant's consent and in her presence.

On July 22, 2013, ALJ Dunderdale issued the Third Interim Order which admitted West Penn's exhibits and closed the record as of July 8, 2013.

In the Initial Decision, issued on October 8, 2013, the ALJ sustained the Complaint and ordered West Penn to pay a civil penalty. I.D. at 17-23.

As previously noted, West Penn filed Exceptions on October 28, 2013. No Replies to Exceptions were filed.

Discussion

As the proponent of a rule or order, the Complainant in this proceeding bears the burden of proof pursuant to Section 332(a) of the Code. 66 Pa. C.S. § 332(a). To establish a sufficient case and satisfy the burden of proof, the Complainant must show that the Respondent is responsible or accountable for the problem described in the Complaint. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). That is, the Complainant's evidence must be more convincing, by even the smallest amount, than that presented by the Respondent. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission's decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980).

Upon the presentation by the Complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence to rebut the evidence of the customer shifts to the Respondent. If the evidence presented by the Respondent is of co-equal value or "weight," the burden of proof has not been satisfied. The Complainant now has to provide some additional evidence to rebut that of the Respondent. *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983). While the burden of going forward with the evidence may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

ALJ Dunderdale made twenty-seven Findings of Fact and reached seven Conclusions of Law. I.D. at 4-10, 24. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

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

Initial Decision

Prior to addressing the merits of the Complaint, the ALJ declined to address the Complainant's challenge of: (1) the lawfulness of West Penn's cutting or proposed cutting in or alongside the easement, as exceeding the grant of the easement; (2) the location of the center line of the right-of-way; and (3) whether the disputed trees were within the right-of-way. The ALJ noted that the Commission does not have jurisdiction to determine the scope or the validity of the Complainant's claim concerning the right-of-way. I.D. at 13-14. Therefore, the ALJ found that, to the extent the Complainant contended that West Penn moved the center line of the easement or misapplied the right-of-way granted to it, she must pursue those claims in another forum. I.D. at 14. The ALJ addressed those aspects of the Complaint and testimony that concerned allegations that West Penn provided unreasonable or inadequate service, pursuant to Section 1501 of the Code, 66 Pa. C.S. § 1501, by attempting to remove the Complainant's trees from West Penn's transmission line right-of-way, and those located outside of that right-of-way, and by failing to notify the Complainant about the removal. *Id.*

According to the ALJ, the Complaint concerns the quality of service rendered by a public utility. The ALJ noted that Section 1501 of the Code, 66 Pa. C.S. § 1501, reads, in pertinent part, as follows:

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission.

The ALJ further noted that Section 102 of the Code, 66 Pa. C.S. § 102, defines the word “service” in pertinent part as follows:

Used in its broadest and most inclusive sense, includes any and all acts done, rendered, or performed, and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities . . . in the performance of their duties under [the Code]. . . .

I.D. at 10-11. The ALJ concluded that the definition of “service” includes any and all actions related to the function of distributing electrical energy to its ratepayers and reliable electrical energy to all end-users on its transmissions system. I.D. at 11.

The ALJ determined that the Complainant did establish, by a preponderance of the evidence, that West Penn’s attempts to remove the trees in its transmission line right-of-way on the Complainant’s property constituted unreasonable service. I.D. at 20.

Finally, the ALJ applied the Statement of Policy at 52 Pa. Code § 69.1201 (factors and standards for evaluating litigated and settled proceedings involving violations of the Public Utility Code and Commission regulations – statement of policy), to determine that a civil penalty of \$6,000 was warranted. I.D. at 20-23.

Exceptions

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.

Based on our review of the record, we conclude that the ALJ properly found that the Commission does not have jurisdiction to determine the scope and validity of an easement. I.D. at 14. As such, she rejected the Complainant’s claims that West Penn moved the centerline of the easement or misapplied the right-of-way. However, she correctly stated vegetation management falls within the scope of service under the Public Utility Code. In *West Penn Power Company v. Pa. PUC*, 578 A.2d 75, 77 (Pa. Cmwlth. 1990), *app. den.*, 593 A.2d 429 (Pa.), the Commonwealth Court determined that vegetation management is a service under Section 1501 of the Code. Section 1501 “clearly indicates that the utility’s ‘service’ is not confined to the distribution of electrical energy, but includes ‘any and all’ acts related to that function.” *Id.* See also, *PECO Energy Co. v. Township of Upper Dublin*, 922 A.2d 996, 1005 (Pa. Cmwlth. 2007); and *Popowsky v. Pa. PUC*, 653 A.2d 1385, 1389 (Pa. Cmwlth. 1995) (“utility’s maintenance of vegetation is a regulated service even though fault, either on the part of the utility or the customer, has no relevance to the existence of vegetation maintenance as a service.”).

Thus, it is clear that vegetation management of rights-of-way fall within the Commission's jurisdiction. We find that this Complaint presents service issues over which the Commission cannot abdicate its responsibility. Thus, it was proper for the ALJ to entertain this matter. *Megan Mohn v. PPL Electric Utilities Corp.*, Docket No. C-2012-2301470 (Order entered Oct. 11, 2012). As such, we will deny West Penn's first Exception.

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.

As we discussed in Exception 1, the ALJ correctly concluded that the Commission does not have jurisdiction to determine the scope and validity of the easement. Accordingly, the ALJ properly rejected the Complainant's claims pertaining to the alleged misapplication of the right-of-way. I.D. at 14. Nonetheless, the Complaint implicates service-related issues pursuant to Section 1501 of the Code. In *West Penn Power, supra*, the utility had a broadly-worded right-of-way agreement permitting it "to cut and trim or remove trees and shrubbery whenever necessary to maintain" its transmission system. 578 A.2d at 76. However, the Commonwealth Court affirmed the Commission's determination that the utility failed to conduct its right-of-way vegetation maintenance program in a reasonable manner. *Id.* Thereafter, the Pennsylvania Supreme Court denied the utility's appeal of that decision. *West Penn Power v. Pa. PUC*, 527 Pa. 660, 593 A.2d 429 (Pa. 1991). Thus, there is no real question as to whether the Company's vegetation management activities constitute a public utility service regulated by the Commission. Here the Company argues that its broadly worded easement grants it the unqualified right to cut, trim or remove trees in the right-of-way. In essence, West Penn argues that its easement trumps the responsibility of the Commission to consider whether the Company's application of its vegetation management program constituted a

service violation. Such an argument is without merit. Therefore, we will deny West Penn's second Exception.

Exception No. 3:

West Penn excepts to the Initial Decision's conclusion that the Commission has jurisdiction to hear issues regarding vegetation management of the transmission right-of-way because existing federal legislation preempts the Commission's jurisdiction in this field.

Section 215 of the Federal Power Act (FPA), 16 U.S.C. Sect. 824o, describes FERC's jurisdiction to develop and enforce reliability standards for the transmission system. This provision contains a savings clause providing that a state may continue to take action pertaining to electric safety and service issues within that state which are not inconsistent with other reliability standards. Section 215 of the FPA provides in pertinent part: "Nothing in this section shall be construed to preempt any authority of any State to take action to ensure safety, adequacy, and reliability of electric service within that State, as long as such action is not inconsistent with any reliability standard...." 16 U.S.C. Sect. 824o(i)(3). In its Exception, the Company argues that Section 215 of the FPA entirely preempts the field of transmission system operations and leaves no room for the Commission to regulate West Penn's vegetation management practices. According to our reading of 16 U.S.C. Section 824o(i)(3), we find the Company's argument to be in error. Under its express terms, the FPA clearly permits a State and, thereby, the Commission, to enforce service-related issues which are consistent with the reliability standards.¹ Thus, West Penn's third Exception is denied.

¹ The Commission's application of the vegetation management standards is not inconsistent with the federal reliability standards as discussed in the analysis of Exception No. 4 and the Disposition sections, *infra*.

Exception No. 4:

West Penn excepts to the Conclusion of Law that West Penn's Transmission Vegetation Management and Maintenance Program (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.

The ALJ concluded in her Initial Decision that West Penn did not provide reasonable, adequate customer service in two ways: (1) it did not provide Complainant with adequate notice of its intention to enter onto her property for the purpose of cutting vegetation on her property; and (2) its vegetation management practices, as applied to Complainant's property, did not qualify as reasonable and adequate customer service. I.D. at 17.

We do not find that the Complainant met her burden of proving that West Penn provided unreasonable service, in violation of Section 1501 of the Code, 66 Pa. C.S. § 1501, by attempting to remove the trees in West Penn's transmission line right of way on the Complainant's property. The Complainant simply did not establish, by a preponderance of the evidence, that West Penn violated the Code, the Commission's Regulations, or a Commission Order.

West Penn, on the other hand, presented evidence that demonstrated that its actions are consistent with the Federal Energy Regulatory Commission's (FERC) standards for Transmission Vegetation Management (most recent revisions issued March 21, 2013, at Docket No. RM12-4-000; Order No. 777). That is, to remove trees which, in West Penn's opinion, interfere with its aerial conductors in such a manner "that they may pose a threat to public safety or to system reliability." West Penn Exh. 3.

In light of the above, we disagree with the ALJ's conclusion that West Penn's TVM Program is unreasonable. West Penn has a duty to maintain reliability of transmission lines and its TVM Program is a reasonable approach in attaining this reliability. First Energy, the parent company of West Penn, developed the TVM Program for vegetation maintenance along transmission line routes. The TVM Program calls for West Penn to inspect transmission lines once per year, by air, and every five years on the ground. The transmission line at issue was ground inspected in 2012, and the next ground inspection is scheduled to occur in 2017. Tr. at 175-176.

The record in this proceeding provides substantial record evidence in which West Penn demonstrated that its actions were consistent with both keeping to the terms of the right-of-way agreement and following its TVM Program.

More specifically, West Penn testified that its TVM Program provides that for 138 kV lines, such as the transmission line at issue here, the vegetation clearance is twenty-five feet. Tr. at 171, 203-204. The TVM Program defines "incompatible vegetation" as all vegetation that will grow tall enough to interfere with overhead electric facilities. Tr. at 130; West Penn Exh. No. 8. West Penn Witness, Mr. Scott, testified that the Company relies on information provided by the Arbor Day organization to determine the growth rate and mature height of trees. Tr. at 165. Further, another company witness, Mr. Swink, 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. Tr. at 192. West Penn believes that the Complainant was under the mistaken idea that trees that had been marked with a yellow ribbon were to be removed. Tr. at 32. Mr. Scott testified that trees slated for removal were marked with red paint while trees that were compatible with the transmission right-of-way were marked with yellow ribbon. Tr. at 158-159. The Complainant believed that West Penn intended to cut down a number of trees outside the

right-of-way. West Penn introduced its work plan and showed that it centered solely on vegetation growing within the right-of-way. Tr. at 131; West Penn Exh. No. 9.

Mr. Swink testified that although the easement establishes a right-of-way 180-feet wide, West Penn only maintains a 50-foot area extending out from either side of the centerline of the transmission line. Tr. at 180.

On October 23, 2012, West Penn removed a pin oak at the Service Location. Tr. at 121. Mr. Swink testified that as of August 30, 2012, the pin oak removed (which was one of two pin oaks on the property) was only 9.86 feet from the tree top to the conductor. Tr. at 185-186; West Penn Exh. No. 14. Mr. Swink further 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 since it was approximately 40 feet tall and the lowest conductor was approximately 47.5 feet from the ground. Tr. at 186-187. Other trees that are of a concern are spruce trees that are incompatible vegetation because their mature height and spread will exceed the guidelines. Tr. at 179-180. Mr. Swink indicated that topping or side-trimming incompatible trees would not prevent the trees from growing taller or wider and eventually encroach for physical contact to the electrical conductors. Tr. at 192. Based on the evidence presented by West Penn, we believe that West Penn’s compliance with the FERC standards in this case was reasonable.

The record also demonstrates that there are a number of factors to consider when vegetation is near transmission lines. The obvious is that if vegetation is in direct contact with a transmission conductor it can cause an outage. Another factor is that electricity can “arc” from the energized conductor to vegetation. Some factors affecting arc are the humidity of the air and the moisture content of the vegetation. The arc occurs through the air and does not require direct contact. Tr. at 138. Also, transmission conductors sway significantly in the wind, and sag significantly due to expansion in summer temperatures. Tr. at 204. These factors are taken into consideration when

determining vegetation clearance. Tr. at 171, 203-204. It is important to note that West Penn's TVM Program was designed with all of these factors taken into consideration and provides for a vegetation clearance of twenty-five feet for a 138 KV line. Furthermore, as further deterrent to overgrowth along transmission lines, we note that, as part of its TVM Program, West Penn provides landowners with a brochure that lists compatible vegetation for around transmission facility corridors. West Penn Exh. No. 3.

We also disagree with the ALJ's conclusion that West Penn did not provide the Complainant with adequate notice of its intention to enter onto her property for the purpose of cutting vegetation on her property. In this regard, our review of the record indicates that West Penn and the Complainant had numerous meetings, letters and phone calls exchanged over the proposed vegetation management. The Complainant was given advance notice, by letter, alerting her of the company's intent to have its contractor do the planned vegetation maintenance. The record shows that throughout this process, West Penn attempted to gain the Complainant's assent, even though not required, for the removal of incompatible trees. Tr. at 40-41, 88-89, 116-118, 121, 208. West Penn Exh. Nos. 3, 4.

While we understand the Complainant's desire to have the trees and shrubs remain, we conclude that West Penn has provided reasonable and adequate service to the Complainant. Thus, West Penn's fourth Exception is granted and the Initial Decision is modified accordingly.

Exception No. 5:

West Penn excepts to the Conclusion of Law that the Complainant met her burden of proving that the Company did not provide reasonable service.

The ALJ concluded that the Complainant met the burden of proving that West Penn did not provide reasonable and adequate service by not providing notice and proving that the vegetation in the right-of-way need not be removed.

Upon review of the record, and as explained in the discussion of the fourth Exception, we conclude that the Complainant has not established a *prima facie* case of a violation of the Code. As such, West Penn's fifth Exception is granted, and the ALJ's Initial Decision is modified accordingly.

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..."

In our previous determination in the discussion under Exception No. 4, above, we found that West Penn has provided reasonable and adequate service to the Complainant. As such, we agree with West Penn that it should not be subject to a civil penalty pursuant to 66 Pa. C.S. § 3301 because it has not committed any violation of the Code, a Commission Regulation or Commission Order. Therefore, we shall grant West Penn's sixth Exception and modify the Initial Decision accordingly.

Before concluding, we urge West Penn to continue to discuss its TVM Program with all affected landowners once the proposed work plan for the vegetation management on their property is completed. Taking the concerns of the landowner into consideration for the final work plan is a reasonable approach to attaining its vegetative management program. Educating the landowner on the potential risks to reliability from

incompatible vegetation, and the cost effectiveness of eliminating those risks is also necessary for a successful program.

Conclusion

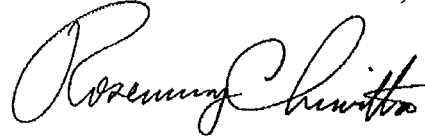
Based on our review and analysis of the record in this proceeding, including the Initial Decision, and the Exceptions thereto, we shall grant, in part, and deny, in part, the Exceptions and modify the ALJ's Initial Decision, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions of West Penn Power Company filed on October 28, 2013, are granted, in part, and denied, in part.
2. That the Initial Decision of Administrative Law Judge Katrina L. Dunderdale, issued October 8, 2013, is modified, consistent with this Opinion and Order.
3. That the Formal Complaint filed by Marlene Broman against West Penn Power Company, at Docket No. C-2013-2356237, is dismissed.

4. That this case be marked closed.

BY THE COMMISSION,

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive, flowing style.

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: April 23, 2014

ORDER ENTERED: April 23, 2014

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

MARLENE BROMAN

v.

WEST PENN POWER COMPANY

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Docket No. C-2015-2485454

CERTIFICATE OF SERVICE

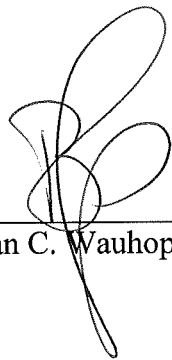
I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

Via First-Class Mail

Administrative Law Judge Jeffery A Watson
Piatt Place
Suite 220
301 5th Avenue
Pittsburgh, PA 15222

Marlene Broman
4136 Patterson Road
Butler, PA 16002

Dated this 16th day of July, 2015.



Brian C. Wauhop, Esq.