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VIA E-FILING

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

Re: Sarah Bernardi v. West Penn Power Company
Docket No. C-2014-2453852

Dear Secretary Chiavetta:

On behalf of West Penn Power Company, I have enclosed for electronic filing the Main Brief 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**

SARAH BERNARDI

v.

WEST PENN POWER COMPANY

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Docket No. C-2014-2453852

**MAIN BRIEF
ON BEHALF OF
WEST PENN POWER COMPANY**

BUCHANAN INGERSOLL & ROONEY, P.C.

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Dated: July 21, 2015

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I. STATEMENT OF THE CASE

A. Introduction

Sarah Bernardi (“Complainant”) filed a Formal Complaint (“Complaint”) against West Penn Power Company (“West Penn” or the “Company”)¹ challenging the Company’s right to apply herbicides to control vegetation growing in a right-of-way (“Right-of-Way”) that crosses the Complainant’s property in Jeanette, Pennsylvania. The Right-of-Way was created pursuant to a written and recorded easement agreement (“Easement”) executed in 1989 between the Complainant’s predecessor in interest and the Company. The Complaint alleged that the Company’s plan to use herbicides to control vegetation growing in the Right-of-Way is not “safe” and requested that the Commission order the Company not to use herbicides in the Right-of-Way portion of her property.

For the reasons set forth below, the Complaint should be dismissed and the relief requested by the Complainant denied. The Complainant produced absolutely no evidence supporting her allegations that the use of herbicides is not “safe.” Instead, the bulk of the evidence presented by the Complainant relates to her personal (not expert) opinions and beliefs about various laws and regulations administered by the Pennsylvania Department of Environmental Protection (“DEP”). The Pennsylvania Public Utility Commission (“Commission”) has no jurisdiction to adjudicate alleged violations of environmental laws and regulations. Most importantly, the Complainant has failed to carry her burden of proof establishing that the Company committed any violation of the Public Utility Code, 66 Pa.C.S. § 101 et seq. (“Code”) or any regulation, order or rule that the Commission has authority to administer. For these reasons, the Commission should dismiss the Complaint.

¹ FirstEnergy is the holding company that owns West Penn Power Company and other electric distribution companies operating in Pennsylvania, Ohio, New Jersey, New York, Maryland and West Virginia, including Pennsylvania Power Company, Pennsylvania Electric Company and Metropolitan Edison Company in Pennsylvania.

B. Procedural History

On or about October 16, 2014, the Complainant filed the Complaint against the Company asking that the Commission order the Company to not use herbicides to control the vegetation growing in the Right-of-Way that crosses her property.

On or about November 19, 2014, the Complaint was served upon the Company via electronic mail.

On December 9, 2014, West Penn filed an Answer admitting in part and denying in part the material allegations set forth in the Complaint.

On March 9, 2015, a Notice was issued scheduling the matter for hearing on Thursday, April 16, 2015 before Administrative Law Judge Susan D. Colwell (“ALJ”). On March 10, 2015, the ALJ issued a Prehearing Order.

On March 20 and 26, 2015, the Complainant contacted counsel for the Company and requested a continuance of the hearing to obtain legal representation. Counsel for the Company agreed to each continuance request.

On April 7, 2015, the ALJ issued a Cancellation/Reschedule Notice scheduling hearing on the matter on June 3, 2015.

The Complainant did not obtain legal representation, but instead, contacted DEP and made a series of allegations to DEP regarding the Company’s conduct on her neighbor’s property.

An evidentiary hearing was held in this matter on June 3, 2015. The Complainant appeared *pro se*.

On June 4, 2015, the ALJ issued a Briefing Order scheduling deadlines for Main Briefs and Replies to Main Briefs.

On June 23, 2015, the Company submitted supplemental exhibits regarding the Company's compliance with environmental regulations.

West Penn submits this Main Brief in accordance with the briefing schedule established in the Briefing Order.

II. PROPOSED FINDINGS OF FACT

1. The Complainant is Sarah Bernardi, 1022 Dahlia Lane, Jeanette, Pennsylvania 15644. (N.T. 9:25, 10:1.)

2. The Respondent is West Penn Power Company, a jurisdictional public utility providing residential electric service in the Commonwealth of Pennsylvania to the Complainant.

3. This Complaint and dispute concern West Penn's plans to control the vegetation growing in a Right-of-Way granted to the Company via a properly recorded Easement.

4. The Complainant owns three parcels of land along Dahlia Lane in Jeanette, Pennsylvania: 3.39 acres, 5.06 acres and 8.313 acres, comprising a total of 16.76 acres. The Complainant resides at the parcel of 3.39 acres and rents the 8.313-acre parcel to tenants. (N.T. 82:21-25; Compl. Exhibit 1.)

5. The Complainant and her tenant obtain water from wells located on the Complainant's parcels. (N.T. 84:24-25, 25:1; Compl. Exhibit 5 (last page).)

6. The Company installed 138kV transmission facilities (the "TMU-222 line") in a Right-of-Way granted to the Company at the Service Location pursuant to a written Easement executed in 1989 between the Complainant's predecessor in interest and the Company. (N.T. 134:20-22; West Penn Exhibit 4.)

7. The Easement states, in part:

...Grantors [Bernardi's predecessor in interest] herein do grant unto the said West Penn Power Company, subject as hereinafter provided, a right of way or easement

100 feet in width, to construct, operate, repair, maintain, remove and rebuild a portion of an electric transmission system consisting of such poles, wires, cables, telephone wires, and fixtures as the said West Penn Power Company may deem necessary...

* * *

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

(West Penn Exhibit 4.)

8. The TMU-222 line crosses the edge of the 8.313-acre parcel of land that the Complainant rents to tenants. (N.T. 82:23-24; Compl. Exhibits 1, 5 (last page).)

9. The Complainant's 8.313-acre property slopes steeply downhill toward the Right-of-Way. (Compl. Exhibit 5; N.T. 90:1-4.)

10. A stream flows underneath the TMU-222 line at the bottom of the steep hill at the end of the Complainant's 8.313-acre parcel. (N.T. 18:7-14, 19:7-9; Compl. Exhibit 1.)

11. The stream is not located on the parcel of land that contains the Complainant's residence or her well. (N.T. 19:7-9; Compl. Exhibit 1)

12. The TMU-222 line and the stream below it are at least 400 feet downhill from the rental unit and well on the Complainant's 8.313-acre parcel. (N.T. 85:20-22; Compl. Exhibits 1, 5.)

13. The TMU-222 line and the stream below it are at least 550 feet downhill from the 3.39-acre parcel where the Complainant resides and obtains water from a well. (N.T. 87:21-25; Compl. Exhibits 1, 5.)

14. Following and in response to the 2003 northeast blackout, the Company developed a Transmission Vegetation Maintenance Policy ("TVMP") which is based on

integrated vegetation management (“IVM”). (N.T. 129:11-13, 131:4-6, 132:16-23, 133:11-13, 136:20-25, 137:1-15; West Penn Exhibits 1, 2, 3.)

15. IVM is a system of controlling plant communities to specific objectives by identifying compatible and incompatible vegetation, setting thresholds for action, evaluating, and then selecting and implementing the most appropriate control methods to achieve the stated objectives. (N.T. 125:21-25, 126:1-15, 128:1-25, 129:1-2; West Penn Exhibits 1, 2, 3.)

16. The objective of the Company’s TVMP is to maintain safe and reliable electric service through effective transmission line clearance in compliance with industry standards and the National Electric Safety Code. (N.T. 125:23-25, 128; West Penn Exhibits 1, 2, 3.)

17. The Company’s TVMP implements nationally recognized best management practices and IVM standards to ensure the safety and reliability of its transmission lines and to prevent outages caused by vegetation interference. (128:1-25, 129:1-2; West Penn Exhibits 1, 2, 3.)

18. The TVMP requires removal of incompatible vegetation growing in the Company’s transmission rights-of-way through a combination of mechanical cutting and herbicide application. (N.T. 126:1-15; West Penn Exhibit 3.)

19. “Incompatible vegetation” is defined by the TVMP as vegetation that, when reaching its full height at maturity, will grow tall enough to affect the conductors. (N.T. 126:1-15; West Penn Exhibits 1, 2, 3.)

20. The Company uses herbicides to eliminate and prevent regrowth of incompatible vegetation because repeated trimming or cutting will not eliminate the incompatible plants. (N.T. 141:3-20.)

21. The Company employs vegetation management contractors certified by the Pennsylvania Department of Agriculture to apply Environmental Protection Agency (“EPA”)-approved herbicides according to the EPA-approved application directions printed on the labels of the herbicides. (N.T. 131-132:1-15, 186:7-13; West Penn Exhibits 1, 2, 3; Compl. Exhibit 13.)

22. The Company’s contractors control herbicide runoff and drift through the use of soil-degrading herbicides and reduced spray pressure. (N.T. 186:17-21.)

23. Prior to 2014, the Company last maintained the vegetation growing in the TMU-222 line in 2009, and had visited the TMU-222 line for off-cycle maintenance in 2003-2006 and 2008. (N.T. 143:21-25, 144:1-2.)

24. Under the TVMP, the Company completes vegetation maintenance on a five-year cycle, and consistent with that program, the Right-of-Way was scheduled for vegetation maintenance in 2014. (N.T. 143:16-20.)

25. Currently, the Right-of-Way is densely filled with incompatible vegetation. (N.T. 139:6-19.)

26. Thick growth of low brush is present in the Right-of-Way, inhibiting the Company’s ability to access its electric facilities and structures in the transmission corridor. (N.T. 174:20-26, 175:1-8.)

27. On May 22, 2014, a representative from the Company’s vegetation maintenance contractor, Arbormetrics, met with the Complainant to notify her of the planned vegetation maintenance in the Right-of-Way. (N.T. 178-179; West Penn Exhibit 6.)

28. The vegetation maintenance plan, or “prescription” developed at that time for the Right-of-Way involved trimming and cutting vegetation and high-volume foliar application of

herbicide to the brush. High-volume foliar herbicide application involves application of herbicide to all brush growing in the Right-of-Way. (N.T. 180:7-25, 181:1-4; West Penn Exhibit 6.)

29. At the May 22, 2014 meeting, the Complainant stated she would not allow the use of herbicides in the Right-of-Way. (N.T. 181; West Penn Exhibit 6.)

30. After receiving the Complainant's refusal, FirstEnergy Transmission Vegetation Maintenance Specialist Jeff Eicher visited the property in July 2014. (N.T. 182:1-2.)

31. On August 6, 2014, Mr. Eicher sent a letter to the Complainant explaining the Company's planned maintenance of the vegetation growing in the Right-of-Way. The letter modified the Company's prescription for vegetation maintenance to manual cutting of vegetation followed by a "cut/stump" application of herbicide with the active ingredient glyphosate. (N.T. 182:5-25, 183:1-10; Compl. Exhibits 3, 4.)

32. The Company changed the work plan for the Right-of-Way to allay the Complainant's concerns about groundwater contamination. (N.T. 183:2-10, 184:24-25, 185:1-6, 186; Compl. Exhibit 13.)

33. Glyphosate is approved for use in or near water and must be applied directly to the target plant to be effective. (N.T. 183:16-24, 184:7-21; Compl. Exhibit 13.)

34. The "prescription," or plan, to control vegetation at the Right-of-Way never included application of herbicide to the stream. (N.T. 187:2-8; Compl. Exhibit 3, 4.)

35. On August 11, 2014, Mr. Eicher provided the Complainant with copies of the label for the herbicides that were prescribed for use in the Right-of-Way. (N.T. 185:7-12.)

36. On August 11, 2014, Mr. Eicher explained that the Company would utilize a “cut/stump” herbicide application to the vegetation growing in the Right-of-Way. (N.T. 185:13-18.)

37. “Cut/stump” application of herbicide involves manually cutting incompatible vegetation down to within two to three inches from the ground and then treating the cut surface of the vegetation with a herbicide to control regrowth. (N.T. 140:18-25, 141:1-2; West Penn Exhibit 2 (page 14 of 26).)

38. Herbicides applied using a “cut/stump” application are applied by hand and the spray nozzle is between three and 12 inches from the target plant. (N.T. 187:25, 188:1-10; West Penn Exhibit 2 (page 14 of 26).)

39. The Complainant refused the prescription offered by Mr. Eicher on August 6, 2014 and on September 10, 2014, the Complainant filed an Informal Complaint with the Commission’s Bureau of Consumer Services (“BCS”) at BCS Case No. 3283664. (Compl. Exhibit 8.)

40. On September 16, 2014, representatives of the Company’s Transmission Forestry division, Asplundh Tree Experts and representatives of industry herbicide experts Arbor Chem and EnviroSolutions Group met with the Complainant to discuss the vegetation maintenance planned for the Right-of-Way. (N.T. 189:1-18; Compl. Exhibit 8.)

41. On October 10, 2014, the BCS dismissed the Informal Complaint at Case No. 3283664, concluding that (i) the Company’s agents possessed proper utility line pesticide licenses; (ii) an aquatic category license is not required for pesticide application on a right-of-way; (iii) the Company had the right via the Easement to have registered technicians apply EPA-approved herbicides to the Right-of-Way. (Compl. Exhibit 8.)

42. The Company has not applied any herbicides at the Service Location since the Complainant first objected to their use in May 2014. (N.T. 196.)

43. Glyphosate applied using the “cut/stubble” application method will not contaminate the Complainant’s well which is located 400 feet away and uphill from the treatment area. (N.T. 187:15-24.)

44. Consistent with its TVMP, the Company applied herbicides to vegetation growing in the TMU-222 transmission corridor where it crosses other landowners’ property. (N.T. 97:1-18.)

45. Consistent with its TVMP, the Company applied herbicides to vegetation in conformity with EPA guidelines and controlled the vegetation consistent with the herbicide’s intended use and application. (N.T. 158:1-10, 23-25, 159:1-10.)

46. The Company did not apply herbicides to water, nor was spraying herbicides into water ever part of a prescription for controlling terrestrial plants growing in the TMU-222 transmission corridor. (N.T. 156:13-14, 157:21-22.)

47. The Company’s agents possess the appropriate pesticide permit, permit number 10, authorizing the use of herbicides in rights-of-way. (Compl. Exhibit 8.)

48. The Company is in compliance with its National Pollution Discharge Elimination System (“NPDES”) General Permit PAG-15 regarding herbicide application in the Commonwealth of Pennsylvania. (West Penn Exhibits 7, 8, 9; Compl. Exhibit 9.)

49. The DEP manages the national NPDES program in Pennsylvania. (West Penn Exhibits 7, 8, 9; Compl. Exhibit 9.)

50. In September 2012, DEP issued NPDES PAG-15, General Permit for Point Source Discharges to Waters of the Commonwealth of Pennsylvania. Supplemental Exhibit 7 is a copy of General Permit PAG-15. (West Penn Exhibits 7, 9.)

51. DEP issued guidance in the format of a Frequently Asked Questions (“FAQ”) document explaining the operation of General Permit PAG-15. Supplemental Exhibit 8 is a copy of the DEP fact sheet explaining General Permit PAG-15. (West Penn Exhibits 8, 9.)

52. FirstEnergy’s vegetation maintenance program does not target waters of the Commonwealth for direct discharge of herbicides, and includes operating procedures designed to minimize any incidental or inadvertent discharge to surface water. (West Penn Exhibit 9, ¶ 9.)

53. PAG-15 provides permit coverage to operators who apply pesticides at “water’s edge,” which includes upland areas adjacent to surface water features up to a distance of 100 feet. (West Penn Exhibit 9, ¶ 10.)

54. As explained on page 6-7 of Supplemental Exhibit 8, if an operator’s discharges to the waters of the Commonwealth exceed 20 linear miles at “water’s edge” or 80 acres of water, then, prior to discharge, the operator must submit a Notice of Intent (“NOI”) to DEP to be covered by the general permit. (West Penn Exhibits 8, pages 6-7; 9, ¶ 11.)

55. If the vegetative maintenance project does not exceed the thresholds cited in Paragraph 54 above, the operator’s discharges to waters of the Commonwealth are automatically covered under the PAG-15 General Permit without the requirement to submit an NOI. (West Penn Exhibit 9, ¶ 13.)

56. During the 2014 vegetation maintenance cycle at issue in this dispute, the treatment areas near Ms. Bernardi’s property did not involve 20 linear miles at “water’s edge” or

80 acres of water. Therefore, West Penn was automatically covered under the PAG-15 General Permit and was not required to submit an NOI. (West Penn Exhibit 8, page 3.)

57. During the 2014 vegetation maintenance cycle at issue in this dispute, West Penn complied with General Permit PAG-15. (West Penn Exhibit 9, ¶ 17.)

III. STATEMENT OF THE QUESTIONS PRESENTED

1. Q. Whether the Commission has jurisdiction to determine if the Company violated any environmental statutes or regulations administered by the Pennsylvania Department of Environmental Protection?

A. *Proposed answer: No*

2. Q. Whether the Complainant has met her burden of proof under Code Section 332(a) by a preponderance of the evidence that West Penn has failed to provide safe, adequate and reasonable electric service to the Service Location?

A. *Proposed answer: No*

3. Q. Whether the Company rebutted any *prima facie* case established by the Complainant?

A. *Proposed answer: Yes*

4. Q. Whether the Company's plan to use herbicides to control vegetation according to its transmission vegetation maintenance policy is reasonable?

A. *Proposed answer: Yes*

IV. APPLICABLE LEGAL STANDARDS

A. Jurisdiction of the Commission

Section 701 of the Code provides that any person may complain, in writing, about any act or thing done or omitted to be done by a public utility in violation, or claimed violation, of any law that the Commission has jurisdiction to administer, or any regulation or order of the Commission.²

² 66 Pa.C.S. § 701.

The Commission has only those duties, powers, responsibilities and jurisdiction as are expressly or by necessary implication given to it by the Legislature.³ The Commission must act within, and cannot exceed, its jurisdiction.⁴ Jurisdiction may not be conferred by the parties where none exists.⁵ A challenge to subject matter jurisdiction of a forum to hear a particular dispute is never waived; this jurisdictional question may be raised at any stage of the judicial process.⁶

It is well-established that the Commission does not have jurisdiction over compliance with state or federal environmental laws.⁷ Specifically, “DEP regulates the National Pollution Discharge Elimination System program in the Commonwealth.”⁸

B. Adequate, efficient, safe and reliable service

Code Section 1501 contains the substantive legal standard applicable to this proceeding. Under Code Section 1501, every public utility has a duty to “...furnish and maintain adequate, efficient, safe, and reasonable service and facilities and to 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.”⁹ The term “service” means not only the distribution of electrical

³ *Rogoff v. The Buncher Company*, 395 Pa. 477, 151 A.2d 83 (1959), *Western Pennsylvania Water Company v. Pa. P.U.C.*, 311 A.2d 370 (Pa. Cmwlth. 1973).

⁴ *City of Pittsburgh v. Pa. P.U.C.*, 43 A.2d 348 (Pa. Super. 1945).

⁵ *Roberts v. Martorano*, 427 Pa. 581, 235 A.2d 602 (1967).

⁶ *Commonwealth v. Atlantic & Gulf Coast Stevedores, Inc.*, 422 Pa. 442, 221 A.2d 128 (1966), *see also Lydine Dutton v. Cordia Communications Corporation*, Docket No. F-2010-2201413 (Final Order entered September 22, 2011) (“...jurisdictional issues are never waived...”).

⁷ *See Pickford v. Pa. P.U.C.*, 4 A.3d 707, 713-714 (Pa. Cmwlth. 2010) (holding that “[t]he issue of water purity is under the exclusive jurisdiction of the DEP as it has primacy over the enforcement of the Safe Drinking Water Act.”); *Country Place Waste Treatment Company, Inc. v. Pa. P.U.C.*, 654 A.2d 72 (Pa. Cmwlth. 1995); *Rovin v. Pa. P.U.C.*, 502 A.2d 785, 787 (Pa. Cmwlth. 1986) (holding that enforcement of state and federal environmental statutes is “specifically vested in [DEP] and the Federal Environmental Protection Agency.”)

⁸ *Re: Monteforte Enterprises, Inc.*, Docket No. R-2008-2038570 (Final Order entered July 17, 2008).

⁹ 66 Pa.C.S. § 1501.

energy, but also, includes any and all acts related to that function, even the maintenance practices that an electric utility undertakes.¹⁰

The Commonwealth Court has ruled that Code Section 1501 requires a complainant to establish that a public utility violated its duty to provide reasonable service in order to sustain a complaint brought under this section:

We hold that in order for the PUC to sustain a complaint brought under this section, the utility must be in violation of its duty under this section. Without such a violation by the utility, the PUC does not have the authority, when acting on a customer's complaint, to require any action by the utility.¹¹

Similarly, Section 57.194(a) of the Commission's regulations, states that "an EDC shall furnish and maintain adequate, efficient, safe and reasonable service and facilities, and shall make repairs, changes, alterations, substitutions, extensions and improvements in or to the service and facilities necessary or proper for the accommodation, convenience and safety of its patrons, employees and the public. The service shall be reasonably continuous and without unreasonable interruptions or delay."¹²

C. Burden of proof

Code Section 332(a) states that the proponent of a rule or order has the burden of proof in a Commission proceeding,¹³ except as otherwise provided in Code Section 315.¹⁴ "Burden of proof" means a duty to establish a fact by a preponderance of the evidence, or evidence more

¹⁰ *West Penn Power Co. v. Pa. Pub. Util. Comm'n*, 578 A.2d 75 (Pa. Cmwlth. 1990). See also Code Section 102, which defines "service" in pertinent part as:

. . . 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, or contract carriers by motor vehicle, in the performance of their duties under this part to their patrons, employees, other public utilities, and the public . . .

¹¹ *West Penn Power Co. v. Pa. P.U.C.*, 478 A.2d 947, 949 (Pa. Cmwlth. 1984) (footnote omitted).

¹² 52 Pa. Code § 57.194(a).

¹³ 66 Pa.C.S. § 332(a).

¹⁴ 66 Pa.C.S. § 315.

convincing, by even the smallest degree, than the evidence presented by the other party.¹⁵ In order to prevail in this proceeding, the Complainant has the burden of showing that the Company is responsible or accountable for the problem described in the Complaint.¹⁶ The Complainant must establish her case by a preponderance of the evidence.¹⁷

If a complainant establishes a *prima facie* case, the burden of going forward with the evidence shifts to the utility.¹⁸ If a utility does not rebut that evidence, a complainant will prevail.¹⁹ If the utility rebuts complainant's evidence, the burden of going forward with the evidence shifts back to a complainant, who must rebut the utility's evidence by a preponderance of the evidence.²⁰ The burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on the complainant.²¹

Furthermore, substantial evidence in the record must support the decision of the Commission.²² The term "substantial evidence" means such relevant evidence that a reasonable mind may accept as adequate to support a conclusion.²³ More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.²⁴ In addition, the

¹⁵ *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

¹⁶ *Patterson v. Bell Telephone Company of Pennsylvania*, Docket No. F-8966524 (Final Order Entered February 8, 1990), *Feinstein v. Philadelphia Suburban Water Company*, Docket No. 20822 (Final Order Entered October 6, 1976).

¹⁷ *Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600 (Pa. Cmwlth. 1990), alloc. den., 529 A.2d 654, 602 A.2d 863 (1992).

¹⁸ *Heller v. Indian Spring Water Co.*, C-2012-2334240 (Final Order Entered June 7, 2013) (citing *Replogle v. Pennsylvania Electric Company*, Docket No. F-06727378 (Final Order Entered October 9, 1980)), and *Waldron v. Philadelphia Electric Company*, 54 Pa. PUC 98 (1980).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² See, e.g., Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704, *Yellow Cab Company v. Pa. P.U.C.*, 524 A.2d 1069 (Pa. Cmwlth. 1987).

²³ *Norfolk & Western Ry. Co. v. Pa. P.U.C.*, 489 Pa. 109, 413 A.2d 1037 (1980).

²⁴ *Norfolk & Western Ry. Co. v. Pa. P.U.C.*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Commonwealth, Dep't. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

offense must be a violation of the Code, the Commission's regulations, or an outstanding order of the Commission.²⁵

Accordingly, the record in this case must be reviewed to determine whether the Complainant has satisfied her burden of proof, i.e., whether the Complainant has established by a preponderance of the evidence that West Penn has failed to provide safe, adequate and reasonable service to the Service Location. And, any finding that West Penn has provided unreasonable service also must be supported by substantial record evidence.

V. SUMMARY OF THE ARGUMENT

The Complainant is not entitled to any relief under any of the theories she has asserted. First, as she admitted at hearing, the Complainant is attempting to convince the Commission to prevent the Company from using herbicides by alleging that the Company violated environmental laws or regulations. The Commission has absolutely no authority to hear and adjudicate allegations of environmental violations like the ones alleged by the Complainant, which is grounded upon her erroneous the interpretations of sections of Chapter 25 of the Pennsylvania Code and state and federal law. The Complaint should be dismissed on this basis alone.

Second, the Complainant has failed to establish a *prima facie* case that the Company provided unreasonable service or committed any violation of the Code, regulation, or order of the Commission. The Complainant never alleged that the Company failed to meet its obligation to provide reasonable service, and the evidence presented at hearing does not establish any wrongdoing on the Company's part.

Third, to the degree the Complainant could be considered to have carried her burden of proof (which she did not do), the Company successfully rebutted any *prima facie* case regarding

²⁵ 66 Pa.C.S. § 701; *West Penn Power Co. v Pa. P.U.C.*, 478 A.2d 947, 949 (Pa. Cmwlth. 1984).

alleged unreasonable service or environmental violations with significant evidence unchallenged by the Complainant at hearing. The Company provided substantial record evidence rebutting all claims set forth by the Complainant. The Complainant failed to rebut any of the Company's evidence.

Finally, the Commission has evaluated the Company's TVMP at least three times prior, and has concluded that the TVMP—including the use of herbicides within a right-of-way—is reasonable. The Easement grants Company the lawful right to use herbicides to remove vegetation from the Right-of-Way. The Commission should dismiss the Complaint because it is not a violation of the Code for the Company to engage in reasonable vegetation maintenance in a Right-of-Way lawfully granted to it via the Easement.

VI. ARGUMENT

A. Claims regarding the interpretation or enforcement of environmental laws and regulations are beyond the Commission's jurisdiction.

As a matter of law—and as specifically stated by the ALJ during the hearing—the Commission does not have any jurisdiction to adjudicate or enforce environmental laws.²⁶ In other words, this Commission is not empowered to evaluate the Company's conduct with respect to an environmental law or regulation. DEP makes that kind of determination, not the Commission.

At the beginning of the June 3, 2015 hearing, counsel for the Company made a motion *in limine* requesting that evidence and testimony submitted in this case be limited only to evidence

²⁶ N.T. 15:9-10 (ALJ to Complainant: "...I don't have the ability to enforce DEP's regulations."); N.T. 16:4-5 (ALJ to Complainant: "...if there's something you would like to see enforced from DEP, you would go to DEP."); N.T. 74:25, 75:1 (ALJ to Complainant: "...I've also told you that I cannot enforce [DEP] regulations..."); N.T. 75:7-9 (ALJ to Complainant: "...what I'm saying is I can't fine [the Company] for violating the Pennsylvania Code that represents DEP's regulations. Okay?").

of the public utility service provided to the Complainant by the Company.²⁷ The ALJ denied the motion and provided the Complainant significant latitude with regard to counsel's objections to the Complainant's irrelevant and extra-jurisdictional evidence and testimony related to alleged environmental violations.²⁸

In her case-in-chief, the Complainant specifically asked the ALJ to fine the Company for violations of environmental regulations and laws.²⁹ The ALJ admitted into evidence numerous documents offered by the Complainant comprised of DEP regulations, EPA materials, sections of the United States Code, and correspondence between DEP and the Complainant.³⁰ The Complainant was also permitted to testify regarding her lay opinions regarding DEP-administered programs and provide her non-expert legal conclusions about the Company's conduct in environmental settings.³¹ As a result, the record in this case is replete with exhibits and testimony that cannot form the basis for a finding of fact that the Company committed any violation within the Commission's jurisdiction to administer.

First, the Company's motion *in limine* was denied. In *Susan K. Pickford, et al. v. Pennsylvania-American Water Company*, several utility customers filed a complaint objecting to a water utility's plan to disinfect water with chloramines.³² The administrative law judge granted the water utility's motion *in limine* to exclude testimony and evidence concerning public health determinations made in the context of DEP's permitting decisions. On interlocutory review, the Commission affirmed, holding that:

²⁷ N.T. 10-12.

²⁸ N.T. 13:14-15. *See contra Susan K. Pickford, et al. v. Pennsylvania-American Water Company*, Docket No. C-20078029 *et al.*, (Opinion and Order on Interlocutory Review entered September 15, 2008 affirming administrative law judge's decision to grant a motion *in limine* excluding evidence and testimony regarding public health determinations made by DEP and the DEP permitting process).

²⁹ N.T. 15:21-24 ("Okay. Well, my case is working around the Pennsylvania state [environmental] codes that were violated. Do I have to go to the Environmental Hearing Board for this?").

³⁰ *See* Complainant's Exhibits 2-7, 9-20, 22, 23, 25.

³¹ N.T. 19, 20, 29, 32, 36, 37, 46, 47, 51, 52.

³² *Susan K. Pickford*, Docket No. C-20078029.

...DEP has primary jurisdiction with regard to the public health issues related to the use of chloramines at PAWC facilities. Therefore, allowing the introduction of public-health related evidence from the DEP permitting decisions would be improper. The Commission will not second-guess the DEP's permitting decisions or its public health determinations regarding the use of chloramines. The parties may not use this venue to collaterally attack the decisions of the DEP or the standards related to disinfectants properly within its authority under the federal and state safe drinking water laws.³³

Here, as demonstrated by the Company's Exhibits 7, 8 and 9, the Company fully complied with NPDES General Permit PAG-15 with regard to herbicide application in utility rights-of-way. The Complainant's statements of her misunderstanding³⁴ and mischaracterizations of environmental agency requirements³⁵ and her failure to comprehend the applicability of General Permit PAG-15 to the Company's conduct³⁶ are not facts establishing that the Company violated any law. Moreover, the Complainant cannot use this Commission as a venue to challenge DEP's administration of PAG-15³⁷ or any other program DEP administers. In *Susan K. Pickford*, the Commission clearly stated that it would not allow the Commission to be used as a venue for this type of collateral attack. As the Commission held in *Susan K. Pickford*, facts regarding alleged environmental violations should never have been admitted into the record in this proceeding.

Second, appellate cases addressing DEP and Commission jurisdiction draw bright-line jurisdictional boundaries between these agencies. In *Rovin v. Pa. P.U.C.*, the Commission dismissed a complaint filed by a dentist alleging that his water utility failed to provide safe, efficient, adequate and reasonable water service because the utility did not provide fluoridated

³³ *Susan K. Pickford*, Docket No. C-20078029.

³⁴ *See, e.g.*, N.T. 15:21-24, 28:1-7, 29:12-19, 56-57, 68-71.

³⁵ *See, e.g.*, N.T. 13:16-23, 23:6-11, 46-47, 52, 59, 72-74, 159:11-12.

³⁶ *See, e.g.*, N.T. 36:1-13, 71-72.

³⁷ *See n.8 supra.*

water to all of its customers.³⁸ The Commission concluded that there is no law authorizing the Commission to require utilities to fluoridate their water, and that the fluoridation issue would be within DEP's jurisdiction.³⁹ On appeal, the Commonwealth Court affirmed the Commission's dismissal, reasoning that by framing the issue in terms of water quality, and not water service, the Commission was not the proper forum to decide the matter.

It is apparent that Petitioner herein is not complainant about the quality of *service* but rather is complaining about the quality of the water.

Water *quality* in Pennsylvania is statutorily regulated by the provisions of the Pennsylvania Safe Drinking Water Act, Act of May 1, 1984, P.L. 206, 35 P.S. §§ 721.1-721.17 and the Federal Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-10. Enforcement of those statutes is specifically vested in DER [now, DEP] and the Federal Environmental Protection Agency.⁴⁰

In *Country Place Waste Treatment Company v. Pa. P.U.C.*, the Commonwealth Court reversed a Commission ruling that partially granted a customer's complaint against a water utility.⁴¹ The customer complained about odors emanating from a sewage treatment facility, and the Commission held that the utility's production of the odors constituted a violation of Section 1501 of the Code.⁴² On appeal, the Commonwealth Court reversed the Commission's determination that it had jurisdiction over the complaint.⁴³ The Commonwealth Court reasoned that nothing in the Code gives the Commission authority to regulate odors produced by a public utility. The Commonwealth Court held that under the Air Pollution Act, the legislature granted DEP specific authority to regulate "air contamination sources" producing "air pollution" which includes obnoxious odors. Accordingly, the Commonwealth Court vacated the Commission's

³⁸ *Rovin v. Pa. P.U.C.*, 502 A.2d 785, 786 (Pa. Cmwlth. 1986).

³⁹ *Id.*

⁴⁰ *Rovin*, 502 A.2d at 787 (emphasis in original).

⁴¹ *Country Place Waste Treatment Company, Inc. v. Pa. P.U.C.*, 654 A.2d 72, 76 (Pa. Cmwlth. 1995).

⁴² *Id.* at 75.

⁴³ *Id.* at 75, 76.

order, concluding: “the Legislature has placed jurisdiction of the matter at issue herein with [DEP] and not the PUC...”⁴⁴

Finally, the Commission dismissed the complaint filed in the *Susan K. Pickford* case. On appeal, in *Pickford v. Pa. P.U.C.*, the Commonwealth Court affirmed the Commission’s dismissal citing *Rovin* and held yet again that there is a clear “distinction between water service, which the Commission may regulate, and water quality, which may only be regulated by the DEP.”⁴⁵ The Court held that no matter how the complainant’s claims were characterized, they were challenging the substances used to treat water and the resulting impact on public health, which constitutes a collateral attack on the DEP permitting process.⁴⁶ The Commonwealth Court held that the Commission did not err in refusing to re-litigate or second-guess DEP’s determinations regarding water quality.⁴⁷ The Court reasoned:

Again, it is the DEP that *has clear and primary jurisdiction regarding water quality under the Safe Drinking Water Act*. Petitioners’ request that the Commission reexamine the public health determinations made by the DEP is a straight forward collateral attack on the DEP approval. To allow the actions to go forward would overturn the Legislature’s policy choice to entrust such matters to the DEP.⁴⁸

These cases clearly hold that the Commission is not the proper forum to litigate environmental questions about water quality or DEP permitting issues. The Complainant repeatedly argued that the Company’s plan to use EPA-approved herbicides creates a water quality issue.⁴⁹ DEP has “clear and primary jurisdiction” regarding water quality issues, not the Commission. The Commission must disregard all of the Complainant’s evidence, exhibits and

⁴⁴ *Id.* at 76.

⁴⁵ *Pickford v. Pa. P.U.C.*, 4 A.3d 707, 713 (Pa. Cmwlth. 2010).

⁴⁶ *Id.* at 714.

⁴⁷ *Id.*

⁴⁸ *Id.* (emphasis added).

⁴⁹ See n.31 *supra*.

testimony related to DEP permitting and the quality of the water in the stream that flows in the Right-of-Way that crosses her property, because those issues are beyond the Commission's jurisdiction to decide.⁵⁰

B. The Complainant failed to meet her burden of proof.

As the party seeking a rule or order from this Commission in this case, i.e., a finding that West Penn had failed to provide reliable electric service to the Service Location, the Complainant has the burden of proof in this matter.⁵¹ As explained above, the Complainant's entire case-in-chief consisted mainly of her allegations of environmental violations that the Commission has no jurisdiction to adjudicate and determine. The Complainant supported her case with the following evidence: (i) Sarah Bernardi's testimony consisting of her lay opinions and beliefs that the Company's plan to treat vegetation growing in the Right-of-Way with herbicides is an environmental hazard;⁵² and (ii) photographs of other properties that the Company treated with herbicides; and (iii) copies of DEP and EPA regulations.⁵³

Both the Code and the Commission's regulations require only that a public utility provide service that is reasonably continuous and without unreasonable interruptions.⁵⁴ In *Re Metropolitan Edison Co.*,⁵⁵ the Commission adopted the Recommended Decision of ALJ John H. Corbett, Jr. as follows:

The Code only requires a public utility to furnish reasonable service. 66 Pa. Code § 1501. It does not mandate perfect service nor must a public utility provide the best possible service. Most certainly, a public utility is not a guarantor of either perfect service or the best possible service.

⁵⁰ See *Susan K. Pickford, et al. v. Pennsylvania-American Water Company; Rovin v. Pa. P.U.C.; Country Place Waste Treatment; Pickford v. Pa. P.U.C.*

⁵¹ See *supra*, p. 13-14.

⁵² N.T. 19, 20, 29, 32, 36, 37, 46, 47, 51, 52.

⁵³ See Complainant's Exhibits 2-7, 9-20, 22, 23, 25.

⁵⁴ See *supra*, p. 12-13.

⁵⁵ 80 Pa. PUC 662, 672 (1993).

The same principle was affirmed in *Emerald Art Glass v. Duquesne Light Co.*: “[s]ection 1501 of the Code does not translate into a duty to provide ‘perfect’ service.”⁵⁶

Applied here, the evidence presented by the Complainant does not establish that the Company did anything that could be characterized as unreasonable service at any time relevant to this proceeding. The Complainant provided no evidence showing that the Company’s plan to apply herbicides to terrestrial plants within its lawful Right-of-Way is unreasonable service or a violation of any provision the Commission has jurisdiction to administer. Therefore, the Complainant has failed to establish a *prima facie* case in support of her claims.

The Complainant alleged that herbicide use in the Right-of-Way is not “safe” and she was “afraid” of herbicide contamination.⁵⁷ At the hearing, Sarah Bernardi provided lay opinion testimony that vegetation on other landowner’s property died after being “poisoned” with herbicide.⁵⁸ She expressed her personal concerns about herbicides leaching into the stream in the Right-of-Way and into the wells on her property which are located more than 400 feet away from the treatment area.⁵⁹ However, she admitted that she had no proof that herbicide ever reached well water,⁶⁰ but she speculated that herbicide “could have infiltrated the well.”⁶¹ Most importantly, Ms. Bernardi admitted she never had the stream water tested to determine if herbicides were present.⁶² Her anecdotes regarding whether or not the herbicides used on other landowner’s property were applied into the stream were inconclusive and evasive. When describing what she saw the Company doing on her neighbor’s property, she testified as follows:

⁵⁶ Docket No. C-00015494 (Order entered June 14, 2002), at 7 (“Emerald Art Glass”); *see also Analytical Laboratory Services, Inc. v. Metropolitan Edison Co.*, Docket No. C-20066608 (Order entered December 21, 2007).

⁵⁷ N.T. 25:5-6.

⁵⁸ N.T. 36:19-25.

⁵⁹ N.T. 37:1-5.

⁶⁰ N.T. 37:2-4 (“...we don’t have any proof that it infiltrated the well...”); 98:14-15 (“I just don’t know if [herbicide] went in the wells.”)

⁶¹ N.T. 37:4-5.

⁶² N.T. 98:1-25, 100:4-6.

Q: (by Attorney Wauhob): Okay. So Ms. Bernardi, what you're saying is you didn't see anybody take a nozzle of a sprayer and direct it into the water; did you?

A: (by Sarah Bernardi): Yeah, I did. Yeah.

Q: You did? Was it on --- ?

A: The nozzle was sprayed down, and the man was walking with it.

Q: Where?

A: Along the right-of-way under the transmission line. I could see him coming towards me in the distance, and there was another little Mexican man standing there with me who also saw it. And my son also saw it.

Q: Is it your testimony that someone was not treating plants and shrubs, but was treating water? Is that your testimony?

A: My testimony is that they treated the whole area. They sprayed both sides of the bank, across the creek and into the water as they sprayed the other side of the creek.⁶³

Objectively, Ms. Bernardi's evasive description of a person walking "along the right-of-way ... in the distance" with the spray nozzle pointed "down" fails to credibly establish that the Company applied herbicide to the water, especially considering that two Company witnesses testified repeatedly that the treatment protocols in the TMU-222 transmission corridor do not specify aquatic application of herbicide, and at no time did the Company apply herbicide to the stream.⁶⁴ It was fairly obvious at hearing that Ms. Bernardi was adapting her story to reach her desired outcome; as such, her testimony is not substantial evidence.⁶⁵ It also lacks credibility that the Company's contractor would "treat" surface water with herbicide during a terrestrial plant application. Moreover, Ms. Bernardi has no standing to prosecute claims for service the Company provided to other customers (including vegetation maintenance on her neighbor's

⁶³ N.T. 99:9-25, 100:1-3.

⁶⁴ N.T. 145:1-11, 150:21, 151:1, 156:13-14, 157:21-22, 166:13-18, 187:2-8, 196:17-25; Compl. Exhibits 3, 4.

⁶⁵ *Norfolk & Western Ry. Co. v. Pa. P.U.C.*, 489 Pa. 109, 413 A.2d 1037 (1980).

property),⁶⁶ so all of her testimony on this issue is *irrelevant* in determining whether the Company provided safe and reasonable service *to her*.

Ms. Bernardi's statements of her fears, speculations, suspicions and opinions are not facts.⁶⁷ Moreover, the Complainant's opinions and beliefs in areas of herbicide use and arboriculture are scientific in nature and require an expert. Ms. Bernardi did not testify that she was an expert in arboriculture or herbicides, or that she was an expert of any kind whatsoever, and she failed to produce an expert to provide expert scientific opinions. Therefore, her lay opinion testimony regarding scientific matters must be disregarded in its entirety. She failed to carry her burden of proof and as a result, the Commission should dismiss her Formal Complaint.

C. The Company successfully rebutted the Complainant's case with substantial evidence.

Even assuming *arguendo* that the Complainant established a *prima facie* case against the Company (which she did not do), the Company rebutted the Complainant's case with substantial and compelling testimony and exhibits at hearing. First, the Company presented the testimony of Richard Scott, West Penn's Supervisor of Transmission Vegetation Management, who is certified by the International Society of Arboriculture as both an Arborist and a Utility Arborist Specialist, with 15 years of experience in the field of arboriculture.⁶⁸ Mr. Scott presented testimony and exhibits establishing the following critical facts:

⁶⁶ See *Minto v. Aqua Pennsylvania, Inc.*, Docket No. C-2013-2369043 (Initial Decision Partially Granting Respondent's Motion for Judgment on the Pleadings entered August 20, 2013 striking the portion of customer's complaint challenging the reliability, safety or quality of the water service provided by the utility to the customer's neighbors); *Powell v. Verizon Pennsylvania, Inc.*, Docket No. C-2011-2264876 (striking claim asserted by customer on behalf of her neighbors); *Gera v. PPL Electric Utilities Corp.*, Docket No. C-20054657 (Final Order entered April 6, 2006 modifying Initial Decision and holding that the customer has no standing to complain about the utility's failure to read his neighbor's meter).

⁶⁷ *Norfolk and Western Ry. v. Pa. P.U.C.*, 489 Pa. 109, 413 A.2d 1037 (1980), *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 166 A.2d 96 (Pa. Super. 1960), *Murphy v. Commonwealth, Dep't. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

⁶⁸ N.T. 120:13-25, 121-122, West Penn Exhibits 1, 2, 3.

- The Company’s TVMP is based on nationally accepted arboricultural best practices and standards, including American National Standards Institute (“ANSI”) A300 and the International Society for Arboriculture IVM standards;⁶⁹
- The Company’s TVMP is designed to comply with National Electric Safety Code standards for transmission corridors;⁷⁰
- The objective of the TVMP is to ensure safety and reliability of the transmission system by promoting low-growth plant communities that will not pose a threat to the transmission facilities in the Right-of-Way;⁷¹
- The arboricultural industry best practice for ensuring safety and reliability of transmission lines is to remove incompatible vegetation and encourage compatible vegetation growth in transmission corridors;⁷² and
- Arboricultural industry best practices for controlling incompatible vegetation specifically authorize and recommend the use of EPA-approved herbicides.⁷³

Mr. Scott sponsored a copy of the Easement creating the Right-of-Way in favor of the Company, which states that the Company may “... 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 system, and the right to control the undergrowth thereon, by such methods as West Penn Power Company may determine.”⁷⁴ The Commission has held that this easement language grants a public utility the right to use herbicides to maintain vegetation in a right-of-way.⁷⁵

⁶⁹ N.T. 129:11-13, 131:4-6, 132:16-23, 133:11-13, West Penn Exhibits 1, 2, 3.

⁷⁰ N.T. 128.

⁷¹ N.T. 125:23-25, 128, West Penn Exhibits 1, 2, 3.

⁷² N.T. 125-128.

⁷³ N.T. 132.

⁷⁴ West Penn Exhibit 4.

⁷⁵ In *Burek v. Pennsylvania Electric Company*, Docket No. C-20028132 (Initial Decision issued March 13, 2003; Final Order entered June 27, 2003) (“Burek”), the complainants filed a formal complaint raising numerous issues, including a challenge to Pennsylvania Electric Company’s (“Penelec”) use of herbicides in the right-of-way that crossed the complainants’ property. The complainants objected when herbicides were applied in the right-of-way. Penelec presented evidence that it properly applied EPA-approved herbicides to the complainant’s property. After an evidentiary hearing, the ALJ found that the easement granted Penelec the right to “construct, maintain and operate an electric line” and remove vegetation within 30 feet of any wire on the line. The ALJ reasoned that the utility’s use of herbicides to prevent re-sprouting and regeneration of incompatible vegetation was “maintenance” within the rights granted to it via the easement and that:

In addition, Mr. Scott testified that:

- The Right-of-Way is currently filled with woody vegetation that has the ability to grow to a size where it may interfere or threaten to interfere with the Company's facilities.⁷⁶
- The herbicide application prescribed for the Right-of-Way is "cut/stump" application, which involves applying herbicide to plant stems remaining after the plants had been mechanically cleared;⁷⁷
- The Company applied herbicide to the neighboring properties in complete compliance with the manufacturer's labels and with local, state and federal laws;⁷⁸
- The herbicides that were applied to the neighboring properties were not applied to the water;⁷⁹ and
- The herbicides that were applied to the neighboring properties are not restricted herbicides.⁸⁰

The Company also presented the testimony of Jeff Eicher, a FirstEnergy Transmission Vegetation Management Specialist who is an ISA-certified Arborist with a Number 10 herbicide application license and 34 years of experience in utility corridor vegetation maintenance.⁸¹ Mr. Eicher confirmed that thick growth of low brush is present in the transmission corridor as well as species of woody plants that will grow large enough to pose a threat to the transmission facilities.⁸² He testified that the Company employs trained personnel who maintain proper pesticide application licenses to apply EPA-approved herbicides according to the manufacturer's

[t]his type of maintenance is necessary to keep Penelec's right-of-way accessible and to reduce the amount of future maintenance. This, in turn, enhances the reliability of Penelec's service. Because vegetation maintenance is required to maintain a line, Penelec had the right under the 1946 agreement to apply herbicide.

The ALJ also concluded that the complainants failed to substantiate their assertions that Penelec's agents applied herbicides improperly.

⁷⁶ N.T. 138-139.

⁷⁷ N.T. 140:18-25, 141.

⁷⁸ N.T. 144:17-25, 145:1-5.

⁷⁹ N.T. 145:1-11, 150:21, 151:1, 156:13-14, 157:21-22, 166:13-18.

⁸⁰ N.T. 167:15-20.

⁸¹ N.T. 172.

⁸² N.T. 174:20-26, 175:1-8.

instructions located on the labels.⁸³ He testified that the prescription for controlling the vegetation in the Right-of-Way is mechanical clearing followed by a “cut/stump” herbicide application,⁸⁴ which will minimize the risk of runoff or drift.⁸⁵ Mr. Eicher explained that when employing the “cut/stump” herbicide application, the nozzle of the herbicide application sprayer is positioned between 3 and 12 inches from the target plant.⁸⁶ He further testified that he has never witnessed herbicide applied in the “cut/stump” method travel hundreds of feet uphill to contaminate well water.⁸⁷ He explained that the Company changed the herbicide prescription for the Right-of-Way to glyphosate because the Complainant was concerned about groundwater contamination and glyphosate degrades in soil to prevent contamination.⁸⁸ He also confirmed that the Company has not done anything to control the vegetation in the Right-of-Way since receiving the Complainant’s refusal.⁸⁹

In addition, the evidence presented at hearing clearly established that the Company has acted reasonably at all times relevant to this proceeding, including halting the use of herbicides in the Right-of-Way after receiving an objection from the Complainant, even though the Easement places no such obligation upon the Company. The Company followed its TVMP policy, which requires foresters and contractors to engage in dialogue and informative discussion with landowners like the Complainant prior to commencing vegetation maintenance in its lawful rights-of-way. Company representatives exchanged correspondence with the Complainant numerous times and held a meeting with the Complainant regarding the proposed vegetation

⁸³ N.T. 186:7-13.

⁸⁴ N.T. 187, 188.

⁸⁵ N.T. 186:17-25, 187:1.

⁸⁶ N.T. 187:25, 188:1-10; West Penn Exhibit 2 (page 14 of 26).

⁸⁷ N.T. 188:11-14.

⁸⁸ N.T. 183:2-10, 184:24-25, 185:1-6, 186; Compl. Exhibit 13.

⁸⁹ N.T. 196:11-13.

maintenance.⁹⁰ So, while the Easement contains no language obligating the Company to honor the Complainant's objections,⁹¹ that is precisely what the Company did in this case. The evidence presented at hearing clearly establishes that the Company acted reasonably, respectfully and professionally when dealing with the Complainant and addressing her objections.

The Company's witnesses testified in great detail that the Company employs trained personnel who maintain proper certifications to apply EPA-approved herbicides according to manufacturer's instructions located on the labels, and that the Company's herbicide prescription was designed to minimize runoff and drift. The Complainant failed to elicit any facts or evidence rebutting the Company's evidence clearly establishing that its conduct in this matter, including the plan to apply herbicides in the Right-of-Way, is reasonable.⁹²

Therefore, the Complaint should be dismissed because the Complainant failed to carry her burden of proof establishing a *prima facie* case that the Company committed any violation. Furthermore, to the degree that the Complainant could be viewed to have established a *prima facie* case against the Company (which the Complainant failed to establish), the Company presented substantial expert testimony and evidence sufficient to rebut the Complainant's *prima facie* case. The Complainant never rebutted the Company's evidence at any time.

⁹⁰ N.T. 182, 187, 189.

⁹¹ West Penn Exhibit 4.

⁹² The Company observes that the ALJ allowed the Complainant to engage in a lengthy cross-examination of Mr. Scott that far exceeded the scope of his testimony on direct. (N.T. 146-164). This included cross-examination of Mr. Scott regarding NPDES permit requirements. (N.T.161-163). While Ms. Bernardi's exhibits contained numerous references to NPDES permits, and counsel for the Company properly questioned Ms. Bernardi briefly about NPDES permits on cross exam, Mr. Scott *did not* testify about NPDES permits in his direct examination. Counsel's examination of the Complainant based on her case-in-chief does not open the door for the Complainant to cross-examine the Company's witnesses about matters to which they did not testify, that were not articulated in the Formal Complaint, and are beyond the jurisdiction of the Commission to decide. Any findings of fact based upon Mr. Scott's cross-examination constitutes (i) significant prejudice to the Company; (ii) a violation of the Company's right to due process; and (iii) reversible error.

D. The Commission has already determined that the Company's TVMP Plan is reasonable.

All of the FirstEnergy operating companies—Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company—utilize the TVMP described in this proceeding. The Commission has already evaluated that very same TVMP and has found it to be reasonable. The Complainant presented no facts or argument suggesting otherwise, and the result in this case must follow established precedent.

In *Broman v. West Penn Power Company*, a customer filed a formal complaint to prevent the Company from removing incompatible vegetation at her property.⁹³ The Company had notified the customer of the trees that needed to be removed and the customer refused.⁹⁴ The Company's forestry team members met with the customer many times explaining the maintenance program but the customer still refused to allow removal of the trees.⁹⁵ After an evidentiary hearing where the Company presented witnesses and exhibits regarding the Company's TVMP, the administrative law judge held that the Company did not provide reasonable service when it followed its TVMP and that the Company's TVMP, as applied to the customer, was unreasonable. The judge sustained the customer's complaint ordered the Company to pay a civil penalty.⁹⁶ On exceptions, the Commission analyzed the record below and reversed the administrative law judge's initial decision, holding that the customer had failed

⁹³ *Broman v. West Penn Power Company*, Docket No. C-2013-2356237 (Final Order entered April 23, 2014) (“Broman”).

⁹⁴ *Id.*, p. 1.

⁹⁵ *Id.*, p. 15.

⁹⁶ *Id.*, p. 7-8.

to carry her burden of proof in establishing that the Company provided unreasonable service.⁹⁷

Importantly, the Commission specifically held that the Company's TVMP is reasonable:

...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. FirstEnergy, 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 record in this proceeding provides substantial 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.⁹⁸

Accordingly, the Commission modified the initial decision and dismissed the customer's complaint.⁹⁹

In *Spirat v. Metropolitan Edison Company*, the Commission also found that the customers had failed to carry their burden of proof that the Company's proposed use of herbicides was not safe.¹⁰⁰ In *Spirat*, the customers filed a formal complaint asking the Commission to order the Company to refrain from using herbicides to control vegetation in a right-of-way that crosses their property because of their fears of the potential impact of herbicides on the environment and the proximity of their residence and pet areas to the transmission corridor.¹⁰¹ After an evidentiary hearing where the customers presented testimony that they feared herbicides would somehow reach their property, the administrative law judge ordered the Company not to use herbicides in the right-of-way.¹⁰² The judge made this order

⁹⁷ *Id.*, p. 13.

⁹⁸ *Id.*, p. 15.

⁹⁹ *Id.*, p. 18.

¹⁰⁰ *Spirat v. Metropolitan Edison Company*, Docket No. C-2013-2367044 (Final Order entered September 11, 2014) ("Spirat").

¹⁰¹ *Id.*, p.5-7.

¹⁰² *Id.*, p. 12.

without finding that the Company had provided unreasonable service or had otherwise violated the Code or a regulation or order.¹⁰³ On exceptions, the Commission modified the initial decision. The Commission's reasoning for doing so is instructive:

After careful consideration of the evidence of record in this proceeding, we will grant Met-Ed's Exception No. 1. We acknowledge the Complainants' concerns regarding the potential hazards of chemical herbicides. However, we note that proper vegetation management within a transmission line ROW [right-of-way] is critical to ensuring that our electric grid operates in a safe and reliable manner, and the Complainants did not establish, by a preponderance of the evidence, that Met-Ed's intended use of such herbicides will result in a violation of the Code, Commission Regulation, or Commission Order. The Complainants' evidence consisted mainly of testimony and exhibits regarding the location of their property relative to the ROW, as well as documentation of the various hazards and required precautions relating to the use of some of the herbicides that Met-Ed intends to apply to the ROW. However, we find no evidence to persuade us that Met-Ed's application of these products violates Code Section 1501.

The product warning labels and other materials supplied by the Complainants contain considerable detail regarding the hazards and risks associated with the herbicides that Met-Ed intends to use in the ROW, particularly if these products are mishandled or misapplied. However, these materials also contain extensive instruction regarding the proper usage and application of the herbicides, as well as relevant risk mitigation procedures. *See*, Complainants Exhs. 6, 7, 8. Met-Ed's witness, Mr. Wirs, testified that the herbicides that the Company will apply to the ROW are EPA-approved, and will be applied according to EPA guidelines. *Tr.* at 154. *Specifically, Mr. Wirs testified that the contractors who apply the herbicides: (1) must be certified to do so, Tr. at 63; (2) are expected to adhere to the precautions set forth on the product labels, Tr. at 131; (3) will follow EPA-required risk mitigation measures, Tr. at 148; and (4) will not apply herbicides under conditions that will result in harmful effects, such as applications to frozen ground, Tr. at 127, or when heavy rain is expected, Tr. at 99.*

In addition, Met-Ed's TVMP, including the use of herbicides, is consistent with NERC Regulation FAC-003-1, with the ANSI A300 standards for integrated vegetation management along utility

¹⁰³ *Id.*, p. 12.

rights-of-way, and with industry best practices. Tr. at 66-69; Met-Ed Exhs. 6, 7, 8. Moreover, as Met-Ed pointed out, the ALJ made numerous Findings of Fact that demonstrate the safety, efficiency, and reasonableness of the Company's proposed use of herbicides in the ROW. I.D. at 6-14. *Thus, we find no evidence to support a conclusion that Met-Ed's application of herbicides on the Complainants' property is unreasonable, and we do not agree that the Complainants have met their burden of proof that Met-Ed's intended use of such herbicides will result in a violation of the Code, a Commission Regulation, or a Commission Order.* Therefore, we will grant Met-Ed's Exception No. 1 and modify the Initial Decision accordingly.¹⁰⁴ (emphasis added).

And most recently, in *Wagner v. West Penn Power Company*, the Commission dismissed a customer's complaint for failure to carry his burden of proof that the Company's proposal to remove incompatible vegetation growing in a right-of-way that crosses his property is unreasonable.¹⁰⁵ The customer alleged that the vegetation did not infringe on the operation of the transmission line and that the Company's plans to remove the trees "has more to do with their profit margins."¹⁰⁶ After an evidentiary hearing was held, the administrative law judge dismissed the customer's complaint:

While Mr. Wagner does raise a quality of service issue under Section 1501 of the Code, there is nothing in the record to establish that West Penn violated this section of the Code. The documentary evidence and the testimonies of West Penn's witnesses established that the spruce trees are in the easement. West Penn's witness, Richard Scott is a supervisor of the company's transmission regulation management. He is a certified arborist. Tr. 30. He testified that the spruce trees have the potential to grow to 60 feet in height and thereby interfere with the transmission lines which are at height of 40 feet. Mr. Wagner testified that the maple tree is not in the easement, but concedes that 60 percent of the branches of the maple tree have grown horizontally into the easement. Tr. 15. West Penn's witness, Mr. Scott, testified that the trunk of the maple tree is in the easement and has the potential to grow to 50 feet with a crown (branch span of 45 feet). Tr. 44-45. Without

¹⁰⁴ *Id.*, pp. 16-17 (internal footnote omitted).

¹⁰⁵ *Wagner v. West Penn Power Company*, Docket No. C-2014-234494 (Final Order entered April 30, 2015) ("Wagner").

¹⁰⁶ *Id.*, p. 1.

reaching a decision as to whether the maple tree is within the easement because of lack of Commission jurisdiction, the evidence is sufficient to establish that the maple tree, in time, will grow to a height and width so as to interfere with West Penn's transmission lines. The evidence further establishes that West Penn notified Mr. Wagner of its plan to remove the incompatible trees from the easement; however, Mr. Wagner refused to allow West Penn to remove the trees. Tr. 84, 93-94; WP-Exhs. 8-10. Although Mr. Wagner offers to keep the subject trees under 10 feet by periodic trimming, West Penn's witness, Mr. Scott, testified that this is not a workable option, because West Penn is ultimately responsible for the safety and reliability of its transmission lines. Mr. Scott is correct.

Section 57.198 of the Commission's regulations, 52 Pa. Code § 57.198, requires West Penn, as an electric distribution company (EDC), to submit biennially a plan for the periodic inspection, maintenance, repair and replacement of its facilities. "The plan must include a program for the maintenance of clearances of vegetation from the EDC's overhead distribution facilities." *Id.* 52 Pa. Code § 57.198(f).

Upon careful analysis of the evidence and applying the law to the evidence, I am compelled to find that Mr. Wagner failed to carry his burden of proving that West Penn's plan to remove incompatible vegetation (four spruce trees and one maple tree) from his property constitutes unreasonable service under the Code. Accordingly the complaint must be dismissed.¹⁰⁷

The central theme running through *Broman*, *Spirat* and *Wagner* is that, after multiple evaluations, the Commission has determined that the Company's TVMP is a reasonable protocol for maintaining vegetation in the Company's transmission corridors. Nothing presented by the Complainant in this case alters that conclusion.

The *Spirat* case is most similar to the matter *sub judice*. In *Spirat*, the customers stated that they feared contamination of their property and well from potential runoff or drift from herbicide application. In *Spirat*, the customers provided the lay testimony, speculations and fears as evidence to support their claims. In *Spirat*, the Company provided substantial evidence to

¹⁰⁷ *Id.*, pp. 9-10.

rebut the customers' claims. In *Spirat*, the Commission held that both the Company's TVMP and its conduct dealing with the customers were reasonable, and that it was not a violation of the Code—in particular, a safety violation—for the Company to use herbicides to control vegetation. The outcome here should be no different than the one reached in *Spirat*, especially because Ms. Bernardi's entire case consists of irrelevant material beyond the Commission's jurisdiction to evaluate. Ms. Bernardi has provided no reason whatsoever to deviate from the well-established conclusion that the Company's adherence to its TVMP—including the use of herbicides in rights-of-way—is part of its statutorily mandated duty to provide safe, reliable, adequate and reasonable service.

In sum, the plain language of the Easement clearly grants the Company an unqualified right to cut, trim and remove all trees located in the Right-of-Way. The Easement grants West Penn the right to maintain the facilities in the Right-of-Way, and such "maintenance" includes the use of herbicides. The Commission should vindicate the Company's Easement rights and dismiss the Formal Complaint because the Company has acted in accordance with the Easement and its reasonable, science-based TVMP policy at all times relevant to this dispute.

VII. PROPOSED CONCLUSIONS OF LAW

1. The Complainant carries the burden of showing that the utility is responsible or accountable for the problem described in the Complaint in order to prevail. *Patterson v. Bell Telephone Company of Pennsylvania*, Docket No. F-8966524 (Final Order Entered February 8, 1990), *Feinstein v. Philadelphia Suburban Water Company*, Docket No. 20822 (Final Order Entered October 6, 1976).

2. The burden of proof must be carried by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. den.*, 529 A.2d 654,

602 A.2d 863 (1992). That is, by presenting evidence more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

3. Any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Pa. P.U.C.*, 447 A.2d 1100 (Pa. Cmwlth. 1982); *Edan Transportation Corp. v. Pa. P.U.C.*, 623 A.2d 6 (Pa. Cmwlth. 1993), 2 Pa.C.S. § 704. 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. P.U.C.*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Commonwealth, Dep't. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

4. The offense must be a violation of the Public Utility Code, the Commission's regulations, or an outstanding order of the Commission. 66 Pa.C.S. § 701; *West Penn Power Co. v Pa. P.U.C.*, 478 A.2d 947, 949 (Pa. Cmwlth. 1984).

5. The "burden of proof" is composed of two distinct burdens: the burden of production and the burden of persuasion. *Hurley v. Hurley*, 754 A.2d 1283 (Pa. Super. 2000).

6. The burden of persuasion determines which party must produce sufficient evidence to meet the applicable standard of proof. *Hurley v. Hurley*, 754 A.2d 1283 (Pa. Super. 2000).

7. The burden of persuasion never leaves the party on whom it is originally cast, but the burden of production may shift during the course of the proceedings." *Riedel v. County of Allegheny*, 633 A.2d 1325; 1328 n. 11 (Pa. Cmwlth. 1993).

8. The Commission does not have subject matter jurisdiction over allegations of environmental issues including claims about the quality of drinking water or DEP permitting issues. *Pickford v. Pa. P.U.C.*, 4 A.3d 707, 713 (Pa. Cmwlth. 2010); *Country Place Waste Treatment Company, Inc. v. Pa. P.U.C.*, 654 A.2d 72, 76 (Pa. Cmwlth. 1995); *Rovin v. Pa. P.U.C.*, 502 A.2d 785, 786 (Pa. Cmwlth. 1986); *Re: Monteforte Enterprises, Inc.*, Docket No. R-2008-2038570 (Final Order entered July 17, 2008).

9. The Commission does not have subject matter jurisdiction to hear and decide the Complainant's environmental allegations or enforce DEP regulations. *Pickford v. Pa. P.U.C.*, 4 A.3d 707, 713 (Pa. Cmwlth. 2010); *Country Place Waste Treatment Company, Inc. v. Pa. P.U.C.*, 654 A.2d 72, 76 (Pa. Cmwlth. 1995); *Rovin v. Pa. P.U.C.*, 502 A.2d 785, 786 (Pa. Cmwlth. 1986); *Re: Monteforte Enterprises, Inc.*, Docket No. R-2008-2038570 (Final Order entered July 17, 2008).

10. The Complainant failed to meet her burden of proving she is entitled to relief or that the Company provided unreasonable service. 66 Pa.C.S. § 332(a).

11. The plain language of the Easement allows the Company to maintain the Right-of-Way and to use herbicides to keep the Right-of-Way accessible and to reduce the amount of future maintenance, thereby enhancing the reliability of the Company's service. *Burek v. Pennsylvania Electric Company*, Docket No. C-20028132 (Initial Decision issued March 13, 2003; Final Order entered June 27, 2003).

12. The Company's TVMP, including the use of herbicides to control incompatible vegetation, is reasonable and has been reasonably applied to the Complainant regarding the Right-of-Way. *Wagner v. West Penn Power Company*, Docket No. C-2014-234494 (Final Order entered April 30, 2015); *Spirat v. Metropolitan Edison Company*, Docket No. C-2013-2367044

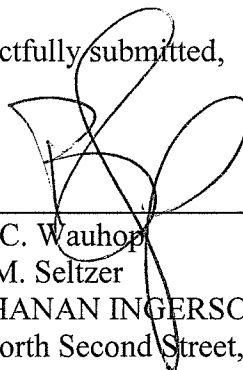
(Final Order entered September 11, 2014); *Broman v. West Penn Power Company*, Docket No. C-2013-2356237 (Final Order entered April 23, 2014).

13. The Company has provided reasonable, safe, efficient and adequate service to the Complainant. 66 Pa.C.S. § 1501.

VIII. CONCLUSION

Based upon the foregoing, it is respectfully requested that the Complaint of Sarah Bernardi be dismissed with prejudice.

Respectfully submitted,



Dated: July 21, 2015

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West Penn Power Company

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

SARAH BERNARDI

v.

WEST PENN POWER COMPANY

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Docket No. C-2014-2453852

CERTIFICATE OF SERVICE

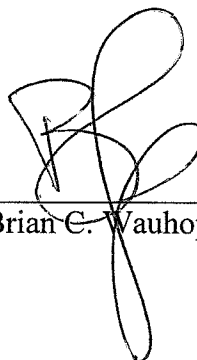
I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

Via Email and First-Class Mail

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Dated this 21st day of July, 2015.



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