

# Buchanan Ingersoll & Rooney PC

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August 4, 2015

## VIA E-FILING

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

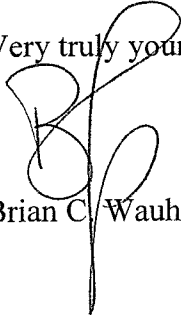
Re: Sarah Bernardi v. West Penn Power Company  
Docket No. C-2014-2453852

Dear Secretary Chiavetta:

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

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**REPLY BRIEF OF  
WEST PENN POWER COMPANY**

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**BUCHANAN INGERSOLL & ROONEY, P.C.**

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**Attorneys for West Penn Power Company**

**Dated: August 4, 2015**

## **I. INTRODUCTION/PROCEDURAL HISTORY**

West Penn Power Company (“West Penn” or the “Company”) Company submits this Reply Brief in response to the issues raised in Sarah Bernardi’s (“Complainant”) Main Brief and in accordance with the Briefing Order issued by Administrative Law Judge Susan D. Colwell.

All matters and issues addressed in the Company’s Main Brief filed on July 21, 2015 including, without limitation, the history of the proceeding, are incorporated herein.

## **II. SUMMARY OF THE ARGUMENT**

In her Main Brief, the Complainant asks the Pennsylvania Public Utility Commission (“Commission”) to “...force the Department of Agriculture and the DEP to enforce the Pennsylvania Codes which regulate point source release of pesticides into the Waters of the Commonwealth.”<sup>1</sup> The Complainant ignores the jurisdiction of this Commission, which does not include the enforcement or adjudication of environmental matters administered by the Pennsylvania Department of Environmental Protection (“DEP”). As explained in the Company’s Main Brief, the Commission does not have the authority to resolve the Complainant’s allegations regarding environmental issues. The Complainant’s Main Brief provides no legal authority establishing that this Commission can make any determinations about alleged environmental violations because there is none. The Complainant is in the wrong forum requesting relief the Commission cannot grant.

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<sup>1</sup> Complainant’s Brief at what appears to be page 1; the pages of the document received by the Company are not numbered. The Company notes that the Complainant’s “brief” fails to comply with 52 Pa. Code § 5.501 in almost every possible way: it does not contain (i) page numbers; (ii) references to the transcript; (iii) a statement of the case; (iv) references to regulations or laws that *the Commission has jurisdiction to administer*; and (v) an argument preceded by a summary. In fact, the brief contains no logical cohesion whatsoever. Instead, it rambles in haphazard fashion in an unsuccessful effort to convince the Commission to assume jurisdiction over environmental claims that are not properly before it.

Furthermore, the Complainant ignores that as the moving party, she, and not the Company, has the burden of proof in this proceeding.<sup>2</sup> The Complainant must establish by a preponderance of the evidence that West Penn has failed to provide safe, adequate and reasonable service to her at the Service Location.<sup>3</sup> As explained in the Company's Main Brief, the Complainant failed to demonstrate that the Company provided unreasonable, inadequate or unreliable service to the Complainant at the Service Location in violation of the Public Utility Code ("Code"). On the contrary, West Penn provided substantial evidence that it has provided and continues to provide safe, adequate, reasonable and reliable service based upon the following:

- West Penn's TVMP is reasonable and is based on arboricultural industry best practices;<sup>4</sup>
- West Penn followed its TVMP when dealing with the Complainant, including notifying her of the planned vegetation maintenance and halting maintenance when she refused the work plan;<sup>5</sup> and
- West Penn met with the Complainant many times to explain the work plan and how it would be implemented, including a comprehensive meeting held September 16, 2014 between Company representatives, herbicide experts and the Complainant to address the Complainant's concerns.<sup>6</sup>

As such, the Company completely rebutted any evidence presented by the Complainant at hearing.

The Complainant's brief is nothing more than a collection of the Complainant's misconceptions, distortions and erroneous, irrelevant legal conclusions unsupported by facts of record. As explained below, the Complainant is completely wrong about every one of her allegations and conclusions and, accordingly, the Formal Complaint must be dismissed.

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<sup>2</sup> West Penn Main Brief at 13-15.

<sup>3</sup> *Id.*

<sup>4</sup> West Penn Main Brief at 24-27, 29-34.

<sup>5</sup> *Id.* at 27-28.

<sup>6</sup> *Id.*

### **III. ARGUMENT**

Similar to the approach employed at the June 3, 2015 hearing, the Complainant's Main Brief reasserts her misguided and unsupported belief that the Company violated environmental regulations. Yet her Main Brief alleges environmental violations but does not contain a single reference to the Pennsylvania Public Utility Code ("Code") or the Commission's regulations. As clearly explained in the Company's Main Brief—and acknowledged by the ALJ at hearing—the Commission cannot evaluate or enforce DEP regulations.<sup>7</sup> The Complainant re-alleges but fails to prove that the Company did anything wrong, or that it violated the Code or a regulation within the Commission's jurisdiction to administer. The Complainant's Main Brief repeatedly misstates legal conclusions regarding environmental laws and regulations.<sup>8</sup> Her notions about the operation of Pennsylvania's environmental law are incorrect and do not show that the Company did anything wrong in this case.

#### **A. The Complainant failed to carry her burden of proof.**

The Complainant wants the Commission to accept her inferences and opinions as *facts*. Opinions, inferences, speculations and the like are clearly not facts, and cannot form the basis of any finding of fact in this proceeding.<sup>9</sup> For example, the Complainant's Main Brief alleged but failed to prove the following:

- West Penn's maintenance of the Right-of-Way constitutes an "illegal point source release of herbicides" and is an "illegal spraying program;"<sup>10</sup> and
- West Penn intentionally sprayed herbicide into stream water on her neighbor's property.<sup>11</sup>

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<sup>7</sup> West Penn Main Brief at 16-21.

<sup>8</sup> *See generally*, Complainant's Main Brief.

<sup>9</sup> *Id.* at 13-15.

<sup>10</sup> Complainant's Main Brief at 1.

<sup>11</sup> *Id.* at 3.

The Complainant's Main Brief provides no references to record evidence establishing any of these allegations. On the contrary, the Complainant repeatedly admits that she does not know whether any herbicide entered the stream because she never had the water tested.<sup>12</sup> Like her case-in-chief at hearing, the Complainant's Main Brief provides no facts establishing herbicides ever entered the stream in the Right-of-Way. Instead, she infers that herbicides must have entered the water because they "had nowhere to go but into the water."<sup>13</sup> She argues, ". . . it's obvious that the [stream] banks were thoroughly sprayed . . .," but admits that her exhibits do not depict Company representatives applying the herbicide to the water, or prove that they sprayed the stream banks or the stream.<sup>14</sup>

On the other hand, the Company's witness credibly testified that when herbicides are properly applied to terrestrial plants—as they were in this case—the target plants die, just as shown in the Complainant's exhibits.<sup>15</sup> The Complainant's statements that lawful herbicide application is illegal and herbicides must have entered the stream are meritless and unsupported by the record evidence. In other words, the Complainant's photographic evidence that herbicides were properly applied to the Complainant's neighbor's property as intended does not support or show that any harm occurred to the Service Location, a completely distinct site. Even considering the wide latitude the Commission gives *pro se* complainants in customer complaint hearings, there are no Pennsylvania cases placing the burden of proof on the non-moving party (i.e., the Company) in proceedings such as this, as the Complainant is clearly seeking to do.

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<sup>12</sup> Complainant's Main Brief at 3; 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.")

<sup>13</sup> Complainant's Main Brief at 5.

<sup>14</sup> *Id.* ("The photos do not depict this happened, the vegetation is too thick and undisturbed by footsteps.")

<sup>15</sup> N.T. 158:23-25, 159:1 ("...if it [referring to Complainant's photographs of Ruoff property] looks that way, that's the [herbicide] working on the woody stem vegetation. That's what the product is designed to do, is control the targeted species that it was applied to.")

**B. The Commission has no jurisdiction over environmental claims.**

The Complainant's arguments about aquatic licenses, environmental regulations and NPDES permit requirements in her Main Brief are beyond the Commission's jurisdiction to evaluate, let alone adjudicate. The Company thoroughly explained this point in its Main Brief.<sup>16</sup> Nonetheless, the Company established by substantial record evidence that *it does have* the proper license to apply herbicides in the Right-of-Way,<sup>17</sup> and that *it does comply* with NPDES General Permit PAG-15.<sup>18</sup> The Complainant's reiterations of irrelevant and indefensible legal theories carry no greater weight now than at hearing, and must be rejected.

Most importantly, the Complainant's tedious reiteration of her environmental theories highlight that she completely failed to carry her burden of proof in this matter. Her reliance on allegations of environmental violations is erroneous as a matter of law and fact. She never alleged—let alone established at hearing—any facts supporting a finding of a Code violation. In addition, the Complainant has no standing to assert or support in evidence that the vegetation maintenance services provided by the Company on other customers' property constitutes unreasonable service to the Complainant. Not only are the facts regarding the service provided by the Company to other customers irrelevant in determining whether the Company provided safe and reasonable service, the Complainant has no standing to prosecute claims based on the vegetation maintenance the Company provided to her neighbors.<sup>19</sup> The Complainant failed to carry her burden of proof to establish that the Company violated any law or regulation the Commission can administer, and nothing contained in the Complainant's Main Brief suggests otherwise.

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<sup>16</sup> *Id.* at 18-21.

<sup>17</sup> *Id.* at 26.

<sup>18</sup> West Penn Exhibits 7, 8, 9.

<sup>19</sup> West Penn Main Brief at 24.

**C. New facts cannot be introduced in the briefing stage.**

Finally, the Complainant uses her Main Brief to improperly introduce new evidence in the form of hearsay after the hearing:

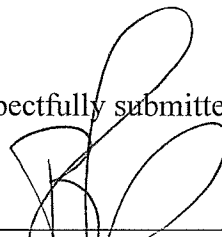
I notified Kevin Halloran of the [sic] SW department of the DEP on June 23, 2015 to complain about FirstEnergys' illegal spraying in the Delmont area. His response was: "Well, we have to give them a chance to get a permit" [sic] My question is: Can a bank robber get a permit to rob a bank?<sup>20</sup>

At the June 3, 2015 hearing, the ALJ specifically provided the Company with the opportunity to provide proof of its NPDES permit compliance after June 3, 2015. The Company provided that material on June 23, 2015. The ALJ did not make any provisions for the Complainant to introduce new evidence in her Main Brief, much less hearsay evidence, attempting to rebut the Company's compliance with its NPDES permit. Rather than file a motion to strike the Complainant's inappropriate and unlawful attempt to introduce new facts into this proceeding at the briefing stage, the Company respectfully requests that the ALJ disregard those alleged facts.

**IV. CONCLUSION**

Based on the foregoing and for the reasons specified in its Main Brief, West Penn Power Company respectfully requests that the Complaint of Sarah Bernardi be dismissed with prejudice.

Respectfully submitted,



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Dated: August 4, 2015

Attorneys for  
West Penn Power Company

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<sup>20</sup> Complainant's Main Brief at 9.

**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**

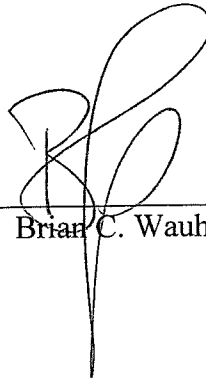
I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

**Via Email and First-Class Mail**

Administrative Law Judge Susan D. Colwell  
Office of Administrative Law Judge  
Pennsylvania Public Utility Commission  
400 North Street – 2<sup>nd</sup> Floor  
Harrisburg, PA 17120  
scolwell@pa.gov

Sarah Bernardi  
1022 Dahlia Lane  
Jeanette, PA 15644  
araslyn@msn.com

Dated this 4<sup>th</sup> day of August, 2015.



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Brian C. Wauhop, Esq.