**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

Public Meeting held September 3, 2015

Commissioners Present:

Gladys M. Brown, Chairman

John F. Coleman, Jr., Vice Chairman

James H. Cawley

Pamela A. Witmer

Robert F. Powelson

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| Pennsylvania Public Utility Commission,  Bureau of Investigation and Enforcement  v.  XTO Energy, Inc. and Mountain  Gathering, LLC |  | C-2014-2444722 |

**Opinion and Order**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is a proposed Settlement Agreement (Settlement) filed on May 18, 2015, by the Commission’s Bureau of Investigation and Enforcement (I&E) and by XTO Energy, Inc. and Mountain Gathering, LLC (jointly and severally, the Company), with respect to the Formal Complaint filed by I&E on September 26, 2014. The Parties submit that the proposed Settlement is in the public interest and is consistent with the Commission’s Policy Statement 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*. Settlement at 11-12. Each Party also submitted a Statement in Support of the Settlement (Statement). For the reasons stated below, we will approve the Settlement.

**History of the Proceeding**

This matter concerns allegations that the Company failed to timely identify and classify gas pipelines for reporting and assessment purposes pursuant to the Gas and Hazardous Liquids Pipelines Act (Act 127), 58 P.S. §§ 801.101, *et seq.* Act 127 expanded the Commission’s authority to enforce the federal pipeline safety laws as they relate to non-public utility gas and hazardous liquids pipeline equipment and facilities within the state.

On September 26, 2014, I&E filed a Formal Complaint with the Commission alleging, in part, that the Company failed to properly report and pay the related assessments on various regulated onshore gathering lines as required by Act 127. I&E also contended that the Company failed to determine whether certain pipeline facilities acquired from previous owners were regulated onshore gathering lines for reporting purposes under Act 127. Lastly, I&E alleged that the Company neglected to follow its procedures regarding pipeline class location studies for their pipeline facilities. Complaint at 8-9.

I&E requested that the Commission impose a civil penalty of $100,000 against the Company pursuant to Section 3301 of the Public Utility Code (Code), 66 Pa. C.S. § 3301, and direct the Company to pay an assessment of $6,994 for the alleged under-reporting of onshore gas gathering pipeline miles for the 2012-2013 and 2013-2014 fiscal years. Further, I&E sought an order requiring the Company to determine whether its onshore pipelines in Pennsylvania, including those assets currently classified as production lines, are regulated gathering lines.[[1]](#footnote-1) Complaint at 9.

On November 14, 2014, the Company filed an Answer and New Matter denying the material allegations in the Complaint. According to the Company, it owns and operates hundreds of miles of gas pipeline in Pennsylvania and the Complaint only implicated a few miles of the pipeline acquired from prior owners. The Company argued, in part, that it treated the acquired pipelines as production facilities, which do not fall under the jurisdiction of the Commission under Act 127, and its treatment was consistent with the prior owners’ classification of the pipeline and standard industry practice. Answer at 1-4, New Matter at 9-10.

The Company also contended, in part, that the nature and quality of the data made available by the prior pipeline owners was poor. Although it was fully engaged in classifying the acquired pipeline pursuant to federal standards under 49 C.F.R. § 192.8, the Company asserted that the process was complex and hampered by poor data quality and other factors. In contrast to the allegations of under-reporting of pipeline mileage, the Company argued that, after completing pipeline classification studies, it actually over reported pipeline mileage to the Commission under Act 127. The Company averred that after completing the pipeline classification studies it definitively determined that the pipeline facilities at issue in the Complaint qualified for an exemption and were not required to be reported to the Commission under Act 127. Answer at 6-7, New Matter at 10-12.

On December 4, 2014, I&E filed a Reply to New Matter generally denying the material allegations in the Company’s New Matter. Additionally, I&E argued that the Company had an ongoing obligation following the effective date of Act 127 to timely evaluate and report to the Commission the jurisdictional gas pipeline acquired from prior owners. Reply to New Matter at 3-14.

The Parties entered into negotiations and agreed to resolve these matters in accordance with the Commission’s policy to promote settlements at 52 Pa. Code § 5.231. The Parties filed the instant Settlement on May 18, 2015.

**Background**

Under Section 501(a) of Act 127, 58 P.S. § 801.501(a), the Commission has the authority to supervise and regulate pipeline operators within Pennsylvania consistent with Federal Pipeline Safety Laws. The Company is an owner and operator of conventional and unconventional gas production and gathering pipeline facilities in Pennsylvania. Accordingly, the Company is a “pipeline operator” pursuant to 58 P.S.

§ 801.102.[[2]](#footnote-2) Settlement at 2.

If this matter had been litigated, I&E would have alleged that the Company failed to properly report the related assessments in connection with at least 5.3 miles of regulated class 3 onshore gathering pipelines and 0.9 miles of regulated class 2 onshore gathering pipelines in operation in Indiana County, Pennsylvania on the Company’s 2011 and 2012 annual registration forms as required by Act 127.[[3]](#footnote-3) I&E contends that these actions, if proven, would have constituted a violation of 58 P.S. § 801.503(d).[[4]](#footnote-4) Settlement at 3-4.

I&E would have also alleged that the Company violated 58 P.S.

§ 801.503(b) by failing to pay the appropriate assessments for the 2012 to 2013 and the 2013 to 2014 fiscal years because the reported jurisdictional miles were less than the actual jurisdictional pipeline miles in operation. Settlement at 4.

Additionally, I&E would have asserted that the Company did not completely evaluate and classify the pipelines it acquired from prior pipeline owners prior to filing the Pennsylvania Pipeline Operator Annual Registration Forms (Annual Registration Forms) for 2011 and 2012. According to I&E, the failure to determine whether the acquired gathering pipelines were regulated onshore gathering lines, if proven, would have been considered a continuing violation of 49 C.F.R. § 192.8. Settlement at 4.

Lastly, I&E would have contended that the Company’s failure to follow its procedures regarding class locations of its pipelines constituted a continuing violation of 49 C.F.R. § 192.613. Section 613 of the Federal Pipeline Safety Regulations requires operators to “have a procedure for continuing surveillance of its facilities to determine and take appropriate action concerning changes in class location, failures, leakage history, corrosion, substantial changes in cathodic protection requirements, and other unusual operating and maintenance conditions.” *Id.* at § 192.613(a). Settlement

at 4.

If the proceeding had been litigated, the Company would have denied I&E’s allegations and asserted the defenses set forth in its Answer and New Matter, as summarized previously. Settlement at 5.

As a result of a series of settlement discussions, the Parties have agreed to resolve their differences and urge the Commission to approve the Settlement as being reasonable and in the public interest. Settlement at 6, 11-12.

**Terms of the Settlement[[5]](#footnote-5)**

Pursuant to the proposed Settlement, the Company will pay a civil penalty of $30,000. The Settlement acknowledges that as of March 31, 2015, the Company fully completed class location studies on all pipeline owned and operated by the Company and required to be reported under Act 127. It also notes that the Company identified all jurisdictional pipeline miles on its 2014 Annual Registration Forms. Settlement at 6.

The Parties agree that the Settlement resolves all issues regarding the Company’s reporting obligations under Act 127 for calendar years 2011, 2012 and 2013, including the claims reasonably related to those contained in the Complaint. Likewise, the Parties agree to the settlement of allegations that the evaluation and classification of pipelines owned and operated by the Company was unreasonably delayed and that there were reporting errors on the 2011 and 2012 Annual Registration Forms. *Id.* at 7.

According to the Settlement, I&E will refrain from filing any further complaints or initiating any actions against the Company with regard to the gas pipeline reporting obligations for calendar years 2011 through 2013. However, the Settlement will not prevent I&E from cooperating with the U.S. Department of Transportation’s Pipeline and Hazardous Materials Safety Administration, as required, with respect to any matters addressed in the Complaint. *Id.* at 7.

The Company will also explain and provide relevant documents in future Act 127 reports and amendments for all changes in reported gas pipeline miles, classifications and exemptions contained in the Annual Registration Forms filed for prior years. Furthermore, the Company agrees to refrain from seeking any refunds related to its alleged over-reporting and over-payments pertaining to jurisdictional gas pipelines for calendar years 2011 to 2013. *Id.* at 8.

The proposed Settlement is conditioned on the Commission’s approval without modification of any of its terms or conditions. If the Commission does not approve the proposed Settlement, or makes any change or modification to the proposed Settlement, either Party may elect to withdraw from the Settlement. *Id.* at 9.

**Discussion**

Initially, we note that any issue or argument that we do not specifically address 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).

Pursuant to our Regulations at 52 Pa. Code § 5.231, it is the Commission’s policy to promote settlements. The Commission must review proposed settlements to determine whether the terms are in the public interest. *Pa. PUC v. Philadelphia Gas Works*, Docket No. M-00031768 (Order entered January 7, 2004). Because a presiding officer has not been assigned to this proceeding, the terms of the proposed Settlement are to be reviewed by the Commission pursuant to 52 Pa. Code § 5.232(g).

The Commission has promulgated a Policy Statement at 52 Pa. Code   
§ 69.1201 that sets forth ten factors that we may consider in evaluating whether a civil penalty for violating a Commission order, regulation or statute is appropriate, as well as if a proposed settlement for a violation is reasonable and approval of the settlement agreement is in the public interest. The Policy Statement sets forth the guidelines we use when determining whether, and to what extent, a civil penalty is warranted. In this case, application of these guidelines supports approval of the Settlement.

The first factor we may consider is whether the conduct at issue is of a serious nature. 52 Pa. Code § 69.1201(c)(1). “When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.” *Id*. I&E argues that the violations alleged in the Complaint are serious in nature because the Company did not completely evaluate and classify the pipelines it owned and operated prior to filing its Annual Registration Forms. According to I&E, the Commission’s Gas Safety Division depends on the accurate completion of Act 127 forms to permit the location and inspection of all jurisdictional facilities to ensure compliance with the Federal Pipeline Safety Regulations. Significant public safety concerns are implicated, I&E asserts, when pipeline is not timely and properly classified and reported to the Commission pursuant to Act 127. Therefore, I&E states that the Company’s alleged conduct was of a serious nature and was considered for purposes of a civil penalty determination. I&E Statement at 11.

In response, the Company acknowledges that the purpose of the reporting requirements under Act 127 is, in part, to allow Commission staff to evaluate jurisdictional pipelines for safety purposes. However, the Company argues that the gas pipelines at issue in the Complaint were historically treated as production lines comprised of low pressure and small diameter pipes which the Company believed were outside the jurisdiction of the Commission. The Company explains that there has been no damage or harm to persons or property resulting from the alleged conduct in the Complaint. Further, the Company avers that its subsequent evaluation and classification of the implicated pipelines reveals that the Company over-reported pipeline miles to the Commission rather than under-reported the data required under Act 127. Therefore, the Company asserts that its conduct cannot reasonably be considered serious. Company Statement at 6-7.

There is no allegation that the Company’s actions here were intentional or involved fraud or misrepresentation. However, the allegations relate to compliance with Act 127 and Federal Pipeline Safety Regulations, which is a serious matter. We are mindful that this proceeding involves a Settlement and that there has been no finding that the Company committed any violation. Nonetheless, we agree with I&E that accurate, diligent and prompt compliance with the reporting and compliance requirements under Act 127 is critical for helping to ensure public safety. Although the Company’s actions to complete the pipeline classification process for the pipelines at issue in the Complaint and to improve its communications with Commission staff as outlined in the Settlement are important steps for ensuring prospective compliance with Act 127, they do not eliminate the seriousness of the alleged prior conduct. Thus, we find that the civil penalty should be evaluated with a consideration of the seriousness of the allegations set forth in the Complaint.

The second factor is whether the resulting consequences of the conduct are of a serious nature. 52 Pa. Code § 69.1201(c)(2). “When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.” *Id.* As noted above, there is no indication that the alleged violations resulted in personal injuries or property damage. Thus, the Company’s actions set forth in the Settlement did not result in consequences of a serious nature which would warrant a higher penalty under this factor.

The third factor pertains to litigated cases only. 52 Pa. Code   
§ 69.1201(c)(3). Because this proceeding was settled, this factor is not applicable to this Settlement.

The fourth factor is whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered. 52 Pa. Code § 69.1201(c)(4). According to the Settlement, the Company fully completed class location studies on all of its pipeline facilities prior to March 31, 2015, which was the deadline for filing the 2014 Annual Registration Form. Settlement at 6. Thus, the Parties assert that the conduct in the Complaint has been addressed. Moreover, the Settlement indicates that the Company agrees to improve the timeliness and completeness of its communications with the Commission, including the provision of explanatory documents in its annual Act 127 reports relating to any changes in pipeline mileage, classification and exemptions. *Id.* at 7-8. Upon review, we believe that this factor does not warrant a higher penalty.

The fifth factor is the number of customers affected and the duration of the violations. 52 Pa. Code § 69.1201(c)(5). The Parties agree that no customers were affected by the Company’s alleged actions. As to the duration of the alleged violations, I&E contends that the class location studies of current pipeline owned and operated by the Company, but acquired from prior owners, were not fully completed until at least 2014. I&E Statement at 12. In response, the Company states generally that it disputes the duration of the alleged under-reporting of pipelines. Because no customers were impacted by the alleged and disputed conduct, the Company argues that the application of this factor suggests that little or no sanction should be imposed on the Company. Company Statement at 8. [[6]](#footnote-6) Here, there is no indication that individual customers were affected by Company’s alleged conduct. Furthermore, without a fully-developed factual record, we decline to conclude that the duration of the alleged violations support a higher penalty.

We may also consider the compliance history of the regulated entity which committed the violation. 52 Pa. Code § 69.1201(c)(6). “An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.” *Id.* Upon review, there is no record of prior violations by the Company. Accordingly, we find that the Company’s compliance history has been satisfactory and poses no barrier to approval of the Settlement between the Parties.

Another factor we may consider is whether the regulated entity cooperated with the Commission’s investigation. 52 Pa. Code § 69.1201(c)(7). According to the Settlement, the Company has been forthcoming with information and has cooperated with I&E and Gas Safety since the filing of the Complaint. Settlement at 6.

In addition, we may consider the amount of the civil penalty necessary to deter future violations, past Commission decisions in similar situations, and other relevant factors. 52 Pa. Code § 69.1201(c)(8), (c)(9) and (c)(10). I&E argues that the civil penalty of $30,000, which cannot be claimed as a tax deduction by operation of law, is substantial and sufficient to deter the Company from committing future violations. I&E Statement at 13. The Company counters that given the substantial dispute between the Parties about the existence of any violations, the Company considers the settlement amount to be reasonable. According to the Company, the settlement saves the time and resources of the Commission and other stakeholders in litigating a matter with an uncertain outcome. Company Statement at 9. I&E agrees that fines, penalties and other remedial actions resulting from fully litigated proceedings are difficult to predict and could vary from the proposed Settlement. I&E Statement at 14. The Parties also assert that when reviewing the relevant factors that are comparable to other incidents, the Settlement is consistent with prior Commission decisions. [[7]](#footnote-7) I&E Statement at 13-14, Company Statement at 10.

The Commission has not dealt previously with a similar situation because of the relatively recent enactment of Act 127. If a violation of Act 127 had been determined, the Commission would have been authorized to impose a civil penalty of up to $200,000 for each violation for each day that the violation persists, but generally not to exceed $2,000,000 for any related series of violations. 58 Pa. C.S. § 801.502 and 66 Pa. Code § 3301(c). However, upon consideration of all the relevant factors, including the avoidance of the expense of further litigation and the significant deterrent effect of the proposed $30,000 civil penalty, we believe that the Settlement is reasonable and consonant with the public interest.

For the reasons set forth above, after reviewing the terms of the Settlement, we find that approval of the Settlement is consistent with the terms of our Policy Statement.

**Conclusion**

It is the Commission’s policy to promote settlements. 52 Pa. Code § 5.231. The Parties herein have provided the Commission with sufficient information upon which to thoroughly consider the terms of the proposed Settlement. Based on our review of the record in this case, including the Settlement and the Statements in Support of the Settlement, we find that the proposed Settlement between I&E and the Company is in the public interest and merits approval; **THEREFORE,**

**IT IS ORDERED:**

1. That the Settlement filed on May 18, 2015, by the Commission’s Bureau of Investigation and Enforcement and by XTO Energy, Inc. and Mountain Gathering, LLC is approved.

2. That, in accordance with Section 3301 of the Public Utility Code, 66 Pa. C.S. § 3301, within forty (40) days of the date this Order becomes final, XTO Energy, Inc. and Mountain Gathering, LLC shall pay a civil penalty in the amount of $30,000. Said payment shall be made by wire transfer directly to the Commonwealth of Pennsylvania (utilizing wire transfer instructions provided by the Bureau of Investigation and Enforcement to XTO Energy, Inc. and Mountain Gathering, LLC).

3. That a copy of this Opinion and Order shall be served upon the Financial and Assessment Chief, Office of Administrative Services.

4. That, after XTO Energy, Inc. and Mountain Gathering, LLC remits the civil penalty as required in Ordering Paragraph No. 2 the Secretary’s Bureau shall mark this proceeding closed.

**** **BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: September 3, 2015

ORDER ENTERED: September 3, 2015

1. I&E cited to Section 192.8 of the Federal Pipeline Safety Regulations, 49 C.F.R. § 192.8, pertaining to the determination of regulated onshore gathering lines. According to I&E, a pipeline operator must determine if the onshore pipelines it operates are onshore gathering lines. The operator must then determine if the onshore gathering lines are regulated and, thereby, subject them to inspection, enforcement, reporting obligations and other requirements. I&E Statement at 3. [↑](#footnote-ref-1)
2. A “pipeline operator” is a “person that owns or operates equipment or facilities in this Commonwealth for the transportation of gas or hazardous liquids by pipeline or pipeline facility regulated under Federal Pipeline Safety laws.” *Id.*  [↑](#footnote-ref-2)
3. Pipeline locations are classified pursuant to 49 C.F.R. § 192.5. Generally, the criteria for evaluating pipeline location classes include a determination of the number of buildings involving human occupation within an onshore area that extends 220 yards on either side of the centerline of any continuous one-mile length of pipeline. *Id.* at

   § 192.5(a). For example, a class 2 location includes more than ten but fewer than forty-six buildings intended for human occupancy. A class 3 location includes an area that has forty-six or more buildings intended for human occupation. Additionally, pipeline areas in close proximity (within 100 yards) of locations such as playgrounds, recreation areas, outdoor theaters or other places of public assembly are class 3 locations depending on the number of regular occupants in those outdoor areas. *Id.* at § 192.5(b). [↑](#footnote-ref-3)
4. Section 503(d) of Act 127 provides:

   **(d) Reporting of miles.--**Following the submission of the original application, each pipeline operator shall, on or before March 31 of each calendar year, report to the commission its total intrastate regulated transmission, regulated distribution and regulated onshore gathering pipeline miles in operation for the transportation of gas and hazardous liquids in this Commonwealth during the prior calendar year. [↑](#footnote-ref-4)
5. The terms are set forth in greater detail in the Settlement at 6-12. [↑](#footnote-ref-5)
6. The Company references its Answer and New Matter and contends that it has documented substantial and timely efforts to evaluate and classify the pipelines it acquired from third parties. Again, the Company argues that the acquired pipelines were historically considered production pipelines outside of the Commission’s jurisdiction and that the Company had no reliable data about them. Furthermore, the Company asserts that federal regulations have frequently permitted a reasonable period of compliance when new safety standards are issued and applied to existing pipeline. *Id.*  [↑](#footnote-ref-6)
7. The Parties did not identify any prior proceedings involving comparable incidents and penalties. Upon review of our prior decisions, we note our approval of the settlement in *Pa. PUC v. ATX Licensing, Inc.,* Docket No. C-20031394 (Order entered October 5, 2004) (allegations included failure to file complete and accurate annual financial reports for the years 2000 through 2002 and the Commission approved a $30,000 civil penalty). [↑](#footnote-ref-7)