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November 28, 2016

VIA EFILING

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

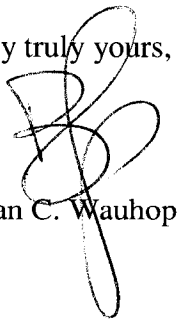
Re: Marlene Broman v. West Penn Power Company
Docket No. C-2015-2485454

Dear Secretary Chiavetta:

On behalf of West Penn Power Company, I have enclosed for electronic filing the Exceptions of West Penn Power Company in the above-captioned matter.

Copies have been served on all parties as indicated in the attached Certificate of Service.

Very truly yours,



Brian C. Wauhop

BCW/tlg
Enclosure
cc: Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

EXCEPTIONS
ON BEHALF OF
WEST PENN POWER COMPANY

BUCHANAN INGERSOLL & ROONEY, P.C.

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Dated: November 28, 2016

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I. INTRODUCTION

On November 4, 2016, the Pennsylvania Public Utility Commission ("Commission") served the Initial Decision ("Initial Decision" or "I.D.") of Administrative Law Judge Jeffrey A. Watson ("ALJ") in connection with the Formal Complaint ("2015 Complaint") filed by Marlene Broman ("Complainant") against West Penn Power Company ("West Penn" or the "Company")[1] challenging the Company's right to remove two oak trees, four cedar trees, five blue spruce trees, brush and smaller incompatible vegetation growing along a fence line bordering the Complainant's property. (*See* N.T. 225:13-21; West Penn Exhibit 2). The trees and vegetation are growing in and along a right-of-way ("Right-of-Way") that crosses the Complainant's property at 4136 Patterson Road, Butler, Pennsylvania ("Property"). The removal of this same vegetation pursuant to the Company's transmission vegetation management and maintenance program ("TVM Program") was the subject of a prior formal complaint filed by the Complainant against the Company in 2013 at Commission Docket No. C-2013-2356237 ("2013 Complaint").[2] The 2013 Complaint was fully litigated, resulting in a final Commission order entered on April 23, 2014 ("April 2014 Order,")[3] dismissing the 2013 Complaint and finding, among other things, that the Company's TVM Program was reasonable and reasonably applied to the Complainant; the Company adequately explained the proposed vegetation removal to the Complainant; and the Company had not provided unreasonable service to the Complainant by proposing to manage the vegetation growing in the Right-of Way.

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[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.
[2] To assist in evaluating these Exceptions, West Penn requests that the Commission take administrative notice, pursuant to 52 Pa. Code § 5.408(a), of the claims averred by the Complainant in the 2013 Complaint, *Marlene Broman v. West Penn Power Company*, Docket No. C-2013-2356237.
[3] The April 2014 Order entered into the record of this 2015 Complaint proceeding as "ALJ Exhibit 2".

Following dismissal of the 2013 Complaint, West Penn contacted the Complainant at various times in 2014 and 2015 to schedule the outstanding vegetation maintenance. The Complainant refused to permit West Penn to finish its vegetation maintenance work, and then filed the 2015 Complaint to permanently prevent the Company from completing the work previously approved by the Commission in the 2013 Complaint proceeding.

West Penn filed an Answer and New Matter on June 22, 2015 asserting, among other things, that the claims raised in the 2013 Complaint were barred by the doctrine of *res judicata*. The Company thereafter filed a Motion for Summary Judgment on July 16, 2015 reiterating that the relief sought in the 2015 Complaint was barred by the Commission's final order entered April 23, 2014 ("April 2014 Order") dismissing the 2013 Complaint. Despite the Complainant's failure to file a reply to the Company's New Matter or respond to the Motion for Summary Judgment, an interim order denying the Motion for Summary Judgment was entered on August 11, 2015.

An initial telephonic evidentiary hearing was held October 6, 2015, during which the Complainant and West Penn presented testimony and exhibits. (I.D. at 2). The ALJ issued post-hearing orders resolving the Complainant's issues with her exhibits.

On April 27, 2016, the ALJ issued an interim order setting a briefing schedule, which was extended at the Complainant's request to June 17, 2016. Thereafter, the parties submitted briefs and the ALJ closed the hearing record by order dated July 18, 2016.

The Initial Decision correctly found that "...West Penn has demonstrated that Complainant has already litigated challenges to the removal of certain incompatible vegetation and the reasonableness of West Penn's TVM Program regarding the claims that were previously

litigated to a final decision in the 2013 Complaint proceeding. Accordingly, those claims must be dismissed." (I.D. at 20).

However, the Initial Decision was not correct in the balance of its analysis. The Initial Decision (i) analyzed claims and evidence barred by the doctrine of *res judicata*, (ii) ignored substantial record evidence provided by the Company on various issues; and (iii) erred in imposing civil penalties upon the Company based on the erroneous conclusions that the Company failed to provide reasonable and adequate service under Section 1501 of the Public Utility Code, 66 Pa.C.S. § 101 *et seq.* ("Code") by providing the Complainant inconsistent information regarding its TVM Program. (ID at 31).

Not only does the Initial Decision make erroneous factual findings, it overlooked the Company's evidence describing its efforts to manage the Right-of-Way following the conclusion of the 2013 Complaint proceeding. First, like the Initial Decision issued in the 2013 Complaint proceeding, the Initial Decision adopts the Complainant's arguments about what she believed the Company's TVM Program means and how the longstanding work plan for her property compares with a recent informational brochure provided to her by a Company representative. But the claims raised in the 2015 Complaint, and the evidence presented at hearing, mirror the claims and evidence advanced by the Complainant in the 2013 Complaint that was fully litigated and dismissed by the Commission on the merits. (*See* ALJ Exhibits 1 and 2). As a result, *res judicata* bars the Complainant from re-litigating the same issues and claims again here. It was error for the Initial Decision to address these matters in the first place.

Second, with respect to any claims that are not barred by *res judicata*, the Complainant failed to satisfy her burden of proof establishing that the Company committed any violation of the Code, or any regulation, order or rule that the Commission has authority to administer. On

the contrary, the evidence established that at all times relevant to this dispute the Company provided reasonable service to the Complainant in a respectful and courteous manner.

The Initial Decision's determinations are not supported by substantial evidence and are contradictory to the Commission's final decision on the merits as discussed in the April 2014 Order. The Commission must reject and reverse the Initial Decision's findings that the Company provided unreasonable service to the Complainant and the imposition of a fine because the Initial Decision (i) erroneously ignored substantial record evidence demonstrating that the brochure provided to the Complainant is consistent with the Company's TVM Program; and (ii) the facts do not justify the imposition of a fine.

For these reasons, West Penn respectfully submits the following Exceptions to the Initial Decision.

II. EXCEPTIONS

West Penn Exception No. 1: West Penn excepts to the Conclusion of Law that the Complainant met her burden of proving that the Company did not provide reasonable service. (Finding of Fact Nos. 6, 15, 22-33; Conclusion of Law No. 4; ID at 20, 22, 23, 28-31, 33-35; Ordering Paragraph No. 1).

The Initial Decision concluded that the Complainant established that the Company failed to provide reasonable service because an informational brochure given to the Complainant was not consistent with the Company's TVM Program. This conclusion is unsupported by and directly contradicted by the record evidence.

A. ID improperly analyzed and resolved claims and evidence barred by res judicata.

The 2015 Complaint should have been dismissed in its entirety based on *res judicata*. As noted above, the Company challenged the relief sought in this proceeding via a Motion for Summary Judgment which the ALJ denied based on his view that certain of the Complainant's claims may not be precluded by *res judicata*.

When the Company orally moved at the hearing to dismiss the 2015 Complaint on the same grounds reflected in the prior Motion of Summary Judgment (N.T. 27:13-25; 36:4-9; 86:22-25, 87:1-11; 199:25; 200; 201:1-14.), the ALJ again denied such motion, despite the Complainant's testimony and admission that this matter was really just an extension of her 2013 Complaint. (N.T. 33:1-6: ALJ Watson to Complainant: "This testimony you've provided, is that testimony what you were telling Judge Dunderdale in the prior proceeding?" Complainant: "Well, it's ongoing. Of course it's the same—yeah, it's the same problem. It's the same thing, yes."). (N.T. 20223-25; 203:1-9.).

Essentially all of the evidence presented by the Complainant in this proceeding related to the claims she brought in the 2013 Complaint regarding the TVM Program for the Right-of-Way that crosses her property. (*See* N.T. 7; 25; 26; 33:4-5; 44; 46-47; 52; 64; 66; 68; 112-113; 119:20-25; 120-122; 124-125). Although the Initial Decision purported to dismiss the Complainant's attempts to re-litigate her claims from the 2013 Complaint (I.D. p. 20), it effectively allowed her to do so by disregarding certain key facts and claims that were previously litigated and resolved, and then finding the Company failed to provide reasonable service. It was an error of law and abuse of discretion for the Initial Decision to re-examine claims and evidence that are barred by res judicata and impose a penalty upon the Company in this proceeding ***where the Commission removed a penalty imposed upon the Company based upon the same claims and evidence*** raised in the 2013 Complaint proceeding. Re-litigating old claims does not and cannot establish a *prima facie* case of unreasonable service.

As the Company explained in its Main Brief:

> The doctrine of "*res judicata*, which is also known as claim preclusion, holds that a final judgment on the merits by a court of competent jurisdiction will bar any future action on the same cause of action between the parties and their privies." *Hopewell Estates, Inc. v. Kent*, 646 A.2d 1192, 1194 (Pa. Super. 1994) citing,

McArdle v. Tronetti, 627 A.2d 1219 (Pa. Super. 1993). This principle was explained in the case of *Pa. Pub. Util. Comm'n Schuylkill Twp. v. Borough of Phoenixville*, 1993 Pa. PUC LEXIS 78 as follows:

> The terms *res judicata* and collateral estoppel have been replaced in recent years in an effort to clarify the difference between the two ... The current terms (adopted by the drafters of the Restatement (Second) of Judgments) are claim preclusion and issue preclusion.
>
> **Claim preclusion**, formerly technical or strict *res judicata*, is the term used to describe the effects of merger and bar a prior judgment will have in a later action. Matters which were actually litigated and also matters which should have been litigated in prior actions as part of the same cause of action will not be allowed to be re-litigated in a subsequent action.
>
> **Issue preclusion**, formerly collateral estoppel, prevents the re-litigation of an issue of fact or law which was actually litigated in a prior proceeding and was necessary to the original judgment.
>
> Claim preclusion applies only when all four conditions exist:
>
> (1) identity of the subject matter;
> (2) identity of the cause of action;
> (3) identity of the parties; and
> (4) identity of the quality or capacity (legal status) of the parties suing or being sued.
>
> Issue preclusion does not require an identity of the parties, but does require:
>
> (1) the issue(s) decided by a prior final judgment is identical with the one(s) presented in the later action;
> (2) the issue(s) was actually litigated;
> (3) the party against whom issue preclusion is asserted was a party or in privy with a party to the prior litigation; and
> (4) the determination of the issue(s) was essential to the prior final judgment.[4]

The doctrine of *res judicata* is designed to promote certainty, finality and judicial economy.[5] It reflects the refusal of the law to tolerate the re-litigation of a matter decided by a court or agency

[4] *See Albert Buoncristiano v. Philadelphia Gas Works*, Docket No. C-2015-2466853 pp. 5-6 (Initial Decision issued March 9, 2016; Final Order entered April 29, 2016) (additional citations omitted).
[5] *Canon v. Verizon Pennsylvania Inc.*, Docket No. C-2013-2353818 (Opinion and Order entered March 6, 2014).

of competent jurisdiction so as to curtail waste of the resources of the agency and the respondent regarding issues that already have been adjudicated.[6]

In addition to the doctrine of *res judicata*, Code Section 316 bars further collateral attacks of Commission orders. Code Section 316 provides in pertinent part:

> Whenever the commission shall make any rule, regulation, finding, determination or order, the same shall be *prima facie* evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review.[7]

Unless the Commission rescinds a decision it has issued, its determinations are conclusive for all parties affected.[8]

At hearing, the Complainant repeatedly attempted to advance claims and evidence related to her 2013 Complaint, in particular:

- She provided testimony challenging the interpretation, dimensions and scope of the right-of-way (N.T. 16:25; 17:1-9; 46-47; 52:16-25; 53:1-7; 54:1-12; 64:1-17; 68:15-20);
- She provided testimony regarding the events that gave rise to the 2013 Complaint (N.T. 26-27; 29; 33; 34; 45:10-25; 64:1-17; 66:4-19);
- She provided testimony alleging West Penn engaged in or planned to engage in ground-to-sky cutting (N.T. 62:1-9; 64:8-9; 88:9-10);
- She provided testimony challenging the validity of West Penn's vegetation maintenance program (N.T. 33:9-12; 34:1-16; 39; 44:8-25; 49:9-21; 56:5-10; 63:2-13; 64:18-25; 65:1-6);
- William Broman, Jr. provided testimony challenging the interpretation, dimensions and scope of the Right-of-Way (N.T. 113:14-19; 122:12-16);
- William Broman, Jr. provided testimony regarding the events that gave rise to the 2013 Complaint (N.T. 125);

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[6] *Id.*

[7] *See* 66 Pa.C.S. § 316.

[8] *See Albert Buoncristiano v. Philadelphia Gas Works*, Docket No. C-2015-2466853, Conclusion of Law 8, (Initial Decision issued March 9, 2016; Final Order entered April 29, 2016) (citing 66 Pa.C.S. § 316).

- William Broman, Jr. provided testimony alleging West Penn engaged in or planned to engage in ground-to-sky cutting (N.T. 112:21-23; 120:6; 121:7, 13-15; 158:22-23); and

- William Broman, Jr. provided testimony challenging the validity of West Penn's vegetation maintenance program (N.T. 105:3-5; 112:23-25; 113:1-5.).

The ALJ sustained the Company's objections that these claims were barred by *res judicata.* (*See, e.g.*, N.T. 35-37; 114:16-17.).

The Initial Decision attempted to properly dispose of these claims and evidence on the basis of *res judicata* with the following statement: "...West Penn has demonstrated that Complainant has already litigated challenges to the removal of certain incompatible vegetation and the reasonableness of West Penn's vegetation management plan regarding the claims that were previously litigated to a final decision in the 2013 Complaint proceeding." (I.D. at 20.).

However, significant portions of the Findings of Fact reached in the Initial Decision are based upon—and stem from—the same facts, evidence and legal claims that were already raised and disposed in the 2013 Complaint. Beginning on page 22, the Initial Decision analyzes evidence and reaches conclusions about the Company's vegetation maintenance plan for the Right-of-Way that crosses the Complainant's property, which were the exact arguments advanced and litigated by the Complainant in the 2013 Complaint:

- The Initial Decision concludes that "...the determination that Complainant's right-of-way was 100 feet in width and the effect this determination had on how trees and vegetation would be managed [was] not a subject of the 2013 Complaint proceeding and [is] therefore not barred by the doctrines of res judicata or collateral estoppel" (I.D. p. 23);

- The Initial Decision concludes that "[i]n the instant case, West Penn's Vegetation Management Program including managing only 100 feet of the 180 foot right-of-way, the method used to determine the right-of-way width, its effect on what management plan was used, and the failure to provide a reasonable explanation and authority for those determinations to Complainant, was unreasonable." (I.D. p. 28);

- The Initial Decision concludes that "West Penn provided no credible evidence that it possesses the unqualified right to treat a 180 foot right-of-way as a 100 foot or less right-of-way." (I.D. p. 29);

- The Initial Decision concludes that "The correct [vegetation maintenance] plan would permit the trees to be pruned or otherwise maintained without being removed." (I.D. pp. 29-30);

- The Initial Decision concludes that "The testimony presented by Respondent failed to provide any basis for the manner in which Respondent determined its right-of-way width and therefore the vegetation management process to be utilized upon Complainant's property." (I.D. p. 30);

- The Initial Decision concludes that "...no credible evidence was provided by the Company that the actual right-of-way width was not the width used by the Company in determining the vegetation management policy to be utilized or that Complainant was ever advised of this policy or of its effect in determining what policy would be utilized by the Company." (I.D. p. 31).

Each and every one of the above issues analyzed by the ALJ *in this proceeding* was already litigated and disposed of in the 2013 Complaint proceeding. (*See* ALJ Exhibit 2.). *Sua sponte*, the ALJ moved the Initial Decision and the Commission's decision on exceptions in the 2013 Complaint into the record in this proceeding. (N.T. 101:13-25; 102:1-10.). In the 2013 Complaint proceeding, the Commission specifically held that West Penn provided "...substantial record evidence in which West Penn demonstrated that its actions were consistent with both keeping to the terms of the right-of-way agreement and following its TVM Program." (ALJ Exhibit 2, p. 13). The April 2014 Order further determined:

- West Penn introduced its work plan and showed that it centered solely on vegetation growing within the right-of-way (*Id.*, p. 14);

- The Company provided evidence establishing that "...although the easement establishes a right-of-way 180-feet wide, West Penn only maintains a 50-foot area extending out from either side of the centerline of the transmission line..." (*Id.*);

- The Company provided evidence establishing why the vegetation maintenance was necessary and that the Company's basis for removing the trees at issue was reasonable and based on safety-based factors (*Id.*, pp. 13-14.);

- The Company provided evidence establishing the clearance distance it uses for 138 kilovolt lines is reasonable (*Id.* p. 13.).

Not only are the Initial Decision's analysis of old claims and conclusions reached therein barred by res judicata, ***the ALJ's own exhibits*** directly contradict the Initial Decision's findings on those same issues. The April 2014 Order concluded that the Company's VMP was reasonable and reasonably applied to the Complainant in the 2013 Complaint proceeding. (*Id.*, pp. 13-16.). Therefore, without some specific change in facts (which was not shown at all), the facts decided and issues disposed of therein cannot be re-litigated or disturbed here.[9]

However, the Initial Decision made findings that are completely inconsistent with the April 2014 Order. It was an error of law and abuse of discretion for the Initial Decision to make findings of fact and conclusions of law contrary to the Commission's final order disposing the 2013 Complaint regarding (i) the width of the right-of-way and how the Company calculated where it would manage vegetation growing there; (ii) the type of vegetation maintenance that should occur in the right-of-way; (iii) whether the maintenance proposed by the Company is reasonable; (iv) whether the Company explained the width of the right-of-way to the complainant. Disposition of those issues in the 2015 Complaint proceeding are barred by the doctrine of *res judicata.*

B. The ID erred by concluding the Complainant's Exhibit J is inconsistent with the Company's VMP

Fundamental to the Initial Decision's conclusion that the Company did not provide reasonable service to the Complainant is the theory that the brochure provided to the Complainant is inconsistent with the Company's TVM Program. This conclusion is incorrect. It was abuse of discretion for the Initial Decision to ignore substantial record evidence establishing

[9] *Albert Buoncristiano v. Philadelphia Gas Works*, Docket No. C-2015-2466853 (Initial Decision issued March 9, 2016; Final Order entered April 29, 2016); *Canon v. Verizon Pennsylvania Inc.*, Docket No. C-2013-2353818 (Opinion and Order entered March 6, 2014).

the purpose and use of the brochure. On the contrary, the Company's substantial evidence rebutted any *prima facie* case the Complainant attempted to establish.

The Complainant and William Broman, Jr. testified that a West Penn brochure describing the Company's TVM Program gave rise to the new claims underpinning the 2015 Complaint. (N.T. 39:16-17; 41:17-23; 122:12-16.). However, the Complainant never produced the subject brochure in any of her evidence. However, West Penn provided a more recent copy of the document described by the Complainant. (N.T. 184:14-18).[10] That brochure is an informational piece West Penn provides to customers regarding its TVM Program. Importantly, it the same program that the Complainant challenged in her 2013 Complaint. The brochure does not alter right-of-way rights, nor does it constitute a change from the TVM Program that the Complainant challenged in 2013. (N.T. 207:2-17; 208:17-23.). Neither the existence of the brochure nor West Penn's act of providing it to the Complainant are *prima facie* case of unreasonable service and the Initial Decision erred by finding to the contrary.

However, the Initial Decision concluded that the Company's use of Exhibit J (i.e., the TVM brochure) was unreasonable and warranted a $5,000.00 civil penalty. Finding of Fact 33 provides:

> Although the right-of-way in this case is 180 feet wide, Respondent's plan was to maintain only 100 feet and to treat the right-of-way as being only 100 feet wide yet Respondent did not provide Complainant with this information or its impact upon the VMP. Tr. 256, 268.

Finding of Fact 34 provides:

> This policy is not stated in the brochure and no credible evidence was presented to indicate that this information was explained to Complainant. Tr. 268.

Finding of Fact 35 provides:

[10] As an accommodation to all parties and in order to provide the ALJ with a complete hearing record, West Penn electronically transmitted the current version of the brochure to the ALJ and the Complainant during the hearing on October 6, 2015. This document was admitted as Complainant's Exhibit J.

> The brochure provided to Complainant after completion of the 2013 Complaint proceeding does not inform customers that the Company uses a 100 foot right-of-way as opposed to actual width of the actual right-of-way that is granted or that the Company uses the 100 feet standard to determine voltage. Tr. 268.

The Initial Decision expanded these Findings of Fact into several incorrect statements about West Penn's evidence at hearing:

- ...no evidence was presented that Complainant was advised that respondent considered the right-of-way to be 100 feet or the significance of such a determination. (I.D. p. 28.).

- West Penn provided no credible evidence that it possessed the unqualified right to treat a 180 foot right-of-way as a 100 foot or less right of way. (*Id.* p. 29).

- ...[the Complainant] was simply provided with bad information and unreasonable service from the utility, whose representatives did not understand or at least have the ability to explain and justify its proposed plan. (*Id.* p. 30.).

- The brochure provided to Complainant provided inconsistent, if not incorrect, information to Complainant and other customers. The testimony presented by Respondent failed to provide any basis for the manner in which Respondent determined its right-of-way width and therefore the vegetation management process to be utilized upon Complainant's property. In addition, Respondent failed to provide such information to Complainant or to make itself aware of the problems with the information and plan proposed in this case and to intelligently discuss or modify its plan to be consistent with its policy and the information and documentation provided to Complainant. (*Id.*).

- ...no credible evidence was presented by Respondent that anyone adequately explained these policies and issues to Complainant... (*Id.* p. 32.).

- Complainant was provided with incorrect information. (*Id.*, p. 33.).

These findings and statements are erroneous and contrary to the substantial evidence presented in both the 2013 Complaint proceeding and the hearing that occurred October 6, 2015.

Finding of Fact No. 33 cites to two pages of the hearing transcript to support its erroneous finding that the Company did not provide the Complainant with information about its plans to maintain the middle 100 feet of the right-of-way. Page 256 contains Company witness Nick Weston's testimony that the Company, in its discretion, may opt to enforce only a portion

of its lawful easement rights based on site conditions: "Because...the right-of-way or easement says 180 [feet] it doesn't mean we are going to implement everything to that 180 [foot width]." (N.T. 256:4-6). In the Initial Decision, the ALJ completely disregarded and ignored the rest Mr. Weston's answer, also recorded on page 256 of the transcript: "I've never changed the work plan since the first day we stepped on the property, as far as what we are going to affect and the width of where we are going to affect it." (N.T. 256:22-25.). Mr. Weston further testified that the vegetation that West Penn discussed with the Complainant in 2015 is the same vegetation that the Complainant placed at issue in the 2013 Complaint (N.T. 225:10-24; 231:7-9), a fact further corroborated by Company witness Harry Flannery (N.T. 208:17-23). This testimony was not challenged or rebutted by the Complainant.

However, the ALJ extensively cross-examined Mr. Weston. (*See* N.T. 242-285, questioning by both the ALJ and Complainant). The second page cited by the Initial Decision in support of Finding of Fact No. 33 and also 34 and 35 is a portion of the ALJ's *sua sponte* cross examination of Mr. Weston:

> Q. ALJ to Mr. Weston: ...where in the entire document [referring to Exhibit J] then does it say that we use the 100-foot right-of-way as the industry standard as opposed to the actual right-of-way that's granted?
>
> A. Mr. Weston: It does not say that. That would be—you know, we use our right-of-way width to determine our voltages.
>
> Q. ALJ to Mr. Weston: Well, how would a customer know that?
>
> A. Mr. Weston. We try to educate property owners as—as best we can. (N.T. 268:14-24.).

While the ALJ found Mr. Weston's answers sufficient to support the ALJ's conclusion that the Complainant was not aware of (or confused about) the Company's plans to manage the vegetation in the right-of-way, Mr. Weston's answer adequately explained the Company's policy

of communicating with customers regarding planned vegetation maintenance. Mr. Weston further responded to the ALJ's questions as follows:

> Well, we try to talk to every property owner before work is done. We have plenty of different instances where we have reached to the Bromans, not only the Bromans, but every property owner on the transmission corridor. And one thing we do is, you know, tell them what we are doing out there...we don't go there and do the work and say this is what we are doing. We make it a point to let them know what we are doing. And I think we have demonstrated that on more than one occasion with phone calls and meetings. And I think one thing I want to make clear is that, you know, these trees just didn't appear. This is just something that has been ongoing. I don't have any new information to give you as far as the right-of-way or the trees that we need to remove. (N.T. 269:5-21).

Mr. Weston's testimony also established the following facts:

- the vegetation that West Penn discussed with the Complainant in 2015 is the same vegetation that the Complainant placed at issue in the 2013 Complaint (N.T. 225:10-24; 231:7-9; 275:1-13);

- the work plan to remove this vegetation was developed in 2012 (N.T. 225:22-24.) and that the removal of same was put on hold pending the resolution of the 2013 Complaint (N.T. 228:9-17; 241:20-25.);

- the vegetation West Penn needs to remove is incompatible with West Penn's vegetation maintenance program because the plants have the potential to grow tall enough to interfere with the conductors (N.T. 230:4-11.);

- the work plan developed in 2012 and 2013 included removal of the plants located on the left side of the tower that the Complainant is now alleging that West Penn failed to remove (N.T. 229:12-15.);[11] and

- Mr. Weston contacted the Complainant to schedule a time when West Penn could finish the vegetation maintenance, and that the Complainant again refused to permit removal of two oak trees, four cedar trees, and five blue spruce trees located in the Right-of-Way. (N.T. 231:10-25; 232:1-5.).

Importantly, Mr. Weston clarified that Exhibit J, the brochure given to the Complainant, was an informational document "...that was created to inform property owners of [West Penn's] program as a whole." (N.T. 280:2-4.). That means the informational document is intended to

[11] N.T. 229:12-15. Mr. Weston testified that removal of the plants growing along the fence row on the left side of the tower was being done "at the request of [the Complainant]." *See* N.T. 229:15.

describe, in a general manner, the Company's TVM Program including using the "border zone wire zone" concept "...when conditions permit." (See Exhibit J, p. 3.). Mr. Weston's testimony—even the testimony elicited by the ALJ—does not establish that Exhibit J represents the Company's entire TVM Program or that the Company changed its approach to the Complainant's Right-of-Way.

Perhaps most significantly, as discussed in Section II.A above, the ***Commission's Order in the 2013 Complaint proceeding conclusively established*** that the Company explained to the Complainant that it planned to manage only the middle 100 feet of the 180-foot right-of-way. (ALJ Exhibit 2, p. 14.). The substantial evidence provided in this case establishes that the Company explained the work plan to the Complainant as far back as 2013 and that ***the Company has not changed the work plan ever since.***

Furthermore, the Company presented unrebutted substantial evidence of its efforts to reach out to and communicate with the Complainant. The Company presented the testimony of Harry Flannery, Senior Corporate Counsel for West Penn. (N.T. 120:13-25, 121-122, West Penn Exhibits 1, 2.). Mr. Flannery presented testimony and exhibits establishing the following critical facts:

- West Penn became aware that the Complainant felt that she had won her case after the Commission dismissed the 2013 Complaint, and Mr. Flannery contacted the Complainant to explain the Commission's April 23, 2014 opinion and order (N.T. 205:14-25; 206:1-20; West Penn Exhibits 1, 7, 8, 9.);
- Mr. Flannery provided copies of the Commission's April 23, 2014 opinion and order to the Complainant (*Id.*);
- The vegetation maintenance that West Penn needs to do now is simply the work that the Commission authorized when it dismissed the 2013 Complaint (N.T. 208:17-23.); and
- West Penn is not prescribing removal of any trees other than those initially placed at issue by the Complainant in the 2013 Complaint. (N.T. 208:24-25; 209:1-3.).

Mr. Flannery sponsored copies of four letters he sent to the Complainant regarding the work West Penn needed to complete as a result of the Commission's dismissal of the 2013 Complaint. (*See* West Penn Exhibits 1, 7, 8, 9.). Mr. Flannery also testified that federal mandates require all electric utilities to have a vegetation management plan in place, and West Penn has such a plan that it implements regarding transmission lines that are 69 kilovolts ("kV") and above. (N.T. 215:25; 216:1-8.).

The Initial Decision's conclusion that the Complainant did not understand the brochure or thought that the brochure created a new vegetation management protocol is directly rebutted by Mr. Flannery's testimony and the exhibits he sponsored. The Company's evidence established that it clearly and consistently communicated precisely the same vegetation maintenance plan for the Complainant's Right-of-Way.

No substantial evidence supports the findings and conclusions reached by the Initial Decision that the Company provided unreasonable service by providing a general informational brochure to the Complainant. The record evidence clearly establishes the exact opposite—that the Company provided correct and consistent information to the Complainant. The Complainant may not agree with or accept the Company's information, but that disagreement or refusal to accept information does not equate to unreasonable service. The Company respectfully submits that it was an abuse of discretion and error of law for the Initial Decision to hold otherwise.

C. The Initial Decision is not based on substantial facts of record and contains other errors.

The conclusions reached in the Initial Decision must be based on substantial evidence.[12] The term "substantial evidence" means such relevant evidence that a reasonable mind may

[12] *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).

accept as adequate to support a conclusion.[13] More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.[14] In addition, the offense must be a violation of the Code, the Commission's regulations, or an outstanding order of the Commission.[15]

The conclusions reached by the Initial Decision are not based on substantial evidence. As explained above, the only substantial evidence provided in the 2015 Complaint proceeding supports the Company's position that it provided reasonable service to the Complainant. The Initial Decision contains other flaws which support reversal.

First, Finding of Fact 15 No. is based entirely on hearsay. Finding of Fact No. 15 provides "When Mr. Scott gave the brochure to Complainant and Mr. Broman, *he said the brochure was the Company's current Vegetation Management Program that the Company intended to enforce.* (Tr. 197)." (emphasis added). However, Mr. Scott was neither offered as a witness nor did he testify at the hearing on the 2015 Complaint. Therefore, Finding of Fact No. 15's conclusion about what Mr. Scott said to the Complainant is based on uncorroborated hearsay. It is error for the Initial Decision to make determinations based on uncorroborated hearsay. *See Castaneira v. PPL Electric Utilities Corp.,* Docket No. F-2014-2402158 (Final Order entered March 10, 2016 providing that "[h]earsay evidence admitted without objection will be given its natural probative effect and may support a finding if corroborated by other competent record evidence; however, a finding based solely on hearsay will not stand," citing *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366 (Pa. Cmwlth. 1976)).

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[13] *Norfolk & Western Ry. Co. v. Pa. P.U.C.*, 489 Pa. 109, 413 A.2d 1037 (1980).
[14] *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).
[15] 66 Pa.C.S. § 701; *West Penn Power Co. v Pa. P.U.C.*, 478 A.2d 947, 949 (Pa. Cmwlth. 1984).

The Initial Decision compounds this error on page 21 with this statement: "Testimony was also presented from Richard Scott, a Company representative, who said he gave Complainant and her son a copy of the brochure in the spring of 2015 and told them it was the current vegetation management plan the Company intended to enforce." There is absolutely no testimony from Richard Scott in the 2015 Complaint proceeding record because he was not a witness in that proceeding. This testimony does not exist, which is why the Initial Decision lists no citation in the transcript showing where Richard Scott testified, and further, no entries exist in the transcript showing Mr. Scott ever testified.

Second, the Initial Decision states Nick Weston delivered the brochure to the Complainant (I.D. p. 28.), when all the other evidence presented at hearing established that Richard Scott gave the brochure to the Complainant. The Initial Decision, referring to Nick Weston, states "...a Respondent witness who provided the brochure to Complainant could not explain the Vegetation Management Program, had never seen the vegetation management plan and did not intend to use it in maintaining Complainant's property." (*Id.*) However, the Complainant specifically stated that Richard Scott gave her the brochure, ***not*** Nick Weston. (*See* N.T. 40-41).

Next, the Initial Decision finds that West Penn employee Nick Weston's answers to the ALJ's cross examination questions constitute the provision of unreasonable service to the Complainant. This finding misunderstands Mr. Weston's role in the proceeding. He was provided as a hearing witness for the sole purpose of explaining the vegetation maintenance work that needed to be completed by the Company at the Complainant's property. (N.T. 225:7-9.). The Initial Decision finds that "Mr. Weston should have had the ability to provide the Complainant with accurate information regarding the width of her right-of-way and its effect on

the vegetation management plan for her property." (*Id.*, p. 32.) However, that was not Mr. Weston's role at hearing and the ALJ was not correct in attempting to elevate Mr. Weston's testimony into more than it was or intended to be. Although the Company's evidence established that it consistently communicated the same vegetation maintenance plan to the Complainant, the Initial Decision utilized Mr. Weston's testimony as an independent basis for finding that the Company failed to provide reasonable customer service to the Complainant. (*Id.*, pp. 31-32.). ***Neither testifying in a hearing nor the Initial Decision's erroneous use of Mr. Weston's testimony constitute customer service let along inadequate service in violation of the Code.*** The Initial Decision provides no support or even suggests that the Complainant ever argued that Mr. Weston could not answer her questions. No evidence was provided that Mr. Weston failed to adequately explain the vegetation maintenance program to the Complainant during their meetings prior to the hearing. Mr. Weston's testimony—like the Complainant's testimony—focused on what they discussed about the existing work plan, not whether or not Mr. Weston understood all the intricacies of the Company's TVM Program.

While the ALJ engaged in a lengthy cross examination of the Company's witness that ranged beyond the scope of the witnesses' knowledge and direct testimony, Mr. Weston's testimony did not establish a basis for a finding that the Company provided unreasonable service to the Complainant under the uncontroverted and substantial evidence of record discussed in detail above.

West Penn Exception No. 2: West Penn excepts to the Ordering Paragraph that "West Penn Power Company within thirty (30) days of the Commission's Order in this case shall pay a civil penalty in the amount of Five Thousand Dollars ($5,000) by sending a check or money order payable to the Pennsylvania Public Utility Commission . . ." (Conclusion of Law No. 9; ID at , Ordering Paragraph No. 4).

Pursuant to Code Section 3301, the Commission may impose civil penalties for, among other things, "violations" of the Code. The Initial Decision imposes a $5,000.00 penalty on West

Penn for violating Code Section 1501 (Character of Service and Facilities) by "failing to provide reasonable and adequate customer service in how it implemented its vegetation maintenance program on Complainant's property." (I.D. at 38, Ordering Paragraph No. 3). Thus, without a "violation" of the Code, no civil penalty can be imposed under Code Section 3301.

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

Moreover, the Initial Decision's evaluation of the factors and standards for determining civil penalty amounts under 52 Pa. Code § 69.1201(c) is flawed and should be rejected. First, the Initial Decision asserts that the Company was unreasonable in maintaining 100 feet out of the 180 feet of the right-of-way and providing the brochure to the Complainant. (I.D. at 33-34). As explained in Exception No. 1.A-B above, these conclusions are inconsistent with the Commission's existing determination on this issue and the evidence presented at hearing that (i) the Complainant and the Company engaged in discussions for years regarding the work plan for the right-of-way, and that the work plan had not changed; and (ii) the brochure provided to the Complainant is consistent with the Company's existing TVM Program. Essentially all of the Complainant's claims were decided by the Commission in the 2013 Compliant and are thus barred by res judicata. Second, the Company acted reasonably in trying to complete its work plan in compliance with the Commission's April 2014 Order. It is not a violation of Code Section 1501 for the Company to comply with a Commission order and notify a customer of its intent to do so.

The Initial Decision also adopts the Complainant's misunderstanding of Exhibit J, and ignores the fact that the Company proved that the information contained in the brochure is completely consistent with the Company's TVM Program. (I.D. at 34). West Penn has not violated the Code based on the evidence presented here, much less committed a "serious" violation. As explained in Exception No. 1 above, the record evidence clearly establishes that the Company provided correct and consistent information to the Complainant. The Company did nothing to intentionally confuse the Complainant in this case, and no evidence was presented establishing that the Company's representatives intentionally committed violations of the Code by following the Company's TVM Program.

The Initial Decision incorrectly reasons that because the Company provided no testimony acknowledging an error with the TVM Program or the brochure, a higher penalty has *not* been mitigated. (ID at 34). However, this reasoning places the burden on the wrong party to defend its conduct because, as outlined in Exception No. 1 above, the Complainant never established a *prima facie* case of a Code violation. In addition, the Commission has already determined that the very same Company policy at issue in this case—the TVM Program—is reasonable. Under these facts and circumstances, there was no reason for West Penn to acknowledge an error that never existed.

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

Regarding West Penn's compliance history, the amount of civil penalty and review of prior Commission decisions, the Initial Decision relies on *West Penn Power Co. v. Pa. Pub. Util. Comm'n*, 578 A.2d 75 (Pa.Cmwlth. 1990). First, the Initial Decision acknowledges no record was evidence submitted to support a finding that the Company has a poor compliance record.

(ID at 35). It relies solely on the *West Penn* case because the Company "was the subject of one of the few reported appellate decisions in this jurisdiction regarding tree trimming," it has "treated the Commissions' requirements for reasonable customer service and maintaining a reasonable and appropriate vegetation maintenance program in an unreasonable manner." (ID at 35). Aside from the fact that the Company was never made aware that its status as a party to an appellate case on a distribution-related tree trimming case 26 years ago would be relevant to the imposition of a civil penalty, the Initial Decision fails to comprehend a key distinguishing feature of the *West Penn* case which is that the instant proceeding involves vegetation management in connection with a transmission line (and not distribution line) right of way. As such and at minimum, the Initial Decision relied upon an irrelevant decision when making its finding about West Penn's prior compliance history for purposes of establishing the civil penalty. That was clearly erroneous.

In determining the amount of civil penalty, the Initial Decision more than doubles the fine ultimately imposed in the *West Penn* case. This finding erroneously fails to recognize the significant differences between the *West Penn* case and this proceeding. In *West Penn* the subject utility was not able to provide prior notice of vegetation management to the landowner prior to cutting down 74 trees. The Court found that the property in the *West Penn* case was uninhabited and the utility's contractor had difficulty locating the landowner to provide notice of the upcoming substantial vegetation removal. Consequently, the contractor cut down 74 trees on the landowner's property without any notice whatsoever to the landowner. The facts are not even at all close in this case. Here, the Company and the landowner engaged in years of discussion and litigation about vegetation removal prior to the removal of any vegetation. The communications involved letters, phone calls and face-to-face meetings at the property,

including a meeting at the property with both parties' attorneys. In *West Penn*, the utility removed 74 trees all at one time; here, all that has happened is the Company attempted to complete its work plan for the right-of-way consistent with the Commission's April 2014 Order. There is no credible way to conclude that the facts of this case are three times worse than the facts of *West Penn* and therefore warrant triple the fine imposed in *West Penn*.

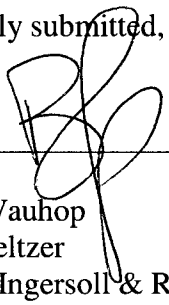
Since West Penn did not violate Code Section 1501 or otherwise render unreasonable customer service in this matter, there is no legal basis for imposing a civil fine of any amount.

III. CONCLUSION

As explained above, there is no basis in law or fact supporting a finding that West Penn provided unreasonable customer service, violated Code Section 1501, or should be charged a civil penalty for any conduct in connection with the 2015 Complaint. Moreover, the Initial Decision penalizes West Penn for doing the very thing the Commission directed West Penn to do in a prior proceeding—provide notice to and discuss with a customer before engaging in vegetation maintenance. This contradictory result cannot stand.

The Initial Decision ignores credible evidence in support of the Company's proper and lawful TVM Program, and commits numerous errors in its findings of fact, and therefore must be reversed.

Respectfully submitted,



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Dated: November 28, 2016

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

CERTIFICATE OF SERVICE

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

Via First-Class Mail

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

Marlene Broman
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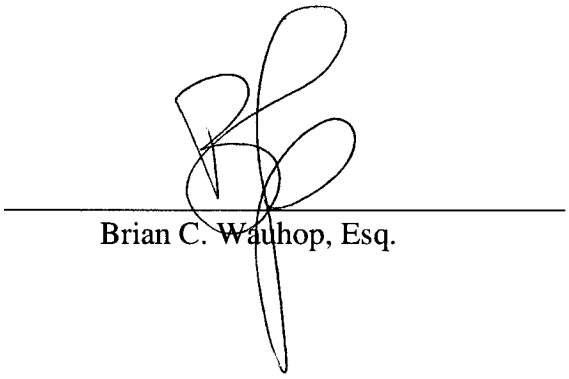
Butler, PA 16002

Dated this 28th day of November, 2016.



Brian C. Wauhop, Esq.