

**Brian C. Wauhop**

717 237 4975  
brian.wauhop@bjpc.com

409 North Second Street, Suite 500  
Harrisburg, PA 17101  
T 717 237 4800  
F 717 233 0852  
www.buchananingersoll.com

December 8, 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 Reply to 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.

**WEST PENN POWER COMPANY**

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**Docket No. C-2015-2485454**

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**REPLY TO EXCEPTIONS  
ON BEHALF OF  
WEST PENN POWER COMPANY**

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

Brian C. Wauhop, PA ID No. 306695  
Alan M. Seltzer, PA ID No. 27890

409 North Second Street  
Suite 500  
Harrisburg, Pennsylvania 17101-1357

**Attorneys for West Penn Power Company**

**Dated: December 8, 2016**

## **I. INTRODUCTION**

As explained in West Penn Power Company's ("West Penn" or the "Company") Exceptions filed November 28, 2016, this proceeding began when the Complainant, Marlene Broman filed the 2015 Complaint<sup>1</sup> against West Penn 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. Since 2012, the Complainant has been challenging the Company's plans to manage vegetation growing in the Right-of-Way containing West Penn transmission facilities that crosses the Complainant's property.

An initial telephonic evidentiary hearing was held October 6, 2015, during which the Complainant and West Penn presented testimony and exhibits. The parties submitted post-hearing briefs further amplifying their positions on the issues raised at hearing.

On November 4, 2016, the Commission served the Initial Decision ("Initial Decision" or "I.D.") of Administrative Law Judge Jeffrey A. Watson ("ALJ") in connection with the 2015 Complaint.

On November 28, 2016, West Penn timely filed Exceptions to the Initial Decision's holding that the Company did not provide reasonable service to the Complainant in the manner that the Company contacted the Complainant and explained the vegetation maintenance plans following disposition of the Complainant's prior formal complaint on that issue.

On November 29, 2016, counsel for the Company received material from the Complainant via U.S. Postal Service mail titled "Petition for Reconsideration" that had apparently been sent to the ALJ and counsel for West Penn. The material was not filed with the

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<sup>1</sup> West Penn respectfully incorporates its Main Brief filed June 17, 2016, and its Exceptions filed November 28, 2016 herein. The abbreviations and capitalized designations used herein are the same as those used in the Company's Main Brief and Exceptions.

Commission until December 2, 2016, and on that date, the Commission Secretary's Bureau listed the Complainant's document on the docket as a "Reply Exception."

Notwithstanding the Secretary's designation of the Complainant's document as "Reply Exceptions," the content of the Complainant's document establishes it is not a response to the Company's timely-filed Exceptions. Instead, the Complainant's document attempts to challenge some conclusions and holdings reached in the ALJ's Initial Decision. In that light, the Company provides the following brief Reply to the Complainant's "Exceptions" to the Initial Decision.<sup>2</sup>

## **II. REPLIES TO EXCEPTIONS**

### **A. Overview**

The Complainant's *pro se* Exceptions are not numbered and do not identify or cite specific findings of fact or conclusions of law in the Initial Decision to which exception is taken.<sup>3</sup> Nonetheless, the general theme of the Complainant's Exceptions is the same one advanced by the Complainant since 2012: that she believes the Company should be prevented from removing vegetation growing in the Right-of-Way. As discussed below, each of the issues raised by the Complainant's Exceptions have already been litigated and disposed in a final order of the Commission. The Complainant's Exceptions fail to provide any reason for disturbing the Initial Decision's determination that issues regarding the Company's plans to remove trees and shrubbery growing in the Right-of-Way are barred from being re-litigated once more in the 2015 Complaint.

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<sup>2</sup> The Company acknowledges and understands the Commission's longstanding policy to liberally construe *pro se* submissions made by customers in complaint proceedings. Therefore, in these Replies to Exceptions, the Company has endeavored to discern the challenges set forth in the Complainant's "Exceptions" document and respond accordingly.

<sup>3</sup> See 52 Pa. Code § 5.553(a)-(e).

B. Responses to Individual “Exceptions”

**EXCEPTION NO. 1: Issues regarding shrubbery on the right side of the overhead lines were not litigated in the prior formal complaint proceeding.**

The Complainant’s first assignment of error appears to be that her claims regarding management of shrubbery and other vegetation growing to the right side of the transmission lines were not raised in her prior formal complaint, the 2013 Complaint proceeding, and therefore, the ALJ should have considered and ruled upon these claims. This argument fails because the evidence clearly establishes that Complainant litigated the issue of vegetation *growing on the right side* of the transmission lines during the 2013 Complaint proceeding, and the Company agreed to the Complainant’s demands regarding maintenance of the shrubbery *growing on the left side* of the transmission lines. Therefore, this issue is both moot and barred by the doctrine of *res judicata*.

First, the 2015 Complaint does not challenge the Company’s management of vegetation growing on any specific side of the overhead wires. At hearing, the Complainant argued that the Company provided unreasonable service because it had not cleared out shrubbery and trees growing on the left side of the transmission lines,<sup>4</sup> even though the Company established it agreed to do this but had not yet completed the task pending resolution of the Complainant’s multiple formal complaints.<sup>5</sup> As explained on page 20 of the Company’s Main Brief:

...[the Complainant] testified that in the last two years, West Penn did not come to her property and remove brush and incompatible vegetation growing on the left side of the tower. The Complainant failed to address the fact that over that exact time period, resolution of the 2013 Complaint was still pending. The Complainant’s argument appears to attack West Penn for not doing the very same conduct the Complainant cites as the source of both the 2013 Complaint and the

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<sup>4</sup> Complainant’s Exhibit B shows Patterson Road at the bottom of that exhibit and vegetation growing on the right side and left side of the transmission lines that intersect Patterson Road. The Complainant testified about vegetation growing on the right side of the transmission lines (near her house) and on the left side of the transmission lines (running along the fencerow just beyond the transmission lines). See N.T. 25:13-25; 38:14-19; 61:3-7; 71:4-18; 73:16-18.

<sup>5</sup> See Exceptions of West Penn, pp. 14-16; West Penn Exhibit 2.

2015 Complaint. This is not unreasonable service; in fact, it is completely reasonable for West Penn to refrain from engaging in vegetation maintenance on the Complainant's property pending the outcome of a dispute on that *precise* issue. Moreover, the work plan specifically stated that West Penn would remove the vegetation the Complainant testified she wanted to have removed.<sup>6</sup>

In other words, the 2013 Complaint proceeding dealt with vegetation growing on both the left side and the right side of the transmission lines, although the Complainant only raised the issue of the trees growing on the right side of the transmission lines in the 2013 Complaint.

Furthermore, the Company told the Complainant it would manage the vegetation growing on the left side of the transmission lines and placed that into the work plan for the Right-of-Way.<sup>7</sup> The Company's evidence—unrebutted by the Complainant—establishes that the Company agreed with the Complainant regarding the vegetation maintenance that would occur on the left side of the transmission lines.

Second, the Complainant's claims regarding the trees and vegetation growing on the right side of the transmission lines—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—were the subject of the 2013 Complaint and were properly dismissed by the ALJ on page 20 of the Initial Decision:

...the doctrine of *res judicata* applies here to bar the claims raised in the 2015 Complaint as they were fully litigated in the 2013 Complaint proceedings.<sup>8</sup> The Commission entered a final order at *Marlene Broman v. West Penn Power Company*, Docket No. C-2013-2356237, reversing ALJ Dunderdale's Initial Decision regarding her finding that Complainant met her burden of proof in establishing a claim for unreasonable service and the assessment of a civil penalty. The Opinion and Order of the Commission was not appealed. **The 2015 Complaint was filed, in part, to prevent West Penn from removing some**

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<sup>6</sup> N.T. 229:12-15; West Penn Exhibit 2.

<sup>7</sup> *Id.*

<sup>8</sup> Additionally, the elements required to establish issue preclusion are also satisfied here: the same issues raised in the 2015 Complaint were actually litigated and decided in the 2013 Complaint proceeding where the Commission ruled against Complainant, and the determination of those issues was essential to the final judgment dismissing the 2013 Complaint. 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).

**trees and vegetation that West Penn wanted to remove back in 2012.** For these reasons, 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. Accordingly, these claims must be dismissed.

(emphasis added). Moreover, as the Initial Decision correctly states, claim preclusion bars claims that could have been raised in prior proceedings from being advanced later against the same party: "...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."<sup>9</sup>

Therefore, the arguments in Complainant's first Exception relating to the Initial Decisions' holdings regarding the Company's plans to manage vegetation, growing on either side of the transmission lines, are moot because the Company has agreed to remove the shrubbery the Complainant wants removed, and the Complainant has already litigated these same claims in the 2013 Complaint proceeding. As a result, the Commission should deny the Complainant's first Exception.

**EXCEPTION NO. 2: Challenge to the ALJ's application of *res judicata* in the 2015 Complaint proceeding.**

The Complainant's second assignment of error appears to be a challenge to the Initial Decision's application of the doctrine of *res judicata* to some of the issues raised by the Complainant in the 2015 Complaint proceeding. She further argues that the Initial Decision reached in the 2013 Complaint proceeding is evidence supporting her claim that the Company did not provide reasonable service, and that she was not afforded a fair opportunity to litigate her case because she chose to appear *pro se* without legal representation. On the contrary, the record in this case establishes that the ALJ was extremely careful in the administration of the

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<sup>9</sup> Initial Decision, p. 15 (internal citation omitted).

evidentiary hearing to allow the Complainant a full and fair opportunity to litigate her case. The evidence establishes that the ALJ properly applied *res judicata* to bar certain claims and evidence from the 2013 Complaint proceeding in the 2015 Complaint proceeding.

Pages 14-20 of the Initial Decision correctly articulates the doctrine of *res judicata* and then properly applies it in the 2015 Complaint proceeding to dismiss the Complainant's attempts to re-litigate the Company's plans 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.<sup>10</sup> The Complainant's Exceptions fail to identify a flaw in the way the Initial Decision applied *res judicata* to bar those claims.

In addition, as explained in the Company's Main Brief, there can be no question that the ALJ afforded the *pro se* Complainant every possible opportunity to present her case, and to present issues that would not be precluded by the Commission's final order regarding the 2013 Complaint proceedings. The ALJ afforded the Complainant almost 5 hours to deliver her case, and permitted the Complainant to ask additional questions or adduce testimony from West Penn witnesses.<sup>11</sup> West Penn delivered its case in roughly one hour and 45 minutes, and referred to only one aspect of the 2013 Complaint proceedings—the work plan that is still outstanding from that action—to establish that the same issues are present in both actions. In an effort to assist the ALJ in providing the Complainant with a full and fair opportunity to present her case, West Penn

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<sup>10</sup> In its November 28, 2016 Exceptions, West Penn challenged several ways the Initial Decision improperly relied upon facts and improperly sustained certain arguments of the Complainant that should also have been barred by *res judicata*. West Penn's Reply here indicating the manner in which the Initial Decision properly applied *res judicata* does not conflict with West Penn's concerns about the Initial Decision's other improper approaches to the doctrine. See Exceptions of West Penn pp. 8-10.

<sup>11</sup> See., e.g., N.T. 30:19-25; 31:1-4; 36:22-25; 37:1-9, 15-20; N.T. 38:11-13; 59:5-16; 60:19-25; 61:1-2, 16-20; 62:17-18; 67:15-19; 69:17-21, 24-25; 70:1-3; 95:21-25; 96:1-17; 99:25; 100:1-15; 107:14-18; 109:13-15; 210:12-15.

even provided the Complainant and the ALJ with a copy of an exhibit she failed to produce at hearing.<sup>12</sup>

Not only did the Company provide reasonable service in its dealings with the Complainant following the disposition of the 2013 Complaint, the Company also cooperated with the ALJ to reasonably accommodate the Complainant at hearing so the Complainant could be afforded a fair opportunity to present her case. Ironically, the Initial Decision actually penalized the Company for the reasonable accommodation of providing the Complainant's missing exhibit during hearing by finding fault—against the weight of the evidence—with the content of Complainant's Exhibit J. On balance, the evidence establishes that there is nothing unreasonable about the way the Company interacted with this customer, including correspondence prior to and during the October 6, 2015 hearing.

As a result, the Commission should deny the Complainant's second Exception, because the record establishes that the Initial Decision properly applied *res judicata* to bar claims related to the 2013 Complaint, and the Complainant had a full and fair opportunity to litigate her claims.

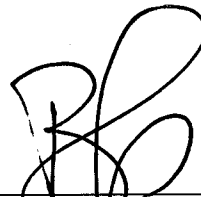
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<sup>12</sup> See Complainant's Exhibit J; see also N.T. 41-42; 63:14-21 (discussion regarding the brochure the Complainant did not provide as a hearing exhibit); 179:5-25, 185:1-25, 186:1-4 (following off-the-record discussion with the ALJ, West Penn agreed to electronically transmit a copy of the brochure (Complainant's Exhibit J) referenced by the Complainant to both the ALJ and the Complainant).

**III. CONCLUSION**

For the reasons set forth above, West Penn Power Company respectfully requests that the Commission (i) reject the Complainant's Exceptions; (ii) grant the Exceptions filed by the Company on November 28, 2016; and (iii) grant the Company such other relief as is just and reasonable under the circumstances.

Respectfully submitted,



Date: December 8, 2016

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Alan Michael Seitzer  
Brian C. Wauhop  
BUCHANAN INGERSOLL & ROONEY PC  
409 North Second Street, Suite 500  
Harrisburg, PA 17101-1357  
(717) 237-4975

Attorneys for  
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**MARLENE BROMAN**

v.

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**Docket No. C-2015-2485454**

**CERTIFICATE OF SERVICE**

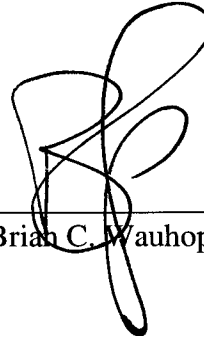
I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

**Via First-Class Mail**

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

Marlene Broman  
4136 Patterson Road  
Butler, PA 16002

Dated this 8<sup>th</sup> day of December, 2016.



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Brian C. Wauhop, Esq.