

December 21, 2016

Via Electronic Filing

Rosemary Chiavetta, Esquire
Secretary
PA Public Utility Commission
Commonwealth Keystone Building, 2 North
P.O. Box 3265
Harrisburg, PA 17105-3265

**Re: Docket No. C-2016-2547322
Robert Mattu v. West Penn Power Company
Reply Brief of West Penn Power**

Dear Secretary Chiavetta:

Attached for filing is the Reply Brief of Respondent, West Penn Power Company (West Penn), in the above referenced proceeding.

A copy of the Reply Brief has been forwarded to Complainant's counsel in the manner indicated on the attached Certificate of Service.

If there are any questions, please contact me.

Very truly yours,

Reger Rizzo & Darnall LLP



Margaret A. Morris

MAM/jmm
Attachment

cc: The Hon. Katrina L. Dunderdale, PA Public Utility Commission
John L. Munsch, Esquire, FirstEnergy Service Company
Robert A. Cinpinski, Esquire, Law Office of Robert A. Cinpinski

**Re: Docket No. C-2016-2547322
Robert Mattu v. West Penn Power Company
Reply Brief of West Penn Power**

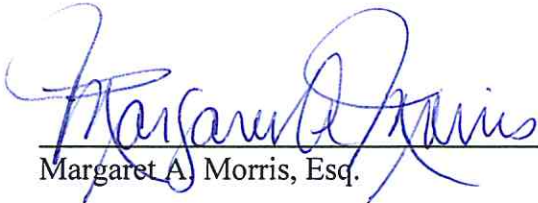
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served upon the person(s) listed below, in the manner indicated, in accordance with the requirements of § 1.54 (relating to service by a participant).

Via Electronic and First Class Mail

Robert A. Cinpinski, Esq.
200 North Jefferson Street
Kittanning, PA 16201
raclaw@windstream.net

Dated: December 21, 2016


Margaret A. Morris, Esq.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

ROBERT M. MATTU :
 :
 v. : Docket No. C-2016-2547322
 :
 WEST PENN POWER COMPANY :

**REPLY BRIEF OF
WEST PENN POWER COMPANY**

Margaret A. Morris, Esquire
Attorney I.D. No. 75048
Cira Centre, 13th Floor
2929 Arch Street
Philadelphia, PA 19104
(215) 495-6524 (voice)
(215) 495-6600 (fax)
mmorris@regerlaw.com

Date: December 21, 2016

Counsel for West Penn Power Company

Table of Contents

TABLE OF AUTHORITIESiii

INTRODUCTION1

SUMMARY OF ARGUMENT1

ARGUMENT..... 2

 1. The Complainant has completely ignored his legal burden required to sustain his
 Complaint.....2

 2. The Complainant argues that using herbicides at his property creates an
 unreasonable safety hazard and is contrary to and in violation of Section 1501
 of the Code.....3

 3. The Complainant argues that using herbicides at his property creates an
 unreasonable safety hazard and is contrary to and in violation of Section 1504
 of the Code.....5

CONCLUSION.....6

TABLE OF AUTHORITIES

Cases

Bernardi v. West Penn, Docket No. C-2014-2453852.....5

Pennsylvania Bureau of Corrections v. City of Pittsburgh, 532 A.2d 12 (Pa. 1987).....2

Pennsylvania Tel. Corp. v. City of Pennsylvania Public Utility Comm., 33 A.2d 765, 766
(Pa. Super. Ct. 1943).....3

Statutes/Regulations

66 Pa. C.S. § 1501.....1, 3, 5
66 Pa. C.S. § 1504.....1, 5

I. INTRODUCTION

On December 14, 2016, pursuant to the schedule established by Administrative Law Judge Katrina L. Dunderdale (Judge Dunderdale), West Penn Power Company (West Penn or Company) and Robert Mattu (Complainant) filed initial briefs in this complaint proceeding. West Penn, in its Brief, explained its positions on the issues pending before Judge Dunderdale. In doing so, West Penn anticipated, and as a practical matter responded to, many of the arguments raised by the Complainant in his Brief. Nevertheless, it is appropriate for West Penn to respond to the principle errors and misstatements in the Complainant's Brief with references to the expanded discussion in the appropriate portions of West Penn's Brief. In responding to the Complainant, West Penn will minimize repetition of explanations provided in its Brief.

II. SUMMARY OF ARGUMENT

The substantial record evidence presented by West Penn's expert witnesses is undisputed. The proposed premixed herbicides, applied using the cut stump treatment to control incompatible species growing within the right-of way (ROW) across the Complainant's property, are: (1) safe and present no danger to the Complainant's water supply; and (2) consistent with the Company's Transmission Vegetation Maintenance (TVM) Program, current federal standards and the Integrated Vegetation Management (IVM) best practices for utility ROWs.

The Complainant opines that the proposed herbicides create "an unreasonable safety hazard and is contrary to and in violation of" Sections 1501 and 1504 of the Pennsylvania Public Utility Code (Code).¹ He requests that West Penn be prohibited from using herbicides in the ROW unless there is consent from him or "successor property owners." The Complainant lacks standing to seek relief on behalf of successor property owners and raised this issue for the first time in his Brief. Rather than file a motion to strike the Complainant's inappropriate and unlawful attempt to expand the requested relief at the briefing stage, West Penn respectfully requests that Judge Dunderdale disregard the expanded requested relief to include future property owners.

¹ 66 Pa. Code §§ 1501 and 1504.

The Complainant's Brief completely ignores his burden of proof and is nothing more than a collection of misconceptions, distortions of the record² and irrelevant arguments. As more fully discussed below, the Complainant improperly offers facts and conclusions unsupported by the record evidence and draws unreasonable inferences that have no basis in fact or law. His Complaint should be dismissed in its entirety.

III. ARGUMENT

1. *The Complainant has completely ignored his legal burden required to sustain his Complaint.*

The Complainant ignores that as the moving party, he, not the Company, has the burden of proof in this proceeding. In fact, his Brief does not even mention the legal burden to sustain his Complaint. The Complainant simply objects to the use of herbicides based on "everything [he] read about this spraying" (Tr. 26-27).³ As set forth in West Penn's Brief at 4-5, the Complainant must establish by a preponderance of the evidence that West Penn failed to provide safe, adequate and reasonable service to him. The Complainant's assertions, personal opinions or perceptions, no matter how strongly held, do not constitute record evidence and cannot support a finding of fact that West Penn's proposed use of herbicides on his property is unsafe and a violation of the Code. *Pennsylvania Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987). The Complainant's "belief," that West Penn must "fully insure that an

² The Complainant's proposed Findings of Fact are not based on the record evidence and should not be adopted. Many of the proposed "facts" actually consist of argument or counsel's interpretation of West Penn Exhibits 7-12 and do not provide the correct transcript citations. Contrary to the citations in the Complainant's Brief, West Penn witness Standish never testified that "the area in dispute is approximately 100 feet by 280 feet long" (Complainant Brief at 4) or the elevation between the ROW and the Complainant's house, wells or ponds. (Complainant Brief at 6). In contrast to the direct testimony of the Complainant that the area of the ROW was 100 foot wide by approximately 200 feet (Tr. 29-30), his Brief revises that testimony based on West Penn Exhibit 13 which is a topographical map of the transmission line and the Complainant's property. West Penn Exhibit 13 speaks for itself regarding the outline for the Complainant's property. There is no testimony, from any witness at the hearings, which identifies where the Complainant's house, wells or pond are located on the topographical map. Contrary to the citations in the Complainant's Brief, West Penn witness Weston never testified "First Energy's business records may not always be accurate." (Complainant Brief at 4). Witness Weston responded not to counsel's question and testified he made a mistake in drafting the letter (WP Exhibit 3). Tr. 266-267.

³ The Complainant's testimony regarding the spraying of Agent Orange in 1968 (Tr. 27, 43) and Penn DOT's spraying along the highway near his property (Tr. 24-25) is irrelevant to the present Complaint. There is no record evidence linking the proposed herbicides to Agent Orange or to the herbicides used by Penn DOT that allegedly killed fish in his pond.

absolute safe application of the chemical herbicides can be made” (Complainant Brief at 17) before their use should be permitted, improperly shift the burden to West Penn.

2. *The Complainant argues that using herbicides at his property creates an unreasonable safety hazard and is contrary to and in violation of Section 1501 of the Code.*

The Complainant argues that using herbicides at his property creates an unreasonable safety hazard and is contrary to and in violation of Section 1501 of the Code. He contends that West Penn “now seeks to change the method by which it intends to maintain the vegetation” growing in the ROW. (Complainant Brief at 15). The record evidence supports why West Penn’s approach to vegetation maintenance changed and that its TVM Program is consistent with current federal standards and industry best practices. (West Penn Brief at 7-8). Pennsylvania courts have held that there can be no question as to the right of a utility doing a general public business to adopt new methods of furnishing service to its patrons if they are reasonable. *Pennsylvania Tel. Corp. v. Pennsylvania Public Utility Com.*, 33 A.2d 765, 766 (Pa. Super. Ct. 1943).

The Complainant contends that the Commission should prohibit West Penn from using herbicides absent facts and circumstances which can fully ensure that an absolute safe application of chemical herbicide can be made. (Complainant Brief at 17). In support of his position, he has distorted or ignored the record evidence particularly the testimony of West Penn’s expert witnesses and admitted exhibits regarding the application of the herbicides by the cut stump method as more fully explained in West Penn’s Brief at 6-10.

The Complainant, based on the language in the respective Safety Data Sheets and Specimen Labels for the proposed herbicides (West Penn Exhibits 7-12) argues the herbicides raise “serious concerns” and that West Penn’s expert witnesses “evaded answering specific questions and repeatedly provided an unresponsive answer more beneficial to their employer/client, West Penn.” (Complainant Brief at 17). Based on his experience and industry practice, expert witness Quattrocchi credibly testified that he is able to interpret the safety data sheets. Tr. 363.

The Complainant's position totally ignores the undisputed testimony of expert witness Quattrocchi (West Penn Brief at 17-25) as well as the following testimony:

- EPA registration for the proposed herbicides, which averages between 7 to 12 years, occurs after years of EPA testing and looking at their impact. Tr. 325, 395.
- The safety data sheet is a required legal document provided by the manufacturer of the product. Tr. 344.
- The safety data sheets and specimen labels are provided for all chemicals that would typically be used in the application of herbicides in the United States, specifically, Pennsylvania. Tr. 325
- The safety data sheets and specimen labels provide a large volume of information about what the chemical is, how it works, where it is recommended, where it is not recommended and the safety procedures that must be put into place if one is going to use them. Tr. 325-326.
- The proposed herbicides do have restrictions on their usage. Tr. 327.
- The proposed herbicides have limitation on treatment sites based on use patterns. Tr. 328.
- The applicator, in accordance with EPA's use pattern and state regulations, must apply the product in accordance to the label specifications for the use pattern. Tr. 230, 331.
- The safety data sheet is in reference to the technical actives of the molecule itself, which is as close to 100% active material. Tr. 343.
- The safety data sheet states that it is a hazardous material, but that does not mean the product is always unsafe; it just means it is unsafe if misused off the label recommendations. Tr. 347.
- The specimen labels for the proposed herbicides specifically state that the proposed herbicides are for use in ROWs such as electric power lines. WP Exhibits 8, 10 and 12.
- The proposed mix of herbicides is based on IVM best management practices. Tr. 327.
- A diluted formulation of the active ingredient of the proposed herbicide is used in the field. Tr. 364.
- There is no physical and/or chemical movement of the herbicide molecules from the isolated single set treatments. Tr. 338-339.
- In addition to preventing undesirable species from regeneration in that site, the beneficial qualities of the three proposed herbicides will balance the ecosystem and encourage the aggressive growth of desirable species. Tr. 328-329.
- Utilizing just mechanical hand cutting would actually incur far more ecological negative impact than use of the proposed herbicides due to the potential encroachment of incompatible species and erosion issues. Tr. 225, 342.

Expert witness Quattrocchi provided the following professional opinions:

- The proposed herbicides are safe and a reasonable approach for vegetation management on the Complainant's property. Tr. 341.
- The application of the proposed herbicides is safe and reasonable for use on the Complainant's property. Tr. 341.
- There is no concern regarding the slow biodegradability in the environment. Tr. 356.
- There is no concern about petrol chemicals in the soil, getting into the soil or near water because the application method only applies to the cambium layer. Tr. 382.
- The Complainant should not be concerned about the use of the proposed herbicides impacting his two wells. Tr. 338.
- The Complainant should not be concerned about the use of the proposed herbicides with young children living at his house. Tr. 339.

The Commission has previously ruled on West Penn's use of herbicides as part of its TVM Program and found that its use constitutes safe and reasonable service under Section 1501 of the Code. *Bernardi v. West Penn*, Docket No. C-2014-2453852, Opinion and Order entered May 5, 2016. In fact, the cut stump treatment was the application method approved in *Bernardi*.

3. *The Complainant argues that using herbicides at his property creates an unreasonable safety hazard and is contrary to and in violation of Section 1504 of the Code.*

The Complainant, citing Section 1504 of the Code, argues that use of herbicides fails to constitute a just and reasonable standard, classification, regulation and/or practice to be furnished, imposed observed or followed by West Penn as required and/or permitted by the Commission. (Complainant Brief at 17). The Complainant simply makes this conclusion. He provided no legal support, let alone cited to any standard, regulation or practice that West Penn has allegedly violated.

The Commission has NOT prescribed standards, regulations or practices regarding how a regulated utility should maintain vegetation that may interfere with its facilities in fulfillment of its obligation to provide reliable service under the Code. Absent such Commission standards, regulations or practices, West Penn cannot be in violation of this Section

of the Code. The Complainant's argument that West Penn's proposed use of herbicides violates Section 1504 is without merit and should be summarily dismissed.

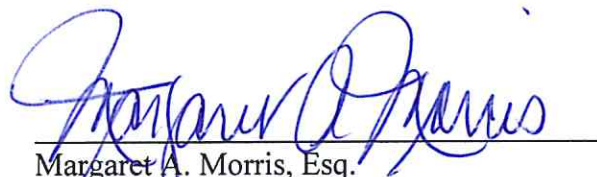
IV. CONCLUSION

The Complainant has failed to carry his burden of proof that West Penn's proposed use of herbicides to control incompatible vegetation on the ROW across his property are unsafe and will endanger his family or his water supply.

WHEREFORE, for the foregoing reasons, West Penn Power Company respectfully requests that this Honorable Court dismiss with prejudice the Formal Complaint of Robert M. Mattu at Docket No. C-2016-2547322 in its entirety.

Respectfully submitted,

Date: December 21, 2016



Margaret A. Morris, Esq.
Attorney ID No. 75048
Reger Rizzo & Darnall LLP
Cira Centre, 13th Floor
2929 Arch Street
Philadelphia, PA 19104
(215) 495-6524 tel.
(215) 495-6600 fax
mmorris@regerlaw.com

Counsel for West Penn Power Company