

**PENNSYLVANIA PUBLIC UTILITY COMMISSION  
HARRISBURG, PA 17120**

**Robert M. Mattu**

**Public Meeting held June 14, 2017**

**v.**

**2547322 – ALJ**

**West Penn Power Company**

**Docket No. C-2016-2547322**

**JOINT MOTION OF CHAIRMAN GLADYS M. BROWN  
AND COMMISSIONER DAVID W. SWEET**

Before us for consideration and review is the formal Complaint filed by Robert M. Mattu against West Penn Power Company (West Penn Power) and the Initial Decision of Administrative Law Judge Katrina Dunderdale (ALJ). Mr. Mattu owns and lives on property that has a 138 kV transmission line crossing on a right-of-way that measures approximately 200 feet long by 100 feet wide. While Mr. Mattu has no problem with West Penn Power's plan to maintain its right-of-way by clearing it of brush and incompatible trees by physical removing the vegetation, he object to West Penn Power's proposed plan to treat the vegetation with herbicides. The Complainant is very concerned that the chemicals might contaminate the two wells that serve his house in an area that has no municipal or public water service. In addition, he believes that the use of herbicides could be harmful to the fish pond located on his property. His home, gardens, fish pond and two water wells that serve his home are less than 25 yards down a slope from the right-of-way.

We want to emphasize that the analysis of the ALJ was thorough and we agree that her decision approving West Penn Power's proposed actions is consistent with both Commission precedent and West Penn Power's filed vegetation management plan. However, simply finding that the planned method of clearing the right-of-way is consistent with a plan is insufficient to provide a fair result in the present case.

The vegetation management plan, filed as part of a larger Biennial Inspection, Maintenance, Repair and Replacement Plan required for all electric distribution companies (EDCs), is far too general to address each factual situation which will arise when keeping transmission line rights-of-way clear. The Commission has consistently found that vegetation management falls within our purview, and the Commonwealth Court has supported this finding.<sup>1</sup> We strongly support the timely vegetation maintenance that is vital to providing reliable and safe service to the citizens of the Commonwealth, but we recognize that there will be exceptions to the utility's preferred methods of keeping the right-of-way clear.

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<sup>1</sup> *PECO Energy Company v. Township of Upper Dublin*, 922 A.2d 996, 1005-06 (Pa.Cmwlt. 2007); In *Mohn v. PPL Electric Utilities Corp.*, Docket No. C-2012-2301470 (Commission Opinion and Order remanding to OALJ entered October 11, 2012); *Yanling Chen and Juanming Hu v. Met Ed*, C-2013-2397061 (Opinion and Order entered November 5, 2015); *Wagner v. West Penn Power Company*, Docket No. C-2014-2434494 (Final Order entered April 30, 2015); *Lehet v. PPL Electric Utilities Corporation*, Docket No. C-2014-2449983 (Opinion and Order entered October 28, 2015); *Broman v. West Penn Power Company*, Docket No. C-2013-2356237 (Final Order Entered April 23, 2014), *Jan and Joyce Spirat v. Metropolitan Edison Company*, Docket No. C-2013-2367044 (Order entered September 11, 2014); and *Sarah Bernardi v. West Penn Power Co.*, Docket No. C-2014-2453852 (Opinion and Order entered May 5, 2016).

West Penn Power's Commission-approved vegetation management plan is vague and lacking in sufficient detail to provide the owners of transmission rights-of-way and adjacent landowners any guidance in determining the circumstances under which the landowners may anticipate the manner in which the rights-of-way will be cleared. It says, in effect, that the utility will keep the rights-of-way cleared of growth that might interfere with safe and reliable electric service, using methods consistent with industry practices. The manner of clearing the growth and the circumstances under which the different methods are used are not delineated. The result is that the utility's defense in any complaint regarding herbicide use is inevitably that the method is consistent with its Commission-approved vegetation management plan; and, therefore, is not a violation of a statute, regulation or order of the Commission.

However, there is a point where the use of herbicides is simply not consistent with the landowner's ability to fully utilize the property, especially where the source of water is shallow wells close to the right-of-way. Under appropriate circumstances, a landowner should be able to seek an exception to the utility's proposed use of herbicides, and if the utility still refuses, the landowner should be able to seek relief from the Commission.

At that point, the landowner should file a petition for relief rather than a complaint. The reason that this Commission has not sustained the complaints in the cited cases against utilities is because no violation of a statute, regulation or order of the Commission is found. Rather, the landowner is seeking an exception to the utility's proposed method of clearing the right-of-way. In fact, that is the nature of the request before the Commission today.

The Commission has a history of treating pleadings by what is reflected in their content instead of by what they are labelled, such as treating preliminary objections as motions for judgment on the pleadings, or treating letters as petitions for withdrawal of pleadings or as exceptions.<sup>2</sup> Other agencies do the same.<sup>3</sup> As long as the parties' rights are not negatively affected, and due process has been provided, there is no bar to changing the designation of a document to more accurately reflect its content and purpose.<sup>4</sup> Here, the parties have fully litigated a case filed as a complaint, although the prayer for relief – a Commission directive to West Penn Power to not use herbicides on the right-of-way – is a request that is more suited to a petition for relief than to a complaint. The burden of proving entitlement to requested relief lies with the proponent of the case in both complaints and petitions for relief, meaning that there

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<sup>2</sup> *Utility Workers Union of America System Local 537 v. Pennsylvania-American Water Company*, C-2012-2287204, 2012 Pa. PUC LEXIS 944 (June 21, 2012)(preliminary objections properly treated as a motion for judgment on the pleadings); *Katz v. PPL Electric Utilities Corporation*, F-2010-2211384 (February 17, 2011) 2011 Pa. PUC LEXIS 825.; *Cuff v. PECO Energy Company*, C-2013-2370894, (August 23, 2013) 2013 Pa. PUC LEXIS 618; *Reynolds v. PPL Electric Utilities Corporation*, C-2011-2255268 (January 5, 2012) 2012 Pa. PUC LEXIS 8; *Boatin v. Verizon North, Inc.*, C-2007-8-2066888 (January 9, 2009) 2009 Pa. PUC LEXIS 1020; *Application of Ram & Sita Company t/a S Day & Night Travelers*, A-2014-2426793 (October 14, 2014) 2014 Pa. PUC Lexis 513; *Re East Norriton Water Company*, A-00015790, Folder 200, P-810315, 1982 Pa. PUC LEXIS 79 (1982)(answer treated as a protest); *Re: Application of Renzenberger, Inc.*, Docket No. A-00116249 F.3, 2003 Pa. PUC LEXIS 12 (Opinion and Order adopted February 7, 2003) (motion to dismiss treated as a petition for declaratory order).

<sup>3</sup> *Len Vando v. PA Dept. of Banking and Securities*, 2017 Pa. O.O.R.D. LEXIS 30 (January 11, 2017) (simple request treated as a Right to Know request). *Bethlehem Mines Corporation*, 1983 EHB; *Magnum Minerals Inc. v. DEP*, 1983 EHB 589 *North Fayette Township v. DEP*, 1984 EHB 654; *Swanson v. DEP*, 1984 EHB 681; *B & D Coal Company v. DEP*, 1986 EHB 359; *B & D Coal Company v. DEP*, 1986 EHB 615; *Del-Aware Unlimited, Inc. v. DER*, 1987 EHB 351; and *Upper Allegheny Joint Sanitary Authority v. DER*, 1989 EHB 303 (treating a motion for summary judgment as a motion for judgment on the pleadings).

<sup>4</sup> 52 Pa.Code § 1.2.

would be no change in the burden of proof if the case had been brought as a petition for relief instead of a complaint.<sup>5</sup> Both parties had an opportunity to present their own cases, having been given notice and an opportunity to be heard. As the requirements of due process have been met, there is no prejudice to either side by treating this complaint as a petition for relief under 52 Pa. Code § 5.41.

Mr. Mattu established the following relevant facts:

- West Penn Power has maintained a 100-foot right-of-way across Mr. Mattu's land since 1968 (FOF 4)
- Public water is not available to Mr. Mattu's residence, and his sole source of water is provided by two shallow wells. (FOFs 5, 6 and 7)
- Both wells are located approximately 70 feet downhill from the right-of-way. (FOF 9)
- The well that is approximately 15 feet deep is served by a natural spring at the base of the hillside carrying the right-of-way. (FOF 12)
- The property also contains a fish pond located partly under the transmission line and less than 100 feet downhill from the area targeted for herbicide use. (FOF 13)
- The residence is located approximately 70 feet downhill from the transmission line. (FOF 14)
- Mr. Mattu does not object to clearing the right-of-way, only to the use of herbicides. (FOF 24)
- The pre-mix of herbicide must not be applied in or on water primarily because the oil carrier itself would harm or negatively impact water sources. (FOF 63; Tr. 329-332)
- The herbicide Garlon is identified as a hazardous material which works by attaching to the plant's metabolism to prevent growth and regrowth, has low toxicity if ingested, low toxicity if inhaled, low toxicity with prolonged skin contact, and has low cation exchange capability.<sup>6</sup> (FOF 64; Tr. 231; West Penn Power Exhs. 7-8)

In addition, the record in this proceeding demonstrates that West Penn Power determines, on a case-by-case basis, the specific vegetation management plan, including herbicides, to use on rights-of-way. In fact, following several site visits, West Penn Power determined that the original herbicide work plan would be adjusted for herbicide application to the stumps and proposed the grinding of tree stumps as a concession to Mr. Mattu because the Complainant did not want any herbicides applied because of his water wells and pond. Tr. 215, 223-225, 268-269. West Penn Power has not performed the vegetation management at this property because of the filing of the Complaint. *Id.*

We believe that the use of herbicides, which are by their very nature hazardous, can be properly used in some circumstances. However, Mr. Mattu has established that his circumstances require more care in choosing and applying vegetation management methods than many other landowners' circumstances. We note that our decision to grant this petition for relief is fact-specific and not intended to create a bright line test by which future cases should be evaluated. Rather, we find that the totality of the circumstances here are sufficient to grant Mr. Mattu relief by directing West Penn power to maintain its right-of-way where it crosses Mr. Mattu's land by means which do not include the use of herbicides. Given this unique fact pattern, the use of herbicides would be unreasonable. Our decision in this case does not bar

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<sup>5</sup> 66 Pa.C.S. § 332(a).

<sup>6</sup> We note that the evidence does not claim "no" toxicity or "no" cation exchange capability and that water at risk of being contaminated is the Complainant's only source of water for the residence.

West Penn power from utilizing other vegetation management methods including grinding tree stumps or assessing the vegetation growth within this right-of-way on a shorter time frames. We note that this is consistent with the methods used to maintain this portion of the right-of-way in past vegetation management cycles.

Because Commission regulations require that petitions for relief be served on the public advocates<sup>7</sup> and this was not done here, this determination will be issued as a tentative order specifically for the purpose of allowing the public advocates an opportunity to intervene. If no intervention is received from any public advocate within 30 days fo the entry date of the tentative order, it shall become final.

Accordingly, this complaint in the nature of a petition for relief is tentatively granted, and West Penn power shall use methods not involving herbicides on the right-of-way crossing Mr. Mattu's land.

THEREFORE,

WE MOVE:

1. That the Initial Decision in this matter be reversed, in part, and affirmed, in part, consistent with this Motion.
2. That West Penn Power Company is directed to forego the use of herbicides on the right-of-way crossing Mr. Mattu's land without his permission.
3. That the Office of Special Assistants prepare an appropriate tentative order which provides for 30 days from the date of entry of the tentative order for the Office of Consumer Advocate, the Office of Small Business Advocate, and the Commission's Bureau of Investigation & Enforcement to file for intervention and request for additional proceedings.
4. That if no statutory advocate has filed a notice of intervention and request for additional proceedings within 30 days of the entry date of the tentative order, then the tentative order shall become final.



**Gladys M. Brown**  
Chairman



**David W. Sweet**  
Commissioner

**DATED: June 14, 2017**

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<sup>7</sup> 52 Pa.Code § 5.41(b).