

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

**Robert M. Mattu**

**Public Meeting September 20, 2018  
2547322-OSA**

v.

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

**West Penn Power Company**

**JOINT STATEMENT OF  
COMMISSIONER JOHN F. COLEMAN, JR. AND  
COMMISSIONER NORMAN J KENNARD**

Before the Pennsylvania Public Utility Commission (Commission) is the West Penn Power Company's (West Penn) Petition for Reconsideration of our Opinion and Order of July 14, 2017. West Penn requests that the Commission grant reconsideration, rescind our prior Order, and adopt the Initial Decision of Administrative Law Judge Dunderdale. We agree with the entirety of West Penn's request, and are therefore dissenting from the proposed Joint Motion.<sup>1</sup>

Initially, we find that West Penn has met the *Duick* standard for reconsideration, as it did identify several considerations that were overlooked or not addressed in the July 14, 2017 Order. This includes, but is not limited to, the failure of the prior Order to address relevant Commission and Pennsylvania Commonwealth Court case precedent that should lead to a different result.<sup>2</sup>

The Joint Motion proposes to grant reconsideration, and now concludes that West Penn's proposed use of herbicides was unreasonable, and therefore in violation of Section 1501 of the Public Utility Code. The Joint Motion would permanently bar the use of all herbicides on the Complainant's property by West Penn. The Joint Motion further maintains that it was appropriate to treat the Complaint as a Petition for Relief and denies that there was any prejudice to West Penn, and by implication any violation of their rights to due process, by applying this new standard after the close of the record. The Joint Motion insists that the holding of the prior Order is limited and only applicable to the facts of the case.

We cannot conclude, as stated in the prior dissent, that the Complainant has met his burden of proof that there was a violation of Section 1501 of the Public Utility Code. In the underlying Complaint, Mr. Mattu objected to West Penn's use of herbicides to prevent the regrowth of trees in the right-of-way of its transmission line. Mr. Mattu explained that he believed, based solely on his personal opinion, that the use of herbicides was unsafe given the proximity of his fish pond and his wells. However, assertions, personal opinions or perceptions do not constitute factual evidence.<sup>3</sup> Moreover, the Complainant was not qualified as an expert witness, and called no witnesses in support of his position.

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<sup>1</sup> We will not reiterate all the arguments put forth in the dissent to the Commission's June 14, 2017 Order, but they should be considered to be continuing unless withdrawn expressly or by necessary implication from this Joint Statement.

<sup>2</sup> *West Penn Power Company v. Pennsylvania Public Utility Commission*, 478 A. 2d 497 (Pa. Cmwlth. 1984); *Bernardi v. West Penn Power*, Docket C-2014-2453852 (Order entered May 5, 2016).

<sup>3</sup> *Pennsylvania Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

In contrast, West Penn provided the testimony of three witnesses, two of which were qualified as experts in the fields of herbicide application, action, environmental impact, and safety. These witnesses testified that the proposed method of vegetation management for this property was reasonable, safe, lawful and consistent with industry best practices. Specifically, West Penn proposed to directly treat the stumps of trees that it had cut with an herbicide to prevent regrowth. West Penn's experts explained that the herbicide would be applied by trained personnel and that the product would not travel beyond the root system of the trees. Their testimony was persuasive that this method of vegetation management was less disruptive to the ecosystem and more cost-effective than the repeated pruning of the same trees, which had the propensity for rapid regrowth.

Although the Joint Motion finds that West Penn's proposed plan for this property was a violation of Section 1501, it fails to explain exactly how the plan was unreasonable or why the testimony of a non-expert layman outweighs the testimony of multiple expert witnesses. It simply states that the risk of herbicides entering the Complainant's drinking water was "too great to permit." Neither the Complainant nor the Joint Motion identify any specific defects or concerns regarding the training of West Penn personnel, the method of application or the choice of herbicide used. Based on the lack of such details, we do not believe that the Joint Motion satisfies Section 703(e) of the Public Utility Code, which provides:

After the conclusion of the hearing, the commission shall make and file its findings and order with its opinion, if any. Its findings shall be in sufficient detail to enable the court on appeal, to determine the controverted question presented by the proceeding, and whether proper weight was given to the evidence.

66 Pa. §703(e).

We do not agree with the assertion that this is a limited, narrow holding. The Complainant offered only his non-expert opinion that the use of herbicides should be prohibited on his property, given that he received his water from two wells located approximately seventy feet from the transmission line right-of-way. There are many property owners in Pennsylvania who receive their water from wells. It is reasonable to assume that many of these properties are also crossed by electric transmission or distribution lines, or even aerial facilities of telecommunications utilities. We believe that other property owners will be able to cite to this case for reliance on a holding that, at a minimum, herbicides should not be used to manage utility rights-of-way that are within 70 feet of private water supplies. However, it is unclear what the minimum, safe distance the Commission deems to be appropriate before herbicides can be used, and upon what evidence this requirement is founded given the Commission's rejection of multiple experts' testimony in this case.

The safety of the public's drinking water is, of course, very important and is accordingly subject to strong regulation at both the federal and state level. While the Commission does regulate the provision of water service by public utilities, it is not the lead agency for ensuring the safety of drinking water, including that provided through wells, or the protection of the environment. We are unaware of any legal prohibitions on the use of herbicides as proposed by West Penn. Neither the Complainant nor the Joint Motion identify any such restrictions.

While the Commission does have jurisdiction over the safe and reliable provision of electric service, including vegetation management, we find that the scope of our jurisdiction over this specific issue of the use of herbicides is unclear, at best. West Penn has asserted in its Petition for Reconsideration that we do not have jurisdiction to prohibit herbicide use in this instance. However, we find it is unnecessary to reach a conclusion on this issue at this time, given that the Complainant has not met his burden of proof.

As stated in the prior dissent, the Commission does have extensive regulations governing the safety and reliability of electric utility service. In its enactment of the Electricity Generation Customer Choice and Competition Act, the Pennsylvania General Assembly expressed a preference that electric reliability standards be addressed through regulations and that they be in conformity with established industry standards.<sup>4</sup> Should the Commission deem it appropriate to develop rules for the use of herbicides by public utilities, we believe we must do this through a rulemaking proceeding, as opposed to customer complaint proceedings.


We do wish to reiterate our consideration for the concerns raised by the Complainant here. However, our decision must be based on the evidentiary record. Here, the substantial, credible record evidence shows that West Penn's transmission vegetation management program, including the use of herbicides, is reasonable. Proper vegetation management within transmission line right-of-ways is critical to ensuring that our electric grid operates in a safe and reliable manner. We observe that both the Energy Association of Pennsylvania and PPL Electric Utilities Corporation took the very unusual step of filing letters in support of West Penn Petition, noting their serious concerns regarding the holding at issue, and its effects on the provision of public utility service.

Accordingly, because we find that the Joint Motion is not based on substantial evidence, appears to conflict with applicable law, and violates West Penn's rights to due process, we must dissent.

**DATE: September 20, 2018**



**JOHN F. COLEMAN, JR.  
COMMISSIONER**



**NORMAN J. KENNARD  
COMMISSIONER**

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<sup>4</sup> 66 Pa.C.S. §§ 2802(20), 66 Pa. C.S. 2804(1)(ii).