

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	
Bureau of Investigation and Enforcement	:	
	:	
v.	:	C-2015-2512950
	:	
Bushkill Group, Inc.	:	

INITIAL DECISION

Before
Dennis J. Buckley
Administrative Law Judge

This Decision recommends that the Commission adopt, without modification, the proposed Settlement of this case between the Commission’s Bureau of Investigation and Enforcement (I&E) and the Bushkill Group, Inc. (Bushkill).

HISTORY OF THE PROCEEDING

Bushkill operates timeshare and vacation rental units at a resort called The Villas at Tree Tops and Fairway (the Villas) in the Pocono Mountains in Pennsylvania. On October 15, 2014, personnel of I&E’s Safety Division were made aware of news reports of a propane gas fire and possible explosion at the Villas. There were no injuries. The initial assessment of the inspectors of the Safety Division concluded that the propane system at the Villas was jurisdictional and that further investigation would be required. Upon further investigation into the incident, including testing and analysis of the pipeline facilities involved, the Safety Division determined that the incident itself was not jurisdictional as to the Commission, but that Bushkill’s propane distribution system is subject to Federal pipeline safety laws and regulations in that it transports petroleum gas, which includes propane, to ten (10) or more customers,

pursuant to 49 CFR § 192.1(b)(5)(i). On November 12, 2015, a formal Complaint was filed by I&E which the parties now propose to resolve through a proposed Settlement.

I&E alleged that since portions of Bushkill's propane distribution system are subject to Federal pipeline safety laws and regulations, Bushkill was and is required to comply with the Gas and Hazardous Liquids Pipelines Act (Act 127), 66 P.S. § 801.101 *et seq.* I&E alleged that Bushkill failed to submit an initial registration form in 2012 to register with the Commission as a pipeline operator pursuant to Act 127 and failed to file Pennsylvania Pipeline Operator Annual Registration Forms to report total intrastate regulated transmission, distribution and gathering pipeline miles that were in operation during the 2013, 2014 and 2015 calendar years. I&E also alleged that Bushkill failed to maintain a procedural manual for operations, maintenance and emergencies, and failed to notify the National Response Center of the October 15, 2014 incident at the Villas at the earliest practicable moment.

The Complaint requested that the Commission: (a) impose a civil penalty of \$70,000 against Respondent; (b) direct Respondent to file 2012, 2013, 2014 and 2015 Pipeline Operator Annual Registration Forms with the Commission; (c) direct Respondent to timely file Pipeline Operator Annual Registration Forms for all future years; and (d) order such further relief as is just and reasonable.

On December 16, 2015, after receiving an extension of time, Bushkill filed Preliminary Objections to I&E's Complaint seeking dismissal of the Complaint on grounds of insufficient specificity and legal insufficiency.

On January 7, 2016, after receiving an extension of time to respond, I&E filed an Answer to the Preliminary Objections of Bushkill and requested that the Preliminary Objections be dismissed and I&E's Complaint be sustained.

By Hearing Notice dated January 27, 2016, an Initial Hearing was scheduled in this matter for February 26, 2016.

On February 22, 2016, the Parties filed a Joint Motion for Continuance requesting a continuance of the Initial Hearing, which was granted by Interim Order dated February 25, 2016.

By Notice dated August 16, 2017, an Initial Prehearing Conference was scheduled for October 4, 2017 at 10:00 AM in Harrisburg. On September 20, 2017, the Parties filed a Second Joint Motion for Continuance.

By Notice dated November 16, 2017, a further Prehearing Conference was scheduled for January 3, 2018. On January 3, 2018, an off-the-record prehearing conference was held in which the Parties were afforded until February 23, 2018 to hold settlement discussions.

Two additional requests for continuances were advanced and granted up until June 1, 2018, to provide additional time for the Parties to engage in settlement negotiations.

The Parties were unable to resolve the matter by June 1, 2018, and requested an additional continuance.

By Order dated June 5, 2018, I denied Bushkill's Preliminary Objections and the Parties' request for a further continuance.

By Hearing Notice dated June 12, 2018, an Initial Hearing was scheduled for June 28, 2018 in Harrisburg.

On June 13, 2018, I&E filed a Motion to Postpone the Initial Hearing by one day. That request was granted and an Order was issued rescheduling the Initial Hearing for June 29, 2018. The Order converted the Initial Hearing scheduled for June 29, 2018 into a prehearing conference.

On June 22, 2018, Bushkill filed an Answer and New Matter to I&E's original Complaint denying any violation of the Public Utility Code and reasserting its argument that the

Commission has no jurisdiction in this matter because Bushkill is not a pipeline operator. Bushkill also contended that the requests of I&E would require Bushkill to act against its own interests, contrary to law, and argued that the proposed civil penalty was punitive and unreasonable.¹

On June 29, 2018, the Parties participated in a prehearing conference at the Commission's Harrisburg office at which time a litigation schedule was established.

Prior to the deadline for the service of I&E's written direct testimony in this matter, I&E and Bushkill reached a settlement in principle and advised the presiding ALJ of the Settlement by e-mail dated July 24, 2018. The proposed Settlement and Joint Petition for Approval of the Settlement was filed on August 28, 2018, at which time the record closed.

JOINT STIPULATION OF FACTS

The parties stipulated to the following facts:

1. Bushkill operates timeshare and vacation rental units at a resort called The Villas at Tree Tops and Fairway ("the Villas") in the Pocono Mountains in Pennsylvania.
2. On October 15, 2014, personnel of I&E's Safety Division were made aware of news reports of a propane gas fire and possible explosion at the Villas.
3. The initial assessment of the inspectors of the Safety Division concluded that the propane system at the Villas was jurisdictional and further investigation would be required.

¹ This filing was timely in that it was permissively held in abeyance until a ruling was made on Bushkill's preliminary objections.

4. Upon further investigation into the incident, including testing and analysis of the pipeline facilities involved, the Safety Division determined that the incident itself was not jurisdictional as to the Commission.

5. Bushkill provided Safety Division personnel with a confidential map of the propane system at the Villas as well as a spreadsheet of tanks and buildings served by that propane distribution system.

6. At least sixteen (16) of the system's tanks distribute propane to ten (10) or more individual timeshare and vacation rental units at the Villas.

7. Prior to the incident, the I&E Safety Division had been unaware of the existence of Bushkill's propane distribution system at the Villas.

TERMS OF THE SETTLEMENT

The relevant terms of the proposed Settlement are given below, with the paragraph numbers maintained as in the original document for ease of reference:

36. I&E and Respondent, intending to be legally bound and for consideration given, desire to fully and finally conclude this litigation and agree that a Commission Order approving the Settlement without modification shall create the following rights and obligations:

A. Respondent will pay a civil penalty in the amount of Thirty-Seven Thousand, Five Hundred Dollars (\$37,500) pursuant to 58 P.S. § 801.502. Said payment shall be made within thirty (30) days of the date of the Commission's Final Order approving the Settlement Agreement and shall be made by certified check or money order payable to the "Commonwealth of Pennsylvania." The docket number of this proceeding, C-2015-2512950, shall be indicated with the certified check or money order and the payment shall be sent to:

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

The civil penalty shall not be tax deductible pursuant to Section 162(f) of the Internal Revenue Code, 26 U.S.C.S. § 162(f).

B. Pursuant to 58 P.S. §§ 801.301(c) and 801.503(d) and within thirty (30) days of the date of the Commission's Final Order approving the Settlement Agreement, Respondent will submit the Initial Pennsylvania Pipeline Operator Registration Form that was due on March 16, 2012, and will submit Pennsylvania Pipeline Operator Annual Registration Forms for all subsequent years, including, 2013, 2014, 2015, 2016 and 2017. Respondent will submit Pennsylvania Pipeline Operator Annual Registration Forms for future years beginning with 2018.

C. Pursuant to 58 P.S. § 801.503(c), Respondent will pay annual assessments to the Commission based on its intrastate regulated transmission, distribution and onshore gathering pipeline miles as reported in the past due Act 127 registration forms set forth in Paragraph 36(b) of this Settlement, *supra*. Said payment shall be made within thirty (30) days of the date of the Commission's Notice of Amount Due and shall be made in accordance with instructions on the Notice. The docket number of this proceeding, C-2015-2512950, shall be indicated on the payment and the payment shall be sent to:

Pennsylvania Public Utility Commission
Bureau of Administrative Services
Assessment Section
P.O. Box 3265
Harrisburg, PA 17105-3265

D. Bushkill agrees that it will fully comply with Federal pipeline safety laws and regulations, including developing the necessary plans and manuals as required by applicable Federal pipeline safety regulations, within four (4) months following the entry of a Commission Order approving any settlement in this matter.

E. Bushkill agrees that it will permit the I&E Safety Division to review the plans and manuals that Bushkill will develop in order to comply with Federal pipeline safety regulations, as set forth in Paragraph 36(d) of this Settlement, *supra*.

F. Bushkill agrees to provide I&E with the contract between Bushkill and the operator trainer subcontractor that Bushkill retains.

37. Upon payment by Respondent of the civil penalty and assessments and the submission of applicable Act 127 registration forms, I&E's Formal Complaint shall be deemed satisfied and the matter shall be marked closed.

38. Upon Commission approval of the Settlement in its entirety without modification, I&E shall be deemed to have released Respondent from all past claims that were made or could have been made for monetary and/or other relief based on allegations that Respondent failed to comply with the obligations set forth in Act 127 for the time periods covered by I&E's Complaint. Nothing contained in the Settlement Agreement shall affect the Commission's authority to receive and resolve any future formal or informal complaints filed by any affected party related to the allegations set forth in I&E's Complaint.

* * *

As noted by the Parties in paragraphs 41-43 of the proposed Settlement, the Settlement is conditioned upon the Commission's approval of the terms and conditions contained in this Joint Petition for Approval of Settlement without modification. If the Commission modifies the Settlement Agreement, either party may elect to withdraw from the Settlement and may proceed with litigation and, in such event, the Settlement Agreement shall be voided and of no effect. By entering into this Settlement Agreement, Bushkill has made no concession or admission of fact or law, beyond those stipulated therein, and may dispute all issues of fact and law for all purposes in all proceedings that may arise as a result of the circumstances described in the Settlement.

DISCUSSION

Public Interest Considerations

Commission policy promotes settlements. 52 Pa. Code § 5.231. Settlements lessen the time and expense the parties must expend litigating a case and at the same time conserve administrative hearing resources. The Commission has indicated that settlement results are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa. Code § 69.401. Many proceedings are expensive to litigate and the cost of such litigation at a reasonable level is an operating expense recovered in the rates approved by the Commission. This means that a settlement, which allows the parties to avoid the substantial costs of preparing

and serving testimony and the cross-examination of witnesses in lengthy hearings, the preparation and service of briefs, reply briefs, exceptions and reply exceptions, together with the briefs and reply briefs necessitated by any appeal of the Commission's decision, yields significant expense savings for the company's customers. That is one reason why settlements are encouraged by long-standing Commission policy.

In order to accept a settlement, the Commission must determine that the proposed terms and conditions are in the public interest. *Pa. Pub. Util. Comm'n v. C S Water and Sewer Assoc.*, 74 Pa. PUC 767 (1991); *Pa. Pub. Util. Comm'n v. Philadelphia Electric Co.*, 60 Pa. PUC 1 (1985).

Applying the public interest standard as discussed herein, the Joint Settlement should be approved by the Commission. I note that Bushkill has agreed to submit the Initial Pennsylvania Pipeline Operator Registration Form that was due on March 16, 2012, and will submit Pennsylvania Pipeline Operator Annual Registration Forms for all subsequent years, including, 2013, 2014, 2015, 2016 and 2017. Bushkill has also agreed that it will submit Pennsylvania Pipeline Operator Annual Registration Forms for future years beginning with 2018. Just as importantly, Bushkill agrees that it will fully comply with Federal pipeline safety laws and regulations, including developing the necessary plans and manuals as required by applicable Federal pipeline safety regulations, within four (4) months following the entry of a Commission Order approving any settlement in this matter. Bushkill agrees that it will permit the I&E Safety Division to review the plans and manuals that Bushkill will develop in order to comply with Federal pipeline safety regulations. These provisions are at the heart of the public interest consideration applicable to this Settlement.

Civil Penalty

The parties have also provided Supporting Statements that are attached to the Settlement as Appendix A (that of I&E) and Appendix B (that of Bushkill). Both parties provide an analysis and conclusions based on the Commission's regulation at 52 Pa. Code § 69.1201, which states the following:

Factors and standards for evaluating litigated and settled proceedings involving violations of the Public Utility Code and Commission regulations—statement of policy.

- (a) The Commission will consider specific factors and standards in evaluating litigated . . . cases involving violations of 66 Pa.C.S. (relating to the Public Utility Code) and this title. These factors and standards will be utilized by the Commission in determining if a fine for violating a Commission order, regulation or statute is appropriate. . . .

* * *

- (c) The factors and standards that will be considered by the Commission include the following:

- (1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing, or technical errors, it may warrant a lower penalty.

- (2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.

- (3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.

- (4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.

- (5) The number of customers affected and the duration of the violation.

- (6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.

(7) Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations or attempts to interfere with Commission investigations may result in a higher penalty.

(8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.

(9) Past Commission decisions in similar situations.

(10) Other relevant factors.

52 Pa. Code § 69.1201.

I&E maintains that the conduct complained of was of a serious nature because accurate completion of Act 127 forms and maintenance of a procedural manual pursuant to 49 CFR § 192.605 is required for compliance with Federal pipeline safety laws and regulations. Bushkill maintains that these omissions were not deliberate as Bushkill was not aware that it fell within the definition of a “pipeline operator,” and its conduct was not a matter of willful fraud or misrepresentation. 52 Pa. Code § 69.1201(c)(1).

With respect to the seriousness of the consequences of Bushkill’s non-compliance, I&E states that the facilities that failed (resulting in a fire and \$50,000 damage) were not jurisdictional. Bushkill adds that no one was injured. 52 Pa. Code § 69.1201(c)(2).

Both I&E and Bushkill maintain that whether the alleged conduct was willful or negligent is inapplicable because this matter is being resolved by settlement. 52 Pa. Code § 69.1201(c)(3).

I&E states that Bushkill has taken steps to come into compliance with the law by hiring a third party consultant. 52 Pa. Code § 69.1201(c)(4).

With respect to the number of customers affected by the incident and the duration of the impact, there is no specific information provided with respect to specific customers or the period of time that customers may have been affected. Indeed, Bushkill maintains that it does

not charge for propane and has no customers, and there is no indication that the occupants of the Villas were affected. 52 Pa. Code § 69.1201(c)(5).

Bushkill has no prior compliance record and thus has no history of violations. The parties identify the failure to file reports as the matter of noncompliance. 52 Pa. Code § 69.1201(c)(6)

Bushkill maintains, and I&E agrees, that Bushkill was forthcoming and cooperated with the investigation. This included Bushkill having independent testing and analysis of the facilities involved in the fire completed at Bushkill's expense. 52 Pa. Code § 69.1201(c)(7).

With respect to the amount of the civil penalty, I&E submits that the civil penalty of \$37,500, which may not be claimed as a tax deduction, is substantial and sufficient to deter future violations. Bushkill points out that deterrence of future violations is unnecessary because Bushkill has agreed to comply with the law. 52 Pa. Code § 69.1201(c)(8)

I&E submits that the proposed Settlement is similar to the previous settlements that the Commission approved in other cases, citing *Pa. Pub. Util. Comm'n v. XTO Energy, Inc. and Mountain Gathering, LLC*, Docket No. C-2014-2444722 (Order entered September 3, 2015); *Pa. Pub. Util. Comm'n v. Brookhaven MHP Management LLC*, Docket Nos. C-2017-2613983 (Order entered August 23, 2018); and *Pa. Pub. Util. Comm'n v. Continental Communities, LLC and Hickory Hills MHC, LLC*, Docket No. C-2015-2468131 (Order entered August 11, 2016). Bushkill cites *Brookhaven* as the most analogous case where the Commission approved a settlement between I&E and Brookhaven regarding allegations of the failure to register under Act 127, wherein Brookhaven owned four mobile home parks providing natural gas service. That case involved a \$25,000 penalty and the payment of back assessments. Bushkill contends that the present Settlement fairly balances the mitigating factors that weigh in Bushkill's favor, including small size, prompt response to the incident, willingness to cooperate with the investigation and willingness to comply with the law. 52 Pa. Code § 69.1201(c)(9).

The Parties submit that the Settlement Agreement is in the public interest because it effectively addresses I&E's allegations that are the subject of the I&E Complaint proceeding, and avoids the time and expense of litigation, which entails hearings, travel for Respondent's witnesses, and the preparation and filing of briefs, exceptions, reply exceptions, as well as possible appeals. 52 Pa. Code § 69.1201(c)(10).

I agree with the reasoning set forth in the Supporting Statements of the parties. I would add that over the course of the proceeding, it was clear that the parties put a great deal of effort into resolving this matter. They are to be commended for their diligence and commitment to resolve this matter by placing the proposed Settlement before the Commission. I find that the proposed Settlement is in the public interest, and I recommend that the Commission adopt the proposed Settlement without modification.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties to this proceeding. 66 Pa.C.S. § 701.

2. To determine whether the settlement should be approved, the Commission must decide whether the settlement promotes the public interest. *Pa. Pub. Util. Comm'n v. C.S. Water and Sewer Associates*, 74 Pa. PUC 767 (1991); *Pa. Pub. Util. Comm'n v. Philadelphia Electric Company*, 60 Pa. PUC 1 (1985).

3. The settlement rates, terms and conditions contained in the Joint Petition for Settlement at Docket No. C-2015-2512950 submitted by the Bureau of Investigation and Enforcement and Bushkill Group, Inc., are just, reasonable and in the public interest.

