



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
COMMONWEALTH KEYSTONE BUILDING
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

November 20, 2019

VIA ELECTRONIC FILING

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

Re: Pennsylvania Public Utility Commission,
Bureau of Investigation and Enforcement v.
Metropolitan Edison Company
Docket No. C-2019-3011675
(I&E Reply to New Matter)

Dear Secretary Chiavetta:

Enclosed for electronic filing is the Reply of the Bureau of Investigation and Enforcement to the New Matter of Metropolitan Edison Company in the above-captioned matter. Copies have been served on the parties of record in accordance with the Certificate of Service.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "K. Myers", written in a cursive style.

Kourtney L. Myers
Prosecutor
PA Attorney ID No. 316494

Prosecutor for the Bureau of
Investigation and Enforcement

Enclosures

cc: As per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,
Bureau of Investigation and Enforcement,
Complainant

v.

Metropolitan Edison Company,
Respondent

Docket No. C-2019-3011675

**THE BUREAU OF INVESTIGATION AND ENFORCEMENT'S
REPLY TO NEW MATTER OF METROPOLITAN EDISON COMPANY**

NOW COMES, the Bureau of Investigation and Enforcement (“I&E” or “Complainant”) of the Pennsylvania Public Utility Commission (“Commission”) by and through its prosecuting attorneys, and files this Reply to New Matter of Metropolitan Edison Company (“Respondent” or “Met-Ed”), pursuant to 52 Pa. Code § 5.63(a). In support thereof, I&E avers as follows:

I. INTRODUCTION

On July 22, 2019, I&E filed a Formal Complaint against Respondent at Docket No. C-2019-3011675, alleging that Respondent violated the Pennsylvania Code, National Electric Safety Code (the “NESC”), and Public Utility Code (the “Code”) in connection with a BH4 6 SOL-400 STR.CU clamp that Met-Ed improperly installed on an aluminum conductor steel-reinforced (hereinafter referred to as “Phase C”). The improperly installed clamp caused Phase C to fall to the ground and resulted in a fatal electrocution and property damage on July 26, 2016 in Easton, Northampton County, Pennsylvania. In its Complaint, I&E seeks payment of a total civil penalty of \$4,533,000 and also requests

that Met-Ed be required to take numerous corrective measures to redress its misconduct and prevent any future harm to the public.

On August 15, 2019, Respondent requested an extension to file an Answer to I&E's Complaint by October 31, 2019. The Commission granted Respondent's request for an extension by Secretarial Letter dated August 16, 2019. On October 31, 2019, Respondent, through counsel, filed an Answer with New Matter and Preliminary Objections to I&E's Complaint at the above docket.

II. REPLY TO NEW MATTER

1. Denied. To the extent that Respondent attempts to incorporate any and all assertions made in Paragraphs 1 through 66 of its Answer as New Matter, this is denied. Pursuant to Section 5.62 of the Commission's regulations, 52 Pa. Code § 5.62, affirmative defenses must be set forth under the heading of "New Matter." New matter is limited to material facts that are not merely denials of the averments of the preceding pleadings. 52 Pa. Code § 5.62(b). Respondent violates these requirements by attempting to incorporate all paragraphs of its Answer as New Matter. I&E rejects this attempt and denies these allegations.

A. Section 3314(a) of the Public Utility Code

2. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied.

3. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. By way of

further response, the case cited, *Feingold v. Bell*, 383 A.2d 791, 794 (Pa. 1977), speaks for itself, and any interpretations, quotation, or characterization thereof is denied.

4. Denied. The averment states a conclusion of law to which no response is required. Section 3314(a) of the Code, 66 Pa.C.S. § 3314(a), speaks for itself, and any interpretation, quotation, or characterization thereof is denied. By way of further response, I&E asserts that the statute of limitations does not apply in this case because I&E brought a timely prosecution, as Met-Ed concedes, and therefore, I&E's civil penalty is not barred.

5. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. By way of further response, *Kovarikova v. Pa. American Water Co.*, 2018 Pa. PUC LEXIS 303 (Order entered August 23, 2018) speaks for itself, and any interpretation, quotation, or characterization thereof is denied. By way of further response, I&E submits that the *Kovarikova* case is factually different from the instant case. In *Kovarikova*, the complainant's water was shut off in April 2013 by the respondent. The complainant was clearly aware of the shutoff as she had no water and also received, and attached to her formal complaint, an April 10, 2013 reply-letter from the respondent regarding the shutoff. *Id.* Although the complainant was aware of the shutoff, she did not file a formal complaint with the Commission until almost four years after the shutoff on March 3, 2017. *Id.* From the time of the shutoff, the complainant was on notice of the conduct which formed the basis of her complaint. *Id.*

I&E submits that as a practical matter, liability cannot arise if a complainant is not aware that liability exists. In *Wilson*, a case involving a billing dispute, the Commission determined that liability arose not during the time period of the high bill, but on the later date when the complainant was first **notified** of the high bill by a letter from the respondent. *Wilson v. Pennsylvania-American Water Co.*, Docket No. C-20066331 (Order entered July 11, 2007). In the instant case, I&E was unaware of Met-Ed's misconduct until Phase C fell on July 26, 2016. This is the date that liability arose. I&E brought its prosecution within three years from the date that liability arose and therefore, the Commission is not divested of jurisdiction and 66 Pa.C.S. § 3314 does not apply to I&E's prosecution or civil penalty.

6. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. By way of further response, *Kovarikova v. Pa. American Water Co.*, 2018 Pa. PUC LEXIS 303 (Order entered August 23, 2018) speaks for itself, and any interpretation, quotation, or characterization thereof is denied. By way of further response, I&E asserts that such a quotation is misplaced as Met-Ed concedes under its own interpretation of 66 Pa.C.S. § 3314 that I&E's right to bring an action was not terminated and that the Commission can still order Met-Ed to pay a civil penalty and perform each of the corrective actions detailed in I&E's Complaint.

7. Denied. The Complaint speaks for itself, and any interpretation, quotation, or characterization thereof is denied.

8. Denied. The Complaint speaks for itself, and any interpretation, quotation, or characterization thereof is denied.

9. Denied. The Complaint speaks for itself, and any interpretation, quotation, or characterization thereof is denied.

a. Denied. The Complaint speaks for itself, and any interpretation, quotation, or characterization thereof is denied.

b. Denied. The Complaint speaks for itself, and any interpretation, quotation, or characterization thereof is denied.

c. Denied. The Complaint speaks for itself, and any interpretation, quotation, or characterization thereof is denied.

d. Denied. The Complaint speaks for itself, and any interpretation, quotation, or characterization thereof is denied.

e. Denied. The Complaint speaks for itself, and any interpretation, quotation, or characterization thereof is denied.

f. Denied. The Complaint speaks for itself, and any interpretation, quotation, or characterization thereof is denied.

g. Denied. The Complaint speaks for itself, and any interpretation, quotation, or characterization thereof is denied.

h. Denied. The Complaint speaks for itself, and any interpretation, quotation, or characterization thereof is denied.

10. Denied. The Complaint speaks for itself, and any interpretation, quotation, or characterization thereof is denied.

11. Denied. The Complaint speaks for itself, and any interpretation, quotation, or characterization thereof is denied.

12. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied.

13. Denied. The Complaint speaks for itself, and any interpretation, quotation, or characterization thereof is denied. By way of further response, the averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. By way of further response, prior to the incident in question, Met-Ed conducted visual inspections of equipment, including Phases A, B, and C, in 2008, 2011, 2013, and 2014 and no defects were purportedly found. I&E was first notified of these inspections on April 3, 2017, when Met-Ed provided revised responses to I&E Data Requests-Set I. It is I&E's position that during these inspections, Met-Ed should have identified and corrected improperly installed and defective equipment, the BH4 6 SOL-400 STR.CU clamps, on Phases A, B, and C, but Met-Ed failed to do so.

I&E is not barred by the statute of limitations to bring a claim since it was not aware of these violations until April 3, 2017 and therefore, liability did not arise until that date. I&E generally learns of misconduct only after an accident occurs, or in this case, when Phase C fell to the ground. The facts relating to such violations are particularly within the knowledge of Met-Ed and I&E had no reason to believe that Met-Ed was not conducting thorough and proper inspections on its equipment and facilities until I&E has reason to believe otherwise. I&E simply cannot oversee and constantly monitor all of the operations, including the inspections, of a regulated entity.

Additionally, in Paragraph 35 of Respondent's Answer, Met-Ed asserts that it performed a visual and infrared inspection on the subject equipment and facilities on July 25, 2016 and no defects were purportedly found. Met-Ed failed to update its responses to I&E's Data Requests-Set I and provide I&E with this information. Therefore, I&E submits that it intends to file an Amended Complaint to account for this additional violation. Such violation, under Met-Ed's interpretation of 66 Pa.C.S. S 3314, would not be barred as it occurred within the three-year period prior to the filing of I&E's Complaint.

14. Denied. The Complaint speaks for itself, and any interpretation, quotation, or characterization thereof is denied. By way of further response, the averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. By way of further response, I&E denies Met-Ed's attempt to limit I&E's claim to Met-Ed employees and contractors who were not properly trained, equipped, monitored, and supervised in the proper installation of BH4 6 SOL-400 STR.CU clamps, which Met-Ed asserts could have only been installed prior to July 22, 2016 thereby barring I&E's requested relief based thereon. I&E submits that its claim, as stated, pertains not only to the training, equipping, monitoring, and supervising of Met-Ed employees and contractors in the proper installation of such clamps, but also to the training, equipping, monitoring, and supervising of Met-Ed employees and contractors *in the proper inspection and maintenance of such clamps*, which would apply well beyond July 22, 2016 and therefore, I&E's relief is not barred.

Indeed, in Paragraph 35 of Respondent's Answer, Met-Ed even asserts that it performed a visual and infrared inspection on the subject equipment and facilities on July 25, 2016, which succeeds July 22, 2016, and no defects were purportedly found. Therefore, I&E maintains that such employees and contractors were not properly trained, monitored and supervised. Otherwise, they would have found the defective equipment on July 25, 2016, which was the day before the fatal electrocution occurred.

15. Denied. The Complaint speaks for itself, and any interpretation, quotation, or characterization thereof is denied. By way of further response, the averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied.

16. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied.

17. Denied. The Complaint speaks for itself, and any interpretation, quotation, or characterization thereof is denied.

18. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. By way of further response, *Kovarikova v. Pa. American Water Co.*, 2018 Pa. PUC LEXIS 303 (Order entered August 23, 2018); *Matenkoski v. Kawon, Inc.*, 1994 Pa. PUC LEXIS 59 (Order entered October 20, 1994); and *Kaufman v. Verizon Pa. Inc.*, 2008 Pa. PUC LEXIS 53 (Order entered November 19, 2008) speak for themselves, and any interpretation, quotation, or characterization thereof is denied. By way of further response, I&E submits that similar to *Kovarikova*, the *Matenkoski* and *Kaufman* cases are

distinguishable from the instant matter as the complainants were aware of the violations yet failed to file complaints within the limitations period. See *Matenkoski v. Kawon, Inc.*, 1994 Pa. PUC LEXIS 59 (Order entered October 20, 1994); See also *Kaufman v. Verizon Pa. Inc.*, 2008 Pa. PUC LEXIS 53 (Order entered November 19, 2008). Additionally in *Matenkoski* and *Kaufman*, the violations of the respondents were not of a continuous and uninterrupted nature. *Id.*

Although Respondent cites to cases where the Commission limits its authority to only imposing penalties for violations that occurred three years or less from the date that the Complaint was filed, I&E asserts that the Commission is not bound by a prior court decision that interprets a statutory provision. In *Popowsky v. Pennsylvania Pub. Util. Comm'n*, 910 A.2d 38, 53 (2006), the Pennsylvania Supreme Court held that

an agency may revise its policies and amend [such] regulations in interpreting its statutory mandates. Further, past interpretation of a statute, though approved by the judiciary, does not bind the PUC to that particular interpretation.” (quoting *Elite Industries, Inc. v. Pennsylvania Pub. Util. Comm'n*, 832 A.2d 428, 431-32 (2003); See also *Seaboard Tank Lines v. Pennsylvania Pub. Util. Comm'n*, 502 A.2d 762 (Pa. Cmwlth. 1985).

19. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. By way of further response, it is I&E’s position that the Commission can impose a per-day civil penalty for violations that occur over three years before the complaint is filed under the discovery rule, continuing violations doctrine, equitable estoppel, and in matters involving informal complaints.

20. Denied. The Complaint speaks for itself, and any interpretation, quotation, or characterization thereof is denied.

21. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. By way of further response, I&E asserts that 66 Pa.C.S. § 3314 applies to untimely prosecutions, not civil penalties assessed in timely prosecutions. Additionally, the Commission is not bound by a prior court decision that interprets a statutory provision. *See Popowsky v. Pa. PUC*, 910 A.2d 38, 53 (2006); *Elite Industries, Inc. v. Pennsylvania Pub. Util. Comm'n*, 832 A.2d 428, 431-32 (2003); *Seaboard Tank Lines v. Pennsylvania Pub. Util. Comm'n*, 502 A.2d 762 (Pa. Cmwlth. 1985).

22. Denied. The Complaint speaks for itself, and any interpretation, quotation, or characterization thereof is denied.

23. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. By way of further response, I&E asserts that because it brought a timely prosecution under 66 Pa.C.S. § 3314, its civil penalty is not barred.

24. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. By way of further response, I&E asserts that because it brought a timely prosecution under 66 Pa.C.S. § 3314, its civil penalty is not barred.

B. Excessive Fines Clauses of the Pennsylvania and United States Constitutions

25. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. By way of further response, I&E utilized the factors found in Section 69.1201 of the Commission's regulations when assessing the civil penalty in this case. 52 Pa. Code § 69.1201; *see also HIKO Energy, LLC v. Pa. Public Utility Commission*, 209 A.3d 246 (Pa. 2019). In utilizing the standards, I&E supports its civil penalties with the following facts: (1) the nature of the conduct was serious due to Met-Ed knowingly using the BH4 6 SOL-400 STR.CU clamps in a way not recommended by the manufacturer or FirstEnergy's material specifications; (2) the resulting consequences were of a serious nature, namely the failure of the clamp resulted in the electrocution and death of a customer as well as property damage; (3) the duration of the improper clamp attachment on Phase C continued over the course of several years; (4) as evidenced in Met-Ed's Answer and New Matter, Met-Ed acted in bad faith during I&E's informal investigation by providing answers that were either inaccurate or representing that responses were unattainable when they were not and by failing to update its responses to I&E's Data Requests; and (5) Met-Ed's continued delay in providing I&E with information during its investigation resulted in the delayed yet timely filing of the complaint.

Further, I&E asserts that Met-Ed's attempt to characterize I&E's requested civil penalty as "excessive" and inflicting "cruel and unusual punishment" is appalling. I&E submits that the only people who suffered excessive, cruel, and unusual punishment in

this matter are Thomas Poynton, who was continuously electrocuted over the course of forty-five (45) minutes, and his wife and two-year-old daughter who witnessed it.

Based upon the serious and continuing nature of Respondents' violations, the maximum civil penalty is certainly warranted in this case.

C. **Laches**

26. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. By way of further response, Met-Ed was made aware of I&E's investigation into the July 26, 2016 incident by letter dated August 16, 2016 as well as subsequent correspondence on September 13, 2017, February 8, 2018, and October 4, 2018. Thus, I&E used due diligence in investigating and instituting the current action and Met-Ed is not prejudiced.

D. **Section 57.193(a) of the Commission's regulations does not apply to the 34.5 kV sub-transmission line at issue, and Met-Ed no longer owns or operates transmission facilities at or above 69 kV in Pennsylvania**

27. Denied. The Complaint speaks for itself, and any interpretation, quotation, or characterization thereof is denied.

28. Denied. The Complaint speaks for itself, and any interpretation, quotation, or characterization thereof is denied.

29. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. By way of further response, 52 Pa. Code §§ 57.1, 57.193(a) speaks for themselves, and any interpretation, quotation, or characterization thereof is denied. Additionally, Met-Ed's attempt to distinguish the 34.5kV line from a transmission line is misguided as 52 Pa.

Code § 57.193(a) refers to “transmission facilities,” not a transmission line, and Met-Ed even refers to Phase C as a “sub-transmission line.” Furthermore, 52 Pa. Code § 57.193 is entitled “transmission system reliability,” further evidencing the far-reaching nature of the section to include all transmission systems/facilities, not just transmission lines. However, should Your Honor find that Phase C is a distribution facility, then I&E asserts that as a distribution facility, Phase C is equally subject to the NESC regulations cited in I&E’s Complaint and additional Commission regulations at 52 Pa. Code §§ 57.194, 57.198. If such a finding is made, I&E will amend its Complaint accordingly.

30. Denied. I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same are therefore denied and strict proof thereof demanded at trial. To the extent a response is required, these allegations are denied. By way of further response, I&E submits that Respondent’s assertion that it no longer owns or operates transmission facilities at or above 69 kV in Pennsylvania is irrelevant as Met-Ed concedes that it still owns or operates transmission facilities below 69 kV, including the sub-transmission at issue in the Complaint, as well as distribution facilities. I&E’s requested relief applies to all transmission and distribution facilities, not just transmission facilities at or above 69 kV.

31. Denied. I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same are therefore denied and strict proof thereof demanded at trial. By way of further response, the Commission Order speaks for itself.

32. Denied. I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same are therefore denied and strict proof thereof

demanded at trial. By way of further response, the letter referenced in Footnote 2 of Met-Ed's New Matter speaks for itself.

33. Denied. I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same are therefore denied and strict proof thereof demanded at trial. By way of further response, the letter referenced in Footnote 3 of Met-Ed's New Matter speaks for itself.

34. Denied. I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same are therefore denied and strict proof thereof demanded at trial. By way of further response, the averment states a conclusion of law to which no response is required.

35. Denied. I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same are therefore denied and strict proof thereof demanded at trial.

36. Denied. I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same are therefore denied and strict proof thereof demanded at trial.

37. Denied. I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same are therefore denied and strict proof thereof demanded at trial.

38. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied.

WHEREFORE, based upon the reasons stated above, the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission respectfully requests that the Commission and the Office of Administrative Law Judge sustain I&E's Complaint, dismiss Respondent's Answer and New Matter, direct Respondent to immediately pay I&E's requested civil penalty of \$4,533,000 and perform each of the corrective actions detailed in I&E's Complaint, and order such other remedies as deemed appropriate.

Respectfully submitted,



Kourtney L. Myers
Prosecutor
PA Attorney ID No. 316494

Kayla L. Rost
Prosecutor
PA Attorney ID No. 322768

Michael L. Swindler
Deputy Chief Prosecutor
PA Attorney ID No. 43319

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Dated: November 20, 2019

Pennsylvania Public Utility Commission,
Bureau of Investigation and Enforcement,
Complainant

v.

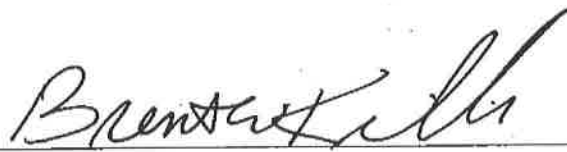
Metropolitan Edison Company,
Respondent

Docket No. C-2019-3011675

VERIFICATION

I, Brent W. Killian, Supervisor, Electric Safety Division, Bureau of Investigation and Enforcement, hereby state that the facts above set forth are true and correct to the best of my knowledge, information, and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Date: November 20, 2019



Brent W. Killian
Supervisor, Electric Safety Division
Bureau of Investigation and Enforcement
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,
Bureau of Investigation and Enforcement,

v.

Metropolitan Edison Company

Docket No. C-2019-3011675

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 52 Pa. Code § 1.54 (relating to service by a party).

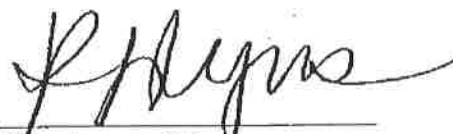
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Dated: November 20, 2019