



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

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

June 7, 2021

Via Electronic Filing

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

Re: Pennsylvania Public Utility Commission,
Bureau of Investigation and Enforcement v.
West Penn Power Company
Docket No. C-2021-3024913
I&E Answer to the Preliminary Objections of West Penn Power Company

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the **Answer to the Preliminary Objections of West Penn Power Company** for the above-referenced case on behalf of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission.

Copies are being served on parties per the attached Certificate of Service. *Due to the temporary closing of the PUC's offices, I&E is only providing electronic 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
(717) 705-4366
komyers@pa.gov

KLM/jfm
Enclosure

cc: Hon. Mary D. Long, OALJ-Pittsburgh (*via email only*)
Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement,	:	
Complainant	:	
	:	
v.	:	Docket No.: C-2021-3024913
	:	
West Penn Power Company,	:	
Respondent	:	

**ANSWER OF THE BUREAU OF INVESTIGATION AND ENFORCEMENT
TO THE PRELIMINARY OBJECTIONS OF
WEST PENN POWER 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 Answer to the Preliminary Objections of West Penn Power Company (“Respondent” or “West Penn”), pursuant to 52 Pa. Code § 5.101(f). In support thereof, I&E avers as follows:

I. INTRODUCTION

On March 26, 2021, I&E filed a Formal Complaint (“Complaint”) against Respondent at Docket No. C-2021-3024913, alleging that Respondent violated the Pennsylvania Code, National Electric Safety Code (the “NESC”), and Public Utility Code (the “Code”) in connection with a conductor (hereinafter referred to as “Phase A”) that fell to the ground and resulted in a brushfire and fatal electrocution on April 12, 2018 in Tarentum, Pennsylvania. In its Complaint, I&E seeks payment of a total civil penalty of

\$3,376,000 and also requests that West Penn be required to take numerous corrective measures to redress its misconduct and prevent any future harm to the public.

On April 19, 2021, West Penn requested an extension of time until May 10, 2021 to file an Answer and/or any other responsive pleading to I&E's Complaint. By Secretarial Letter dated April 19, 2021, the Commission granted Respondent's request for an extension. On May 10, 2021, Respondent requested a second extension of time to file an Answer and/or any other responsive pleading by May 17, 2021. By Secretarial Letter dated May 12, 2021, the Commission granted Respondent's second request for an extension. On May 17, 2021, West Penn, through counsel, filed an Answer with New Matter and Preliminary Objections to I&E's Complaint at the above docket.

On May 21, 2021, I&E requested an extension to file an Answer to West Penn's Preliminary Objections by June 7, 2021. On May 27, 2021, the Commission's Office of Administrative Law Judge ("OALJ") issued a Motion Judge Assignment Notice notifying the Parties that Administrative Law Judge ("ALJ") Mary D. Long was assigned as the Presiding Officer in the above-docketed matter. On June 2, 2021, ALJ Long issued an Interim Order granting I&E's request for an extension of time.

In its Preliminary Objections, West Penn asserts that some of the averments of I&E's Complaint, specifically the allegations and requests for relief in Paragraphs 74 and 77, are barred by the statute of limitations at 66 Pa.C.S. § 3314. For the reasons stated herein, West Penn's Preliminary Objections are meritless and should be rejected. The basis of West Penn's Preliminary Objections, which West Penn erroneously raises under 52 Pa. Code §§ 5.101(a)(1) and (4), is that a *portion* of I&E's requested civil penalty in

this matter is barred by the statute of limitations. I&E asserts that because it filed a timely prosecution, as West Penn concedes, I&E's civil penalty is not barred. However, accepting, for the sake of the argument, West Penn's proposition that a portion of I&E's penalty is barred, I&E would still be entitled to the other portion of its civil penalty, which is not barred, as well as the corrective measures that I&E requests West Penn to perform in its Complaint. Because preliminary objections can only be sustained when the law will permit *no recovery*, West Penn's Preliminary Objections must be rejected.

II. LEGAL STANDARD

The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections. 52 Pa. Code §§ 5.101(a)(1)-(7). The grounds for preliminary objections are limited to the following:

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
- (3) Insufficient specificity of a pleading.
- (4) Legal insufficiency of a pleading.
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
- (6) Pendency of a prior proceeding or agreement for alternative dispute resolution.
- (7) Standing of a party to participate in the proceeding.

52 Pa. Code § 5.101(a).

Commission preliminary objection practice is analogous to Pennsylvania civil practice. *Equitable Small Transportation Interveners v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, Docket No. C-000935435 (Order entered July 18, 1994). When considering the preliminary objection, the Commission must determine “whether the law says with certainty, based on well-pleaded factual averments . . . that ***no recovery or relief is possible.***” *P. J. S. v. Pa. State Ethics Commission*, 669 A.2d 1105 (Pa. Cmwlth. 1996) (emphasis added). Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlth. 2002); *Dept. of Auditor General, et al., v. State Employees’ Retirement System, et al.*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003). For an ALJ to sustain preliminary objections, “it must appear with certainty that the law will permit ***no recovery.***” *Stilp v. Cmwlth.*, 910 A.2d 775, 781 (Pa. Cmwlth. 2006) (emphasis added). All of the non-moving party’s averments in the complaint must be viewed as true for purposes of deciding the preliminary objections, and only those facts specifically admitted may be considered against the non-moving party. *Ridge v. State Employees’ Retirement Board*, 690 A.2d 1312 (Pa. Cmwlth. 1997).

III. ANSWER

Background

1. Admitted.
2. Admitted in part and denied in part. I&E admits that the Complaint was served upon West Penn on April 1, 2021. By way of further response, the Complaint speaks for itself, and any interpretation, quotation, or characterization thereof 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.

Standard of Review

4. 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.

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.

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.

7. 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.

Preliminary Objections

8. This is a paragraph of incorporation to which no response is required.

9. Denied. The Complaint speaks for itself, and any interpretation, quotation, or characterization thereof is denied. By way of further response, I&E specifically denies that its Complaint makes allegations concerning West Penn's operation and maintenance of transmission facilities as I&E's Complaint concerns allegations of Respondent's operation and maintenance of distribution facilities.

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

13. 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.

**ANSWER TO PRELIMINARY OBJECTION NO. 1:
PARAGRAPHS 74 AND 77 OF I&E’S COMPLAINT ARE NOT BARRED BY
66 PA.C.S. § 3314**

14. This is a paragraph of incorporation to which no response is required.

15. 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, Respondent seeks that I&E’s Complaint be dismissed in its *entirety* on the grounds that a *portion* of I&E’s requested relief is barred by Section 3314 of the Code, 66 Pa.C.S. § 3314. I&E asserts that the Commission clearly has jurisdiction over this matter as I&E brought a timely prosecution and the statute of limitations does not bar I&E’s requested relief. West Penn even concedes that under its own interpretation of 66 Pa.C.S. § 3314, I&E is entitled to a portion of its civil penalty, yet overreachingly seeks dismissal of the entire Complaint. For an ALJ to sustain preliminary objections, “it must appear with certainty that the law will permit *no recovery*.” *Stilp*, 910 A.2d at 781 (emphasis added). The Commission can provide I&E with its requested relief in this case. Thus, West Penn’s objection is irrelevant and should be overruled.

Additionally, in this Paragraph, West Penn avers that I&E’s Complaint raises allegations and requests relief in Paragraphs 57, 60, and 63 that are barred by 66 Pa.C.S.

§ 3314. However, I&E does not request any type of relief in Paragraphs 57, 60, and 63 of its Complaint.

Furthermore, West Penn erroneously cites to Sections 5.101(a)(1) and (4) of the Commission's regulations relating to lack of Commission jurisdiction and legal insufficiency of a pleading, 52 Pa. Code §§ 5.101(a)(1), (4), respectively, as the grounds for its Preliminary Objections. Although I&E asserts that the statute of limitations does not apply in this case, an applicable statute of limitations argument should be raised in preliminary objections under "impertinent matter" pursuant to 52 Pa. Code § 5.101(a)(2).

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. By way of further response. 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 as I&E brought a timely prosecution and is entitled to relief, as West Penn conceded, and therefore, West Penn's Preliminary Objections must be overruled. I&E further asserts that 66 Pa.C.S. § 3314(a) does not apply to timely prosecutions that assess civil penalties.

In addition, I&E denies West Penn's disreputable, footnote request for its Preliminary Objections to be treated, in the alternative, as a motion for judgment on the pleadings. Here, West Penn attempts to "file" its motion for judgment on the pleadings at the same time as its Answer, New Matter, and Preliminary Objections. As stated in 52 Pa. Code § 5.1(a), these filings are pleadings before the Commission and must be closed

and/or ruled upon before West Penn can file a motion for judgment on the pleadings. Accordingly, West Penn's footnote request should be denied.

Furthermore, if Your Honor was so inclined to entertain West Penn's footnote request, then West Penn's request should be denied because the pleadings clearly show genuine issues of material facts that are appropriately before Your Honor. The Commission will grant a motion for judgment on the pleadings only if the pleadings show there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. *Darrel Ross v. PECO Energy Co.*, Docket No. C-2008-2060301 (Order entered Oct. 14, 2008). Only in a case where the moving party's right to prevail *is so clear* that a trial would be a fruitless exercise should judgment on the pleadings be granted. *Williams v. Lewis*, 466 A.2d 682 (Pa. Super. 1983); *Service Employees International Union, Local 69, AFL-CIO v. The Peoples Natural Gas Company, d/b/a Dominion Peoples*, Docket No. C-20028539 (Order entered December 19, 2003).

For example, in the Complaint, I&E asserts that West Penn failed to check for conditions that could adversely affect the operation of overhead distribution lines in that during its alleged visual overhead distribution line inspection of its equipment and facilities located between West Penn Power Pole Nos. 146791, 146792, and 146793, including Phases A and B, (hereinafter referred to as right of way or "ROW") in 2016, Respondent did not identify the overgrown vegetation in that area that had the potential to adversely affect the operation of Phases A and B, thereby placing the public safety in danger. In its Answer, West Penn disputes I&E's assertions, suggesting that it checked

for adverse conditions during its alleged overhead distribution line inspection of the ROW in 2016. Thus, in the simplest of terms, a genuine issue of fact exists and West Penn's footnote request should be denied.

17. 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 any *potential*

misconduct by West Penn until Phase A fell on April 12, 2018. Throughout the course of I&E's investigation in this matter, West Penn Power maintained the position that its contractor, Asplundh Tree Experts, LLC ("Asplundh"), performed and completed vegetation management on the ROW on the Colton Property for the 2010-2011 and 2015-2016 vegetation management cycles. It was not until December 8, 2020 when West Penn informed I&E for the first time that Asplundh had taken a "contradictory position with regard to the work they performed for West Penn between poles 146791 and 146793 on both [2010-2011 and 2015-2016] trimming cycles prior to the incident."

At no point prior to December 8, 2020 did West Penn apprise I&E of this critical information or update its responses to I&E's data requests to reflect such information. Therefore, it is I&E's belief that December 8, 2020 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.

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) 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 West Penn 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 West Penn to pay a civil penalty and perform the corrective actions detailed in I&E's Complaint.

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

20. 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.

21. Denied. The Complaint speaks for itself, and any interpretation, quotation, or characterization thereof is denied. By way of further response, I&E submits that there is no "maximum per day penalty of \$1,000" as averred by West Penn. Pursuant to 66 Pa.C.S. § 3301(a)-(b), I&E is authorized to seek a maximum civil penalty of \$1,000 *per violation* and \$1,000 for each day's continuance of such violation.

22. 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 occur 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 (Pa. 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 (Pa. 2003)); *See also Seaboard Tank Lines v. Pennsylvania Pub. Util. Comm'n*, 502 A.2d 762 (Pa. Cmwlth. 1985).

By way of further response, I&E incorporates its Argument, made below, as if fully set forth herein.¹

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, it is I&E's position that the Commission can impose a per-day or a per-violation civil penalty for violations that occur over three years before the complaint is filed under the doctrines of the discovery rule, continuing violations, and equitable

¹ For judicial efficiency, I&E incorporates its argument section beginning on Page 14 as if fully set forth herein, instead of including it, in its entirety, in response to West Penn's Preliminary Objections at Paragraphs 22-23.

estoppel and in matters involving informal complaints. By way of further response, I&E incorporates its Argument, made below, as if fully set forth herein.

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

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 asserts that 66 Pa.C.S. § 3314 applies to actions and prosecutions, not civil penalties. 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 (Pa. 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).

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. Again, West Penn concedes here that I&E's remedy is not totally barred by arguing that the maximum civil penalty that could be imposed under Paragraph 74 of the Complaint is \$17,000 and that the total maximum civil penalty that I&E could seek is \$1,099,000, yet West Penn seeks to dismiss the entirety of I&E's Complaint. For an ALJ to sustain preliminary objections, "it must appear with certainty that the law will permit *no recovery*." *Stilp*, 910 A.2d at 781 (emphasis added).

Additionally, in its Complaint, I&E is not seeking the total maximum penalty that it could seek pursuant to Section 3301(a)-(b) of the Code, 66 Pa.C.S. § 3301(a)-(b). In Paragraphs 72-76 of the Complaint, I&E alleges violations of multiple sections of the Code, Commission's regulations, and the NESAC. Under Section 3301(a)-(b) of the Code, 66 Pa.C.S. § 3301(a)-(b), I&E is authorized to seek a maximum civil penalty of \$1,000 *per violation* of the Code and Commission's regulations and \$1,000 for each day's continuance of such violations. However, in the Complaint, I&E seeks a much lower, per day, civil penalty of \$1,000. Had I&E taken a "per violation" approach when calculating the civil penalty in this case, as authorized under 66 Pa.C.S. § 3301(a)-(b), I&E could have sought a much higher civil penalty.

27. 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.

28. 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.

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.

IV. ARGUMENT

Section 3314 of the Code, 66 Pa.C.S. § 3314, provides in pertinent part, the following:

No action for the recovery of any penalties or forfeitures incurred under the provisions of this part, and no prosecutions on account of any matter or thing mentioned in this part, shall be maintained unless brought within three years from the date at which the liability therefor arose, except as otherwise provided in this part.

As Section 3314 of the Code is entitled “Limitation of *actions* and cumulation of remedies,” I&E argues that the statute does not apply to the assessment of civil penalties, only actions or prosecutions brought after three years from the date at which the liability arose. 66 Pa.C.S. § 3314(a) (emphasis added). I&E submits that the statute differentiates an “action” from a “prosecution” in that the statute only bars the “recovery” of penalties in actions that are brought more than three years from the date at which the liability arose, not prosecutions that are timely filed and assess civil penalties. If the bar to the recovery of penalties or forfeitures applied equally to prosecutions assessing civil penalties, then the statute would state “no prosecutions for the recovery of penalties,” which it does not.

In applying the three-year statute of limitations to the instant case, I&E’s prosecution had to be filed on or before December 8, 2023 in order to be timely. West Penn agrees that I&E filed a timely complaint yet asserts that a portion of I&E’s requested civil penalty is barred.

According to West Penn’s flawed interpretation of 66 Pa.C.S. § 3314 and its argument that the Commission cannot impose penalties for violations occurring more than three years prior to the date that the complaint is filed, had I&E waited until December 8, 2023 to file a complaint, I&E’s Complaint would still be considered timely under Section 3314, but I&E’s remedy would amount to almost nothing. Such an interpretation of Section 3314 must be considered incorrect as it impedes, if not forecloses, the remedial benefits of the statute and undermines the purpose of Section 3301 of the Code, 66 Pa.C.S. § 3301, (which serves as a deterrence and provides for the

imposition of a per violation civil penalty and a civil penalty for *each and every day's continuance* of a violation) and 66 Pa.C.S. §§ 331(a), 506 and 52 Pa. Code § 3.113 (which authorizes I&E to conduct an informal investigation). West Penn's interpretation would only serve to incentivize utilities to delay I&E's investigation and withhold information from I&E since each day that I&E takes to investigate a violation will subtract a day's worth of penalties that I&E could potentially impose. West Penn's reading of the statute must be incorrect as it only undermines the remedial purposes of 66 Pa.C.S. § 3301 and I&E's investigation process and enforcement responsibilities.

However, should Your Honor find that I&E's civil penalty or a portion of it is barred by the statute of limitations, then I&E asserts that the discovery rule, the continuing violations doctrine, equitable estoppel, and I&E's informal investigation process all serve to toll the statute of limitations.

In *Fine v. Checcio*, 870 A.2d 850 (Pa. 2005), the Pennsylvania Supreme Court held that the law recognizes certain exceptions which toll the statute of limitations, such as the discovery rule and the doctrine of fraudulent concealment. The court further instructed that "a statute of limitations, like all statutes, must be read with reason and common sense; that its application to a given set of circumstances, must not be made to produce something that the General Assembly could never have intended; and that its interpretation must be guided by the presumption in the Statutory Construction Act that the legislature does not intend a result that is absurd, impossible of execution or unreasonable." *Id.* at 860.

The Discovery Rule

Many violations of the Code and Commission regulations, like the misconduct at issue in this case, are inherently difficult to detect. For example, in this case, West Penn conducting its own inspections on its equipment and facilities. Whether the inspections have been performed correctly or conducted at all is not a matter that lends itself to easy detection. Additionally, some Commission regulatory requirements are based on a self-policing honor system. For example, Respondent conducting vegetation management on its equipment and facilities. Such information relating to a violation is peculiarly within the knowledge of West Penn and I&E relies on West Penn for correct information. The Commission, nor I&E for that matter, simply cannot oversee and constantly monitor all the operations and innerworkings of a regulated entity.

The discovery rule works to toll the statute of limitations during the period the complainant's cause was neither known nor reasonably knowable to the complainant. *See Fine v. Checcio*, 870 A.2d 850 (Pa. 2005). In *Wilson*, the Commission applied the discovery rule when it determined that liability arose not during the time period of the complainant's high bill (May 21-30, 2002) but on the later date (June 5, 2002) when the complainant was first *notified* of the high bill by a letter from the respondent utility. *Wilson v. Pennsylvania-American Water Co.*, Docket No. C-20066331 (Order entered July 11, 2007).

To say that liability accrues *before* a complainant has or can reasonably be expected to have knowledge of any wrongdoing is patently inconsistent and unrealistic.

I&E cannot maintain an action before it knows that it has one. To take away I&E's remedy before the misconduct is ascertainable to I&E makes a mockery of the law.

In the instant case, I&E was unaware of any *potential* misconduct until Phase A fell on April 12, 2018 resulting in a brushfire and fatal electrocution. Prior to this incident, I&E had no way of knowing that such a dangerous and hazardous condition existed. Moreover, in its responses to I&E's data requests, West Penn informed I&E that vegetation management was performed on the ROW on the Colton Property for the 2010-2011 and 2015-2016 vegetation management cycles. Such information relating to the vegetation management was peculiarly within the knowledge of West Penn and I&E relied on West Penn for correct information. It was not until December 8, 2020 that West Penn informed I&E for the first time that Asplundh had taken a "contradictory position with regard to the work they performed for West Penn between poles 146791 and 146793 on both [2010-2011 and 2015-2016] trimming cycles prior to the incident" and West Penn admits to this in Paragraph 60 of its Answer to I&E's Complaint.

Therefore, it is I&E's belief that December 8, 2020 is the date that liability arose. I&E exercised reasonable diligence to discover the liability, investigate the misconduct, and bring its prosecution within three years from the date that liability arose. I&E has an incentive to act promptly since it bears the burden of proof and is more likely to suffer prejudice from the lack of evidence associated with such claim, and I&E has in fact suffered prejudice in this case as explained further below. Therefore, I&E is entitled to its requested relief.

The Continuing Violations Doctrine

Under the continuing violations doctrine, a complainant may recover for misconduct that falls outside the limitations period on the theory that such misconduct is part of one continuing violation. *See Barra v. Rose Tree Media Sch. Dist.*, 858 A.2d 206, 213 (Pa. Cmwlth. 2004). The United States Supreme Court addressed the continuing violation doctrine in *U.S. v. ITT Continental Baking Co.*, 420 U.S. 223 at 231 (1975) where it held that in a regulatory setting, a violation should be construed as continuing where “the detrimental effect to the public and the advantage to the violator continue and increase over a period of time, and the violator could eliminate the effects of the violation if it were motivated to do so, after it had begun.” The U.S. Supreme Court further emphasized in *ITT Continental* that the Federal Trade Commission Act should not be interpreted to convert penalties for violations into minor taxes that encourage noncompliance. *Id.* at 232. *See also Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (where the U.S. Supreme Court held that all violations are actionable if any occur within the limitations period).

In *Del Vecchio v. PPL Electric Utilities Corporation*, Docket Z-01464793 (Order entered September 13, 2005), the Commission found that the appropriate timeframe for limitations purposes includes the period up to the date when the respondent utility actually acted to address the misconduct.

Additionally, the continuing nature and duration of a violation is a specific factor that the Commission must consider when assessing civil penalties in litigated proceedings. *See* 52 Pa. Code § 69.1201. When this factor is applied in a litigated

proceeding, it must be applied in a strict fashion. 52 Pa. Code § 69.1201(b). I&E asserts that in order to apply this factor in a strict and consistent fashion, the entire duration of the continuing violation must be considered when assessing a civil penalty in a litigated proceeding, not just a part of it. Otherwise, this undermines the purpose of not only 52 Pa. Code § 69.1201, but also 66 Pa.C.S. § 3301.

In the instant case, West Penn's failure to conduct vegetation management on the ROW on the Colton Property for the 2010-2011 and 2015-2016 vegetation management cycles continued from December 31, 2011 (the last day of the 2010-2011 vegetation management cycle) to April 12, 2018 (the day that West Penn de-energized Phase A) and was an uninterrupted and continuing course of misconduct. I&E was not aware of such continuing violation until December 8, 2020. Respondent's failure to conduct vegetation management on the ROW for the 2010-2011 and 2015-2016 vegetation management cycles created an ongoing, dangerous, and detrimental effect to the public and resulted in death. The effect and consequence of such violation, death, was within the control of West Penn and could have been eliminated had West Penn properly inspected its equipment and facilities and conducted vegetation management on the ROW.

Should Your Honor find that only a portion of I&E's requested civil penalty applies as West Penn suggests, such a penalty will only disincentivize utilities from adhering to the law because they will be able to escape prosecution for continuing violations. Furthermore, I&E submits that a continuing violation does not present problems of staleness and thus, does not interfere with the purpose of the statute of limitations.

Equitable Estoppel

The doctrine of equitable estoppel also serves to toll the statute of limitations and is based on the theory of estoppel. *Ely v. Pennsylvania American Water Co.*, Docket No. C-20055616 (Order entered July 10, 2006). It provides that a defendant may not invoke the statute of limitations if the defendant misleads the plaintiff or causes the plaintiff to relax his vigilance or deviate from his right of inquiry into the facts through fraud or concealment. *Id.* The doctrine does not require fraud in the strictest sense but rather fraud in the broadest sense, which includes unintentional deception. *Battle v. PECO Energy Co.*, Docket No. C-00003804 (Order entered July 16, 2001).

As stated above, throughout the course of I&E's investigation in this matter, West Penn Power maintained the position that Asplundh performed and completed vegetation management on the ROW on the Colton Property for the 2010-2011 and 2015-2016 vegetation management cycles, until December 8, 2020 when West Penn informed I&E for the first time that Asplundh had taken a "contradictory position with regard to the work they performed for West Penn between poles 146791 and 146793 on both [2010-2011 and 2015-2016] trimming cycles prior to the incident."

At no point prior to December 8, 2020 did West Penn apprise I&E of this critical information or update its responses to I&E's data requests to reflect such information. Therefore, it is I&E's belief that December 8, 2020 is the date that liability arose. West Penn's interpretation of 66 Pa.C.S. § 3314, if adopted, will only incentivize utilities to conceal information from I&E and intentionally delay I&E's investigation, like West Penn has clearly done here, in order to escape prosecution and a maximum penalty.

Informal Complaint Process

Lastly, the statute of limitations can be tolled by the filing of an informal complaint with the Commission. *Duquesne Light Co. v. Pa. PUC*, 611 A.2d 370 (Pa. Cmwlth. 1992). Thus, the period of time within which the Commission's Bureau of Consumer Services ("BCS") investigates a consumer's informal complaint cannot be charged against that consumer. *Id.* at 383. This is consistent with the underlying purpose of the informal complaint process which is to encourage settlements of billing disputes. *Id.* at 384.

I&E submits that BCS's informal complaint investigation process is similar to I&E's informal investigation process and should serve to toll the statute of limitations. I&E has the authority to institute an informal investigation of a regulated entity pursuant to 66 Pa.C.S. §§ 331(a), 506 and 52 Pa. Code § 3.113. Once I&E becomes aware of a potential violation of the Code or Commission regulations, I&E must determine whether a factual and legal basis exists for an informal investigation. If the matter warrants an investigation, I&E will conduct the investigation through data and document requests, interviews, and other methods used to obtain information. I&E relies on the information that the respondent utility provides to I&E in response to the data and document requests to make a determination of whether or not a violation has been committed to form the basis for a formal complaint, to settle the matter, or terminate its informal investigation.

In this matter, I&E initiated its informal investigation of West Penn on June 19, 2018. I&E asserts that the time it took to conduct its investigation should not be counted against it. Under West Penn's interpretation of 66 Pa.C.S. § 3314 and in arguing that

Section 3314 applies to civil penalties assessed in a timely prosecution, each day that I&E takes to investigate a violation will subtract a day's worth of penalties that I&E could potentially impose. In other words, under West Penn's reading of Section 3314, in order for I&E to assess the maximum civil penalty in a case like this, I&E will have to file its Complaint on the same day that it discovers a violation, leaving no time for an investigation to make a determination as to whether or not a violation of the Code or Commission regulations even exists. Such an interpretation must be deemed incorrect as this only undermines I&E's informal investigation process and I&E's investigative and enforcement responsibilities.

Moreover, I&E submits, again, that the Commission is not bound to any prior caselaw that suggests the same interpretation and reading of Section 3314 as that of West Penn. See *Popowsky v. Pennsylvania Pub. Util. Comm'n*, 910 A.2d 38, 53 (Pa. 2006).

V. CONCLUSION

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 dismiss Respondent's Preliminary Objections and sustain I&E's Complaint.

Respectfully submitted,



Kourtney L. Myers

Prosecutor

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Dated: June 7, 2021

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement,	:	
Complainant	:	
	:	
v.	:	Docket No.: C-2021-3024913
	:	
West Penn Power Company,	:	
Respondent	:	

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: June 7, 2021



Brent W. Killian
Supervisor, Electric Safety Division
Bureau of Investigation and Enforcement
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

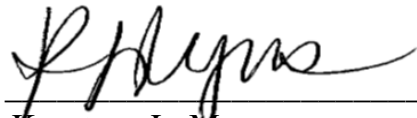
Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement,	:	
Complainant	:	
	:	
v.	:	Docket No.: C-2021-3024913
	:	
West Penn Power Company,	:	
Respondent	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing **I&E Answer to the Preliminary Objections of West Penn Power Company** in the manner and upon the parties listed below, in accordance with the requirements of 52 Pa. Code §§ 1.54 (relating to service by a party).

Served via Electronic Mail Only

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Date: June 7, 2021