



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 Reply to New Matter of West Penn Power Company**

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the **Reply to New Matter 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](mailto: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	:	

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**THE BUREAU OF INVESTIGATION AND ENFORCEMENT’S  
REPLY TO NEW MATTER  
OF WEST PENN POWER COMPANY**

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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 West Penn Power Company (“Respondent” or “West Penn”), pursuant to 52 Pa. Code § 5.63(a). 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.

## **II. REPLY TO NEW MATTER**

79. Denied. To the extent that Respondent attempts to incorporate any and all assertions made in Paragraphs 1 through 78 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**

80. 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.

81. 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.

82. 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 West Penn concedes, and therefore, I&E's civil penalty is not barred.

83. 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 right of way ("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" and West Penn admits to this in Paragraph 60 of its Answer to I&E's Complaint.

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, 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.

84. 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.

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

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

87. 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.

88. 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.

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

90. 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.

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

92. 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.

93. 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 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. 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).

94. 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 discovery rule, continuing violations doctrine, equitable estoppel, and in matters involving informal complaints.

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

96. 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).

97. 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.

98. 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**

99. 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 West Penn not performing vegetation management on the ROW on the Colton Property for the 2010-2011 and 2015-2016 vegetation management cycles or identifying any conditions that adversely affected the operation of the overhead distribution lines on the ROW during the alleged overhead

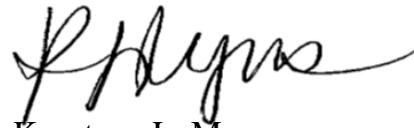
inspection in 2016; (2) the resulting consequences were of a serious nature, namely the failure of the Phase A resulted in a brushfire and the electrocution and death of a customer; (3) the duration of the misconduct at issue, specifically West Penn's failure to conduct vegetation management on the ROW on the Colton Property, has continued over the course of several years and continues to this day; (4) as evidenced in West Penn's Answer and New Matter, West Penn acted in bad faith during I&E's informal investigation by failing to update its responses to I&E's data requests regarding the lack of vegetation management by its contractor, Asplundh; and (5) West Penn's 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 West Penn'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 Terry Colton, who was continuously electrocuted for over an hour, and his family who witnessed it.

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

**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 \$3,376,000 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

Bureau of Investigation & Enforcement  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg PA 17120  
[komyers@pa.gov](mailto:komyers@pa.gov)

Dated: June 7, 2021

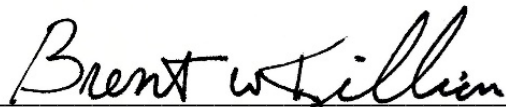
**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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**

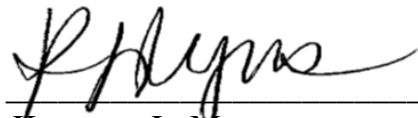
Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement,	:	
Complainant	:	
	:	
v.	:	Docket No.: C-2021-3024913
	:	
West Penn Power Company,	:	
Respondent	:	

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the foregoing **I&E Reply to New Matter** 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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\_\_\_\_\_  
Kourtney L. Myers  
Prosecutor  
PA Attorney ID No. 316494

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Date: June 7, 2021