*Via electronic service only due to Emergency Order at M-2020-3019262*

**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission, Bureau :

Of Investigation & Enforcement : :

v. : C-2021-3024913

:

West Penn Power Company :

**INTERIM ORDER**

**DISMISSING PRELIMINARY OBJECTIONS**

On March 26, 2021, the Commission’s Bureau of Investigation and Enforcement (BIE) filed a complaint against West Penn Power, alleging violations of the Public Utility Code and requesting a civil penalty. BIE alleged that on April 12, 2018, a conductor owned by West Penn Power fell into the wooded property of Terry and Frances Colton, causing a brush fire. After the fire was extinguished Terry Colton came into contact with the conductor and was killed. BIE further alleged violations of the Public Utility Code because, among other things, of West Penn’s failure to properly inspect and maintain the right-of-way and manage the vegetation within the right-of-way. In total, BIE requests a civil penalty in the amount of approximately $3.4 million.

West Penn Power filed an answer denying the material allegations of the complaint, new matter, and preliminary objections on May 17, 2021.[[1]](#footnote-1) By letter dated May 21, 2021, BIE requested an extension to June 7, 2021, to file an answer to West Penn Power’s preliminary objections.

By notice dated May 27, 2021, the complaint was assigned to me. BIE’s extension request was granted.

BIE filed a response to the preliminary objections and also filed an answer to West Penn Power’s new matter on June 7, 2021. The preliminary objections of West Penn Power are ripe for review. As explained in more detail below, the preliminary objections will be dismissed. West Penn Power and BIE raise important issues related to the interpretation of Section 3314, which are better decided when both parties have had an opportunity to develop a legal analysis in the context of the factual record.

Preliminary objection practice before the Commission is similar to Pennsylvania civil practice respecting preliminary objections.[[2]](#footnote-2) In deciding the preliminary objections, the Commission must determine whether, based on well-pleaded factual averments of the petitioners, recovery or relief is possible.[[3]](#footnote-3) Any doubt must be resolved in favor of the non‑moving party by refusing to sustain the preliminary objections.[[4]](#footnote-4) All of the non-moving party’s averments in the complaint must be viewed as true for purposes of deciding the preliminary objections.[[5]](#footnote-5) Only those facts specifically admitted may be considered against the non-moving party.[[6]](#footnote-6) A preliminary objection which seeks dismissal of a pleading will only be granted where relief is clearly warranted and free from doubt.[[7]](#footnote-7)

West Penn Power argues that the complaint should be dismissed because the relief sought by BIE is barred by Section 3314 of the Public Utility Code.[[8]](#footnote-8) Specifically, West Penn Power argues that the civil penalties requested by BIE in Paragraphs 74 and 77 of the complaint are calculated based on time periods earlier than three years before BIE filed its complaint. BIE counters that a strict application of Section 3314 should not bar its request for relief under a variety of legal theories.

Section 3314 of the Public Utility Code[[9]](#footnote-9) sets forth a statute of limitation for proceedings before the Commission:

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 therefore arose, except as otherwise provided in this part.

Generally, the Commission has held that Section 3314 “terminates the right to bring an action as well as any remedy the Commission may order.”[[10]](#footnote-10) However, as explained by the Pennsylvania Supreme Court, the law recognizes certain exceptions which toll the statute of limitations, such as the discovery rule and the doctrine of fraudulent concealment.[[11]](#footnote-11) That court also 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.”[[12]](#footnote-12)

While the Commission has not explicitly adopted the Pennsylvania Supreme Court’s instruction for interpreting statutes of limitations, Commission decisions reflect the principles set forth by the court. The Commission has not articulated a “discovery rule” per se, but it has noted in consumer cases that the statute of limitations begins to run when a complainant becomes aware of a cause of action.[[13]](#footnote-13) Also, the Commission has applied the doctrine of equitable estoppel to toll the application of a statute of limitations in consumer cases.[[14]](#footnote-14) Finally, the Commission has determined that where a complainant alleged that a utility failed to remedy a service complaint for a number of years, a violation which continued until the utility acted, and a civil penalty was permitted.[[15]](#footnote-15)

The cases cited by West Penn Power to support its preliminary objections, do not address the application of an exception to the statute of limitation that may be applicable to the circumstances here. These cases are consumer complaints where a consumer was aware of when water service became unreliable[[16]](#footnote-16) or was terminated.[[17]](#footnote-17) West Penn Power’s preliminary objections do not address any of the doctrines which may toll Section 3314.[[18]](#footnote-18) Therefore, West Penn Power’s preliminary objections will be dismissed as the right to prevail is not clearly warranted at this point in the proceedings.

BIE’s complaint raises issues of fact and law beyond the factual circumstances in the consumer cases discussed above. West Penn Power has not had an opportunity to develop facts to counter BIE’s argument that an exception to the statute of limitations should apply to the alleged facts here.

THEREFORE,

IT IS ORDERED:

1. That the preliminary objections of West Penn Power Company filed on May 17, 2021, are dismissed.

2. That a prehearing conference shall be scheduled to discuss an appropriate procedural schedule for the disposition of the formal complaint.

Date: June 11, 2021 /s/

Mary D. Long

Administrative Law

**C-2021-3024913 – PA PUC BUREAU OF INVESTIGATION & ENFORCEMENT v. WEST PENN POWER COMPANY**KOURTNEY MYERS ESQUIREPA PUC BI&EPO BOX 3265HARRISBURG PA 17105-3265**717.705.4366**  
[komyers@pa.gov](mailto:komyers@pa.gov)  
Accepts eServiceMICHAEL L. SWINDLER ESQUIREPA PUC BI&E400 NORTH STREETPO BOX 3265HARRISBURG PA 17105-3265**717.783.6369**[mswindler@pa.gov](mailto:mswindler@pa.gov)Accepts eServiceTORI L. GIESLERFIRSTENERGY SERVICE COMPANY2800 POTTSVILLE PIKEREADING PA 19605**610.921.6658**[PARegulatoryComplaints@firstenergycorp.com](mailto:PARegulatoryComplaints@firstenergycorp.com)Accepts eService

1. West Penn Power was granted extensions of time to file its answer which were unopposed by BIE. [↑](#footnote-ref-1)
2. *Equitable Small Transportation Intervenors v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994). [↑](#footnote-ref-2)
3. *Dept. of Auditor General v. SERS*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003); *P.J.S. v. Pa. State Ethics Comm’n*, 669 A.2d 1105 (Pa. Cmwlth. 1996). [↑](#footnote-ref-3)
4. *Boyd v. Ward*, 802 A.2d 705 (Pa.Cmwlth. 2002). [↑](#footnote-ref-4)
5. *Pennsylvania State Lodge, Fraternal Order of Police v. Dept. of Conservation and Natural Resources*, 909 A.2d 413 (Pa.Cmwlth. 2006), aff’d per curium, 924 A.2d 1203 (Pa. 2007). [↑](#footnote-ref-5)
6. Ridge v. State Employees’ Retirement Board, 690 A.2d 1312 (Pa.Cmwlth. 1997). [↑](#footnote-ref-6)
7. *Interstate Traveller Services, Inc. v. Pa. Department of Environmental Resources*, 406 A.2d 1020 (Pa. 1979); *Application of K&F Medical Transport, LLC*, PUC Docket No. A-2008-2020353 (Initial Decision dated April 25, 2008). [↑](#footnote-ref-7)
8. 66 Pa.C.S. § 3314. [↑](#footnote-ref-8)
9. 66 Pa.C.S. §3314(a). [↑](#footnote-ref-9)
10. *Kovarik v. Pennsylvania American Water Company,* Docket No. C-2017-2592131 (Opinion and Order entered August 23, 2018); *Ross v. PECO Energy Co.*, Docket No. C-2008-2060301 (Final Order entered February 19, 2009). [↑](#footnote-ref-10)
11. *Fine v. Checcio*, 870 A.2d 850 (Pa. 2005).  
     [↑](#footnote-ref-11)
12. *Id.* at 860. [↑](#footnote-ref-12)
13. *Wilson v. Pennsylvania American Water*, Docket No. C-20066331 (Opinion and Order entered July 11, 2007)(statute begins to run when complainant became aware of a potential dispute); *see also* cases applying the limitation at 66 Pa.C.S. §1312 to refunds. [↑](#footnote-ref-13)
14. *Ely v. Pennsylvania American Water* Company, Docket C-20055616 (Opinion and Order entered July 10, 2006); *Battle v. PECO Energy Company*, Docket No. C-00003804 (Opinion and Order entered July 16, 2001). [↑](#footnote-ref-14)
15. *Del Vecchio v. PPL Electric Utilities Corporation*, Docket Z-01464793 (Opinion and Order entered September 13, 2005). [↑](#footnote-ref-15)
16. *Matenkoski v. Kawon, Inc.*, Docket C-00935089 (Opinion and Order entered October 20, 1994). [↑](#footnote-ref-16)
17. *Kovarik v. Pennsylvania American Water Company,* C-201702592131 (Opinion and Order entered August 23, 2018). [↑](#footnote-ref-17)
18. Similar preliminary objections were dismissed in an enforcement action lodged against a sister company, Metropolitan Edison. *Public Utility Commission v. Metropolitan Edison Company*, Docket C-2019-3011675 (Interim Order Dismissing Preliminary Objections entered January 16, 2020). [↑](#footnote-ref-18)