

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission, Bureau	:	
Of Investigation & Enforcement	:	
	:	
v.	:	C-2021-3024913
	:	
West Penn Power Company	:	

INITIAL DECISION

Before
Mary D. Long
Administrative Law Judge

INTRODUCTION

A conductor fell onto the property of Terry and Frances Colton, ultimately resulting in the death of Terry Colton. The Bureau of Investigation and Enforcement filed a Formal Complaint against West Penn Power Company seeking a \$3.4 million civil penalty and corrective measures. This decision approves the settlement of the Complaint. Pursuant to the terms of the settlement, West Penn Power will pay nearly \$1.2 million as a civil penalty and execute a number of remedial measures.

HISTORY OF THE PROCEEDINGS

On March 26, 2021, the Pennsylvania Public Utility Commission’s Bureau of Investigation and Enforcement (I&E) filed a Complaint with the Pennsylvania Public Utility Commission (Commission) against West Penn Power Company (West Penn Power), alleging that West Penn Power violated the Public Utility Code and requesting a civil penalty. Specifically, I&E alleged that on April 12, 2018, a conductor owned by West Penn Power fell

onto the wooded property of Terry and Frances Colton, causing a brush fire (April 12 Incident). After the fire was extinguished Terry Colton came into contact with the conductor and was killed. I&E further alleged West Penn Power violated the Public Utility Code because, among other things, West Penn Power failed to properly inspect and maintain the right-of-way and manage the vegetation within the right-of-way. I&E requested a civil penalty in the amount of approximately \$3.4 million.

On May 17, 2021, West Penn Power filed an Answer denying the material allegations of the Complaint and the New Matter. West Penn Power also filed Preliminary Objections on May 17, 2021.¹

By notice dated May 27, 2021, the Complaint was assigned to me. I&E filed a response to the Preliminary Objections and also filed an Answer to West Penn Power's New Matter on June 7, 2021.²

By Interim Order entered on June 11, 2021, West Penn Power's Preliminary Objections were dismissed. A notice was issued scheduling a prehearing conference for July 14, 2021.

The prehearing conference convened as scheduled. Attorney Kourtney Myers appeared on behalf of I&E. Attorney Tori Giesler appeared on behalf of West Penn Power. The parties reported that settlement discussions were ongoing. After further discussion, the parties agreed to a litigation schedule which provided for the filing of written testimony and scheduled evidentiary hearings to begin on January 26, 2022. A prehearing order memorializing this schedule and other matters agreed upon at the prehearing conference was issued on July 14, 2021.

¹ West Penn Power was granted extensions of time to file its answer which were unopposed by I&E.

² By letter dated May 21, 2021, I&E requested an extension to June 7, 2021, to file an Answer to West Penn Power's Preliminary Objections. I&E's extension request was granted.

By email dated October 19, 2021, the parties notified me that the parties had reached an agreement in principle, and they requested the suspension of the litigation schedule and the cancellation of the January 2022 hearings. By Interim Order entered October 20, 2021 the request to suspend the litigation schedule was granted and the parties were directed to file a joint petition for settlement on or before December 1, 2021.

I&E and West Penn Power (Joint Petitioners) filed a Joint Petition for Approval of Settlement on December 1, 2021. The filing included the terms of the settlement, a Joint Stipulation of Facts, Joint Proposed Ordering Paragraphs, and statements in support of the settlement by both I&E and West Penn Power. The record also closed on this date.

STIPULATED FACTS

The Parties stipulated to the following facts which are adopted verbatim and included herein in their entirety.

A. Conductors

1. On April 12, 2018, a conductor (“Phase A”), owned and operated by West Penn, fell into the wooded area of the property of Terry and Frances Colton at 203 McKrell Road, Tarentum, Pennsylvania 15084 (“Colton Property”).
2. Phase A was a 7.2kV (phase-to-ground) primary distribution line.
3. Phase A and Phase B were part of a two-phase 12.5kV (phase-to-phase) primary distribution system (hereinafter referred to as the “Millerstown Circuit”).
4. West Penn does not know the date on which it de-energized Phase B but claims that Phase B was de-energized before April 12, 2018.

B. Poles

5. Phases A and B were suspended, in part, by West Penn Pole Nos. 146791, 146792, and 146793.

6. Phase A fell between Pole Nos. 146791 and 146792.

C. Fault Detection Devices

7. Three (3) fuse locations and two (2) reclosers (collectively referred to as “fault detection devices”) were installed on the Millerstown Circuit to protect the conductors on Pole Nos. 146791, 146792, and 146793 and to detect a fault occurring at the aforementioned poles.

8. On the day of the incident, the fault detection devices ultimately did not operate to de-energize Phase A after Phase A fell to the ground.

D. 2010-2011 Vegetation Management Cycle

9. West Penn has a right of way (“ROW”) or easement that runs through the Colton Property.

10. The ROW contains Pole Nos. 146791, 146792, and 146793, which run beyond the Colton’s residence and into the wooded area in the rear of the Colton Property and cover a span of approximately 200 yards.

11. Pursuant to the ROW, West Penn has the right to enter upon the Colton Property for the purpose of maintaining Pole Nos. 146791, 146792, and 146793 and to cut and trim any trees whenever necessary to keep the conductors on the aforementioned poles free from any obstructions.

12. Prior to the incident, West Penn contracted with Asplundh Tree Experts, LLC (“Asplundh”) to provide vegetation management services on the Millerstown Circuit, including the ROW on the Colton Property for the 2010-2011 and 2015-2016 vegetation management cycles.

13. Throughout the course of I&E’s investigation in this matter, West Penn maintained the position that Asplundh performed vegetation management services on the ROW on the Colton Property for the 2010-2011 vegetation

management cycle as Asplundh was contracted and invoiced West Penn for the aforementioned services.

14. In 2011, Allegheny Power merged with FirstEnergy Corp. (“FirstEnergy”).

15. West Penn is a wholly-owned subsidiary of FirstEnergy.

16. According to the “Vegetation – Purpose and Objectives” Section of the Construction, Operation and Maintenance Manual of Allegheny Power (“Allegheny Power Manual”), which was in effect during the 2010-2011 vegetation management cycle, “[o]verhead conductors and associated rights-of-way must be free of vegetation which interferes with or has the potential to interfere with electric service, or creates a condition hazardous to company facilities, customer facilities, and the public at large” and “[r]ight-of-way vegetation management on Distribution lines shall be performed as required on a circuit basis a minimum of once every six (6) years in rural areas and once every three (3) years in urban/suburban areas.”

17. Per the “Vegetation – Purpose and Objectives” Section of the Allegheny Power Manual, “Allegheny Power employees ensure contractor adheres to all specifications promulgated by Allegheny Power.”

18. A circuit map of the Millerstown Circuit (hereinafter referred to as “Circuit Map”) reflects the vegetation management that Asplundh presented to West Penn as complete on the Millerstown Circuit for the 2010-2011 vegetation management cycle.

19. Per the “Vegetation – Vegetation Management Inspection” Section of the Allegheny Power Manual, “[w]here work involving line or circuit jobs is designated on maps, inspector marks maps showing inspected areas and either writes inspection results upon maps or attaches applicable notes.”

20. The Circuit Map contains notes in the area of the ROW on the Colton property stating, “OWNER WOULD LIKE LINE CUT DEAD, DOESN’T FEED ANYTHING” and “HAVE R/W ON.”

21. Another area on the Circuit Map to the left of the ROW on the Colton Property contains a note “HAVE R/W ON” and below that note, FirstEnergy Forestry Representative, Charles G. Sarver wrote “CLEARANCE” with his initials “CGS,” directly below.

22. The “CLEARANCE” note and initials represent Mr. Sarver’s decision that the current clearance in that specific location was sufficient until the next cycle trimming and that no follow up work was required

23. A “CLEARANCE” note and initials do not appear near the “HAVE R/W ON” note on the Circuit Map in the area of the ROW on the Colton Property.

24. No applicable notes were attached to the Circuit Map.

25. According to the “Vegetation – Vegetation Management Inspection” Section of the Allegheny Power Manual, “[i]nspectors perform in-field inspection(s) as required to ensure crews fulfill contract requirements” and “[i]f deficiencies are discovered, inspectors schedule additional inspections sufficient to ensure deficiencies are corrected.”

26. West Penn has no records of the specific work that was allegedly performed between Pole Nos. 146791 and 146793 for the 2010-2011 vegetation management cycle.

E. 2016 Overhead Inspection

27. According to the “Distribution Overhead Line Inspections” Section of the biennial Inspection, Maintenance, Repair and Replacement Plan (“I&M Plan”) of West Penn for the period of January 1, 2015 through December 31, 2016, “the purpose for inspecting overhead lines and equipment is to identify and repair unsafe conditions or conditions that may adversely affect service reliability, and to comply with the requirements of state regulatory agencies and the National Electric Safety Code.”

28. After the alleged 2010-2011 vegetation management cycle work, West Penn claims that it performed visual overhead inspections of the equipment and facilities between

Pole Nos. 146791, 146792, and 146793, including Phases A and B, on April 1, 2016.

29. During this alleged inspection, West Penn did not identify any conditions that adversely affected the operation of the overhead distribution lines on Pole Nos. 146791, 146792, and 146793, including Phases A and B.

F. 2015-2016 Vegetation Management Cycle

30. Throughout the course of I&E's investigation in this matter, West Penn has maintained the position that Asplundh performed and completed vegetation management services on the ROW on Colton Property for the 2015-2016 vegetation management cycle as Asplundh was contracted and invoiced West Penn for the aforementioned services.

31. According to the "Vegetation Management" Section of the I&M Plan of West Penn for the period of January 1, 2015 through December 31, 2016, "West Penn performs vegetation management in order to promote the continued safe and reliable operation of the distribution system" and the "[s]tandard vegetation specification provides vegetation to be pruned to achieve five (5) years of clearance, removal of selected incompatible trees within the clearing zone corridor, removal of certain defective limbs that are overhanging primary conductors, controlling selected incompatible brush mechanically and/or using herbicide, and removal of off-corridor priority trees that are dead, dying, diseased, and leaning or significantly encroaching the corridor."

32. According to the "Distribution Primary Voltage Clearance Requirements" Section of the FirstEnergy Vegetation Management Distribution Specifications ("FirstEnergy Specifications"), which was in effect during the 2015-2016 vegetation management cycle, "[a]ll vegetation management activities shall be performed in such a manner as to achieve a minimum of cycle length clearance from FirstEnergy primary conductors based on tree species and growing conditions" and "[c]ycle lengths for . . . West Penn Power is five (5) years."

33. Per the "Work Inspection Process" Section of the FirstEnergy Specifications, "FirstEnergy has the responsibility for inspecting and approving work performed

under this Specification” and “FirstEnergy will inspect and approve all planned work performed by the Contractor to ensure compliance with this Specification.”

34. On West Penn’s “Work Inspection Sheet” for the alleged 2015-2016 vegetation management cycle work, West Penn claims that the vegetation management for this cycle was completed by Asplundh on September 12, 2016 and that a final inspection was completed by FirstEnergy Forestry Representative Charles G. Sarver on September 21, 2016.

35. On April 13, 2018, I&E’s Safety Division took photographs of the ROW on the Colton Property, including Pole Nos. 146791, 146792, and 146793 and Phases A and B. The photographs are attached to I&E’s Complaint as I&E Exhibits 1A-C.

36. In its responses to I&E’s data requests on December 8, 2020, 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.”

37. The lack of vegetation management on the ROW on the Colton Property from the time of the 2010-2011 vegetation management cycle to the date of the incident on April 12, 2018 allowed the trees to grow into and past Phases A and B.

G. Chronology of Events

38. After Phase A fell, a brush fire started in the wooded area of the Colton Property.

39. The West Deer Township Police Department and West Deer Volunteer Fire Department responded to an emergency call from the Colton Property regarding the brush fire and extinguished the fire.

40. After the fire was extinguished, Terry Colton came into contact with Phase A, which was still energized.

41. Terry Colton was electrocuted and caught fire.

42. At approximately 7:13 PM on April 12, 2018, West Penn received a life and limb call from 911 reporting an electrocution at the Colton Property.

43. The energized conductor prevented first responders from providing aid and resuscitative measures to Terry Colton, who was engulfed by fire from the energized conductor.

44. Terry Colton was continuously electrocuted until West Penn de-energized the conductor at 8:15 PM.

45. Terry Colton died of electrocution in the wooded area of the Colton Property.

H. Post Incident

46. On May 18, 2018, West Penn removed and restrung Phase A, which has remained de-energized since the incident on April 12, 2018.

47. Although Phase B was allegedly de-energized some time prior to April 12, 2018 and Phase A has been de-energized since April 12, 2018, West Penn is still required to maintain the ROW on the Colton Property, including Pole Nos. 146791, 146792, and 146793 and Phases A and B, in a safe condition.

48. According to the “Vegetation Management” Section of the biennial Inspection, Maintenance, Repair and Replacement Plan of West Penn for the periods of January 1, 2017 through December 31, 2018, January 1, 2019 through December 31, 2020, and January 1, 2021 through December 31, 2022, “West Penn Power performs vegetation management on its distribution circuits in order to promote the continued safe and reliable operation of the distribution system” and the vegetation management program “specification prunes vegetation to achieve five (5) years of clearance and includes the removal of selected incompatible trees within the clearing zone corridor, removal of certain defective limbs that are overhanging primary conductors, controlling selected incompatible brush mechanically and/or using herbicide, and removal of off-corridor priority trees that are dead, dying, diseased, and leaning or significantly encroaching the corridor.”

49. On March 15, 2021, I&E's Safety Division returned to the Colton Property and took photographs of the ROW on the Colton Property, including Pole Nos. 146791, 146792, and 146793 and Phases A and B. The photographs are attached to I&E's Complaint as I&E Exhibits 3A-C.

50. As of the filing date of West Penn's Answer to I&E's Complaint, May 17, 2021, West Penn had not performed vegetation management on or maintained the ROW on the Colton Property, including Pole Nos. 146791, 146792, and 146793 and Phases A and B.

Joint Stipulation of Facts, pp. 2-10.

SETTLEMENT TERMS

The Joint Petitioners agreed to the following specific settlement terms:³

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

a. Civil Penalty:

West Penn will pay a civil penalty in the amount of One Million, One Hundred and Seventy-Five Thousand Dollars (\$1,175,000.00) pursuant to 66 Pa.C.S. § 3301(c). Said payment shall be made within thirty (30) days of the entry date of the Commission's Final Order approving the Settlement Agreement and shall be made by certified check or money order payable to the "Commonwealth of Pennsylvania." The docket number of this proceeding, C-2021-3024913, shall be indicated on the certified check or money order and the payment shall be sent to:

³

The paragraph numbering of the Joint Petition for Settlement has been retained.

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

The civil penalty shall not be tax deductible pursuant to Section 162(f) of the Internal Revenue Code, 26 U.S.C.S. § 162(f) and shall not be passed through as an additional charge to West Penn's customers in Pennsylvania.

b. Immediate Removal of Facilities:

West Penn will immediately remove all existing primary facilities from West Penn Pole No. 146791-WP45, including all supporting crossarms, hardware and insulators, to West Penn Pole No. 491873-WP45.

c. Work Management Software Solution:

By end of 2Q 2023, West Penn will implement a work management software solution tool to enable the Company's employees and contractors to manage, document, track, inspect, and report on the aspects of vegetation management work. All terms and/or abbreviations utilized for documentation within the software solution tool that describe the type of work, any other category, or action shall be from a predetermined and defined list from FirstEnergy's Vegetation Management Distribution Specifications.

d. Maintenance of Detailed Records of Required Rework:

Upon entry of the Commission's Final Order approving the Settlement Agreement, West Penn will maintain detailed records of any areas that have been identified as requiring additional rework and inspection for at least three (3) cycles.

e. **Maintenance of Detailed Records of Rework:**

Upon entry of the Commission's Final Order approving the Settlement Agreement, West Penn will maintain detailed records of rework that was performed and inspected for at least three (3) cycles.

f. **Review of Vegetation Management Standards:**

West Penn will review its existing vegetation management standards to ensure compliance with ANSI standards for vegetation management, including all associated clearance specifications within twelve (12) months of the entry date of the Commission's Final Order approving the Settlement Agreement.

g. **Revisions to Distribution Vegetation Management Standards:**

Within twelve (12) months of the entry date of the Commission's Final Order approving the Settlement Agreement, West Penn will revise its Distribution Vegetation Management Standards to include the following:

- i. Specifications that meet the ANSI A300 Standard, and which require accounting for various factors including, but not limited to the voltage and height of the conductor, the type of tree, its growth rate and branching habit, the extent of potential for vegetation to interfere with energized conductors and importance of facilities in maintaining safety and reliability;
- ii. Requirements for on-cycle trimming to be conducted to achieve a minimum of cycle length clearance from all primary conductors based on tree species and growing conditions. In cases where cycle length is unattainable, twelve (12) feet of clearance shall be achieved;
- iii. The following language: "Contractor personnel shall be properly trained in tree species identification and growth characteristics to perform the work proficiently and safely to

comply with all applicable laws, regulations and local ordinances. The Contractor shall provide all training and secure all required licenses and certifications to perform work and shall provide proof of these upon request"; and

iv. The requirement that West Penn will conduct an annual kickoff meeting with its contractors to review all requirements of the Distribution Vegetation Management Standards, to include the topics of safety, contractor employee responsibilities, emergency work, recordkeeping, landowner notification, tree species identification and growth characteristics, clearance requirements, and vegetation management methods.

h. Maintenance of Detailed Records of Vegetation Management:

Upon entry of the Commission's Final Order approving the Settlement Agreement, West Penn will maintain detailed vegetation management records for at least three (3) cycles, to include the following information, inter alia:

- i. The name of the company performing the vegetation management work;
- ii. The beginning and ending dates of the vegetation management work;
- iii. The locations of the vegetation management work, including the pole numbers of the starting and finishing locations;
- iv. The number of work hours to perform such work;
- v. A reference to the standard to vegetation management work was performed; and
- vi. A legend explaining any code references.

i. Inspection of Vegetation Management:

A West Penn forestry representative will thoroughly inspect the vegetation management work completed by employees and contractors and maintain detailed records of such inspections for at least three (3) cycles.

j. Vegetation Management Quality Control Program:

Within twelve (12) months of the entry date of the Commission's Final Order approving the Settlement Agreement, West Penn will implement a vegetation management quality control program under which West Penn will:

- i. Conduct field assessments on samples of completed and inspected work and provide feedback on areas of improvement and best practices to staff and vendors; and
- ii. Implement field assessments of work completed by West Penn Forestry Services to provide feedback on areas of improvement and best practices to internal management and staff.

k. Review of Emergency Response Procedures:

Within twelve (12) months of the entry date of the Commission's Final Order approving the Settlement Agreement, West Penn will conduct a review of its existing procedures to ensure effective and efficient response to 911 dispatches and requests to de-energize. After the completion of such review, West Penn will provide I&E's Electric Safety Division with the following:

- i. Detailed documentation of the review performed on West Penn's existing procedures; and
- ii. Information on the Company's plans for improving its existing procedures to ensure effective and efficient 911 dispatches and emergency requests to de-energize.

l. Review of Primary System:

Within twelve (12) months of the entry date of the Commission's Final Order approving the Settlement Agreement, West Penn will initiate a review of its primary system for facilities that have no current load or connected customers for possible removal. Once identified, an analysis will be undertaken as to whether the facilities can be removed and, if so, these facilities will be de-energized if necessary and removed.

m. Evaluation of De-Energized Facilities:

West Penn will evaluate de-energized facilities that are not currently in use for removal based on possible future use during its standard overhead circuit inspection cycle.

n. Maintenance of Facilities Not Removed:

West Penn will ensure that any facilities not removed will be maintained in accordance with the NESC for energized facilities.

o. Mandatory Training Program:

Within twelve (12) months of the entry date of the Commission's Final Order approving the Settlement Agreement, West Penn will implement a mandatory training program for all employees and contractors inspecting West Penn's overhead circuit facilities. The program shall include training on the following, inter alia:

i. Identification and documentation of unused facilities; and

ii. The requirements for inspecting and maintaining West Penn's system as presented in its I&M Plan. Qualification and certification of successful training will be required for all employees and contractors performing any type of overhead circuit inspection. Mandatory refresher training will be performed on an annual basis to ensure compliance.

p. Review of Vegetation Management and Inspection Records:

West Penn will make vegetation management and inspection records available to I&E's Electric Safety Division for review upon request.

q. Modifications to Training Program:

Within twelve (12) months of the entry date of a Final Order, West Penn will modify its training program to ensure that appropriate employees and contractors are properly trained in the use of West Penn's vegetation work management system, proper record keeping, and proper notation for follow up work.

r. Visual Overhead Inspections:

West Penn will visually inspect its overhead lines and equipment on a five (5) year cycle, beginning January 1, 2022, which shall be reflected in the I&M Plan for the period of January 1, 2022 to December 31, 2023.

37. Following the performance of each non-monetary, remedial measure, referenced above, West Penn shall file with the Commission a verification acknowledging that each non-monetary, remedial measure has been met or complied with, pursuant to 52 Pa. Code § 5.591. In addition, I&E's Safety Division shall have the opportunity to review West Penn's performance of each remedial measure to confirm compliance.

38. Upon Commission approval of the Settlement in its entirety without modification, I&E shall be deemed to have released West Penn from all past claims that were made or could have been made for monetary and/or other relief based on allegations associated with the April 12, 2018 incident.

39. I&E and West Penn jointly acknowledge that approval of this Settlement Agreement is in the public interest and fully consistent with the Commission's Policy Statement regarding Factors and Standards for Evaluating Litigated and Settled Proceedings, 52 Pa. Code § 69.1201. The Parties submit that the Settlement Agreement is in the public interest because it effectively addresses I&E's allegations that are the subject of the

I&E Complaint proceeding, promotes public safety, and avoids the time and expense of litigation, which entails hearings, travel for West Penn's witnesses, and the preparation and filing of briefs, exceptions, reply exceptions, as well as possible appeals.

...

40. This document represents the Settlement Agreement in its entirety. No changes to obligations set forth herein may be made unless they are in writing and are expressly accepted by the Parties. This Settlement Agreement shall be construed and interpreted under Pennsylvania law.

41. The Settlement is conditioned upon the Commission's approval of the terms and conditions contained in this Joint Petition for Approval of Settlement without modification. If the Commission modifies this Settlement Agreement, any party may elect to withdraw from the Settlement and may proceed with litigation and, in such event, this Settlement Agreement shall be void and of no effect. Such election to withdraw must be made in writing, filed with the Secretary of the Commission and served upon the other party within twenty (20) days after entry of an Order modifying the Settlement.

42. In the event that the presiding ALJ issues an initial decision or recommended decision approving this Joint Petition for Approval of Settlement without modification, the Parties agree to waive the exception period, thereby allowing the Settlement Agreement to be presented directly to the Commission for review, pursuant to 52 Pa. Code § 5.232(e).

43. The Parties agree that the underlying allegations were not the subject of any hearing and that there has been no order, findings of fact or conclusions of law rendered in this Complaint proceeding. It is further understood that, by entering into this Settlement Agreement, West Penn has made no concession or admission of fact or law and may dispute all issues of fact and law for all purposes in any other proceeding, including but not limited to any civil proceedings, that may arise as a result of the circumstances described in this Joint Settlement Petition. Nor may this settlement be used by any other person or entity as a concession or admission of fact or law.

44. The Parties acknowledge that this Settlement Agreement reflects a compromise of competing positions and

does not necessarily reflect any party's position with respect to any issues raised in this proceeding.

45. This Settlement Agreement is being presented only in the context of this proceeding in an effort to resolve the proceeding in a manner that is fair and reasonable. This Settlement is presented without prejudice to any position that any of the Parties may have advanced and without prejudice to the position any of the Parties may advance in the future on the merits of the issues in any other proceedings, except to the extent necessary to effectuate or enforce the terms and conditions of this Settlement Agreement. This Settlement does not preclude the Parties from taking other positions in any other proceeding but is conclusive in this proceeding and may not be reasserted in any other proceeding or forum except for the limited purpose of enforcing the Settlement by a Party.

Joint Petition for Settlement, pp. 14-23.

LEGAL STANDARDS

I&E is authorized by the Public Utility Code to, among other things, prosecute complaints against public utilities within the Commission's jurisdiction.⁴ Section 2804 of the Public Utility Code directs the Commission to "ensure continuation of safe and reliable electric service to all consumers in the Commonwealth. . . ."⁵ Regulations have been promulgated by the Commission to implement the requirement to provide safe and adequate service.⁶

Section 1501 of the Public Utility Code,⁷ places a duty upon a public utility to furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and directs the utility to "make such repairs, changes, alterations, substitutions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience

⁴ 66 Pa.C.S. § 308.1(a)(11).

⁵ 66 Pa.C.S. § 2804.

⁶ *E.g.*, 52 Pa. Code §§ 57.193-.57.194.

⁷ 66 Pa.C.S. § 1501.

and safety” of its patrons and the public. Upon finding that the service or facilities of a public utility are unreasonable, unsafe, or inadequate, the Commission “may prescribe, by regulation or order, the reasonable, safe, and adequate service, or facilities that a public utility must furnish or employ.”⁸

When the Commission determines that a utility has violated the Public Utility Code, regulations, or orders of the Commission, Section 3301 of the Public Utility Code authorizes the Commission to direct that utility to forfeit and pay to the Commonwealth a sum not exceeding \$1,000 per day of violation.⁹

The Commission encourages parties in contested on-the-record proceedings to settle cases, including enforcement proceedings.¹⁰ Settlements eliminate the time, effort, and expense of litigating a matter to its ultimate conclusion, which may entail review of the Commission’s decision by the appellate courts of Pennsylvania. Such savings benefit not only the individual parties, but also the Commission and all ratepayers of a utility, who otherwise may have to bear the financial burden such litigation necessarily entails.

By definition, a “settlement” reflects a compromise of the positions that the parties of interest have held, which arguably fosters and promotes the public interest. When active parties in a proceeding reach a settlement, the principal issue that the Commission considers is whether the agreement reached suits the public interest.¹¹ In their supporting statements, the Joint Petitioners conclude, after extensive discovery and discussion, that this Settlement resolves most of the contested issues in this case, fairly balances the interests of the company and its ratepayers, is in the public interest, and is consistent with the requirements of the Public Utility Code.

⁸ 66 Pa.C.S. § 1505.

⁹ 66 Pa.C.S. § 3301.

¹⁰ *See* 52 Pa. Code § 5.231.

¹¹ Pa. Pub. Util. Comm’n v. CS Water & Sewer Assocs., 74 Pa. PUC 767, 771 (1991). *See also* Pa. Pub. Util. Comm’n v. York Water Co., Docket No. R-00049165 (Order entered October 4, 2004); Pa. Pub. Util. Comm’n v. Phila. Elec. Co., 60 Pa. PUC 1 (1985).

I&E and West Penn Power have agreed to settlement terms, which according to the Joint Petitioners, resolves many of the issues raised in its Complaint. The settlement will be approved without modification.

DISCUSSION

The foundational allegation of I&E's Complaint alleged that West Penn failed to appropriately perform vegetation management on the right of way ("ROW") on the Colton Property, including West Penn Pole Nos. 146791, 146792, and 146793 and Phases A and B, for the 2010-2011 and 2015-2016 vegetation management cycles. I&E also alleged that West Penn Power failed to remove or maintain in a safe condition Phases A and B (which were temporarily out of service or permanently abandoned since April 12, 2018) by failing to perform vegetation management on the ROW on the Colton Property, thereby placing the public safety in danger in violation of Commission regulations and Section 1501 of the Code, 66 Pa.C.S. § 1501.

I&E sought relief in the form of a civil penalty of \$3,376,000, as well as a number of corrective measures designed to address emergency response, training, revisions of West Penn Power's procedures, and the review of West Penn Power's primary system for facilities that have no current load or connected customers for possible removal.

In its answer, West Penn Power admitted to many of the basic facts surrounding the April 12 Incident, but denied that West Penn Power violated the Commission's regulations or failed to provide reasonable and safe service. In its new matter, West Penn Power contended that much of I&E's complaint was barred by the statute of limitations and that the civil penalty requested was excessive.

I&E and West Penn engaged in an extensive and comprehensive series of technical discussions. In settlement, the Joint Petitioners agreed to operational and training changes as well as a civil penalty in the amount of \$1,175,000. Both parties assert that this settlement is reasonable and in the public interest.

The Commission has adopted a framework to determine whether a settlement in an enforcement matter is in the public interest, often referred to as the “*Rosi* factors.”¹² This framework includes a list of ten factors and standards that the Commission will consider, to determine whether a civil penalty is appropriate:

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

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

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

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

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

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

¹² See *Rosi v. Bell Atl.-Pa., Inc. and Sprint Commc’ns Co.*, Docket No. C-00992409 (Order entered February 10, 2000).

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

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

(9) Past Commission decisions in similar situations.

(10) Other relevant factors.¹³

In settled cases, the policy directs a more liberal approach to applying these factors in order to afford to the parties a settlement flexibility in reaching an agreement. This approach supports the Commission's policy of encouraging settlements.¹⁴ This flexibility also offers an incentive to parties to fully participate in settlement discussions in order to reach an accord.¹⁵ In their statements in support of the settlement, both I&E and West Penn Power addressed each of these factors.

Whether the conduct and consequences at issue was of a serious nature

The first factor requires consideration of whether the conduct which resulted in a violation was serious. Conduct of a more serious nature, may warrant a higher civil penalty while conduct that is less egregious warrants a lower civil penalty.¹⁶ Conduct such as willful fraud or misrepresentation is considered more serious. In contrast, a less serious violation may be an administrative or technical error. The second factor examines the consequences of a violation. When a violation results in personal injury or property damage, the consequences may warrant a higher penalty.¹⁷

¹³ 52 Pa. Code § 69.1201(c).

¹⁴ 52 Pa. Code § 69.1201(b).

¹⁵ 52 Pa. Code § 69.1201(b).

¹⁶ 52 Pa. Code § 69.1201(c)(1).

¹⁷ 52 Pa. Code § 69.1201(c)(2). The third factor, whether the conduct was intentional or negligent, only applies to litigated cases. 52 Pa. Code § 69.1201(c)(3).

The alleged conduct in this case involved a conductor owned and operated by West Penn which fell into the wooded property of Terry and Frances Colton at 203 McKrell Road, Tarentum, Pennsylvania 15084 causing a brush fire.¹⁸ The West Deer Township Police Department and Volunteer Fire Department responded to an emergency call from the Colton Property regarding the brush fire and extinguished the fire.¹⁹ After the fire was extinguished, Terry Colton walked through the wooded area of the Colton Property, came into contact with Phase A and was electrocuted.²⁰ These events resulted in the fatal electrocution of one customer and fire damage to the customer's property.²¹

I&E submits that the conduct alleged in the Complaint is of a very serious nature. I&E alleges that West Penn's conduct includes the following: (1) West Penn failed to check for conditions that could adversely affect the operation of overhead distribution lines during its alleged visual overhead distribution line inspection of its equipment and facilities located between Pole Nos. 146791, 146792, and 146793, including Phases A and B, in 2016, by not identifying the overgrown vegetation in that area that had the potential to adversely affect the operation of Phases A and B; (2) West Penn's three fuse locations on the Millerstown Circuit failed to detect a fault or otherwise effectively de-energize Phase A upon Phase A's failure; (3) West Penn failed to perform vegetation management on the ROW on the Colton Property, including Pole Nos. 146791, 146792, and 146793 and Phases A and B, for the 2010-2011 and 2015-2016 vegetation management cycles consistent with the Construction, Operation and Maintenance Manual of Allegheny Power, which was in effect during the 2010-2011 vegetation management cycle, the I&M Plan of West Penn for the period of January 1, 2015 through December 31, 2016, and FirstEnergy Vegetation Management Distribution Specifications, which was in effect during the 2015-2016 vegetation management cycle; (4) West Penn failed to remove Phases A and B or maintain Phases A and B in a safe condition by failing to perform

¹⁸ Stipulated Facts, ¶¶ 1, 38.

¹⁹ Stipulated Facts, ¶ 39.

²⁰ Stipulated Facts, ¶¶ 40, 41.

²¹ Stipulated Facts, ¶¶ 41, 45.

vegetation management on the ROW on the Colton Property, including Pole Nos. 146791, 146792, and 146793 and Phases A and B, consistent with the I&M Plan of West Penn for the periods of January 1, 2017 through December 31, 2018, January 1, 2019 through December 31, 2020, and January 1, 2021 through December 31, 2022 from April 12, 2018 to the present; and (5) West Penn failed to timely de-energize Phase A on April 12, 2018.

According to I&E, any conduct involving the inspection, vegetation management, and maintenance of overhead conductors should be taken seriously due to the inherent danger involved if such lines should overheat, fall, or otherwise fail. Further, the actions and inactions of West Penn described above constitute conduct that placed the public safety at great risk.

Both I&E and West Penn Power assert that the seriousness of the conduct and the tragic consequence at issue is addressed in the costly and extensive, corrective measures that the Company has agreed to undertake, as well as the payment of the agreed-upon civil penalty. West Penn Power adds that electric safety is a paramount concern of the Company, and West Penn continually strives to provide safe electric service to its customers. The terms and conditions of the settlement adequately take the alleged conduct into account, as well as West Penn's response under the circumstances. The remediation measures agreed to in the settlement are designed to enhance West Penn's system safety and service reliability and to minimize the likelihood that a similar incident occur in the future.

Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future

The fourth factor to be considered is whether West Penn made efforts to modify internal policies and procedures to address the alleged conduct at issue and to prevent similar conduct in the future.²² West Penn undertook an extensive investigation of the events related to the April 12 Incident and cooperated with and assisted I&E in its investigation of the incident. In addition, after the incident, West Penn permanently de-energized the subject facilities. West Penn has also, among other things, begun taking steps to identify, de-energize and remove

²² 52 Pa. Code § 69.1201(c)(4).

unused facilities elsewhere on its system. Finally, as outlined above, West Penn will adopt several changes to its policies and practices to further enhance the safety and reliability of its service.

I&E also points to the significant remedial measures which form a large portion of the settlement. The settlement terms which outline the program review and institute training procedures demonstrate that West Penn is taking appropriate actions to enhance the safety of its distribution system, improve the reliability of its operations, and prevent similar occurrences in the future. According to I&E, these improvements will provide a significant benefit to public safety.

The number of customers affected and the duration of the violation

The fifth factor to be considered deals with the number of customers affected and the duration of the violation.²³ In this case, a system outage and electrocution occurred. The electrocution resulted in the fatal electrocution of one customer and fire damage to the customer's property. Others in the community, approximately 109 customers, experienced a service interruption as a result of the incident.

The compliance history of the regulated entity

The sixth factor to be considered relates to the compliance history of West Penn. An isolated incident from an otherwise compliant company may result in a lower penalty, whereas frequent, recurrent violations by a company may result in a higher penalty.²⁴

Although the investigation also resulted in a settlement, I&E points to one prior complaint against West Penn that resulted in serious consequences, including death, *Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. West Penn Power Company*, Docket

²³ 52 Pa. Code § 69.1201(c)(5).

²⁴ 52 Pa. Code § 69.1201(c)(6).

No. C-2012-2307244 (Opinion and Order entered January 9, 2014) (hereinafter referred to as “*West Penn I*”). A live conductor fell into the yard of a homeowner, who came into contact with the live conductor, was electrocuted, and ultimately died. In *West Penn I*, the Commission approved a settlement agreement that imposed a civil penalty of \$86,000 upon West Penn in connection with an overhead conductor that came down at its point of connection with an automatic splice.

In the present case, West Penn Power notes in its Statement in Support that after the incident, West Penn has, among other things, begun taking steps to identify, de-energize and remove unused facilities. According to West Penn Power, the settlement terms evidence West Penn’s good faith efforts to enhance the safety and reliability of its electrical system, consistent with the purposes of the Code and the Commission’s regulations.

Whether the regulated entity cooperated with the Commission’s investigation

The seventh factor to be considered relates to whether the Company cooperated with the Commission’s investigation: “Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.”²⁵

I&E and West Penn Power diverge in their characterization of West Penn Power’s conduct during the investigation of the April 12 Incident. According to I&E, West Penn was not initially forthcoming with information regarding its contractor, Asplundh Tree Experts, LLC’s “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.”²⁶ However, I&E goes on to note that once it filed the complaint, West Penn Power did cooperate throughout the complaint and settlement process.

²⁵ 52 Pa. Code § 69.1201(c)(7).

²⁶ I&E Formal Complaint, ¶ 60.

West Penn Power believes that it supported and cooperated with the Commission and its staff throughout the investigation, as well as the Commission complaint and settlement process. West Penn states that it has demonstrated a commitment consistent with the Commission's public safety goals and objectives by implementing or beginning to implement many of the changes set forth in the settlement prior to the filing of the Settlement.

The amount of the civil penalty or fine necessary to deter future violations

The eighth factor to be considered is the appropriate settlement amount necessary to deter future violations.²⁷ I&E submits that given the serious nature of West Penn's conduct and the serious nature of the resulting consequences, a civil penalty amount of \$1,175,000 is appropriate. This penalty is not tax deductible. I&E further submits that the monetary cost of West Penn's performance of all the remedial measures in addition to the civil penalty is sufficient to deter West Penn from committing future violations. The remedial measures that West Penn has agreed to are collectively estimated to cost in excess of \$10 million. According to I&E, it is an appropriate penalty payment in this case.

West Penn also believes that the civil penalty set forth in the Settlement appropriately recognizes the seriousness of the matter but also reflects a negotiated compromise by the parties that considers the efforts of the Company since the April 12 Incident occurred.

Past Commission decisions in similar situations

The ninth factor to be considered relates to past Commission decisions in similar situations.²⁸ According to West Penn Power, the Settlement, while consistent with past Commission decisions, should nevertheless be considered on its own merits.

²⁷ 52 Pa. Code § 69.1201(c)(8).

²⁸ 52 Pa. Code § 69.1201(c)(9).

Although neither I&E nor West Penn Power point to any litigated cases which are similar to the facts alleged in this matter, in its Statement in Support, I&E describes settlements approved by the Commission in *West Penn I* and *Bureau of Investigation and Enforcement v. Metropolitan Edison Company*, Docket No. C-2019-3011675 (Final Order entered February 4, 2021)(*Met-Ed*). In I&E's view, the Commission's determination that these two settlements were in the public interest, support the public interest of this Settlement.

In *West Penn I*, the Commission approved a settlement agreement that imposed a civil penalty of \$86,000 upon West Penn. As part of the settlement, West Penn agreed to the performance of remedial measures equating to approximately \$2.5 million. In its *West Penn I* complaint I&E alleged that West Penn's conduct constituted six, separate violations of 66 Pa.C.S. § 1501 and sought a \$1,000 civil penalty for each violation. Additionally, I&E alleged that West Penn committed an ongoing violation of Sections 504-506 of the Code, 66 Pa.C.S. §§ 504-506, by failing to furnish information requested by Commission staff in aid of its investigation and I&E sought a civil penalty of \$80,000 for such violation.

According to I&E, *West Penn I* is distinguishable from the present complaint because the principal allegation in *West Penn I* related to the failure to furnish information to the Commission. In contrast, the allegations here involve serious, ongoing violations of NESC § 214(B)(2)-(3), 52 Pa. Code §§ 57.28(a)(1) and 57.194(a)-(b), and 66 Pa.C.S. § 1501.

In *Met-Ed*, the Commission approved a settlement agreement that imposed a civil penalty of \$1,000,000 upon Metropolitan Edison Company (Met-Ed) as well as a \$150,000 contribution to Met-Ed's hardship fund in connection with an overhead conductor that fell from its point of attachment with a bronze hot line clamp. Like the April 12 Incident, a live conductor fell into the yard of a homeowner, who encountered energized ground from the conductor, was electrocuted, and died. As part of the settlement, Met-Ed agreed to the performance of remedial measures in excess of \$16 million.

Like the instant proceeding, I&E alleged in the *Met-Ed* proceeding, among other things, that Met-Ed committed serious, ongoing violations of 66 Pa.C.S. § 1501 (by installing

bronze hot line clamps inconsistent with the recommendation of the manufacturer of the clamps and FirstEnergy Material Specifications), which resulted in serious consequences involving death, and sought a \$1,000 civil penalty for each violation and each day's continuance of such violation. According to I&E, the substantial civil penalty and remedial measures presented in this settlement are consistent with the settlement approved by the Commission in *Met-Ed*.

Other relevant factors

The final provision of Section 69.1201 invites consideration of "other relevant factors" that may impact the evaluation of a settlement.²⁹ Both I&E and West Penn Power point to the importance of the negotiated settlement which resolves I&E's complaint. First, a settlement avoids the necessity for the prosecuting agency to prove elements of each allegation. In return, the opposing party in a settlement agrees to a lesser fine or penalty, or other remedial action. Both parties negotiated from their initial litigation positions. The fines, penalties, and other remedial actions resulting from a fully litigated proceeding are difficult to predict and can differ from those that result from a settlement. Reasonable settlement terms can represent economic and programmatic compromise but allow the parties to move forward and to focus on implementing the agreed upon remedial actions. West Penn has demonstrated a commitment consistent with the Commission's public safety goals and objectives and broadly expanded the scope of the general public that will benefit from the commitments made in this Settlement. Both Joint Petitioners fully support the Settlement and request the Commission approve the agreement without modification.

Conclusion

The Joint Petition for Settlement includes settlement terms sufficient to meet the public interest. Although West Penn Power does not admit that any specific violation occurred, the settlement, taken as a whole, appreciates the serious nature of the equipment failure which resulted in the death of Terry Colton on his own property. The settlement provides for a substantial civil penalty that will neither be borne by ratepayers nor used as a tax benefit by West

²⁹ 52 Pa. Code § 69.1201(c)(10).

Penn Power. This penalty is not merely “a cost of doing business” but represents a serious consequence to West Penn Power’s investors for failing to ensure that equipment is maintained as required by industry standards and Commission regulation.

The settlement further provides for substantial remediation of materials, programs and policies which will go toward preventing any future material malfunctions. These important commitments to service improvement benefit West Penn Power’s customers in an even more direct way than the civil penalty. An important aspect of the Settlement includes the implementation of training procedures for both employees and contractors as well as enhanced oversight procedures for contractors by West Penn Power employees. The Commission has held that utilities are “responsible for any violations caused by their contractors or sub-contractors' training which resulted in a catastrophic loss of property, and the public's safety was placed at risk on an ongoing basis.”³⁰ The decision to use employees or contractors is generally considered a management decision of a utility. These provisions of the Settlement which formalize training for contractors who are delegated the work of the public utility are important and emphasize that a utility may not avoid liability for violations of the Public Utility Code when the work of a contractor falls below adequate standards.

Finally, the settlement provides for Commission oversight of West Penn Power’s practice and policy improvements, which will ensure that West Penn Power continues to follow through with the commitments made in the settlement.

There is also no doubt that litigation of the violations alleged by I&E would have encumbered significant Commission and utility resources -- resources that are better devoted to the fulfillment of the settlement terms agreed to by the Joint Petitioners. Accordingly, I find the settlement is in the public interest and is approved without modification.

³⁰ *Public Utility Comm’n v. Peoples Nat. Gas Co., d/b/a Dominion Peoples*, Docket No. M-2009-2088651 (Opinion and Order entered May 11, 2010), at p. 11.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject-matter of this dispute. 66 Pa.C.S. §§ 502; 701.

2. The Commission encourages parties in contested on-the-record proceedings to settle cases. *See* 52 Pa. Code § 5.231.

3. When active parties in a proceeding reach a settlement, the principal issue for Commission consideration is whether the agreement reached suits the public interest. *Pa. Pub. Util. Comm'n v. CS Water & Sewer Assocs.*, 74 Pa. PUC 767 (1991). *See also Pa. Pub. Util. Comm'n v. York Water Co.*, Docket No. R-00049165 (Order entered October 4, 2004); *Pa. Pub. Util. Comm'n v. Phila. Elec. Co.*, 60 Pa. PUC 1 (1985); 52 Pa. Code § 69.1201.

4. The settlement reached by the Joint Petitioners is in the public interest. 52 Pa. Code § 69.1201.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Joint Settlement Petition filed on December 1, 2021 between the Commission's Bureau of Investigation and Enforcement and West Penn Power Company is approved in its entirety without modification.

2. That, in accordance with Section 3301(c) of the Public Utility Code, 66 Pa.C.S. § 3301(c), within thirty (30) days of the date this Order becomes final, West Penn Power Company shall pay a civil penalty of One Million, One Hundred and Seventy-Five

Thousand Dollars (\$1,175,000.00). Said payment shall be made by certified check or money order payable to “Commonwealth of Pennsylvania.” The docket number of this proceeding, C-2021-3024913, shall be indicated on the certified check or money order and the payment shall be sent to:

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

3. That the civil penalty shall not be tax deductible or passed through as an additional charge to West Penn Power Company’s customers in Pennsylvania.

4. That upon fulfillment of each non-monetary, remedial measure set forth in Paragraph 36 of the Joint Petition for Settlement, West Penn Power Company shall file with the Commission a verification acknowledging compliance with each non-monetary remedial measure, pursuant to 52 Pa. Code § 5.591.

5. A copy of this Opinion and Order shall be served upon the Financial and Assessment Chief, Bureau of Administration.

6. That the above-captioned matter shall be marked closed upon receipt of the civil penalty and the verifications acknowledging that the non-monetary remedial measures set forth in Paragraph 36 of the Joint Petition for Settlement have been fulfilled.

Date: January 19, 2022

/s/
Mary D. Long
Administrative Law Judge