

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held October 27, 2022

Commissioners Present:

Gladys Brown Dutrieuille, Chairman
Stephen M. DeFrank, Vice Chairman
Ralph V. Yanora
Kathryn L. Zerfuss
John F. Coleman, Jr.

Pennsylvania Public Utility Commission,
Bureau of Investigation and Enforcement

C-2022-3031862

v.

West Penn Utilities

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Motion for Default Judgment (Motion), filed by the Commission's Bureau of Investigation and Enforcement (I&E) on May 24, 2022, against West Penn Utilities (West Penn or Respondent) in the above-captioned proceeding. The Motion was served on West Penn on May 24, 2022 as evidenced by a Certificate of Service. Review of the Motion indicates that it was accompanied by a Notice to Plead. No Answer to the Motion has been filed. For the reasons stated below, we shall grant the Motion. The allegations of the Formal Complaint (Complaint) filed on April 11, 2022 at Docket No. C-2022-3031862, are deemed admitted and a default judgment against West Penn will be entered consistent with the discussion in this Opinion and Order.

Background

This matter is a Complaint filed by I&E pursuant to Sections 182.8(d) and 182.10 of the Underground Utility Line Protection Law, Act of October 30, 2017, P.L.806, No. 50 (hereinafter referred to as the PA One Call Law), 73 P. S. §§ 182.8(d) and 182.10.¹

On April 20, 2020, at approximately 14:30 PM, while performing excavation work, West Penn damaged an unmarked electrical line at or near Village Drive, Bethel Park Borough, Allegheny County. It was only after striking the line that West Penn determined the facility owner of the underground electrical line to be the Ashby at South Hills Village Station. Complaint at 4.

The line strike caused a 12–24-hour utility service disruption to more than fifty-one (51) customers, damaged landscaping and trees nearby, and resulted in an estimated total cost of damaged line and property repair between \$6,002 and \$30,000. *Id.*

The Alleged Violation Report (AVR) identified the work site as “Village Drive” at the nearest intersections with “Fort Couch Road” and “Washington Road” in Allegheny County, Pennsylvania. The AVR identified the entire length of the excavation work to be “1,477 ft.” *Id.* The identified work site met the definition of “complex project” as that term is defined at 73 P.S. § 176 as it is “an excavation that involves more work than properly can be described in a single locate request . . . including excavations

¹ The purpose of the PA One Call Law is to protect the public health and safety by preventing excavation or demolition work from damaging underground lines used in providing electricity, communication, gas, propane, oil delivery, oil product delivery, sewage, water or other service; imposing duties upon the providers of such service and persons and other entities preparing drawings or performing excavation or demolition work; and prescribing penalties.

that require scheduling locates over an extended time frame.” The Respondent, as an excavator of a complex project, had the duty “to request the location and type of facility lines at each work site by notifying the facility owner through the [Pennsylvania] One Call System (POCS) . . . in the case of a complex project, notification shall not be less than ten business days in advance of the beginning of excavation or demolition work.” 73 P.S. § 180(2.1).

The Respondent did not submit a Complex Project Ticket prior to the commencement of excavation through the POCS.

History of Proceeding

On April 11, 2022, I&E filed the above-captioned Complaint.² The Complaint was served by electronic mail to the Respondent at s.dowling_westpennutilities@yahoo.com, which is the last known email address that the Respondent provided to the Commission. Service of the Complaint was performed by electronic mail due to COVID-19 pandemic restrictions impacting Commission mailing operations.³

In the Complaint, I&E alleged that the Respondent violated Section 180(2.1) of the PA One Call Law, 73 P.S. § 180(2.1), by failing to submit a Complex Project Ticket through POCS at least ten (10) business days prior to commencing excavation as Respondent failed to ever submit a Complex Project Ticket for the referenced work site. I&E recommended a civil penalty of \$2,500 for this violation. Complaint at 5.

³ See *Suspension of Regulatory and Statutory Deadlines; Modification to Filing and Service Requirements*, Docket No. M-2020-3019262 (Emergency Order ratified on March 26, 2020).

A Notice was attached to the Complaint and informed the Respondent that it must file an Answer within twenty (20) days of the date of service of the Complaint. The Notice also informed the Respondent that if it failed to answer the Complaint, I&E would request that the Commission issue an Order imposing the penalty set forth in the Complaint. The twenty (20) days to file an Answer to the Complaint expired on May 3, 2022.

As stated above, I&E filed its Motion on May 24, 2022. No Answer to the Motion has been filed.

A. Complaint and Motion

I&E incorporates by reference the Complaint that was filed in this proceeding in its Motion. *See* Motion at 1.

In the Complaint, I&E averred that: (1) the identified work site met the definition of “complex project” as that term is defined at 73 P.S. § 176 as it is “an excavation that involves more work than properly can be described in a single locate request . . . including excavations that require scheduling locates over an extended time frame.” Complaint at 4.

I&E further averred that the Respondent, as an excavator of a complex project, had the duty “to request the location and type of facility lines at each work site by notifying the facility owner through the [Pennsylvania] One Call System (POCS) . . . in the case of a complex project, notification shall not be less than ten business days in advance of the beginning of excavation or demolition work.” 73 P.S. § 180(2.1). Complaint at 5.

Finally, I&E averred that the Respondent did not submit a Complex Project Ticket prior to the commencement of excavation through the POCS. Therefore, I&E contended that the Respondent failed to submit a Complex Project Ticket through the POCS at least ten (10) business days prior to commencing excavation, as the Respondent failed to ever submit a Complex Project Ticket for the above-referenced work site and if proven, this is a violation of Section 180(2.1) of the PA One Call Law, 73 P.S. § 180(2.1), requiring an excavator of a complex project to notify facility owners through the POCS at least ten (10) business days prior to commencing excavation.

For relief, I&E respectfully requested that the Commission:

- (a) Find Respondent to be in violation of the PA One Call Law at 73 P.S. § 180(2.1);
- (b) Impose an administrative penalty upon Respondent in the amount of Two Thousand Five Hundred Dollars (\$2,500); and
- (c) Order such other remedies as the Commission may deem appropriate.

Complaint at 5-6.

On May 24, 2022, I&E filed its Motion. In its Motion, I&E cites our Regulations at 52 Pa. Code § 5.103, and the service of the Complaint upon West Penn, which included a Notice to Plead and advised of the consequences of a failure to respond. Motion at 1-2.

Based on the adequacy of service of the Complaint and failure of West Penn to respond, I&E avers that, pursuant to 52 Pa. Code § 5.61(c), a Respondent who fails to file an Answer to a Complaint within the twenty-day response period may be deemed in default, and the relevant facts stated in the Complaint may be deemed admitted. Motion at 2. I&E notes that the Commonwealth Court has upheld the

Commission's authority to sustain complaints that are not answered within twenty days. *Id.* citing *Fusaro v. Pa. PUC*, 382 A.2d 794, 797 (Pa. Cmwlth. 1978).

Based on the foregoing, I&E requests that the Complaint in the instant proceeding be sustained and its Motion granted.

Discussion

Initially, we note that any issue that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. It is well-settled that the Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *also see, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984)

A. Legal Standard

In reviewing the instant Motion, we put West Penn on notice that we will not hesitate to invoke our authority under PA One Call Law and the Public Utility Code, 66 Pa. C.S. § 101, *et seq.*, to ensure timely compliance with our Regulations and Orders, including the ordering of such other remedies that we may deem appropriate. 66 Pa. C.S. §§ 504, 505, 506, 3301, and 3302.

Pursuant to Section 5.61(c) of our Regulations, 52 Pa. Code § 5.61(c), a Respondent who fails to file an Answer within the twenty-day response period may be deemed in default, and the relevant facts stated in the Complaint may be deemed admitted. As noted by I&E, the Commonwealth Court has extensively addressed due process considerations in proceedings before the Commission and has upheld our

authority to sustain complaints that are not answered within twenty days. *See Fusaro v. Pa. PUC*, 382 A.2d 794, 797 (Pa. Cmwlth. 1978).

West Penn was provided with adequate notice of the alleged violations against it and had the opportunity to respond and to dispute the alleged violation and administrative penalty assessed against it according to the PA One Call Law.

Act 287 was enacted in 2017 to address incidents involving underground utilities and is known as the Pennsylvania One Call Law (One Call). One Call provides in pertinent part:

- (c) The following shall apply to alleged violations:
 - (1) A person determined, in a report issued by a damage prevention investigator, to have committed an alleged violation shall do one of the following:
 - (i) Provide a written acknowledgment of the findings and administrative penalty contained in the report issued by the damage prevention investigator to the committee.
 - (ii) Appear before the commission to present its position.
 - (2) A person who is subject to an informal determination of the committee may accept or reject the result. If an informal determination is rejected, the matter shall be returned to the damage prevention investigator for further action, if appropriate, including referring the matter to the commission prosecutor staff for the purpose of issuing a formal complaint.
- (d) Except for alleged violations involving injury or death, the provisions of subsection (c) may be applied in advance or instead of filing a formal complaint against a person determined, in a report issued by a damage prevention investigator, to have committed an alleged violation. An informal determination of the committee shall

be binding on the commission unless the person rejects the informal determination.

73 P.S. § 182.8(c)-(d).

§ 182.10.

- (a) The commission may issue a warning and order requiring compliance with this act and may levy an administrative penalty for a violation of this act. A warning, order or penalty shall be served on the person or entity violating this act at the person's last known address. A party aggrieved by the imposition of an order or administrative penalty imposed by the commission may appeal the order or penalty as provided under 2 Pa.C.S. Chs. 5 Subch. A (relating to practice and procedure of Commonwealth agencies) and 7 Subch. A (relating to judicial review of Commonwealth agency action).
- (b) The following shall apply:
 - (1) A person or entity violating this act may be subject to:
 - (i) an administrative penalty of not more than two thousand five hundred dollars (\$2,500) per violation; or
 - (ii) if the violation results in injury, death or property damage of twenty-five thousand dollars (\$25,000) or more, an administrative penalty of not more than fifty thousand dollars (\$50,000).
 - (2) The commission and committee shall consider the following factors in determining the administrative penalty to be assessed:
 - (i) The history of the party's compliance with the act prior to the date of the violation.
 - (ii) The amount of injury or property damage caused by the party's noncompliance.
 - (iii) The degree of threat to the public safety and inconvenience caused by the party's noncompliance.

- (iv) The party's proposed modification to internal practices and procedures to ensure future compliance with statutes and regulations.
 - (v) The degree of the party's culpability.
 - (vi) Other factors as may be appropriate considering the facts and circumstances of the incident.
- (c) An administrative penalty recovered under this section shall be payable to the commission and collected in the manner provided for by law.
- (d) This act shall not affect a civil remedy for personal injury or property damage, except as provided for under this act.
- (e) The commission may issue a subpoena, on application of an attorney responsible for representing the Commonwealth in actions before the commission, for the purpose of investigating an alleged violation of this act. The commission shall have the power to subpoena witnesses and compel the production of books, records, papers and documents.
- (f) No provision of this act shall be construed or interpreted to do any of the following:
 - (1) Affect the ability of a district attorney or the Attorney General to investigate or file a claim for the same conduct.
 - (2) Deprive a governmental agency, including a law enforcement agency, the Auditor General and a district attorney, of any jurisdictional power or duty.
- (g) A facility owner may petition a court of competent jurisdiction to enjoin excavation or demolition work conducted in violation of this act. Local law enforcement or emergency management personnel may, in the interest of public safety, order an excavator on a work site to stop further excavation if the excavation is being conducted in violation of this act.

73 P.S. § § 182.10.

B. Disposition

Based on our consideration of the averments in the Motion and our review and consideration of the record and applicable law, we shall grant the Motion, consistent with the discussion in this Opinion and Order.

At the outset, we note that under Section 5.61(c) of our Regulations a respondent failing to file an answer within the applicable period may be deemed in default, and relevant facts stated in the pleadings may be deemed admitted. Here the Respondent has not filed an answer and therefore we will deem all of the relevant facts in the Complaint admitted.

Among those relevant facts deemed admitted are that the Commission has jurisdiction over the Complaint and the Respondent. Specifically, Sections 182.8(d) and 182.10 of the PA One Call Law, 73 P.S. §§ 182.8(d) and 182.10, authorize the Commission to, *inter alia*, hear and determine complaints against facility owners for violations of the PA One Call Law and to enforce the provisions of the PA One Call Law. Furthermore, Section 182.10(a) of the PA One Call Law, 73 P.S. § 182.10(a), authorizes the Commission to impose administrative penalties on facility owners who violate the PA One Call Law. Section 182.10(b)(1)(i)-(ii) allows for the imposition of an administrative penalty not to exceed \$2,500 for each violation or if the violation results in injury, death, or property damage of \$25,000 or more, an administrative penalty not to exceed \$50,000.

Also admitted, is the Respondent is an “excavator” as that term is defined at 73 P.S. § 176 as it “performs excavation or demolition work for [itself] or for another person and that the Respondent, as an excavator, is subject to the power and authority of this Commission pursuant to Section 182.10 of the PA One Call Law, 73 P.S. § 182.10, which requires facility owners to comply with the PA One Call Law. Complaint at 2.

In addition, it is deemed admitted that the Respondent: (1) on April 20, 2020, at approximately 14:30 PM, while performing excavation work, damaged an unmarked electrical line at or near Village Drive, Bethel Park Borough, Allegheny County; (2) it was only after the line strike, that the Respondent determined the facility owner of the underground electrical line to be the Ashby at South Hills Village Station; (3) the line strike caused a 12–24-hour utility service disruption to more than fifty-one (51) customers, damaged landscaping and trees nearby, resulting in an estimated total cost of damaged line and property repair between \$6,002 and \$30,000; (4) the AVR identified the work site as “Village Drive” at the nearest intersections with “Fort Couch Road” and “Washington Road” in Allegheny County, Pennsylvania; (5) the AVR identified the entire length of the excavation work to be “1,477 ft”; (6) the identified work site met the definition of “complex project” as that term is defined at 73 P.S. § 176 as it is “an excavation that involves more work than properly can be described in a single locate request . . . including excavations that require scheduling locates over an extended time frame; (7) the Respondent, as an excavator of a complex project, had the duty “to request the location and type of facility lines at each work site by notifying the facility owner through the [Pennsylvania] One Call System (POCS) . . . in the case of a complex project, notification shall not be less than ten business days in advance of the beginning of excavation or demolition work.” 73 P.S. § 180(2.1); (8) the Respondent, as an excavator of a complex project, had the duty “to request the location and type of facility lines at each work site by notifying the facility owner through the [Pennsylvania] One Call System (POCS) . . . in the case of a complex project, notification shall not be less than ten business days in advance of the beginning of excavation or demolition work.” 73 P.S. § 180(2.1); (9) the Respondent did not submit a Complex Project Ticket prior to the commencement of excavation through the POCS; and (10) the Respondent failed to submit a Complex Project Ticket through the POCS at least ten (10) business days prior to commencing excavation, as the Respondent failed to ever submit a Complex Project Ticket for the above-referenced work site. Complaint at 4-5.

By failing to submit a Complex Project Ticket prior to the commencement of excavation in accordance with the statute, the Respondent violated Section 180(2.1) of the PA One Call Law requiring an excavator of a complex project to notify facility owners through the POCS at least ten (10) business days prior to commencing excavation. 73 P.S. § 180(2.1). Complaint at 5. The Bureau of Investigation and Enforcement proposed an administrative penalty of \$2,500 for this violation. *Id.*

Pursuant to Section 5.61(c) of our Regulations, 52 Pa. Code § 5.61(c), a Respondent who fails to file an Answer within the twenty-day response period may be deemed in default, and the relevant facts stated in the Complaint may be deemed admitted. The Commonwealth Court has upheld our authority to sustain complaints that are not answered within twenty days. *See Fusaro v. Pa. PUC*, 382 A.2d 794, 797 (Pa. Cmwlth. 1978). In this case, I&E's Complaint and Notice was served on the Respondent. The Respondent was provided with adequate notice of the alleged violations against it and had the opportunity to respond and to request a hearing. The Respondent was also clearly advised that, if it did not file an Answer within twenty days, then I&E would request that we issue an Order imposing the penalties set forth in the Complaint. Under the circumstances in this case, we find that it is appropriate to sustain the Complaint, consistent with this Opinion and Order.

As noted earlier under the statute in assessing the administrative penalty there a number of factors to consider regarding the party's noncompliance: (1) the party's compliance history; (2) the amount of the injury or property damage caused by the party's noncompliance; (3) the degree of threat to the public safety and inconvenience caused by the party's noncompliance; (4) the party's proposed modification to internal practices and procedures to ensure future compliance; (5) the degree of the party's culpability; and (6) other factors as may be appropriate.

In considering these factors we find the administrative penalty of \$2,500 to be appropriate. Specifically, we note that West Penn has a good compliance history, that the amount of the property damage was not high, that the threat to public safety and inconvenience was low and that the party has acknowledged its culpability. For these foregoing reasons, we find the designated administrative penalty of \$2,500 appropriate.

Accordingly, based on our review and consideration of the record, applicable law and circumstances in this case, we conclude that it is appropriate to sustain the Complaint without modification and to grant the Motion. We find that no due process concerns are present in this matter, because West Penn was provided with adequate notice of the alleged violation against it, and it has had full and fair notice and opportunity to be heard and to respond and dispute the penalty assessed against it in accordance with the PA One Call Law.

Furthermore, West Penn failed to pay the administrative charges related to its failure to comply with the PA One Call Law. In addition, West Penn did not respond to the Complaint or Motion.

Accordingly, for the reasons set forth above, the Motion shall be granted. Furthermore, the allegations of the Complaint are deemed admitted, and a Default Judgment against West Penn will be entered consistent with the discussion in this Opinion and Order.

Conclusion

Based on our review of the record, the averments in the Motion, and the applicable law, we shall grant I&E's Motion for Default Judgment, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Motion for Default Judgment filed by the Commission's Bureau of Investigation and Enforcement on May 24, 2022, is granted, consistent with this Opinion and Order.

2. That the allegations in the Bureau of Investigation and Enforcement's Formal Complaint filed on April 11, 2022, at Docket No. C-2022-3031862 are deemed admitted, and the Complaint is thereby sustained, consistent with this Opinion and Order.

3. That, within thirty (30) days of the entry date of this Opinion and Order, West Penn Utilities shall remit \$ 2,500.00, payable by certified check or money order, to “Commonwealth of Pennsylvania” and sent to:

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

4. That a copy of this Opinion and Order shall be served upon the Financial and Assessment Chief, Office of Administrative Services.

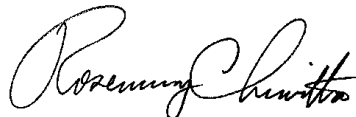
5. That a copy of this Opinion and Order shall be served upon the Bureau of Technical Utility Services for monitoring of compliance.

6. That, if West Penn Utilities fails to make the payment required by Ordering Paragraph No. 3, above, within thirty (30) days of the entry date shown on the last page of this Opinion and Order, it is further ordered:

- a. That the Bureau of Administrative Services, Assessment Section, shall refer this matter to the Pennsylvania Office of Attorney General for appropriate action.
- b. That all parties are hereby placed on notice of the Commission's intent to consider pursuing all remedies, provided by law, including criminal prosecution as well as the initiation of an enforcement proceeding in the Commonwealth Court, pursuant to Pa. R.A.P. Rule 3761.

8. That, after West Penn Utilities remits the \$2,500.00 as required by Ordering Paragraph No. 3, the Secretary's Bureau shall mark this proceeding closed.

BY THE COMMISSION,



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: October 27, 2022

ORDER ENTERED: October 27, 2022