PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120

Public Meeting held January 8, 2025

Commissioners Present:

Stephen M. DeFrank, Chairman
Kimberly Barrow, Vice Chair
Kathryn L. Zerfuss, Concurring in Part, Dissenting in Part
John F. Coleman, Jr., Statement
Ralph V. Yanora

Michael and Sharon Hartman

v. C-2019-3008272

PPL Electric Utilities Corporation

OPINION AND ORDER

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BEFORE THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of Michael and Sharon Hartman (Hartmans or Complainants) and PPL Electric Utilities Corporation (PPL or Respondent) filed on October 19, 2023, and October 23, 2023, respectively, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Steven K. Haas, issued October 3, 2023, in the above-captioned proceeding. Pursuant to the grant of an unopposed request for extension of time, Replies to Exceptions were received from each of the Parties on November 14, 2023.[1]

On consideration of the Initial Decision, the Exceptions, and Replies, we shall adopt the Initial Decision consistent with, and as modified by, the discussion in this Opinion and Order. Additionally, we shall: (1) grant, in part, and deny, in part, the Exceptions of the Complainants; and (2) deny the Exceptions of PPL.

We, hereby, notify the Parties that the Commission will take official notice of federal standards for Transmission Vegetation Management as promulgated by the Federal Energy Regulatory Commission (FERC). *See* 66 Pa.C.S. §§ 331(g); 332(e); 52 Pa. Code § 5.408.

[1] *See* Secretarial Letter issued November 2, 2023.

I. Introduction

The matter before the Commission is a formal complaint (Complaint) of Michael and Sharon Hartman naming PPL as Respondent. 66 Pa.C.S. § 701.[2] The Complaint concerns the adequacy of service provided by PPL. *See* 66 Pa.C.S. § 1501.[3] The adequacy of service dispute arises in connection with PPL's construction and construction related activity involving the Halifax-Dauphin 69 kV Transmission Line Rebuild Project (Project). Intrinsically related to the construction and construction related activity of PPL concerning the Project are allegations of improper vegetation management, discriminatory treatment of the Hartmans, and lack of good faith.

The October 3, 2023 Initial Decision has been issued consistent with our Opinion and Order entered April 16, 2020 (*April 2020 Order*) in the proceeding. Our *April 2020 Order* reversed, in part, an Initial Decision issued October 16, 2019, wherein the ALJ recommended that the Commission dismiss the Complaint in its entirety. The *April 2020 Order* directed a remand, limited to certain issues within the jurisdiction of the Commission. In the Initial Decision issued October 3, 2023 (upon remand), ALJ Haas has recommended that the Complaint be sustained, in part, and dismissed, in part. With respect to certain Complaint allegations raised by the Hartmans, for which the

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[2] This Complaint was filed subsequent to an informal complaint filed with the Commission's Bureau of Consumer Services (BCS) at Case # 3671881. The informal complaint was closed by a BCS letter issued on January 12, 2019. *See* Complainants' Exh. 3; *see also*, Complainants' Motion to Compel, filed September 23, 2020, ¶¶ 25-26, *infra*.

[3] This provision states, in pertinent part: "Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission. . . ."

ALJ recommended be sustained, remedial action by PPL will be ordered, as discussed below, in Section IV.D of this Opinion and Order.

II. Background

The Hartmans are owners and residents of property located in Dauphin County, which property is subject to a 100-foot-wide transmission line right-of-way that is owned by PPL. *See* Finding of Fact No. 4, *infra*, (citing PPL Statement (Stmt.) 3 at 3).[4] Approximately 50 feet of the right-of-way owned by PPL traverses the Complainants' property. PPL Stmt. 3 at 7. PPL had to rebuild certain structures and appurtenances on its transmission line right-of-way across the Complainants' property as part of the Halifax-Dauphin 69 kV Transmission Rebuild Project (*i.e.*, Project). *Id* at 5. The Project involved reconstruction of the Sunbury-Dauphin 69 kV transmission line crossing 179 landowners' properties, including the Complainants' property. *Id.* at 6.

The purpose and scope of the Halifax-Dauphin 69 kV Transmission Rebuild Project has been summarized by ALJ Haas, as follows:

> Initially, by way of brief background, the Project involved rebuilding a 3.57-mile long segment of the company's single circuit Sunbury-Dauphin 69 kV transmission line between the Halifax Tap and the Dauphin Substation as a single circuit/future double circuit. Engineering for the project began in 2017, and the Project was placed into service in January 2019. PPL Stmt. 1, p. 5. The overall Project traversed the properties of 179 landowners. PPL Stmt. 1, p. 6. As part of the Project, PPL installed 36,922 feet (approximately 7 miles) of access roads for access to the

[4] PPL explained, "[m]ore specifically on February 22, 1950, Respondent [PPL's predecessor corporate entity] entered into a right-of-way agreement with Edward and Thelma Fetterhoff pertaining to the Property (the "Right of Way Agreement") . . . [t]he Fetterhoffs were the prior owners of the Property, and the rights which they conveyed unto Respondent survived the conveyance of the Property to Complainants." *See* PPL Motion for Summary Judgment, *infra*, at ¶¶ 8-9.

> company's facilities, including an approximately 2,150-foot-long access road that traverses the property of the Hartmans and neighboring landowners. PPL also installed 52 new steel poles for the new transmission lines. PPL Stmt. 1, p. 5. PPL explained that "the driver for the Project was replacing aging assets, increasing conductor size to meet the Company's standard ratings, and meeting fiber communication needs." PPL Stmt. 1, p. 6.
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> The portion of new access road on the Hartman's property is approximately 1,078 feet long. PPL Stmt. 1, pp. 5-6. Two new poles (poles 75 and 76) and pole pads were constructed on this section of the Project. PPL Stmt. 2, p. 6. PPL needed to haul large amounts of concrete up a steep mountainside in order to construct and install the poles and pads. PPL estimates that each truck carrying concrete weighed approximately 27 tons (27,000 pounds of concrete and 27,000 pounds of truck weight). PPL Stmt. 2, p. 6. The access road and pole pads on Mr. Hartman's property were constructed using rip-rap, "2-A modified" and "2-B" stone. PPL Stmt. 2, p. 6. PPL argues that this size stone was necessary to provide a strong and secure foundation for the company's trucks and equipment. PPL Stmt. 2, p. 11.
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> PPL holds a transmission line right-of-way through the properties on which the Project at issue in this proceeding is located. The right-of-way is 100 feet wide, 50 feet of which is on the Hartman's property and 50 feet of which is on neighboring properties. PPL Stmt. 3, p. 3; PPL Ex. AW-1. The right-of-way agreement for the Hartman property gives PPL the right to "construct, operate and maintain, and from time to time to reconstruct its electric lines, including such poles, towers, cables and wires above and under the surface of the ground . . . including the right of ingress and egress to and from the said lines at all times for any of the purposes aforesaid[.] PPL Ex. AW-1.

I.D. at 16-17.

As noted in the ALJ's summary, part of the Project involved the installation by PPL of 52 new steel poles along with approximately 36,922 feet (or, an estimated

7 miles) of access roads that enable PPL's employees and contractors to access its facilities. *See* PPL Main Brief (M.B.) at 14 (citing PPL Stmt. 1 at 5-6, *infra*). At issue in the Complaint is one of those access roads, which is approximately 2,500 feet (or approximately 0.41 miles) in length and crosses the Complainants' property, as well as the properties of neighboring landowners. *Id*. The portion of the access road that is located on the Complainants' property is estimated as 1,078 feet long. PPL's witness, Mr. Thomas R. Eby, *infra*, testified that 1,078 feet equals approximately 2.9% of the 36,922 feet of access roads that were constructed as part of the Project. PPL M.B. at 14.

III. History of Proceedings

On March 1, 2019, the Hartmans filed the Complaint against PPL. In the Complaint, the Hartmans raised several claims. The essential allegations in the Complaint were stated as follows: "PPL has violated the existing right-of-way Agreement on our residential property; and has failed to compensate us for damage and removal of our property. Furthermore, PPL has trespassed upon and damaged private property outside the right-of-way." *See* Complaint.

Appended to the Complaint was a detailed, type-written, statement. The Complainants also attached photographs of the area of the right-of-way on the subject property and included maps and charts in support of the factual narrative concerning the dispute with PPL; a copy of the Deed Book and page number of the executed right-of-way agreement pertaining to the property; a December 18, 2019, letter of the Dauphin County Conservation District (DCCD); and a June 19, 1990, letter from PPL (PPL predecessor corporate entity) granting permission to construct a road, within, upon and along a portion of PPL's Sunbury-Dauphin 69 kV line right-of-way to the predecessor(s) in title to the Hartmans.

For relief, the Complainants sought the following disposition:

a) PPL should be ordered to purchase a new right-of-way Agreement. PPL has violated the existing ROW;
b) PPL should be ordered to restore our property to its original condition to include:
c) Restoration of topsoil and landscaping stones and boulders removed from our property;
d) Removal of stone road and foreign materials from our property;
e) Installation of water runoff protection and soil erosion control measures;
f) Replace vegetation to include native shrubs that were indiscriminately destroyed during construction. Return property to original topography (natural slope).

See summary of requested relief, Initial Decision issued October 16, 2019 at 2 (ALJ Andrew Calvelli).

The Complaint was, thereafter, assigned to ALJ Calvelli. The Parties engaged in motion practice designed to narrow the issues in dispute to those matters over which the Commission has jurisdiction. We further acknowledge the service of interrogatories and other discovery efforts of the Parties during this time; notwithstanding, no evidentiary hearings were held.

On October 16, 2019, an Initial Decision of ALJ Calvelli was issued wherein he granted a PPL Motion for Summary Judgment. In addition, ALJ Calvelli recommended the dismissal of the Complaint in its entirety. Exceptions to the decision were filed by the Complainants. In our *April 2020 Order*, we granted the Exceptions, in part, and reversed, in part, the October 16, 2019, Initial Decision. As a result, the Complaint was remanded for such further proceedings consistent with the *April 2020 Order*. Subsequent to the issuance of the *April 2020 Order*, the matter was reassigned to ALJ Haas as presiding officer. *See* I.D. at 1.

In our *April 2020 Order*, we identified the allegations in the Complaint that were beyond the Commission's jurisdiction, as well as the allegations that were the proper subjects of further proceedings. In pertinent part, the *April 2020 Order* stated:

> Based upon our review and consideration of the pleadings, the Initial Decision, Exceptions, and Reply Exceptions we will grant in part, the Complainant's Exceptions and modify the Initial Decision that granted PPL's Motion and dismissed the Complaint without a hearing. In summary, upon review of the pleadings, there are five categories of claims raised by the Complainants in their Complaint: 1) notice claims; 2) general utility service claims; 3) vegetation management claims; 4) real property claims; and 5) environmental claims. Regarding the Complainants' notice and real property claims, we agree with the ALJ that we lack subject matter jurisdiction and therefore must dismiss those claims, as discussed further below. Regarding the environmental claims, we are compelled also to dismiss such claims for lack of subject matter jurisdiction, as discussed further below.

April 2020 Order at 10-11.

As directed by the foregoing disposition, the Complaint was referred to the Office of Administrative Law Judge for such further proceedings consistent with the *April 2020 Order*. On November 30, 2021, PPL filed a Praecipe for Withdrawal of attorney Kimberly Krupka, and on December 1, 2021, PPL filed a Notice of Entry of Appearance for attorneys Michael J. Shafer, Devin T. Ryan, and Nicholas A. Stobbe. I.D. at 2. The Hartmans, as of March 1, 2022, participated, *pro se*.[5] *Id*.

Throughout and after the time period during which the above-described events occurred, the Parties engaged in discovery and settlement discussions.

[5] On February 17, 2021, attorney Robert Young filed a Notice of Entry of Appearance on behalf of the Hartmans. On March 1, 2022, attorney Robert Young filed a Notice of Withdrawal of Appearance on behalf of the Hartmans. I.D. at 2.

Additionally, several site visits took place at the Hartmans' property at which the Parties viewed the property and discussed the various allegations in the Complaint. I.D. at 2-3.[6]

ALJ Haas conducted an informal, off the record, call between the Parties and in early 2022 proposed, and the Parties agreed, to "re-set," *i.e.* reestablish a discovery schedule in the case. The Parties decided to reissue their various, outstanding discovery requests in order to overcome and rectify any prior procedural issues or defects. I.D. at 3.

The Hartmans and PPL discussed interrogatories that had been previously propounded by them and resolved the issues related to PPL's answers. These discussions culminated in an e-mail from PPL's counsel on April 25, 2022, in which counsel advised the ALJ that Mr. Hartman indicated that he would not be filing a Motion to Compel. I.D. at 3.

Following the discovery "re-set," the Hartmans again submitted requests for subpoenas for a number of individuals. The said requests were not properly served upon the deponent individuals as required by the Commission's regulations. By e-mail to the Parties dated May 17, 2022, Mr. Hartman was advised that his subpoena requests had not been properly served. Proper subpoena applications were not subsequently submitted for the subject individuals by Mr. Hartman. I.D. at 3.

According to a procedural schedule established by the Parties, evidentiary hearings were scheduled for August 16-17, 2022. The Hartmans served written direct testimony and exhibits on May 17, 2022. The Hartmans submitted their direct testimony which was received by the presiding ALJ and designated as Complainants' "Exhibit A."

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[6] A specific site visit to the access road of the Project on the Hartmans' property took place, December 2, 2021. This site visit involved Mr. Hartman, his former attorney, and the presiding ALJ. *See* PPL M.B. at 23 (referencing PPL Stmt. 2 at 18).

Accordingly, the direct testimony was referred to by ALJ Haas as either Hartman Direct or Hartman Exhibit A. I.D. at 3, n.1.

On July 8, 2022, PPL served its written rebuttal testimony and exhibits. By e-mail dated July 13, 2022, the Hartmans indicated that they did not intend to serve surrebuttal testimony. Additional proposed exhibits were served by the Parties and evidentiary hearings were held, as scheduled, on August 16-17, 2022. A third and final hearing was held on September 21, 2022. I.D. at 3.

At the beginning of the August 16, 2022 hearing, counsel for PPL indicated that PPL had objections to portions of the direct testimony and exhibits submitted by the Hartmans. ALJ Haas directed that the Parties proceed with the hearing and the cross examination of witnesses and allow PPL to submit its objections in writing after the hearings had concluded, with an opportunity for the Hartmans to respond. To that end, a schedule was established whereby PPL's written objections to the direct testimony and exhibits would be due by October 20, 2022, and a written response to PPL's objections, if any, would be due by November 9, 2022. I.D. at 3-4.

On October 20, 2022, PPL filed a Motion to Strike directed to portions of the Hartmans' testimony and exhibits. After some initial filing difficulty with submitting a response, PPL and ALJ Haas received the Complainants' response to PPL's Motion to Strike on December 12, 2022. By e-mail dated December 12, 2022, the Parties were advised by ALJ Haas that the Hartmans' response would be accepted and considered in ruling on PPL's Motion, even though it had not been properly filed with the Commission, initially, by the established deadline. An Order on PPL's Motion to Strike was issued on February 2, 2023.

In the February 2, 2023 Order, ALJ Haas granted the PPL Motion to Strike in part. ALJ Haas identified the portions of the Complainants' testimony and proposed exhibits that were stricken from the evidentiary record. I.D. at 4.

The evidentiary record in this proceeding consists of the following:

- Hartman Exhibit A (Hartman Direct Testimony);[7]
- Hartman Exhibit B (compilation of photographs included in Hartman Exhibit A);
- Hartman Exhibit Numbers 1, 3, 5, 7, 8, 9, 10, 11, 12, 16, 17, 18, 19, 20, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 47, 49, 50, 51, 52, 53, 54, 55 and 56;
- PPL Statement 1 (Rebuttal Testimony of Thomas R. Eby);
- PPL Exhibits TE-1, TE-2, TE-3, TE-4, TE-4 Supplement and TE-5 (exhibits attached to PPL Statement 1);
- PPL Statement 2 (Rebuttal Testimony of William Salisbury);
- PPL Statement 3 (Rebuttal Testimony of Austin Weseloh);
- PPL Exhibits AW-1, AW-2, AW-3 and AW-4 (exhibits attached to PPL Statement 3);
- PPL Statement 4 (Rebuttal Testimony of Matthew Stutzman);

[7] *See* I.D. at 4; *see also,* n.2, identifying the portions of the Hartmans' Direct Testimony which were stricken from the record pursuant to the February 2, 2023 Order. Paragraph Nos. 11, 13, 14 (last sentence only), 16, 21, 24, 25, 26, 31, 35, 39, 41, 42, 48, 49, 76, 77, 85, 86, 89, 90, 91, 93, 94, 96, 98, 128, 136 (subsection Nos. 12, 19, 20, 21, 27, 28, and 32 only) of the Hartmans' Direct Testimony were stricken.

- PPL Exhibits MS-1, MS-2, MS-3, MS-4, MS-5, MS-6, MS-7, MS-8, MS-9, MS-10, MS-11 and MS-12 (exhibits attached to PPL Statement 4);
- Transcript page numbers 24-674.

See I.D. at 5.[8]

Main Briefs (M.B.) were filed by the Parties on March 9, 2023. Reply Briefs (R.B.) were filed on March 30, 2023. The evidentiary record was closed, May 1, 2023. 52 Pa. Code § 5.431. No issues related to the submitted briefs were noted. I.D. at 4.

The Initial Decision was issued October 3, 2023. Exceptions and Replies to Exceptions were received from each of the Parties: the Hartmans' Exceptions on October 19, 2023; PPL's Exceptions on October 23, 2023; and both Parties filed Replies to Exceptions on November 13, 2023, as noted.

Commission dockets indicate that on August 1, 2024, the Hartmans filed a formal complaint with the Commission at Docket No. C-2024-3050485, naming PPL as Respondent. The complaint allegations in the August 1, 2024 formal complaint, at Docket No. C-2024-3050485, specifically reference the instant docket (No. C-2019-3008272) under consideration by the Commission and further raise substantive and procedural allegations related to the docket now under consideration. As noted, the record of this proceeding is closed. Based on the closure of this record, we shall not entertain allegations of procedural misconduct in this proceeding nor allegations of a substantive nature that are directly related to the record of the matter under consideration that are asserted by the Hartmans in the context of a separate, docketed formal

[8] The entire hearing exhibits, although referenced for admission at the August 16, 2022, hearing, (*See* Tr. 92), were admitted upon issuance of the Initial Decision and, thereafter, entered onto the Commission dockets.

complaint. Absent a determination by the Commission for reopening of this record for purposes of the receipt of additional evidence, or consolidation of the proceedings, the complaint filed August 1, 2024, at Docket No. C-2024-3050485 shall proceed according to the merits of that docketed matter.

IV. Discussion

A. Legal Standards

1. Burden of Proof

Michael and Sharon Hartman are the Complainants in this proceeding. As the Complainants, they are the proponents of a rule or order from the Commission that the conduct and actions of PPL relating to the Project violated the Public Utility Code (Code); 66 Pa.C.S. §§ 101, *et seq*, a Commission regulation, or Order. The Complainants are, therefore, the parties that have the burden of proof. *See* 66 Pa.C.S. § 332(a): " . . . Except as may be otherwise provided in section 315 (relating to burden of proof) or other provisions of this part or other relevant statute, the proponent of a rule or order has the burden of proof."

The burden of proof is comprised of two distinct burdens: the burden of production and the burden of persuasion. *See Theresa Gavin v. PECO Energy Company*, Docket No. C-2017-2616249 (Opinion and Order entered July 11, 2019); 2019 WL 3252287 (Pa.P.U.C.) (*Gavin*), citing *Hurley v. Hurley*, 754 A.2d 1283 (Pa. Super. 2000), citing *Riedel v. County of Allegheny*, 633 A.2d 1325, 1329, n.11 (Pa. Cmwlth. 1993) (*Riedel*). In order to bear the burden of proof and be entitled to a decision in one's favor, a party must bear both the burden of production and the burden of persuasion. *Riedel*.

The burden of production, also called the burden of going forward with the evidence, determines which party must come forward with evidence to support a particular claim or defense. *See Scott and Linda Moore v. National Fuel Gas Distribution*, Docket No. C-2014-2458555 (Final Order entered on August 25, 2015) (*Moore*). The burden of production goes to the legal sufficiency of a party's claim or affirmative defense. *Id.* The burden of production may shift between the parties during a hearing. If a complainant - in this instance, the Hartmans - introduces sufficient evidence to establish the legal sufficiency of the claim, also called a *prima facie* case, the burden of production shifts to the utility to rebut the evidence. *See Moore*. A complainant may establish a *prima facie* case with circumstantial evidence. *Milkie v. Pa. PUC*, 768 A.2d 1217, 1220 (Pa. Cmwlth. 2001) (*Milkie*); *see also, Gavin* citing *Romeo v. Pa. PUC*, 154 A.3d 422 (Pa. Cmwlth. 2017) (*Romeo*) for the proposition that at an evidentiary hearing, a complainant may prove the claim that a "smart meter," caused or will cause adverse health effects through the complainant's own testimony and/or ". . . the testimony of others as well as other evidence that goes to that issue." *Romeo*, 154 A.3d at 430.

The burden of production, usually placed on the complainant, applicant, or petitioner, determines which party must produce sufficient evidence to meet the applicable standard of proof. *Hurley v. Hurley*; *see also, Applications of Transource Pennsylvania, LLC*, Docket Nos. A-2017-2640195, *et al.* (Opinion and Order entered May 24, 2021); 2021 WL 2143699 (Pa.P.U.C.), *affirmed*, *Transource Pennsylvania, LLC v. Pa. PUC*, 278 A.3d 942 (Pa. Cmwlth. 2022)[9].

Unlike the burden of production, the burden of persuasion includes determinations of credibility and acceptance or rejection of inferences. Even unrebutted

[9] *Reversed on federal law claims, Transource Pa., LLC v. DeFrank, et al.*, M.D. Pa. Civil No. 1:21-CV-01101 (December 6, 2023); 705 F.Supp. 3d 266 (W.D. Pa. 2023); 2023 WL 8457071, *appeal filed*, Case No. 24-1045 (3d Cir.).

evidence may be disbelieved. *Applications of Transource*, citing *Suber v. Pa. Comm'n on Crime and Delinquency*, 885 A.2d 678 (Pa. Cmwlth. 2005), *appeal denied*, 895 A.2d 1264 (Pa. 2006). "[T]he burden of persuasion never leaves the party on whom it is originally cast, but the burden of production may shift during the course of the proceedings." *See Riedel* at n. 11.

The Hartmans, at various points in the prosecution of their Complaint, and in efforts to meet their burden of proof, have referenced and/or cited to extra-record information. The Complainants have also proffered information which has been ruled upon by the presiding ALJ as beyond the scope of Commission jurisdiction or has been excluded from the evidentiary record as inadmissible hearsay testimony. *See* Order Granting in Part and Denying in Part Respondent's Motion to Strike dated February 2, 2023 (*Order re Motion to Strike*).

We further acknowledge that the Hartmans have expressed concern and raise objections to the procedural conduct of the case. The Complainants' objections to procedure are, in substantial part, attributed to the delay occasioned by the *April 2020 Order*, which reversed the dismissal of their Complaint in its entirety and directed a remand. The Hartmans, in their Exceptions, *infra*, complain that the procedural conduct of the case impaired their efforts to procure the testimony and/or appearance of PPL employees and/or agents who they feel had direct, 'real time', involvement with the construction and vegetation management decisions surrounding the Project. This is in contrast to witnesses later produced and made available by PPL at hearing for purposes of litigating the case in defense of the Complaint allegations.[10]

[10] We also note the contention of the Hartmans that PPL did not, as represented by prior counsel, either produce for discovery, or provide them with information, concerning the identity of certain of the PPL construction contractors and/or vegetation management contractors, as part of their efforts for discovery in this matter. PPL denies that such failure was attributable to bad faith. *See* PPL Stmt. 1 at 23.

The Hartmans have also expressed objections to the failure to have 'in-person' hearings in this matter.[11] They take the position that such in-person hearings would have assisted in their attempts to have the factfinder observe the demeanor of PPL witnesses and assess their candor based thereon. *See* Complainants' Exceptions; *see also,* Complainants' Request for Mediation filed May 20, 2020 (*Complainants' Mediation Request*).

The Complainants' position is duly noted. As the Parties are aware, the Commission is the ultimate finder of fact in any proceeding under the Code. 66 Pa.C.S. § 335(a); *Hess v. Pa. PUC*, 107 A.3d 246, 264-265 (Pa. Cmwlth. 2014), citing *Popowsky v. Pa. PUC*, 706 A.2d 1197, 1201 (Pa. 1997). Pursuant to the Code, the Commission, as the ultimate fact-finder, weighs the evidence and resolves conflicts in testimony. When reviewing the initial decision of an ALJ, the Commission, therefore, has all the powers that it would have had in making the initial decision except as to any limits that it may impose by notice or by rule. *See Milkie*, 768 A.2d at 1220, n.7 (citing, *inter alia*, 66 Pa.C.S. § 335(a)).

Based on the foregoing, as the ultimate finder of fact, the entire record of the proceeding is available to the Commission and shall be reviewed in reaching a determination as to whether the Complainants have met their burden of proof as to any claims within our jurisdiction.[12]

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[11] *See* Prehearing conference held June 26, 2019, wherein the Hartmans requested an in-person hearing rather than telephonic hearing. The Hartmans also requested a site visit. The presiding ALJ indicated an in-person hearing would be held.

[12] The Commission further acknowledges the site visits conducted by the presiding ALJ and the Parties. The Commission accepts for independent review and consideration the persuasive value of said onsite visits to the subject property as reflected in the positions of the Parties and the I.D. recommendations.

2. Standard of Proof

To establish a sufficient case and satisfy the burden of proof, the Complainants must show that the utility, PPL, is responsible or accountable for the problem described in the Complaint. *Patterson v. Bell Telephone Co. of Pa.*, 72 Pa. P.U.C. 196 (1990) (*Patterson*); *Feinstein v. Philadelphia Suburban Water Co.*, 50 Pa. P.U.C. 300 (1976) (*Feinstein*).

Complainants, as the party with the burden of proof, have the duty to establish a fact by a "preponderance of the evidence." The term "preponderance of the evidence" means that one party has presented evidence which is more convincing, by even the smallest amount, than the evidence presented by the other party. *Povacz v. Pa. PUC*, 280 A.3d 975, 999, n. 25 (Pa. 2022) (*Povacz*); *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950); *see also, Brown v. Commonwealth*, 940 A.2d 610, 614, n.14 (Pa. Cmwlth. 2008); *Commonwealth v. Williams*, 732 A.2d 1167 (Pa. 1999). The burden of proof is satisfied by establishing a preponderance of evidence which is substantial and legally credible. *See Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

Additionally, the Commission's decision must be based upon "substantial evidence." *See* 2 Pa.C.S. § 704. "Substantial evidence is defined as 'such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.'" *See Arctic Cat Sales Inc. v. State Bd. of Vehicle Mfrs., Dealers & Salespersons*, 110 A.3d 242, 248, n. 5 (Pa. Cmwlth. 2015) (quoting *Kerr v. Pa. State Bd. of Dentistry*, 960 A.2d 427, 436 (Pa. 2008)); *see also, Consl. Edison Co. of New York v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 12 (1938). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 413 A.2d 1037 (Pa. 1980) (*Norfolk*); *Erie Resistor Corp. v. Unemployment Comp. Bd. of*

Review, 166 A.2d 96 (Pa. Super. 1961); *Murphy v. Comm. Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

3. Jurisdiction of the Commission

Our *April 2020 Order* was entered without the benefit of an evidentiary record in this matter. On development of a record, questions of jurisdiction continue to present themselves due to the particular facts of this Complaint.

As a creature of legislation, the Commission possesses only the authority the state legislature has specifically granted to it in the Code. Its jurisdiction[13] must arise from the express language of the pertinent enabling legislation (the Code) or by strong and necessary implication therefrom. *Feingold v. Bell of Pa*., 383 A.2d 791 (Pa. 1977); s*ee also, Flynn, et al., v. Sunoco Pipeline, L.P.*, Docket Nos. C-2018-3006116; P-2018-3006117, *et al.,* (Opinion and Order entered November 18, 2021) (*Mariner East Litigation*), at 18, citing *Dep't of Transp. v. Beam*, 788 A.2d 357, 360 (Pa. 2002) for the proposition that "[T]he rule requiring express legislative delegation is tempered by the recognition that an administrative agency is invested with the implied authority necessary to the effectuation of its express mandates."); *Allegheny County Port Authority v. Pa. PUC*, 237 A.2d 602 (Pa. 1967). The Commission must act within and cannot exceed its jurisdiction. *City of Pittsburgh v. Pa. PUC*, 43 A.2d 348, 350 (Pa. Super. 1945) (*City of Pittsburgh*).

[13] Jurisdiction relates solely to the competency of the particular court or administrative body to determine controversies of the general class to which the case then presented for its consideration belongs. *See Robert Naborn and Cynthia Pronko v. Direct Energy Services, LLC, PECO Energy Company*, Docket No. F-2023-3037611 (Opinion and Order entered March 4, 2024) (citing *Riedel v. The Human Relations Comm'n of the City of Reading*, 739 A.2d 121 (Pa. 1999)).

The provisions of Chapter 15 of the Code, 66 Pa.C.S. §§ 1501; 1502; 1503; 1504; and 1505, provide the Commission with a general grant of jurisdiction and authority over the "service" and "facilities" of a utility as they involve the public. *See Borough of Ambridge v. PSC*, 165 A. 47, 49 (Pa. Super. 1933) and citations. "Service" and "facilities" under the Code are to be broadly construed. *Country Place Waste Treatment Co., Inc. v. Pa. PUC*, 654 A.2d 72, 76 (Pa. Cmwlth. 1995) (*Country Place*); *April 2020 Order* at 12-13; *Gavin*.[14]

A utility's vegetation management has been determined to fall within the jurisdiction of the Commission regarding service and facilities under the Code. *See* I.D. at 22. With vegetation management, the Commission may determine whether the policies of a company are consistent with the statutory requirement that service offered by the company is just, reasonable, adequate and safe. *See Richard and Sandy Lehet v. PPL Utilities Corporation*, Docket No. C-2014-2449983 (Opinion and Order entered October 28, 2015) (*Lehet*), at 7-8, citing *PECO Energy Co. v. Twp. of Upper Dublin*, 922 A.2d 996, 1004-1005 (Pa. Cmwlth. 2007) (*Twp. of Upper Dublin*); *see also, Robert G. Kuhn, Jr. v. Duquesne Light Company*, Docket No. C-2017-2610584 (Opinion and Order entered October 16, 2018); 2018 WL 5620874 (Pa.P.U.C.) (*Kuhn*) and citations.

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[14] *See also,* Section 501(b) of the Code, 66 Pa.C.S. § 501(b), which provides, in pertinent part:

> **(b) Administrative authority and regulations.--**The commission [Public Utility Commission] shall have general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth. The commission may make such regulations, not inconsistent with law, as may be necessary or proper in the exercise of its powers or for the performance of its duties.

In *Twp. of Upper Dublin*, the court has explained:

> We agree with the positions advanced by PECO and the PUC. First, we conclude public utility service embraces vegetation management. The PUC has full authority to enforce the provisions of the Public Utility Code. *W. Penn Power.* Certain acts, done while rendering utility service, fall within the ambit of the PUC's jurisdiction under 66 Pa.C.S. § 1501 over character of utility service. *See W. Penn Power*, 578 A.2d at 77. In particular, vegetation management activities by an electric utility fall within the Public Utility Code's definition of service in 66 Pa.C.S. § 102. *Id.* Utility service "is not confined to the distribution of electrical energy, but includes 'any and all acts' related to that function." *Id.* (citing 66 Pa.C.S. § 102). *See also Popowsky,* 653 A.2d at 1389 ("utility's maintenance of vegetation is a regulated service even though fault, either on the part of the utility or the customer, has no relevance to the existence of vegetation maintenance as a service.")

992 A.2d at 1004-05; (emphasis supplied).

See also, Sarah Bernardi v. West Penn Power Co., Docket No. C-2014-2453852 (Opinion and Order entered May 5, 2016) (*Benardi*), addressing the inter-relationship between Commission jurisdiction over utility vegetation management and easements:

> The Commission must act within its jurisdiction, which does not include interpretation of an easement, but can review the acts of a regulated utility to determine whether its actions in dealing with the underlying landowner and its actions in maintaining the right-of-way crossing the landowner's property is consistent with the provision of adequate, efficient, safe and reasonable service within the provisions of the Public Utility Code:
>
> > The Commission must act within and cannot exceed its jurisdiction. *Behrend v. Bell Telephone Co*., 363 A.2d 1152

(Pa. Super. 1976). It is well-settled that the Commission does not have the jurisdiction to determine the validity of a right-of-way. *Stefanoski v. PA American Water Co*., Docket No. C-20078219 (Opinion and order entered September 22, 2008).

In addition, property disputes belong in a court of general jurisdiction. *See Anne E. Perrige v. Metropolitan Edison Co*., PUC Docket No. C-00004110 (Order entered July 11, 2003) (Commission had no jurisdiction to interpret the meaning of a written right-of-way agreement); *Lou Amati/Amati Service Station v. West Penn Power Co*. and *Bell Atlantic-Pennsylvania, Inc*., PUC Docket No. C-00945842 (Order entered October 25, 1995) (real property issues such as trespass and whether utility facilities are located pursuant to valid easements are within the exclusive jurisdiction of the Courts of Common Pleas); *Tod and Lisa Shedlosky v. Pennsylvania Electric Company*, PUC Docket No. C-20066937 (Order entered May 28, 2008).

However, the Commission has the responsibility to ensure that "[E]very public utility shall furnish and maintain adequate, efficient, safe and reasonable service and facilities. . ." 66 Pa.C.S. § 1501, and the Commission is the proper forum to determine whether the utility has provided proper service to these Complainants, short of resolving a controversy which will determine property rights. *See Burek v. Pennsylvania Electric Company*, Docket No. C-20028132 (Opinion and Order entered June 27, 2003) (the Commission affirmed the analysis of Administrative Law Judge Larry Gesoff, whose Initial Decision contained a discussion regarding the utility's application of herbicides). Order of July 23, 2013.

> While the Commission will not interpret the content of a right-of-way contract once its existence has been established, *and its existence is not in question here*, the Commission can determine whether the policies of the Company are consistent with the statutory requirement that service offered by the Company be just, reasonable, adequate and safe. 66 Pa.C.S. § 1501.

Bernardi. I.D. at 11-12; (emphasis (italics) original; emphasis underscore added).

Additionally, the Commission has promulgated regulations of general applicability to the performance of vegetation management and vegetation control by utilities. *See* 57 Pa. Code § 198(f); (n)(1).

Finally, the Respondent, as an Electric Distribution Company (EDC) subject to Commission regulation, is under a general duty of adherence to safety to the public and its patrons concerning its service and facilities. Pursuant to Section 57.28(a)(1) of our Regulations, an EDC must use reasonable efforts to properly warn and protect the public from danger and to exercise reasonable care to reduce the hazards to which customers may be subjected to by reason of the EDC's provision of

electric utility service and its associated equipment and facilities. 52 Pa. Code § 57.28(a)(1). *See also, Kuhn* at n. 4;[15] *Lehet*.[16]

4. Scope of Issues on Remand Pursuant to *April 2020 Order*

Our *April 2020 Order*, as indicated, directed a remand of the Hartmans' Complaint and narrowed the issues for consideration. *See April 2020 Order* at 10-11. Since the issuance of our *April 2020 Order*, we find that recent developments concerning the impact of Article I, Section 27, of the Pennsylvania Constitution, known as the Environmental Rights Amendment (ERA),[17] require clarification of the scope of our jurisdiction and authority concerning allegations of the Hartmans that PPL's actions

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[15] "Additionally, Section 2802 of the Code, 66 Pa.C.S. § 2802(2) . . . authorizes the Commission to set reliable standards for maintenance of electric service transmission and distribution systems. Our Regulations at 52 Pa. Code § 57.198 governs vegetation clearance and management as part of the inspection and maintenance standards for electric utilities and requires an electric utility to submit a plan to the Commission every two years for the periodic inspection, maintenance, repair and replacement of its facilities . . . The Regulation at 52 Pa. Code § 57.193 provides that an EDC must ensure its transmission facilities are operated in conformity with all applicable regional and national reliability requirements . . . ." *Kuhn*, n.14.

[16] *See e.g*., *Bernardi*, I.D. at 9: "It is clear that plans regarding vegetation maintenance of rights-of-way fall within the Commission's jurisdiction, although the regulations are not specific in prescribing what methods can be used in specific circumstances."

[17] *See* Pa. Const., Article I: "Declaration of Rights:"

> **§ 27. Natural resources and the public estate.**
> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people. (May 18, 1971, P.L.769, J.R.3)

regarding the Project had an adverse environmental impact on their property and the area adjacent thereto. *See e.g.*, Complainants' Exceptions at 8-9, *infra*.

The Commission generally lacks jurisdiction to adjudicate claims regarding violations of Municipal law or environmental regulations that are beyond the scope of the Code or a Commission order or Regulation. *See Mariner East Litigation* at 16, citing *Rovin, D.D.S. v. Pa. PUC*, 502 A.2d 785 (Pa. Cmwlth. 1986) (*Rovin*) and *Country Place*. In these cases, the Commonwealth Court held the Commission lacked jurisdiction over issues involving air and water quality, which are environmental matters specifically regulated by statutes administered by state and federal agencies, not the Commission. *Id*.

In pertinent part, our discussion of the Hartmans' environmental claims in the *April 2020 Order* was as follows:

> **5. Environmental Claims**
>
> Lastly, the Complainants alleged that PPL's construction has caused significant damage via water runoff to private property as well as Clarks Creek, a Class A waterway. Complaint at 8-9; Response to Motion for Summary Judgment at 9; Exc. at 2.
>
> We decline to examine the general or specific issues raised in the Complaint because the Complainants' assertions regarding any environmental impact of PPL's construction practices, the reasonableness of PPL's environmental protection controls, or lack thereof, or any unpermitted or increased storm water discharges are outside of this Commission's jurisdiction. These matters are squarely within the purview of the Pennsylvania Department of Environmental Protection and/or an appropriate civil court of jurisdiction to address. Thus, we will sustain, in part, PPL's Motion for Summary Judgment, and dismiss the claims in the Complaint raising general or specific environmental challenges.

> With that said, as articulated above under the vegetation management claims, the Complainants alleged that the construction of the stone road killed surrounding vegetation which aided in preventing environmental and property damage. This specific allegation, despite being connected to environmental considerations, relates to the Complainants' vegetation management claims. Thus, as noted above, to make a determination whether PPL's construction practices constitute adequate, safe and reasonable service, in accordance with 66 Pa. C.S. § 1501, we direct the ALJ to examine on remand the impact of the construction on the Complainants' property, including but not limited to, any erosion to the soil and sedimentation on the Complainants' property and any safety hazards resulting therefrom that may be reasonably identified, and the steps that PPL proposes to implement in order to adhere to its statutory duty to furnish adequate, safe and reasonable service.

April 2020 Order at 22-23 (emphasis added).

When an environmental concern is raised in a matter before the Commission, the ERA would require us to assess its relevance and materiality. *See Twp. of Marple v. Pa. PUC*, 294 A.3d 965, 973-974 and citations (Pa. Cmwlth. 2023) (*Twp. of Marple*); *see also, Applications of Transource*, *supra*; and *Pa. PUC*, *et al. v. PGW*, Docket Nos. R-2023-3037933, *et al.* (Opinion and Order entered November 9, 2023), slip op. at 247-48 (a rate case proceeding) (citing *Pennsylvania Environmental Defense Fund v. Commonwealth of Pennsylvania*, 161 A.3d 911 (Pa. 2017)). However, in doing so, we find our *April 2020 Order* consistent with the holding of *Funk v. Wolfe*, 144 A.3d 228, 235 (Pa. Cmwlth. 2016), *aff'd*, 158 A.3d 642 (Pa. 2017) (*Wolfe*), a decision which predates *Twp. of Marple*.

> In *Funk v. Wolfe* the Court has held the following:
>
> The second provision of the ERA impels executive branch agencies and departments to act in support of conserving and

> maintaining public natural resources, but it cannot operate on its own to "expand the powers of a statutory agency...." *Cmty. Coll. of Delaware Cnty.*, 342 A.2d at 482.[18] Thus, courts assessing the duties imposed upon executive branch departments and agencies by the ERA must remain cognizant of the balance the General Assembly has already struck between environmental and societal concerns in an agency or department's enabling act. *Id.* at 473.

144 A.3d at 235.

Pursuant to the discussion of the Court in *Funk v. Wolf*, our *April 2020 Order* is consistent with the delineation of the scope of legislative enabling responsibilities as between the Commission, the Pennsylvania Department of Environmental Protection (DEP), and other government agencies who have been expressly delegated specific oversight and responsibility for, *inter alia*, the "earth disturbance,"[19] and water runoff aspects of the Project.

Whether PPL's conduct was in conformity with regulations over which other government agencies have been delegated primary oversight are matters outside of the purview of Commission proceedings. The specific oversight of such activity that has been entrusted to other government agencies, however, does not obviate the

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[18] *Community College of Delaware County and Community College of Delaware County Authority, Appellants and Township of Marple, Intervening Appellant, v. Mrs. Cyril G. Fox and Natural Lands Trust, Inc., Appellees, et al*., 342 A.2d 468 (Pa. Cmwlth. 1975).

[19] *See* 25 Pa. Code § 102.1 *Definitions*: *Earth disturbance activity*—A construction or other human activity which disturbs the surface of the land, including land clearing and grubbing, grading, excavations, embankments, land development, agricultural plowing or tilling, operation of animal heavy use areas, timber harvesting activities, road maintenance activities, oil and gas activities, well drilling, mineral extraction, and the moving, depositing, stockpiling, or storing of soil, rock or earth materials. *See also*, PPL Exh. TE-2, Individual NPDES Permit for Stormwater Discharges Associated With Construction Activities, "Definitions."

Commission's responsibilities under the Code for any discernable violations arising under the Code that have been established by substantial evidence and which affect the safety of the public. *See e.g., Rulemaking Regarding Hazardous Liquid Public Utility Safety Standards at 52 Pa. Code Chapter 59 - FINAL FORM RULEMAKING ORDER*, Docket No. L-2019-3010267 (Order entered February 22, 2024) at 18: "[T]he PUC's mission is to balance the needs of consumers and public utilities; ensure safe and reliable public utility service at reasonable rates; protect the public interest; educate consumers to make independent and informed public utility choices; further economic development; and foster new technologies and competitive markets in an environmentally sound manner. *See* https://www.puc.pa.gov/about-the-puc/."

The Commission's primary responsibility to determine whether there have been violations of the Code and the relationship of said violations to the limits of our consideration of environmental harm as alleged in the Hartmans' Complaint will be addressed in our discussion and disposition of the Complainants' Exceptions, *infra*.[20]

5. Official Notice – Federal Vegetation Management Standards; *Lehet v. PPL, et al.*

We shall take official notice of federal standards promulgated by FERC for Transmission Vegetation Management. *See* 66 Pa.C.S. § 331(g) - "**(g) Official notice defined.--**As used in this chapter the term "official notice" means a method by which the commission may notify all parties that no further evidence will be heard on a material fact and that unless the parties prove to the contrary, the commission's findings will

[20] We find the ALJ's rulings concerning the admissibility of proffered evidence in the *Order re Motion to Strike* as those rulings addressed certain portions of the testimony of the Complainants, including environmental related claims, to be in accord with our clarification herein. *See Order re Motion to Strike* at 6-7.

include that particular fact."; *see also*, § 332(e); 52 Pa. Code § 5.408.[21] The Commission concludes that official notice of federal standards promulgated by FERC relating to vegetation management in transmission corridors to be appropriate due to our regulations at 52 Pa. Code § 57.198; *see* I.D. at 25; *see also, Lehet*; *Kuhn*.

The *Bernardi* Initial Decision is insightful for a summary of federal law changes, circa 2005, implemented by FERC through the North American Electric Reliability Corporation (NERC). These changes were spurred in substantial part by a widespread, regional power outage occurring in 2003. *See Bernardi*, I.D. at 15. Such federal reliability standards for transmission lines included mandatory vegetation clearance standards. These clearance standards, known collectively at this time as FAC-003-1, apply to transmission lines rated at 200kV and higher, as well as any lower-voltage lines designated as critical to reliability by regional reliability organizations that report to NERC. These same federal regulations were also used to set minimum clearance distances as set forth in the Institute of Electrical and Electronics Engineers (IEEE) Standard 516-2003 and, *inter alia*, as specified in its Section 4.2.2.3, Minimum Air Insulation Distances without Tools in the Air Gap. *See Bernardi*, I.D. at 15-16; *see also*, PPL Stmt. 4 at 5-7.

Federal guidelines regarding vegetation management for transmission corridors are not expressly in question in this Complaint. However, such federal standards are implicitly relevant and material, as the Hartmans allege that PPL's actions and conduct regarding the Project departed from the terms of an Erosion and Sediment Permit (E&S Permit) issued by the DCCD, applicable to the earth disturbance facet of the

[21] In pertinent part, Section 332(e) of the Code, 66 Pa.C.S. § 332(e), and Commission Regulations at 52 Pa. Code § 5.408, set forth the procedure to be followed when the Commission's decision rests on official notice of a material fact not in evidence in the record. These sections provide that any party adversely affected shall have the opportunity upon timely request to show that the facts are not properly noticed or that alternative facts should be noticed.

Project. They also argue that PPL's conduct in specific aspects of the Project was inconsistent with "best practices" and/or generally accepted practices involving comparable projects and/or comparable construction requirements for projects of this nature and scope. *See* I.D. at 22-32.[22]

The Complainants also contend that PPL's resultant vegetation management activity within the right-of-way after the Project was complete was not reasonable, as such activity, *inter alia*, was not consistent with identifiable "best practices." They find it objectionable that PPL employed best practices and/or generally accepted practices with respect to other easements within the same transmission line corridor, most notably practices regarding the use of herbicides, as part of PPL's vegetation management, but failed to do so concerning the easement crossing the Complainants' property. This raises a discussion concerning claims of discrimination under the Code, in addition to allegations of unreasonable service.

In response, PPL has defended its actions and decisions by presenting witnesses who, in rebuttal statements, have testified that the Respondent's conduct was consistent with all applicable federal, state, and local standards pertaining to the construction, post construction restoration activity pertaining to the Project, and includes PPL's vegetation management after construction. *See generally* PPL Stmt. 2 at 3. To the extent there is competent evidence that has been presented by the Complainants to the contrary, PPL takes the position that it had justifiable reasons for deviating from such standards. *See* I.D. at 25-28.

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[22] The Complainants argue, *inter alia*, that the crane pads constructed on their property and property adjacent to their property (Pole 75 and Pole 76) are exceedingly large, particularly when compared to the Pole 74 and Pole 73 crane pads on United States National Park Service (U.S. NPS) Lands. *See* Complainants' M.B. at 29 (citing Exhibits 53 and 56; Exhibit A Paragraphs 7 and 8 and Photographs). They take the position that crane pads on the U.S. NPS lands are "barely noticeable" in contrast to the poles constructed on their right-of-way, and do not have any "unnatural high walls." *Id*.

As noted in the *Bernardi* Initial Decision, at the time of its writing, Pennsylvania EDCs began to apply federal standards for maintenance of high voltage lines of 200 kV and above to the lower voltage transmission lines in their internal "best practices" policies. *Id*. (citing *Marlene Broman v. West Penn Power Company*, Docket No. C-2013-2356237 (Opinion and Order entered April 23, 2014) (*Broman*); *Jan and Joyce Spirat v. Metropolitan Edison Company*, Docket No. C-2013-2367044 (Opinion and Order entered September 11, 2014) (*Spirat*),[23] and *Lehet*).

As the Commission acknowledged in *Lehet*, a case distinguishable from the Hartmans' Complaint due to its unique set of facts, but relevant, nonetheless, for the Commission's recognition of federal vegetation management standards for low voltage transmission corridors:

> With regard to PPL's final Exception, pursuant to the Commission's Regulations at 52 Pa. Code § 5.408, we take official notice of the following facts: (1) PPL filed its Inspection and Maintenance Standards Plan pursuant to 52 Pa. Code § 57.198, which includes vegetation maintenance specifications for distribution lines and transmission lines of 69 kV (Updated Plan); (2) the Updated Plan was accepted by the Commission per the Bureau of Technical Utility Services letter dated December 28, 2012; (3) PPL included for Commission review as part of a transmission line siting application proceeding at Docket No. A-2012-2340872, *et al.*, its Specification for Transmission Management (STM Plan), which includes vegetation maintenance specifications for transmission lines of 69 kV and higher and takes into consideration, *inter alia*, protection of natural resources, environmental impact, land use, and other environmental concerns; and (4) the STM Plan was not specifically addressed in the Commission's January 9, 2014 Order adjudicating the siting application at Docket No. A-2012-2340872, *et al*. Accordingly, we agree with PPL that

[23] The Initial Decision in *Spirat* was modified in part by the Opinion and Order entered September 11, 2014.

> its Updated and STM Plans were submitted to and reviewed by the Commission and this Exception is, therefore, granted.

Lehet at 22-23.

Based on the foregoing, pursuant to 52 Pa. Code § 57.198, PPL is obligated to file a biennial Inspection and Maintenance Standards Plan (I&M Plan) "[f]or the periodic inspection, maintenance, repair and replacement of its facilities that is designed to meet its performance benchmarks and standards under this subchapter." Such I&M Plan, pursuant to Commission regulations, will include "[a] program for the maintenance of clearances of vegetation from the EDC's overhead distribution facilities . . ." *See* (f) and "[t]he Statewide minimum inspection and treatment cycle for vegetation management is between 4-8 years for distribution facilities. An EDC shall submit a condition-based plan for vegetation management for its distribution system facilities explaining its treatment cycle." *See* (n)(1).

Concerning the decision to coordinate the I&M Plan with federal mandates, the Commission has noted that "[i]n addition, the Commission [Pennsylvania Public Utility Commission] will monitor what the Federal Energy Regulatory Commission is doing regarding the promulgation of federal regulations regarding vegetation management around transmission lines. We will coordinate with the Department of Environmental Protection, Department of Conservation and Natural Resources, and Game Commission regarding these issues." *See Revision of 52 Pa. Code Chapter 57 Pertaining to Adding Inspection, Maintenance, Repair, and Replacement Standards for Electric Distribution Companies*, Docket No. L-00040167 (Order entered May 22, 2008) – *Final Rulemaking Order*; 2008 WL 8013874 (Pa.P.U.C.) at *31.

In this matter, PPL has referenced the I&M Plan in its Stmt. 4, Mr. Matthew Stutzman, *infra*; *see also,* PPL M.B. at 24-29. At PPL M.B. at 27, the Respondent advised the following:

> At the state level, the Commission also took steps to address service reliability and vegetation management. In its I&M Standards Rulemaking Order, the Commission established inspection, maintenance, repair, and replacement standards ("I&M standards"), which cover, among other things, vegetation management practices based on industry practices. The Commission also created "a new regulation at 52 Pa. Code § 57.198, requiring biennial filings regarding companies' inspection, maintenance, repair and replacement plans ('I&M plans') that fit within [I&M] standards' intervals." However, in that rulemaking, the Commission declined to promulgate a standard regarding transmission lines and stated that it would monitor FERC's rulemaking proceeding instead.

PPL M.B. at 27 (emphasis added).

In light of the foregoing, and consistent with the due process rights of any Party to challenge, we shall take official notice of any applicable federal standards and/or rules as they are related to vegetation management within the transmission corridor of the Project to the extent there is a nexus between such rule and PPL's alleged violation of its duty under the Code or Commission Regulations.[24]

[24] There is no information in the record of this Complaint that the FERC has modified any of the standards previously incorporated by PPL into its current biennial I&M Plan. The most recent federal revisions of which the Commission is aware were issued March 21, 2013, at FERC Docket No. RM12-4-000; Order No. 777, 142 FERC 61,208, for tree removal and/or vegetation management relating to transmission facilities.

B. Positions of the Parties

1. Complainants

The Complainants are Michael and Sharon Hartman, husband and wife. Mr. Hartman testified that his educational background consists of a Bachelor's degree in accounting; a Certified Public Accountant license (inactive); and Certified Fraud Examiner Registration (retired). His professional career has been as an investigative support analyst for the United States Postal Inspection Service (16 years). Prior to the 16 years as an investigative support analyst, Mr. Hartman spent twenty-eight (28) years as a United States Postal Inspector. Mr. Hartman stipulated that he does not have any professional experience in the electric utility field, *i.e.* constructing or performing maintenance on electric utility facilities, other than his observations of PPL doing various maintenance and construction activity on his property (twenty (20) years). Tr. 45-50.

Mr. Hartman testified to 'lay' experience in 'vegetation management.' He referred to Hartman Exh. A, ¶ 2, which is a summary of his lay vegetation management experience. Mr. Hartman also advised that he and Mrs. Hartman have managed their 20-acre property, including the right-of-way at issue in the Complaint, for the past 25 years. *See* Hartman M.B. at 9. Based upon their lay experience in the management of their property, the Complainants offered their opinion concerning PPL's vegetation management. *See* M.B. at 9:

> 19. Hartman Exhibit A Paragraph 2 summarizes my 50, plus, years of vegetation management experience. Far greater experience than the individual or collective experience of the four PPL witnesses. It must also be noted that my wife and I have managed our 20-acre property, including the right of way, for the past 25 years. We share the engineer's opinion that the below listed E & S Plan excerpts reflect reasonable, safe, and reliable vegetation management practices. Vegetation management practices that were not

> followed by PPL. PPL's failure to follow each guideline/best practice resulted in the unwarranted destruction of existing vegetation and PPL's failure to re-establish erosion deterrent vegetation post-construction on our property.

Hartman M.B. at 9.

Mrs. Hartman is retired from her position as a clerk with the Pennsylvania Attorney General's Office. Tr. at 77. She is also a personal trainer. *Id.* at 78.

The Hartmans, as noted, are owners of a property that is subject to a right-of-way agreement (easement) owned by PPL. During 1999, the Complainants acquired the property, a 20-acre mountainside parcel, from the prior owner, developer and builder, Mr. Raymond Stanley Miller. Mr. Miller acquired the property from the Fetterhoff estate. *See* Complaint. PPL acquired the right-of-way from Mr. and Mrs. Edward Fetterhoff, predecessors in title to the Hartmans. *Id.*; *see also,* documents attached as Complainants' Exh. 12.

The Hartmans were attracted to and motivated to purchase their property because of the privacy, landscape, wildlife, and the fact that they could walk out their back door and hike to the Appalachian Trail on logging roads without crossing a highway. Tr. at 78.

In "Background" of their Main Brief, the Complainants asserted their essential position regarding PPL's actions relative to the Project:

> . . . During 2018, PPL needlessly destroyed our vegetation, removed our topsoil and mountain stone, littered our property with unsafe rip-rap, Hartman Exhibit 37, and subjected our remaining property to <u>unmitigated erosion and sediment</u>. During 2019 and 2020, PPL, motivated by corporate greed, applied unreasonable, unsafe, and unreliable restoration

> methods, most notably the road claw back procedure, which further endangered our property. During 2021, unannounced, PPL applied dangerous herbicides to virtually all the natural vegetation that survived the 2018 - 2020 construction and failed restoration activity. During 2022, invasive noxious weeds overtook the core area of the 2021 herbicide application. The prolific noxious weeds are poised to overrun the rest of the ROW and our private property during 2023, and beyond. Every day our home and private property is threatened by PPL's absolute failure to establish vegetation with a density sufficient to resist accelerated erosion, Hartman Testimony Exhibit A Paragraph 57, Photographs 19, 20, and 21 and Hartman Exhibit 52, in contradiction of PPL's own best practices.

Hartman M.B. at 6-7; ¶ 12; (emphasis added).

The Hartmans do not view their grievance against the PPL construction and construction related activity, inclusive of vegetation management and control, concerning the Project as primarily based on the retention of aesthetics of their property in lieu of safety to PPL employees and the public. They explained:

> [w]hat we have requested repeatedly and to no avail is that our property, particularly the powerline vegetation, be restored to its natural or pre-construction state in a manner that protects our remaining property, including our dwelling, from erosion and stormwater runoff. We also requested that PPL apply the same vegetation management practices afforded our neighbors to include not only the National Park Service, but also private landowners on the north and south side of Peters Mountain and the north side of Stoney Mountain (Hartman Exhibits 50, 51, 53, and 56).

Complainants' M.B. at 7.

The Complainants took the position that PPL witness testimony in defense of the Complaint, and brought out on cross-examination, establishes misfeasance

regarding the overall necessity for the construction of the specific access road selected for Pole 75 and 76, the materials used in the construction of the access road, *i.e.*, "rip rap," and the resulting effect on the right-of-way.[25]

The Complainants unequivocally hold the position that PPL treated them and their property differently than neighboring properties within the Project corridor. The Complainants claimed that this is so, even though the neighboring properties have similar geophysical and topographical characteristics, including similar vegetation and/or other considerations, so as to not justify, in their opinion, different treatment. *See* Complainants M.B. at 8 (citing Hartman Exh. A ¶ 22 and Hartman Photographs 4, 10, 11 and Hartman Exhs. 28, 29, 30 and 50; M.B. at 29-30; 38-39; R.B at 1-2). Under this reasoning, the Complainants requested that the difference in treatment be found to constitute a violation of the statutory prohibition against unreasonable preferences in the Code, 66 Pa.C.S. § 1502.[26]

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[25] *See* Hartman M.B. ¶ 29 at 12: ". . . PPL, without justification or attribution, did not utilize the existing 70-year access road between Pole 76 and Pole 75. In contradiction to its own best management practices, PPL constructed a new access road and compacted soil that greatly exceeded the necessary 15 feet, admittedly as wide as 24 feet, a 60% overage. To make matters worse, PPL did not conserve the topsoil that was excavated to construct the access road."

[26] 66 Pa.C.S. § 1502:

> **§ 1502. Discrimination in service.**
> No public utility shall, as to service, make or grant any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to service, either as between localities or as between classes of service, but this section does not prohibit the establishment of reasonable classifications of service.

Essential to the Complainants' claims, and as discussed more fully in reference to their Exceptions, is the fact that PPL removed topsoil from the right-of-way as part of its excavation activity for the Project and failed to replace the said topsoil. *See* I.D. at 24: "The Hartmans testified that PPL excavated topsoil from their property on the west side of the right-of-way and used it to construct pole pad 75 on the east side of the right-of-way, which is situated largely on neighboring property. Hartman Direct, ¶ 9;" Hartman M.B. at 29-30.[27]

The Hartmans vigorously asserted that the failure of PPL and/or its employees/agents to replace the topsoil as part of the Project has had an adverse, ripple effect on their safety. They claimed that this is due to increased susceptibility of their property to erosion and water runoff. *See* I.D. at 24:

> . . . Additionally, they [Complainants] argue that PPL failed to cover the excavated areas with the required topsoil prior to re-seeding those areas. In fact, PPL witness Eby acknowledged during cross examination that PPL did not bring in any new topsoil to put down on the portion of the right-of-way that runs through the Hartmans' property. Tr. 240. The company used the topsoil that was excavated as part of the Project to revegetate the work areas. The Hartmans argue that the new seeding failed to properly establish in the excavated areas. Hartman Direct, ¶ 34, 73, 95. They argue that the lack of topsoil resulted in the excavated areas being strewn with large, unsightly commercial rocks that smother the ground and prevent the growth of beneficial vegetation. Hartman Direct, ¶ 72.

[27] Related to this fundamental position are also allegations by the Complainants that PPL misidentified the extent of the easement that it held for their property and went beyond, *i.e.*, encroached and/or trespassed upon property outside the bounds of the easement. *See* PPL Stmt. 1 at 15-16, responding to Complainants Stmt. (Exh. A) 1, at ¶¶ 9; 29; 136; Hartman M.B. at 33.

> The Hartmans further testified that the lack of topsoil and resulting failed revegetation has led to excessive erosion and stormwater runoff over their property.

I.D. at 24.

The Complainants also took issue with the vegetation management decisions of PPL within the right-of-way, both during construction and post construction. As noted in the Initial Decision discussion above, the Hartmans asserted that there is a causal nexus between the failure of the Respondent to adequately re-establish topsoil that had been removed from their property for purposes of constructing Pole 75 and 76, and excessive erosion and stormwater runoff on their property. They further asserted that the record supports a determination that, subsequent to construction of the Project, PPL treated their property for "incompatible" vegetation. However, the Complainants disputed the PPL conclusion that there was, in fact, incompatible vegetation on their property, moreover, vegetation which required the use of herbicide treatment rather than alternative means of control. *See* Hartman M.B. at 31-39. The Complainants further alleged that PPL's vegetation treatment on the right-of-way was indiscriminate and excessive as based on, *inter alia*, faulty identification of targeted species of vegetation.

According to accusations that are factually disputed by PPL, the Complainants, in substantial part, asserted that herbicides were used on the right-of-way on their property without advance notice or warning to them, in contravention to their health and safety. *See* Hartman M.B. ¶ 86 at. 34. The Complainants testified that PPL's employees and/or agents, represented to them that they would be given the chance to remove incompatible vegetation on the right-of-way in lieu of PPL's contractors performing this work, and that PPL did not make good on this representation.

In addition to other complaints against the vegetation management on the right-of-way, the Hartmans disputed the overall necessity for the type of vegetation

control methods used by PPL on the right-of-way and the underlying justification of its use. The Complainants stated that: "[t]here is overwhelming evidence that PPL's July 2021 vegetation management activity, particularly the herbicide application, was discriminatory, unreasonable, unsafe, and unreliable. PPL presented no credible evidence that our pre-existing vegetation posed any danger to PPL equipment, assets, and distribution capability." Hartman M.B. at ¶ 96 at 39. They also explained, in pertinent part: "The proliferation of 'mile-a-minute'[28] endangers our erosion deterrent vegetation, on and off the ROW, and the ability to establish vegetation with a density sufficient to resist accelerated erosion in contradiction of PPL's own best practices." Hartman M.B. at ¶ 93 at 38.

The Complainants' case consisted of the sponsor of numerous exhibits, including several photographs of the property taken during the time of the Project and after the completion of the Project, their testimony, including their personal observations, and testimony derived from cross-examination of PPL witnesses. The Complainants also relied upon, *inter alia*, the terms included in the E&S Plan and Permit issued by the DCCD,[29] and other documents, addressed mainly on cross-examination of PPL witnesses. The Complainants alleged that PPL's actions, as determined through review of the documents and witness testimony on cross-examination, were not consistent with "best practices" as outlined in those documents.

[28] As discussed below, "mile a minute" refers to a highly invasive weed. The identification of this species of weed is based on testimony elicited, *inter alia*, on cross-examination of PPL's witness, Mr. Eby, and corroborated by certain hearsay evidence within the exceptions to hearsay, *infra*. *See* Hartman M.B. at ¶¶ 92-93 at 37-38.

[29] PPL sponsored the entire E&S Permit in the record as TE-2; the E&S Plan was sponsored as TE-1.

2. PPL

PPL, after taking the position that the Complainants did not meet their burden of proof, categorized its response and rebuttal to the Complainants' evidence in three, general areas:

> (1) PPL's construction activities in its transmission line right-of-way were safe and reasonable and that its choice of access road and materials used in construction were reasonable in light of the safety concerns posed by the right-of-way for this transmission line, particularly the land stretching from Pole 76 which was up a steep mountainside toward the next transmission line pole, *i.e.*, Pole 75 (*see* PPL Exh. No. TE-5);
>
> (2) that PPL's vegetation management practices on the right-of-way were reasonable; that PPL conducted vegetation management, including the use of herbicides, subsequent to engaging in contacts and discussions with the Complainants concerning, *inter alia*, their request that herbicides not be used on the right-of-way and that the Complainants be given the opportunity to remove incompatible vegetation prior to PPL contractors performing vegetation control on the easement; and
>
> (3) that the Complainants' discrimination claims pursuant to Section 1502 of the Code should be rejected as the statute requires three critical elements which are missing in the present case – (a) the discrimination must involve persons, corporations, or municipal corporations within the same reasonable classification of service; (b) the discrimination must concern the public utility's "service"; and (c) the discrimination must be "unreasonable."

PPL provided rebuttal testimony of the following witnesses who, variously, sponsored exhibits: (1) Mr. Eby, Senior Environmental Professional (PPL Stmt. No. 1),[30] providing testimony regarding PPL's environmental permitting and regulatory compliance concerning the Project;[31] (2) Mr. William Salisbury, Construction Supervisor at PPL (PPL Stmt. 2), providing testimony regarding PPL's construction of the crane pads, access road and logging road as part of the Project; (3) Mr. Austin Weseloh (PPL Stmt. 3), Transmission Right-of-Way and Real Estate Supervisor, providing testimony regarding the details of PPL's transmission line right-of-way crossing the Complainants' property, PPL's interactions with other landowners as part of the Project and further addressing real estate related accusations of the Complaint; and (4) Mr. Stutzman (PPL Stmt. 4), employed by PPL as the Company's Forester,[32] providing testimony describing PPL's vegetation management practices, including the use of herbicides and providing details on the vegetation management that took place on the Hartmans' property.[33]

(a) Unreasonable Service re Construction of Project

PPL advised that it constructed a portion of its Halifax-Dauphin 69 kV Transmission Rebuild Project within its existing transmission line right-of-way on the

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[30] Mr. Eby's prior title was "Senior Permitting and Regulatory Professional" from November 2018 until early 2022, after which time his title changed to Senior Environmental Professional. The duties and responsibilities were not changed as a result of the new title. *See* Stmt. at 2.

[31] Mr. Eby sponsored exhibits TE-1 through TE-5.

[32] The vegetation management at issue in this Complaint was reviewed and approved by PPL's previous Forester for the Harrisburg region (Justin Mease). PPL Stmt. 4 at 10, 12. Mr. Stutzman's testimony is based upon his review of the Respondent's files regarding the work, a post vegetation management field visit and interview with the vegetation management contractor, Penn Line. *Id.* at 10.

[33] PPL's witness, Mr. Stutzman sponsored exhibits, MS-1 through MS-12. Stmt. A 3.

Complainants' property. As part of that Project, PPL needed to construct a new access road and crane pads to safely build, support, and provide access to those facilities. *See* PPL M.B. at 11.

PPL continued that, given the difficult topography of the segment of the Project on which the right-of-way at issue was located, which segment extended up a steep mountainside, PPL's access road and crane pads were constructed, as necessary, to comport with the safe construction and safe continued access to the facilities by its employees, agents, and the public. This was the overall goal. PPL M.B. at 11.

As noted by PPL's witness, Mr. Eby, the Company's excavation for the crane pads occurred within the permitted "LIMIT OF DISTURBANCE" under the approved E&S Plan - except for two areas, approximately 12 feet outside of the right-of-way. PPL conceded excavation outside of the right-of-way and stated that it promptly addressed and restored the area as soon as it was made aware of the situation.

PPL took the position that DCCD would not have closed out the E&S Permit if those 'minor' disturbances alluded to by the Complainants were not addressed. PPL Stmt. 1 at 15-16; PPL M.B. at 21, n.13. According to the testimony of PPL's witness, Mr. Eby, had there been storm or water runoff issues, the DEP would have issued a "notice of violation" (NOV) and the DCCD would not have closed out the E&S permit.

(b) Vegetation Management

PPL addressed its vegetation management practice, generally, and, as such, practices were specifically implemented in connection with the Project and the easement over the Complainants' property.

PPL responded that proper transmission line right-of-way management is critical to providing safe, reliable, and reasonable electric service. PPL M.B. at 24 (citing PPL Stmt. 4 at 4-5). When performing vegetation management for distribution lines (*i.e.*, line voltage under 69 kV), PPL explained that it relies on its "Specification for Distribution Vegetation Management" to ensure that PPL complies with those rules and regulations. PPL M.B. at 24 (citing PPL Stmt. 4 at 4); PPL Exh. MS-1. For transmission lines (*i.e.*, line voltage at or above 69 kV), PPL adheres to its "Specification for Transmission Vegetation Management" for compliance purposes. *Id.*; PPL Exh. MS-2.

PPL explained that its vegetation management practice within transmission line corridors is further subject to compliance with federal standards. *See* PPL M.B. at 26-27:

> One of the mandatory reliability standards adopted was for electric utilities to develop a program to address vegetation management in transmission line corridors.[25] PPL Electric's "FAC-003 Transmission Vegetation Program Document" ("TVPD") sets forth the Company's program for maintaining vegetation in transmission line corridors. (PPL St. No. 4, p. 6.) The Company must adhere to its TVPD under NERC's mandatory reliability standards. (PPL St. No. 4, p. 6.) PPL Electric's and the other EDCs' transmission line vegetation management programs have been very successful in improving system reliability. (PPL St. No. 4, p. 6.)
>
> [25] *See 18 CFR Part 40 Mandatory Reliability Standards for the Bulk-Power Sys.*, 2007 FERC LEXIS 588, 118 FERC ¶ 61,218 at P 735 (2007) (approving NERC Standard FAC-003-1 addressing vegetation management in transmission line rights-of-way).

PPL M.B. at 26-27.

PPL disputed the Hartmans' claims that its vegetation activity was unreasonable by, *inter alia*, mis-identification of harmful vegetation, or the Respondent's use of non-qualified herbicides or herbicide contractors. PPL acknowledged that certain, non-targeted vegetation was adversely affected by vegetation management activity but contended that such collateral adverse effect on non-targeted growth is not permanent.

(c) Unreasonable Discrimination

Finally, PPL contended that there is no violation of Section 1502 of the Code pertaining to unreasonable preferences, *i.e.*, discrimination. PPL acknowledged that it was precluded from using herbicides on land owned by the U.S. National Park Service as an option for vegetation management. The prohibition from the use of herbicides was a condition of the permitting requirements for those lands. PPL argued, however, that to establish a violation of Section 1502 of the Code, there must be: (1) discrimination of persons, corporations, or municipal corporations within the same reasonable classification of service; (2) the discrimination must concern the public utility's service; and (3) the discrimination must be unreasonable. PPL M.B. at 10-11. PPL is of the opinion that no findings of discrimination can be made on the basis of this record.

3. ALJ's Recommendations

The following issues were dismissed from this proceeding pursuant to the *April 2020 Order*:

a. Whether proper notice of activities contemplated by the easement agreement was provided (*April 16, 2020 Order*, p. 14);

b. Complainants' allegation that PPL Electric's restoration efforts showed a preference for the

National Park Service and constituted discrimination in service that violated Section 1502 of the Public Utility Code (*April 16, 2020 Order*, p. 20);

c. Complainants' request for a ruling from the PUC as to the scope and validity of the existing easement agreement and whether PPL Electric is acting in accordance with or in breach thereof (*April 16, 2020 Order*, p. 21);

d. Complainants' request for monetary damages (*April 16, 2020 Order*, p. 21); and

e. Complainants' allegations regarding any environmental impact of PPL Electric's construction practices, the reasonableness of PPL electric's environmental protection controls, or lack thereof, or any unpermitted or increases storm water discharges (*April 16, 2020 Order*, p. 22).

I.D. at 15-16.

The following issues were specifically identified as those to be considered and for which an evidentiary record was to be developed in this proceeding, upon remand:

a. Allegations about PPL Electric's vegetation management practices (*April 16, 2020 Order*, p. 19);

b. Allegations about the quality and reasonableness of PPL Electric's construction efforts (*April 16, 2020 Order*, p. 19); and

c. Allegations about the safety impact of the construction and alleged destruction of vegetation on the Complainants' property, including, but not limited to, any erosion to the soil and sedimentation on the Complainant's property and any safety hazards resulting therefrom that may be reasonably identified and the steps that PPL Electric proposes to implement

> in order to adhere to its statutory duty to furnish adequate, safe and reasonable service (*April 16, 2020 Order*, pp. 22-23).

See I.D. at 16.

ALJ Haas reached seventy-two (72) Findings of Fact and drew eleven (11) Conclusions of Law. The Complainants and PPL, as discussed below, raise several issues regarding the ALJ's Findings of Fact and further dispute certain Conclusions of Law. We incorporate by reference and shall adopt, reject, or modify said findings and conclusions in our discussion and disposition of the Exceptions of the Parties in this Opinion and Order. To the extent any Findings of Fact or Conclusions of Law are not expressly rejected or modified, they are, by necessary implication from our disposition of the Exceptions to the Initial Decision, adopted as set forth in the I.D.

(a) Reasonable Service re Construction of the Project

ALJ Haas concluded that the Hartmans did not meet their burden of proof concerning their allegations that PPL provided unreasonable service pursuant to, *inter alia*, Section 1501 of the Code with regard to the following: (a) Pole pads; (b) access roads; (c) vegetation management restoration; and (d) discrimination in service. ALJ Haas stated the following:

> As discussed above, I find that the Hartmans did not prove by a preponderance of the evidence that (1) PPL's construction activities in building the pole pads and access road were unreasonable, (2) PPL's use of herbicides on their property was unreasonable, and (3) PPL's spraying methods, with accompanying impacts on non-targeted vegetation, were unreasonable.
>
> * * *

> . . . For the reasons set forth above, I find that (1) the Complainants have failed to prove, by a preponderance of the evidence, that PPL's construction activities related to the pole pads and access road were unreasonable or unsafe, and (2) the Complainants have failed to prove, by a preponderance of the evidence, that PPL's vegetation management activities on the right-of-way, including the difference in methods used on the Hartmans' property and the National Park Service property, were unreasonable or unsafe.

I.D. at 30; 32.

(b) Reasonable Service re Pole Pads and Access Road

The pertinent considerations involved in PPL's construction of pole pads (Pole 75 and 76) were addressed on pages 17 to 19 of the Initial Decision. The considerations involved in PPL's construction of the access road within the subject easement were addressed on pages 19-21 of the Initial Decision. ALJ Haas found, and so concluded, that the Complainants failed to establish, by a preponderance of the evidence, that any of the factors involved in PPL's implementation of the Project, including the decision by PPL to construct a new access road rather than use an existing logging road, or the use of materials which included 'large' 'rip-rap' stone/rocks, was unreasonable. ALJ Haas reasoned:

> . . . I am persuaded by PPL's evidence that the access road and pole pads were designed and constructed with safety as the primary consideration and goal. Further, the materials used were necessary to insure safe access both during the construction of the pole pads and installation of the new steel transmission line poles, as well as for ongoing future maintenance and repair efforts. As noted, the access road and pole pads needed to accommodate trucks weighing up to 27 tons to haul concrete and materials necessary for the project. The large rip-rap rocks used by PPL would result in a solid and stable surface that could safely support the trucks. PPL Stmt. 2, p. 6. PPL explained that the use of rip-rap is a

> common construction practice on steep slopes and switchback routes, such as exists at the Hartman's property. Tr. 353. While the Hartmans may find the access road and pole pads aesthetically displeasing and difficult to traverse by foot, I find that the safety considerations described by PPL outweigh the Hartmans' concerns.

I.D. at 21.

(c) Reasonable Service re Vegetation Management/Restoration

On pages 22 to 31 of the Initial Decision, ALJ Haas extensively addressed the Complainants' allegations regarding the actions of PPL relative to PPL's vegetation management activity at or near the right-of-way during the Project. ALJ Haas explained:

> The Hartmans allege in their complaint that PPL's vegetation management activities during the project and its restoration efforts following construction of the new poles and pads resulted in the decimation of desirable and beneficial vegetation on their property and erosion and damaging stormwater runoff on their property. They testified that they devoted a great deal of time and resources over the years to planting desirable vegetation on the right-of way, including grasses, fruit shrubs and trees for both wildlife and aesthetic value. Hartman Direct, ¶¶ 1, 106-108, 115.

I.D. at 22.

ALJ Haas reviewed the Complainants' testimony and evidence in support of their allegations concerning PPL's vegetation management. As noted, the Hartmans expressed significant lay experience in vegetation management based upon their activity and involvement in the maintenance and care of their acreage for, approximately, 25 years. Also, the Hartmans submitted a number of photographs of the right-of-way that they argued supported their allegations of excessive and indiscriminate spraying,

including the killing of beneficial vegetation and/or non-targeted vegetation on their property. I.D. at 23 (citing Hartman Exhs. 28-29).

The Hartmans alleged that PPL's restoration activities violated several provisions in the E&S Plan, thereby constituting unreasonable service. *See* I.D. at 24, citing the E&S Plan requirements as follows: (a) Areas to be vegetated shall have a minimum 4 inches of topsoil in place prior to seeding and mulching; (b) Strip topsoil from disturbed areas and stockpile in designated locations, temporarily seed and stabilize stockpiles; (c) Spread topsoil and compost as needed; (d) If work pad is a proposed stone pad, strip the topsoil and stockpile in accordance with the detail in this plan; (e) Graded areas should be scarified or otherwise loosened to a depth of 3 to 5 inches to permit bonding of the topsoil to the surface areas and to provide a roughened surface to prevent topsoil from sliding down slope; (f) Topsoil should be uniformly distributed across the disturbed area to a depth of 4 to 8 inches. *Id*. (citing Hartman Direct, ¶ 34; PPL Ex. TE-1 at 2).

ALJ Haas concluded that the record did not support the claims of the Hartmans that PPL's vegetation management was unreasonable on application of Section 1501 of the Code:

> Although the Hartmans objected to the use of herbicide on their property, I cannot conclude that they have proven by a preponderance of the evidence that its use by PPL as a means of vegetation management was unreasonable or unsafe. The evidence presented by PPL demonstrates that it used an approved herbicide in an approved concentration and that it targeted non-compatible species on the right-of-way. The facts that the Hartmans preferred that herbicide not be used and that there may have been some collateral damage to other compatible, non-targeted species does not render PPL's decision to use herbicide unreasonable.

> With respect to the Hartmans' allegation that PPL's spraying activities were excessive and performed in an unwarranted, reckless and destructive manner, causing unnecessary destruction of vegetation on the right-of-way, I find that PPL presented sufficient evidence to demonstrate that the spraying was performed in a reasonable manner that was intended to control non-compatible vegetation in the right-of-way. While there may have been some collateral impacts to non-targeted compatible vegetation, I cannot conclude that this rendered PPL's spraying activities unreasonable.

I.D. at 28.

(d) Discrimination in Service Under Section 1502 of the Code

ALJ Haas recommended that the Commission reject the Complaint allegations that a violation of Section 1502 of the Code could be found based on the record. The ALJ's analysis focused upon the lack of any detail provided by the Complainants concerning the specifications adopted for the Project. Other than the admission by PPL that different vegetation management methods were used on the Hartman right-of-way, particularly, the application of herbicides, because of a condition of the federal permit PPL obtained for the work on U.S. National Park Service property, ALJ Haas did not find any further support in the record to find a violation of the Code. He reasoned, in substantial part, as follows:

> Beyond that explanation, there is no record evidence about the design, planning, or other details, requirements or specifications governing the work to be performed by PPL on the NPS property. Without any such additional information, I am unwilling to determine whether or not PPL's activities on the Hartmans' property were, in fact, discriminatory as compared to the work performed by the company on the NPS land. The respective work performed by PPL on the two properties may have been governed by differing requirements and specifications. The record evidence does not provide this information. Accordingly, I am unable to conclude, based

> upon the record evidence, that the vegetation management work performed by PPL on the two properties reflected unreasonable discrimination against the Hartmans.

I.D. at 32.

(e) Unreasonable Service re Adequate Erosion Control Measures

ALJ Haas concluded that the Complainants met their burden of proof in this Complaint concerning unreasonable service by PPL with regard to the erosion control measures employed by PPL within the right-of-way as part of the Project and subsequent to the Project's completion. ALJ Haas noted the following:

> I am convinced by the evidence presented by the Hartmans, however, that PPL's erosion control measures were inadequate to prevent or minimize erosion on and near the right-of-way through their property. The testimony and exhibits presented by the Hartmans (Hartman Direct, ¶¶ 51-53, 57, 69; Hartman Exhs. 28, 52) show that excessive erosion was occurring on portions of the right-of-way through their property, at least during the time periods reflected in the testimony and photographs. In fact, the exhibits presented by the Hartmans show that the surfaces of the pole pads and access road were largely cleared of vegetation following the Project. This likely resulted in erosion and excess stormwater runoff following completion of the Project.
>
> While at the time of the hearing, these areas were showing signs of vegetation regrowth, it is unclear the extent, if any, to which the vegetation on the pole pads and access road has re-established and regrown since the time periods reflected in the Hartmans' testimony and photo exhibits to the present. I do not believe that the record evidence supports imposition of a civil penalty against PPL on this issue. I am directing, however, that PPL, within 45 days of a final Commission Order in this proceeding, re-inspect the pole pads and the access road and shoulders to determine if any areas of erosion or excessive runoff are still occurring and take any necessary

> corrective measures to prevent or minimize future erosion, including but not limited to surface re-grading, adding additional stone material and adding additional topsoil and re seeding areas where the soil and vegetation has washed away.

I.D. at 31. *See also, Id*. at 32:

> With respect to PPL's erosion control efforts, I find that they were inadequate to prevent or minimize erosion and excessive water runoff on and along the right-of-way immediately following completion of the construction and vegetation management activities. Therefore, in the ordering paragraphs below, I will order PPL, within 45 days of a final Commission Order in this proceeding, to re-inspect the pole pads and the access road and shoulders to determine if any areas of erosion or excessive runoff are occurring and take any necessary corrective measures to prevent or minimize future erosion, including but not limited to surface re-grading, adding additional stone material and adding additional topsoil and re-seeding areas where the soil and vegetation has washed away.

I.D. at 32; *see also Id.* at 34, Conclusion of Law No. 11.

Based on the foregoing, ALJ Haas recommended that PPL be directed, within 45 days of a final Commission Order in the proceeding, to re-inspect the pole pads and the access road and shoulders to determine if any areas of erosion or excessive runoff are still occurring and " . . . take any necessary corrective measures to prevent or minimize future erosion, including but not limited to surface re-grading, adding additional stone material and adding additional topsoil and re-seeding areas where the soil and vegetation has washed away." I.D. at 32.

(f) Civil Penalty Under "Rosi" Standards

ALJ Haas concluded that the testimony and exhibits presented by the Hartmans (*i.e.* Hartman Direct, ¶¶ 51- 53, 57, 69; Hartman Exhs. 28, 52) showed that excessive erosion was occurring on portions of the right-of-way through their property during the time periods reflected in their testimony and photographs. I.D. at 30-31. As previously noted, notwithstanding this finding, the ALJ concluded that the record evidence did not support the imposition of a civil penalty against PPL on this issue. I.D. at 31; *see Rosi v. Bell Atlantic-Pa., Inc*., Docket No. C-00992409 (Opinion and Order entered March 16, 2000); 2000 Pa. PUC LEXIS 5 (2000); *ruling codified* at 52 Pa. Code § 69.1201(c)(1)-(10) (*Rosi*).

C. Exceptions

As a preliminary matter, we advise the Parties that the filing of Exceptions is governed by Commission Rules of Practice and Procedure, 52 Pa. Code § 5.533. The Exceptions of the Complainants generally conform to the Commission Regulations at sub-section (b), which states: "(b) Each exception must be numbered and identify the finding of fact or conclusion of law to which exception is taken and cite relevant pages of the decision. Supporting reasons for the exceptions shall follow each specific exception."

However, sub-section (c) of our Regulations provides: "(c) The exceptions must be concise. The exceptions and supporting reasons must be limited to 40 pages in length. Statements of reasons supporting exceptions must, insofar as practicable, incorporate by reference and citation, relevant portions of the record and passages in previously filed briefs. . . ."

The Exceptions of the Hartmans exceed the page limitations set forth in our Regulations (forty-five (45) pages). We shall, however, in the interest of justice, accept the Exceptions for consideration on the merits finding no prejudice to the Parties.[34]

1. Complainants' Exceptions

In their Exceptions (Exc.), the Hartmans request that we sustain their Complaint, modify the I.D., and direct PPL to take the following actions:

a. Return or replace topsoil removed from our property to construct the Pole 75 and Pole 76 access roads and crane pads.

b. Remove rip-rap protruding from the Pole 76 and Pole 76 crane pads, add topsoil and re-seed.

c. Remove rip-rap dumped on top of the Pole 76 and Pole 75 access road during the April 2020 claw-back procedure.

d. Replace native vegetation (huckleberry, blackberry, ferns, honeysuckle, mountain laurel, a Norway Spruce and white oak) destroyed by excavation activity beyond the prescribed excavation area detailed in the original PPL E & S Plans Attachments 114 and 115, to

[34] We are secure in our decision of no prejudice to the Parties as the Exceptions, although 45 pages, include several pages which contain photographs that are incorporated into the document rather than consisting of 45 pages exclusively of text. *See* 52 Pa. Code § 1.2(a) and (d); *see also, Florence Ackridge v. Philadelphia Gas Works*, Docket No. C-2022-3035899 (Opinion and Order entered February 15, 2024); citing, *James Coppedge v. PECO Energy Company*, Docket No. F-2014-2406180 (Opinion and Order entered January 29, 2015); and *James Coppedge v. PECO Energy Company*, Docket No. F-2009-2135893 (Opinion and Order entered August 3, 2010), for the proposition that the Commission has a policy of engaging in a liberal construction of its Rules of Practice in the case of unrepresented participants and, based on the circumstances of the proceeding, the Commission considered the complainant's Exceptions although the filing did not comply with 52 Pa. Code § 5.533(b).

include vegetation destroyed by excavation activity off the ROW.

e. Remove stone that has washed off the road as depicted in Hartman Exhibit 52, add topsoil, and re-seed.

f. Construct a swale or water bar that prevents higher elevation neighboring property stormwater runoff from entering our property of the ROW as depicted in Hartman Testimony Exhibit A Paragraph 57, Photographs 19, 20, and 21 and Hartman Exhibit 52.

g Scarify the existing Pole 76 and Pole 75 access road shoulders and add topsoil to return the shoulders to grade and re-seed.

h. Destroy the mile-a-minute that has overtaken our property above Pole 75 following the July 2021 herbicide application.

i. Replace native vegetation (huckleberry, blackberry, and ferns) above Pole 75 and below Pole 76, and re-seed Pole 75 and Pole 76 grasses that were destroyed by the July 2021 herbicide application.

j. Remove the rip-rap that litters our property off the access road, and prevents vegetation necessary to protect our property from accelerated erosion.

k. All disturbed areas must be topsoiled and restored consistent with PPL's own Restoration Standards as detailed in the E & S Plans, below:

Hartman Exc. at 46-47.

The Complainants no longer request an Order directing PPL to remove all stone material and revegetate the Pole 75 access road and re-establish the access road as depicted on the original PPL E&S Plan, identified as Attachments 114 and 115. *See* Hartman Exc. at 48.

The Complainants' specific points of objections to the ALJ's findings and recommendations are summarized in the sections that follow.

(a) Allegations of Unfair Procedure (Exc. at 2-8)

As a threshold position, in their Exceptions, the Complainants raise objections to the procedural conduct of the proceeding. *See* Hartman Exc. at 2-8. The Complainants allege, generally, unfairness in the proceedings and, *inter alia*, take issue with various rulings by the presiding ALJ(s) concerning the receipt, admissibility, and evidentiary weight to be given certain hearsay evidence. They specifically object and allege that the I.D., and certain Findings of Fact supportive of the defense of PPL, were predicated upon hearsay testimony[35] while testimony that the Hartmans proffered in support of their case in chief, certain evidence and testimony which came from the same hearsay source, was stricken.[36]

The Hartmans also express concern that the October 19, 2019, Initial Decision, which was, as discussed, reversed, in part, by our *April 2020 Order*, caused a delay in the proceedings. The Hartmans contend that this delay was prejudicial to their ability to subpoena PPL employees and/or agents with actual familiarity with the Project. This is in contrast to the production by PPL of employees/agents who were subsequently made available for purposes of litigating this Complaint, most of whom, as objected to by the Complainants, testified from PPL business records and/or other sources. The Complainants assert that this testimony was improper and lacking in persuasive value as

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[35] *See* Hartman Exc. at 16-18 (objecting, in substantial part, that PPL did not provide evidence to corroborate the manner of herbicide application on their property by the contractor).

[36] *See e.g.*, Hartman Exc. at 1; *see also*, 6-7, referencing; Hearsay testimony that originated from William Ruch, Hartman Exhibit A Paragraphs 92-94; Hearsay testimony that originated from Drew Gradwell, Hartman Exhibit A Paragraphs 85, 86, 89, 90, and 91; Exc. at 16.

it could not be properly rebutted or independently verified or corroborated. They detail and contest the factual findings reached by the presiding ALJ based on the PPL testimony. *See* Hartman Exc. at 20-45.

The Hartmans further argue that they suffered prejudice and were denied an opportunity to present rebuttal/surrebuttal testimony. The prejudice, the Complainants argue, was aggravated by the fact that significant portions of their testimony and exhibits were struck by ALJ Haas in the February 2023 ruling on admissibility (*Order re Motion to Strike*), months after the evidentiary hearings were closed. The Complainants point out that this was, approximately, eight (8) months after their testimony was submitted (May 17, 2022). In light of the foregoing, the Complainants allege that PPL's motion to exclude this evidence was untimely. As a result, the Hartmans insist that the ALJ's ruling on admissibility denied the Complainants an opportunity to gather testimony and exhibits to replace evidence that was stricken so as to rebut PPL's testimony. *See* Complainant Exc. at 8.[37]

(b) Reconsideration of Environmental Claims (Exc. at 8-9)

On pages 8 to 9 of their Exceptions, the Complainants cite *Twp. of Marple*, and request that the Commission reconsider the dismissal of their environmental claims as addressed in the *April 2020 Order*.

In support of the request for reconsideration, the Complainants, in addition to reliance upon *Twp. of Marple*, refer to ALJ Haas' conclusion that they sustained their burden of proof that PPL's erosion control efforts as part of the Project were inadequate

[37] Mr. Hartman noted his objection to the timeliness of PPL's oral motion to strike certain portions of the Complainants' testimony and exhibits at the August 16, 2022, hearing and was informed that it was common practice in administrative hearings for the presiding ALJ to entertain such objections at the time of hearing. Tr. at 43-44.

to effectively control or prevent erosion or excessive water runoff on the right-of-way through portions of their property. Hartman Exc. at 8 (citing 66 Pa.C.S. §§ 332(a); 1501). The Complainants request that consideration also be given to Hartman Exhibit 52 and Exhibit A, Photographs 19, 20, and 21. In reference to Hartman Exhibit 52 and Exhibit A, Photographs 19, 20, and 21, the Complainants point out that Clarks Creek is a High Quality Cold Water Fishery and Special Protection Stream and is situated below and within close proximity of the depicted erosion. Hartman Exc. at 8.

(c) Review of Vegetation Management and Unreasonable Service Under a 'Totality of Circumstances Analysis' (Exc. at 9)

Based upon their review of the Initial Decision, the Complainants claim that ALJ Haas evaluated the reasonableness of PPL's construction activity and vegetation management activity (herbicide application in particular) individually, or independently, and found each reasonable. Hartman Exc. at 9. The Complainants make the argument that the reasonableness of PPL's construction, construction related activity and vegetation management activity related to and concerning the Project must be evaluated together or in conjunction. They propose a "totality of the circumstances approach." *Id*.

The Hartmans stress their position that a review of the Initial Decision pursuant to a totality of the circumstances approach is significant, contending, as follows:

> The egregious July 2021 herbicide application was admittedly planned during June 2020, one year before the PA DEP construction permit was closed. At that time, PPL was still in the process of establishing sufficient erosion deterrent vegetation to satisfy the 70% vegetation standard to close the Permit. Also, the PPL E & S Plan represented that the ROW would be maintained in a meadow-like or brush condition. The herbicide application was completed 29 days after the permit was closed while your Complainant's property that was subjected to recent aggressive excavation was vulnerable. The grasses on the construction pads and the grasses, if any,

> on the clawed back access road shoulders were immature and sparse. The herbicide application, in direct contradiction to the E & S Plan representation that the property would be maintained in a meadow like and brush condition, proved to be the perfect storm. The herbicide application violated PPL's own best practices as detailed in the E & S Plan. Accordingly, your complainant respectfully requests that the Commissioners evaluate the reasonableness of the combined construction and vegetation management activity.

Hartmans Exc. at 9; (emphasis added).

As we understand this Exception, the Complainants assert that, pursuant to a "totality of the circumstances" review, PPL's timing of herbicide application as part of its vegetation management, was unreasonable due to the specific, vulnerable nature of the area that was created by excavation at and/or near, the pole pad/access route of the Project. It is, *inter alia*, the confluence and timing of the "aggressive excavation" at the pole pad site(s) with, alleged, insufficient erosion deterrent measures and vegetation management activity, emphasizing or exacerbated by the removal of the native topsoil, that has resulted in unreasonable service under the Code. *See* Hartman Exc. at 9.

(d) Removal of Complainants' Topsoil and Safe and Reasonable Service (Exc. at 10)

In their Exceptions, the Complainants also vigorously contend that PPL's removal, use, and retention of their property's topsoil is, itself, an adequate basis for a finding of unreasonable service under the Code. The alleged failure of PPL to replace topsoil that has been removed for purposes of the Project is the crux of the Complainants' claim of unreasonable service and harm to their property and personal safety. They elaborate: "[w]ithout topsoil there is no erosion deterrent vegetation. Without erosion deterrent vegetation there is no safe, reliable, and reasonable service." Hartman Exc. at 10.

The Complainants argue that it would set a "dangerous" precedent if it were ruled that PPL, or any public utility, could take a landowner's personal property, in this case topsoil and mountain stone, based on unspecified safety and field conditions presented by non-experts' witness testimony - PPL employees Mr. Eby and Mr. Salisbury. Hartman Exc. at 10.

(e) Improper Application of Herbicide (Exc. at 11-13)

In their Exceptions at 11-13, the Complainants generally except to the ALJ's conclusions that there was no improper conduct by PPL in the treatment of the right-of-way and surrounding area as part of the utility's vegetation management during and after completion of the Project.

The Complainants repeat their contention that the herbicide treatment was performed by PPL contractors/agents in an unreasonable manner, thereby, jeopardizing the safety of the Hartmans. In pertinent part, the Complainants argue:

> The herbicide applicator destroyed compatible vegetation in violation of PPL's Transmission Line Vegetation Management guidelines and policies, and in so doing subjected our property to accelerated erosion and stormwater laced with dangerous herbicides. Herbicides which endanger our well water. Additionally, the herbicides washed onto grasses that were not scheduled for treatment, ever, and destroyed those grasses. If you break it, fix it, and if you can't fix it, replace it.

Hartman Exc. at 13.

(f) Quality of Service and Reasonableness of PPL's Construction Efforts (Exc. at 13-16)

In this section of their Exceptions, the Complainants cite the *April 2020 Order* to contend that the ALJ did not properly consider or give appropriate weight to the quality of service issue. The Hartmans assert that quality of service was a claim that survived the remand directives of the Commission. Based on the retention of quality of service in their Complaint, the Complainants argue and object that unreasonable and substandard quality of service is evidenced by a number of factors observed by them at the Project site.[38] The Complainants allege and cite "uncourteous" behavior of PPL agents/employees in excavating large rocks from their natural location and "haphazardly" discarding those rocks in a manner that limited access and use of their property. Hartman Exc. at 13-14 (citing Hartman Testimony Exhibit A Paragraph 70, Photograph 29, and Hartman Exhibit 47).

In further exception related to quality of service, the Complainants cite "degradation of the poorly designed and constructed Pole 76 and Pole 75 access road and accelerated erosion of foreign material, including herbicides." Hartman Exc. at 15-16 (citing Hartman Exhibit A Photograph 75 and 76 and Hartman Exhibit 52. The Complainants also reference their observation of "discarded personal litter, construction containers, and rip-rap" on the Project site. *See* Hartman Testimony Exh. A Photographs 13 (Paragraph 43) and 31, and Hartman Exh. 26); *see also*, Hartman Exc. at 30.

This Exception, while noting several personal observations that the Complainants find objectionable surrounding the Project, mostly centers upon PPL's use of rip-rap (Exc. at 15-16) and PPL's application of herbicide to the right-of-way as part of PPL's vegetation management (Exc. at 16-20).

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[38] *See, e.g.*, Hartman R.B. at 7-8.

The Hartmans explain that the use of rip-rap as a road and crane pad cover, itself, reflects unreasonable, unsafe, and unreliable service. Hartman Exc. at 15. In continuing their complaint that PPL's use of "rip rap" is indicative of substandard construction practice, the Hartmans state that PPL witnesses could not identify a single application of rip-rap on any of the reported 179 properties associated with the Project. *Id*.; Hartman Exc. at 26, ¶ 69; 28 ¶ 77. They point out that the definition of rip-rap as set forth in a Wikipedia definition, supports their argument. That is, *inter alia*, that rip rap is a material that is not consistent with PPL's justification for its use in this part of the Project. As such, the use of rip rap in the Project, under the Complainants' position, portends shoddy service in relation to the Project. *See e.g.*, Hartman Exc. at 14.

(g) Persuasive Value of PPL Rebuttal Testimony (Exc. at 16-45)

In the Complainants' Exceptions at 16-20, they repeat and detail the portions of the record that, they argue, support a finding of unreasonable service by PPL concerning the use of herbicides on their property. According to the Complainants, unreasonable service is supported, in pertinent part, by their reference to the following: (a) the extensive set of photographic exhibits of the area depicting the effect of PPL's vegetation management, *i.e*., herbicide use, that was not rebutted by PPL witnesses; (b) the Respondent failed to present any notes, diary entries, memoranda, or reports to document any field condition that warranted an, alleged, departure from the originally proposed/filed plan to utilize an existing access road on a neighboring property, rather than the "unplanned" access road on the Complainants' property; and (c) the Respondent failed to present any notes, diary entries, memoranda, or reports to support or justify the use and placement of rip-rap on top of the access road constructed on the Complainant's property.

On pages 34 to 37 of their Exceptions, the Complainants point out the testimony of PPL's witness, Mr. Salisbury, that they contend establishes non-persuasive value in the proceeding.

On pages 38 to 45 of their Exceptions, the Complainants point out the testimony of PPL's witness, Mr. Stutzman, that they contend establishes non-persuasive value in the proceeding.

In summary, the Complainants detail the rebuttal testimony of PPL's witnesses to argue that the Complainant (Mr. Hartman) was the only witness that documented the 'real-time' excavation of topsoil and mountain stone, including the Hartman/Wech logging road, to construct the Pole 75 and Pole 76 construction (crane) pads and was the only witness in this matter that described the subject property, including vegetation, topsoil and mountain stone, prior to and during construction. Hartman Exc. at 36.

2. PPL Replies to the Complainants' Exceptions

(a) Conformity of Exceptions to Commission Rules of Practice and Procedure

In its Replies to the Exceptions (R. Exc.) of the Complainants, PPL initially notes its objection to the conformity of the Exceptions to the requirements of the Commission's Rules of Practice and Procedure, 52 Pa. Code § 5.533. PPL R. Exc. at 1-2.

(b) Procedural Conduct of Complaint Proceeding

PPL replies to the objections of the Complainants concerning the procedural conduct of their Complaint. Namely, PPL details the procedural history of the

matter, focusing upon the discovery "re-set" agreed to by the Parties, and the extensive evidentiary record developed in the case. PPL, therefore, takes the position that the Complainants were afforded more than adequate due process throughout the proceeding and were given a full and fair opportunity to litigate their claims. Based on the foregoing, PPL asserts that the Complainants' Exception No. 1 should be denied. PPL R. Exc. at 2-5.

(c) ALJ's Reliance Upon Hearsay Evidence

PPL replies to the Hartmans' Exceptions concerning the consideration of, alleged, hearsay evidence by emphasizing three points. First, PPL counters that the Complainants were the parties who had the burden of proof in this matter. Therefore, PPL contends that the Complainants, rather than PPL, had the burden of coming forward with substantial evidence in support of their claim. PPL further argues that the Complainants were properly not given a second opportunity to engage in meeting this burden. PPL R. Exc. at 6.

Second, PPL emphasizes the fact that the Complainants waived any objection to PPL's evidence. In this case, PPL explains that, although the Complainants lodge accusations about the Respondent's testimony and exhibits, they never objected to the admission of PPL's testimony and exhibits, despite being provided the explicit opportunity to do so. PPL R. Exc. at 7 (citing Tr. 92; 168; 372; 401).

Third, PPL cites *Walker*[39] and related cases to respond that, assuming, *arguendo*, that PPL's evidence contained or relied on hearsay evidence, hearsay evidence can form the basis of findings of fact in administrative proceedings so long as the hearsay was not objected to and is corroborated by competent evidence. PPL R. Exc. at 7.

[39] *Walker v. Unemployment Comp. Bd. of Rev.*, 367 A.2d 366 (Pa. Cmwlth. 1976) (*Walker*).

In specific reference to the testimony of PPL's witness, Mr. Stutzman, concerning vegetation management practices on the Complainants' property, PPL replies that this evidence and testimony was corroborated by the witnesses' "post-vegetation management field visit" where he inspected the areas where the herbicides were applied, his review of the Respondent's files related to that vegetation management work, and his review and analysis (across multiple days of evidentiary hearings) of the Complainants' photographs of the areas where the vegetation management took place. PPL R. Exc. at 7 (citing PPL Stmt. 4 at 10; Tr. at 402-656).

(d) Claims Regarding the Reasonableness of PPL's Construction Practices

PPL emphasizes the difference in the formal education or experience related to the safety of constructing electric utility facilities of its witnesses, as compared to that of Mr. or Mrs. Hartman. Based thereon, PPL replies that the Complainants' allegations, particularly as those allegations are related to PPL's construction and excavation practices in the right-of-way, are mere speculation and bald assertions. PPL adds that such bald assertions, personal opinions, or perceptions do not constitute evidence that can support findings of fact in this proceeding. *See* PPL R. Exc. at 9 (citing *West Penn Power Co. v. Pa. PUC*, 2019 Pa. Commw. Unpub. LEXIS 532, at *21 (Pa. Cmwlth. 2019); *see also, Mid-Atlantic Power Supply Ass'n v. Pa. PUC*, 746 A.2d 1196, 1200 (Pa. Cmwlth. 2000); *Bobchock v. Unemployment Comp. Bd. of Review*, 525 A.2d 463, 465 (Pa. Cmwlth. 1987); *W.J. Menkins Holdings, LLC v. Douglass Twp.*, 208 A.3d 190 (Pa. Cmwlth. 2019)).

In reliance on the foregoing, PPL argues that the Complainants failed to establish a *prima facie* case that its construction and excavation activities were unsafe or unreasonable and, therefore, in violation of the Code. PPL states that, assuming that the Complainants established a *prima facie* case, it counters with nine salient factors that it

provides from the record in support of its decision concerning the construction related activities of the Project. *See* PPL R. Exc. at 10-13.

(e) Claims Regarding Reasonableness of PPL's Vegetation Management Practices

PPL relies upon the rebuttal testimony of its witness, Mr. Stutzman, to reply that his testimony established that "[a]ll PPL Electric-approved herbicide mixtures and chemical components have label and application rates that are set by the EPA [Environmental Protection Agency] and outlined in detail within the PPL Electric-approved herbicide mixture document," which was admitted into the record as PPL Exh. MS-7. *See* PPL M.B. at 33. PPL takes the position that nothing presented by the Complainants demonstrated that PPL's herbicide application was inconsistent with the applicable labels and application rates. PPL R. Exc. at 14-15.

PPL acknowledges that the Complainants dispute the presence of incompatible species in the subject area of the right-of-way. However, PPL responds that Mr. Stutzman confirmed the presence of incompatible species by personally visiting the property and investigating the areas that were treated. PPL stresses that this witness also reviewed the photo exhibits of the Complainants on cross-examination and pointed out where the incompatible species could be seen in the Complainants' photographs. PPL R. Exc. at 15-20.

(f) Applicability of *Twp. of Marple* to This Complaint

Finally, in its Replies to Exceptions at 21-22, PPL asserts that the Complainants' reliance upon *Twp. of Marple* in support of their environmental claims is misplaced. PPL would distinguish *Twp. of Marple* based upon the difference in the statutory provisions of Section 619 of the Municipal Planning Code (MPC), as compared

to Section 701 of the Code pertaining to formal complaints. In the opinion of PPL, the court's decision in *Twp. of Marple* turned upon the court's view that MPC Section 619 was "constitutionally inadequate" unless the Commission completes an appropriately thorough environmental review of a building siting proposal and, in addition, factors the results into its ultimate determination regarding the reasonable necessity of the proposed siting. PPL R. Exc. at 21 (citing *Twp. of Marple*, 294 A.3d at 973-74).

In summary, PPL argues: "[t]he Commonwealth Court's ruling does not apply because this case is a Section 701 formal complaint proceeding, not a Section 619 proceeding. Compare 66 Pa.C.S. § 701, with 53 P.S. § 619." PPL R. Exc. at 22.

3. PPL's Exceptions

PPL filed three Exceptions to the Initial Decision, raising the following arguments in its Exceptions: (1) The Initial Decision Erred in Ruling on Erosion and Stormwater Runoff Issues Because Such Issues Lie Within The Jurisdiction of DEP and DCCD (Exc. at 4-7); (2) Even Assuming *Arguendo* That The Commission Has Jurisdiction Over Erosion and Stormwater Runoff Issues, The Initial Decision Erred In Finding That The Complainants Sustained Their Burden Of Proof (Exc. at 7-9); and (3) The Initial Decision's Ordered Relief To Address The Alleged Erosion and Stormwater Runoff Issues Is Unsupported, Infeasible, and Vague (Exc. at 9-12).

(a) PPL Exception No. 1 - The Initial Decision Erred in Ruling on Erosion and Stormwater Runoff Issues Because Such Issues Lie Within the Jurisdiction of DEP and DCCD (Exc. at 4-7)

In its Exception No. 1, PPL argues that the Initial Decision should be reversed concerning the conclusions reached as to soil erosion and runoff issues.

PPL Exc. at 4-7. Specifically, PPL takes issue with Finding of Fact No. 72 and Conclusion of Law No. 11 of the Initial Decision, reprinted below:

> 72. There are areas on and near the right-of-way through the Hartmans' property where excessive erosion and water runoff are evident. Hartman Direct, ¶¶ 51-53, 57, 69; Hartman Exs. 28, 52.

I.D. at 14; Finding of Fact No. 72;

> 11. The Complainants have sustained their burden of proof that PPL's erosion control efforts as part of the Project were inadequate to effectively control or prevent erosion or excessive water runoff on the right-of-way through portions of their property. 66 Pa.C.S. §§ 332(a), 1501.

I.D. at 34; Conclusion of Law No. 11.

PPL's primary argument in support of its Exception No. 1 is that DEP and DCCD, rather than the Commission, have jurisdiction to regulate erosion and stormwater runoff issues related to earth disturbance activities under The Clean Streams Law and the Environmental Quality Board's (EQB's) regulations. PPL Exc. at 7. For the Project, PPL reiterates that the EQB adopted regulations that govern earth disturbance activities and their impact on erosion, sedimentation, and stormwater runoff pursuant to its authority under The Clean Streams Law, 35 P.S. §§ 691.5, 691.402. Under those regulations, DEP and local conservation districts, in this case, DCCD, are tasked with permitting earth disturbance activities and conducting investigations and enforcement actions to ensure that there are no issues with erosion, sedimentation, or stormwater runoff resulting from those activities. Because the Project involved earth disturbance activities, as defined by EQB's regulations, PPL was required to obtain approval of its E&S Plans and Permit for the Project. *Id*. at 6.

Continuing, PPL explains that pursuant to EQB's regulations, PPL's E&S Plans set forth, among other things, the best management practices (BMPs) that it would use "to minimize the potential for accelerated erosion and sedimentation" and to "[u]tilize other measures or controls that prevent or minimize the generation of increased stormwater runoff." PPL Exc. at 6 (citing PPL Stmt. 1 at 10-14; PPL Exh. TE-1 at 3; Tr. at 269).

Based on the foregoing, PPL argues that the ALJ erred by ruling on the alleged erosion and stormwater runoff issues created by PPL's earth disturbance activities within the transmission line right-of-way. Thus, PPL submits that the ALJ's findings on erosion and stormwater runoff, as well as the ordered relief based thereon, should be reversed, as the Commission lacks jurisdiction over erosion and stormwater runoff issues. PPL Exc. at 4-7.

Secondarily in support of its Exception No. 1, PPL advises that the Commission's *April 2020 Order* established the scope of issues to be addressed on remand. In reliance upon language from the *April 2020 Order*, PPL submits that the ALJ exceeded the scope of issues established in the order and, therefore, contravenes the "law of the case" doctrine as this doctrine should be applied to the Complaint. PPL Exc. at 5, citing *Zane v. Friends Hosp*., 836 A.2d 25, 29, n.6 (Pa. 2003).[40]

PPL acknowledges that the *April 2020 Order* directed that a record be developed on, among other things, "erosion to the soil and sedimentation on the Complainants' property." PPL Exc. at 5. However, PPL takes the position that for the same reason that stormwater runoff issues are outside the Commission's jurisdiction, erosion issues should, likewise, be considered outside of the Commission's purview. *Id*. at 5-6.

[40] *Distinguished by Octave ex rel Octave v. Walker*, 103 A.3d 1255 (Pa. 2014).

(b) PPL Exception No. 2 – Even Assuming *Arguendo* that the Commission has Jurisdiction Over Erosion and Stormwater Runoff Issues, the Initial Decision Erred In Finding that the Complainants Sustained Their Burden of Proof (Exc. at 7-9)

In its Exception No. 2, PPL argues that, assuming there is some aspect of its 'earth disturbance' activities during the Project over which the Commission could assert jurisdiction or authority, given that DCCD performed inspections throughout the Project, did not issue any "Notice of Violation," and, ultimately, closed out the E&S Permit, PPL's compliance with the E&S Plans and Permit should be conclusive as to the Hartmans' failure to sustain their burden of proof. PPL Exc. at 7-9.

In this Exception, PPL foremost and principally continues its reliance on the DCCD permitting and permitting closure procedures to voice its objection to the Complainants' burden of proof in this matter. PPL explains that the DCCD inspections are designed to address concerns with erosion, sedimentation, and stormwater runoff. PPL Exc. at 8 (citing PPL R.B. at 12, 13; 25 Pa. Code § 102.7(c) (stating that when a permittee submits a notice of termination for the E&S Permit, the "Department or conservation district will conduct a final inspection and approve or deny the notice of termination within 30 days")).

Also, PPL states that its witness, Mr. Eby, testified that he has not observed, and there is no evidence to suggest, that "sediment laden stormwater runoff left the project site and entered any adjacent waterway, including Clarks Creek or the Susquehanna River." PPL Exc. at 9.

PPL asserts that the Commission cannot and should not 'second-guess' DCCD's conclusion that the Company complied with its requirements to employ BMPs to minimize the potential for accelerated erosion and sedimentation and to utilize measures to control stormwater runoff.

(c) PPL Exception No. 3 – The Initial Decision's Ordered Relief to Address the Alleged Erosion and Stormwater Runoff Issues is Unsupported, Infeasible, and Vague (Exc. at 9-12)

In its third Exception, PPL critiques the directives recommended by ALJ Haas in the Initial Decision as unsupported by the record, infeasible as to their accomplishment, and vague. PPL Exc. at 9-12.

PPL contends that the ALJ's recommendations are infeasible in that they ignore the requirements for commencing any remedial earth disturbance activities. PPL posits that were it to determine that corrective actions are necessary, it must prepare and receive approval of a new E&S Plan and Permit. To do otherwise, PPL argues, would be unlawfully engaging in earth disturbance activities. *See* PPL Exc. at 10. PPL points to the following testimony of its witness, Mr. Eby: "[t]he approximate cost for developing a new E&S Plan and Permit would be around $30,000," and it would "take approximately 10 months to develop and receive approval from the DEP." *Id*.

Finally, PPL excepts that the relief directed in the I.D. sets forth a vague standard for re-inspecting the 'areas' involved and determining whether remedial actions are necessary. PPL states that it is unclear what the ALJ means by "areas or erosion or excessive runoff" that "are still occurring," given that the agencies tasked with regulating erosion and stormwater runoff in the Project, DEP and DCCD, did not find any issues with erosion and stormwater runoff. PPL Exc. at 11.

In conclusion, PPL adds that the recommendations would subject it to a higher standard than minimizing the potential for accelerated erosion and sedimentation as set forth in the applicable earth disturbance regulations and remain "open ended" as to whether PPL has complied. PPL Exc. at 11-12.

4. Complainants' Replies to PPL Exceptions

In their Replies to the Exceptions of PPL, the Complainants first cite § 102.5. Permit requirements (Erosion and Sediment Control),[41] to argue that this provision requires a permit for earth disturbances equal to or exceeding one acre. They assert that the recommendation of ALJ Haas would not require any earth disturbance under this regulation. The Complainants dispute whether adding topsoil to establish and maintain erosion deterrent vegetation is an earth disturbance event. Also, they cite the afore-mentioned regulation to point out that the size of their property within the right-of-way is less than one acre, further suggesting the inapplicability of the regulation.

Based on the foregoing, the Hartmans take the position that PPL would not be required to obtain a permit regardless of the nature and extent of the restoration activity ordered by the Commission on their property. Hartman R. Exc. at 2.

The Complainants next attack PPL's statement that it did not cause any erosion or stormwater runoff issues during this Project, as unsupported by the record. They insist that PPL has failed to introduce a single photograph or present a third party "objective" witness to support this assertion, other than the statement of its witnesses who, in turn, have relied upon the closure of the E&S Permit. Hartman R. Exc. at 2-5.

The Complainants' further replies dispute the individual bases argued by PPL for reversing the presiding ALJ's recommendations. *See* Hartman R. Exc. at 6-15.

[41] 25 Pa. Code § 102.5(a).

D. Disposition of the Complainants' Exceptions

As a preliminary matter, we advise the Parties that any argument or Exception that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. 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); *see also, Univ. of Pa. v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

Also, we advise the Parties that the Commission, as an administrative agency, follows the *Walker* rule which, *inter alia*, provides that hearsay evidence,[42] properly objected to, is not competent evidence to support a finding of the agency. *See Melvin Williams v. Pittsburgh Water and Sewer Auth.*, Docket No. C-2020-3019223 (Opinion and Order entered August 5, 2021) (*Williams*) (citing *Walker*).

Hearsay evidence admitted without objection will be given its natural probative effect and may support a finding of an agency if it is corroborated by any competent evidence in the record. A finding of fact based solely on hearsay will not stand. *Walker* at 370.

[42] Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Pa. R.E. 801; *Bonegre v. Workers' Comp. Appeal Board* (*Bonegre*), 863 A.2d 68, 72 (Pa. Cmwlth. 2004). Ordinarily, hearsay evidence is inadmissible unless some exception applies. Pa. R.E. 802. The hearsay rule is somewhat relaxed in proceedings before administrative agencies. *Rox Coal Co. v. Workers' Comp. Appeal Bd.* (*Snizaski*), 807 A.2d 906 (Pa. 2002); *See e.g.*, PPL Motion to Strike at 14, n. 11.

1. The Complainants' Exceptions

The Complainants' Exceptions overlap the essential, controverted issues in this Complaint. We address and dispose of the Exceptions under the following identified subject areas:

(a) Objections to Procedural Conduct of Case

On consideration of the Hartmans' Exceptions to the procedural conduct of this case, unless otherwise expressly distinguished, their Exceptions are denied. We understand the frustration faced by the Hartmans in the prosecution of their Complaint. Litigating a complex administrative proceeding presents a daunting task for persons trained in the law, moreover, parties that participate *pro se*. However, the process, though far from perfect, is intended to provide this Commission with all necessary information consistent with due process afforded to all participants on which an evidentiary record may be created. As explained, the Commission is the ultimate factfinder in proceedings under the Code. Consequently, it is the creation of an evidentiary record on which the Commission is able to fairly decide matters before it that is of paramount concern. *See, e.g.*, *Lawrence Jones v. Philadelphia Gas Works*, Docket No. C-2019-3007984 (Opinion and Order entered July 16, 2020).

The Complainants substantially raise objection to several discovery rulings of the presiding ALJ.[43] Discovery rulings are rarely subject to interlocutory review by

[43] Procedurally, a party seeking certification of a petition for interlocutory review of a presiding officer's ruling regarding a discovery matter must file a Petition for Certification within three days of the ruling in question. 52 Pa. Code § 5.304(c)(1). Such Petition must "state the question to be certified and the reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceedings." 52 Pa. Code § 5.304(c)(3). Review of discovery orders are generally disfavored and are only permitted in limited circumstances. *MCI WorldCom Communications, Inc. v.*

the Commission and are disfavored. *See Application of First Class Transportation, Inc*., Docket Nos. P-2015-2501758 and A-2015-2466538 (Opinion and Order entered February 25, 2016); citing, *inter alia*, *In re: Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985) (*Knights Limousine*); *Joint Application of Bell Atlantic Corp. and GTE Corp.*, Docket No. A-310200F0002, *et al.* (Opinion and Order entered June 14, 1999) (*Application of Bell Atlantic*); and *Pa. PUC v. Frontier Communications of Pa. Inc.*, Docket No. R-00984411 (Opinion and Order entered February 11, 1999) (*Frontier Communications*) discussing the standards for interlocutory review of discovery rulings.[44]

The pertinent consideration when interlocutory review is under consideration is whether interlocutory review is necessary in order to prevent substantial prejudice - that is, the error and any prejudice flowing therefrom could not be satisfactorily cured during the normal Commission review process. *Pa. PUC, Bureau of Investigation and Enforcement v. Lyft, Inc*., Docket No. C-2014-2422713 (Opinion and Order entered November 13, 2014); 2014 WL 6386848 (Pa.P.U.C.);[45] *see also, Application of Bell Atlantic*; *Frontier Communications*; *Knights Limousine Service*. The correctness of the presiding officer's ruling involved in a request for interlocutory Commission review of a material question is not a determinative issue when the Commission sets out to examine whether a petitioner has fulfilled the regulatory requirements. *Saucon Creek Assoc., Inc. v. Borough of Hellertown*, 69 Pa. P.U.C. 467 (1989).

Verizon Pennsylvania Inc., Docket No. C-00015149 (Opinion and Order entered November 13, 2001).

[44] If a petition for interlocutory review of a discovery matter is properly before the Commission for consideration, the same standards that apply to interlocutory review of material questions on non-discovery matters apply to interlocutory review of discovery matters. *MCI WorldCom Communications, Inc. v. Verizon Pennsylvania Inc., supra*, slip op. at 15.

[45] Subsequent case history omitted.

Based on the foregoing, the determinative factor as to whether the Complainants' Exceptions should be granted is essentially a determination as to whether they have suffered substantial prejudice to their ability to present facts and information on which a record has been created on which the Commission is able to fully understand and decide their Complaint.

On review of the discovery rulings in this matter, we conclude that substantial prejudice has not been shown. Upon the filing of Exceptions and Replies to Exceptions in this matter, we are able to address and cure any prejudice asserted by the Complainants against the discovery rulings of the presiding ALJs as those rulings are alleged to have affected the ability of the Complainants to establish their case. As we do not find any ruling that has resulted in substantial prejudice to the ability of the Complainants to create a record on which we may act as a factfinder in reaching a determination of whether any portion of the claims in this Complaint is supported by substantial evidence and within our jurisdiction and authority, the Exception is denied.

2. Reconsideration of Environmental Claims

The Complainants, primarily in reliance upon *Twp. of Marple*, argue for reconsideration of their environmental claims against PPL concerning the Project. On consideration of the Exceptions of the Hartmans on this issue, the Exceptions are denied consistent with the discussion in this Opinion and Order.

The Code establishes a party's right to seek relief in the nature of petitions for rehearing, reconsideration and recission, within fifteen days following the service of a

Commission order pursuant to Section 703 of the Code, 66 Pa.C.S. § 703.[46] Upon the filing of a petition for relief pursuant to Section 703(f), the Commission may affirm, rescind, or modify its original order. 66 Pa.C.S. § 703(f). The Code further provides that the Commission may, at any time, after notice and opportunity to be heard by all affected parties, rescind or amend any order made by the Commission, pursuant to Section 703(g). *See* 66 Pa.C.S. § 703(g) (relating to rescission and amendment of orders). A request for relief pursuant to § 703(f) or § 703(g) must be brought as a petition for relief consistent with Section 5.572 of Commission Regulations. 52 Pa. Code § 5.572 (relating to petitions for relief).

Petitions for relief predicated upon Sections 703(f) and 703(g) of the Code, whether brought under Section 5.572(c) of Commission Regulations as a petition for reconsideration, rehearing, reargument, clarification, supersedeas or others, within fifteen days of the service of a Commission order, or under Section 5.572(d) as a petition for rescission or amendment filed at any time following service of a Commission order, are reviewed by the Commission as matters seeking relief falling within the agency's discretion.

The Commission's substantive standards for granting a petition for amendment, reconsideration, or recission have been set forth in *Philip Duick, et al. v Pennsylvania Gas and Water Company*, 56 Pa. PUC 553 (1982) (*Duick*). *See Duick* at 559 citing *Pennsylvania Railroad Co. v. PSC*, 118 Pa. Sup. Ct. 380 (1935); *see also,*

[46] Petitions under this section which do not allege new evidence are typically treated as petitions for reconsideration. Petitions for rehearing pursuant to Section 703(f) of the Code, typically include an allegation of new evidence. 66 Pa.C.S. § 703(f); *see West Penn Power Co. v. Pa. PUC*, 659 A. 2d 1055 (Pa. Cmwlth. 1995).

AT&T v Pa. PUC, 568 A.2d 1362 (Pa. Cmwlth. 1990). The key holding of *Duick* is that the Commission has held:

> What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission. Absent such matters being presented, we consider it unlikely that a party will succeed in persuading us that our initial decision on a matter or issue was either unwise or in error.

Duick at 559.

In this Complaint, the request for reconsideration has been filed as part of the Exceptions of the Complainants, rather than a "stand alone" petition and/or pleading. *See* Hartman Exc. at 8-9. Notwithstanding, we conclude that the request is procedurally sustainable as consistent with the applicable Commission Regulation. This is so in that the request is in writing and sufficiently identifies the " [t]he findings or orders involved, and the points relied upon by petitioner, with appropriate record references and specific requests for the findings or orders desired . . ." 52 Pa. Code § 5.572(a).[47] Also, PPL, as the Respondent, has been provided an opportunity to respond to the request and has done so in its Replies to Exceptions in this matter. *See* PPL R. Exc. at 21-22.

As discussed, recent developments interpreting the reach of the ERA in administrative proceedings supports denying reconsideration under the standards of *Duick*. The holding of *Twp. of Marple* presents a new and novel legal holding and, therefore, raises a consideration which has not been fully addressed, though not overlooked As noted, this Commission's *April 2020 Order* was issued prior to the

[47] Our Regulation at 52 Pa. Code § 5.572(d) states the following: "(d) Petitions for rescission or amendment may be filed at any time according to the requirements of section 703(g) of the act (relating to fixing of hearings)." 52 Pa. Code § 5.572(d).

decision in *Twp. of Marple*. Therefore, while the Hartman's have raised a novel issue under *Duick*, upon review, we are not persuaded to grant reconsideration based upon *Twp. of Marple*.

Twp. of Marple specifically involved a proceeding under the provisions of Section 619 of the MPC, 53 P.S. § 10619. However, in *Twp. of Marple*, the Court's admonition to avoid summarily dismissing environmental claim allegations, out of hand, was broader in scope than proceedings arising under the MPC. *See Twp. of Marple*, 294 A.3d at 974: " [w]e agree with the Township that the Commission erred when it flatly deemed environmental concerns to be outside the purview of Section 619 proceedings." *See also, Township of Marple v. Pa.* PUC, 295 A.3d 748 (Table) Commonwealth Court Unpublished Disposition; 2023 WL 2421090 at *5 (emphasis original) – "To the contrary, in proceedings of this nature, the Commission is *obligated* to consider "the environmental impacts of placing [a building] at [a] proposed location," while also deferring to environmental determinations made by other agencies with primary regulatory jurisdiction over such matters."

However, PPL's distinguishment of *Twp of Marple* based on the distinction in proceedings arising under the Code and the MPC is persuasive under the facts of this Complaint. *See* PPL R. Exc. at 21-22. Based on the foregoing, we will deny the Exceptions of the Hartmans in the nature of a petition for reconsideration of their environmental claims, consistent with the discussion in this Opinion and Order and in observance of the holding of *Wolfe* (The administrative structure and duty of agencies is generally not modified by the ERA.).

Upon review of the Initial Decision, the Exceptions, and Reply Exceptions, we submit that further clarity and modification is required to make an appropriate determination on the Complainants' Exceptions related to reconsideration of

environmental claims.[48] In light of the Commonwealth Court's ruling in the *Twp.of Marple*, the Complainants seek reconsideration of the claims regarding the environmental impact of PPL's construction practices and the reasonableness of PPL's environmental protection controls.[49] In the *Twp. of Marple,* the Commonwealth Court determined the Commission failed to properly apply the requirements of the Environmental Rights Amendment of the Pennsylvania State Constitution in our review and disposition of a petition for exemption of certain local zoning requirements.[50]

PPL, via its Reply Exceptions, asserts that the Complainants' reliance upon *Twp. of Marple* in support of their environmental claims is misplaced.[51] The Company distinguished *Twp. of Marple* based upon the difference in the statutory provisions of Section 619 of the Municipal Planning Code (MPC) as compared to Section 701 of the Public Utility Code pertaining to formal complaints. In summary, PPL argues: "[t]he Commonwealth Court's ruling does not apply because this case is a Section 701 formal complaint proceeding, not a Section 619 proceeding."

The ERA places requirements on the Commonwealth and its agencies, including this Commission.[52] We note the Commission's adjudicatory decisions and

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48 *See* Complainants' Exceptions at Pages 8-9.

49 *See Twp of Marple*.

50 *Id.* at 973-975; Pa. Const., Art. 1, § 27.

51 *See* PPL Reply Exceptions at pages 21-22.

52 The Environmental Rights Amendment establishes a right for people to have clean air, pure water, and to the preservation of the environment, and for the Commonwealth to act as a trustee of public natural resources, conserving and maintaining them for the benefit of all. Pa. Const., Art. 1, § 27. The Pennsylvania Supreme Court has noted that the Environmental Rights Amendment "places a limitation on the state's power to act contrary to [the] right, and while the subject of the right may be amenable to regulation, any laws that unreasonably impair the right are unconstitutional." *Pa. Env't Def. Found. v. Commonwealth*, 161 A.3d 911, 931-32 (Pa. 2017).

regulations are subject to the ERA.[53] When a complainant raises quality of service issues in a complaint, which could include environmental issues, they bear the burden of proof to show that utility service is unreasonable, just like any other complaint.[54] Here the Commission is addressing the merits of the assertions made by the Complainants regarding PPL's quality of service, which does include allegations of PPL's impact on the property of the Complainants.

Consequently, we believe that the Exceptions of the Hartmans in the nature of petition for reconsideration of their environmental claims, as described above, should be granted to the extent the Hartmans have raised a novel argument, however, denied as to the ultimate reconsideration under *Twp. of Marple*. We find this determination to be consistent with the Commission's recent disposition in *Tate v Columbia Gas of Pennsylvania, Inc.*[55] We offer this determination solely based on the facts and circumstances presented in this instant case. Such determination is not intended to qualify the universe of circumstances in which this Commission is obligated, or not obligated, to apply an ERA analysis.

3. Reasonable Service Under a Totality of Circumstances Review

The Hartmans have, as noted, argued for a "totality of circumstances" review of the evidence in support of their Complaint. On consideration of the Exceptions

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[53] *Township of Marple*, 294 A3.d 965, 974 (Pa. Cmwlth. 2023); *Energy Conservation Council of Pennsylvania v. Pa. PUC*, 25 A.3d 440, 446-447 (Pa. Cmwlth. 2011). *See* page 694.

[54] 66 Pa.C.S. § 332; *Wolfe.*

[55] *See Tate v. Columbia Gas of Pennsylvania, Inc.*, Docket No. C-2020-3018966, at 30 (Order entered October 10, 2024) (finding that the utility is not a state actor and, therefore, its actions cannot be held to violate the Environmental Rights Amendment of the Pennsylvania Constitution).

of the Complainants concerning this issue, the Exceptions shall be granted, solely to the extent consistent with the discussion in this Opinion and Order.

The recommendations of the presiding ALJ, while objected to by the Complainants as inapposite to such a "totality of circumstances" review, in fact, accomplishes a "totality of the circumstances" result based on the record.

Under the facts of this proceeding, we conclude that a "totality of the circumstances" approach is supported by the facts and the law. *See Povacz*, 280 A.3d 975, 1012 (Pa. 2022): "We reiterate the applicable standard of proof under Section 1501 [66 Pa.C.S. § 1501] requires a customer to demonstrate by a preponderance of the evidence based on the totality of the circumstances that the furnishing of a service or facility is unsafe **or** unreasonable. This was the standard applied by the PUC here."[56]

In this Complaint, the Hartmans have testified to the presence of water flowing and/or accumulating on their property since the Project. *See* Tr. at 66; 83; 86.

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[56] Where a "totality of circumstances" approach was previously addressed in a dispute concerning vegetation management, substantial concerns arose concerning the due process rights of utilities to engage in vegetation management according to acceptable industry best practices and to exercise reasonable managerial discretion. The concern was primarily focused upon the indefinite nature of standards. *See, e.g., Joint Dissenting Statement of Comms. Coleman and Powelson, Mattu v. West Penn* (Tentative Opinion and Order), Docket No. C-2016-2547322, slip op. at 5. We note, however, that *Matu v. West Penn* was the subject of a Petition for Review and an unreported decision of the Commonwealth Court. *West Penn v. Pa. PUC*, No. 1548 C.D. 2018 (2019); (*Matu Appeal*). In *Matu Appeal*, the Court upheld the authority of the Commission to entertain formal complaints under the Code alleging unreasonable service when herbicides are used as part of the utility's vegetation management. *Matu Appeal* at *7, notes omitted: "The Commission need not refrain from evaluating whether a public utility's vegetation maintenance is reasonable under Section 1501 of the Code simply because that maintenance involves herbicide use." The Commission's decision was reversed, however, on grounds that the complainant did not meet his burden of proof and substantial evidence did not support the Commission's decision.

The Complainants have testified that the access road (*i.e*. Project), has diverted stormwater off the right-of-way onto their property and home.

Under the preponderance of the evidence standard of proof that has been extensively addressed by the Supreme Court in *Povacz*, we conclude that the Complainants have met their burden of proof that a service or facility provided by PPL is, more likely than not, the cause of the problem described in their Complaint. *See Povacz* at 1006 – "The preponderance burden requires a customer to prove that a service or facility is — more likely than not - the cause of the problem described in their complaint. *See also Popowsky v. Pa. PUC*, 594 Pa. 583, 937 A.2d 1040, 1055 n.18 (2007) ("This Court has characterized a preponderance of the evidence as tantamount to a 'more likely than not' inquiry[.]")."

The PPL witnesses, by stipulation, were determined to have specialized expertise in the area of the construction of utility facilities. However, the PPL witnesses were not so qualified so as to provide expert testimony concerning the ultimate issue in this matter: "… the impact of the construction on the Complainants' property, including but not limited to, any erosion to the soil and sedimentation on the Complainants' property and any safety hazards resulting therefrom that may be reasonably identified,…" *April 2020 Order* at 21-22.

The PPL witnesses testified primarily from PPL business records. Testimony was also provided through cross-examination elicited through photo exhibits sponsored by the Complainants, and site visits to the subject property. In *Robert P. Gasparro v. PECO Energy Company*, Docket No. C-00015482 (Opinion and Order entered April 22, 2002), *aff'd sub nom. Gasparro v. Pa. PUC*, 814 A.2d 1282 (Pa. Cmwlth. 2003) (*Gasparro*), the extent to which a utility's business records are authenticated for purposes of their admissibility into the record was addressed. It is

noted, however, that the business record exception addressed in *Gasparro* does not, necessarily, extend to the testimony of a witness testifying as an expert.

A witness must testify to facts and not opinions. *Commonwealth v. Eyler*, 217 Pa. 512, 66 A. 746 (1907); *Commonwealth v. Rouchie*, 135 Pa. Super. 594, 7 A.2d 102 (1939). *See also, Craftex Mills, Inc. of PA v. W.C.A.B.* (*Markowicz*), 901 A.2d 1077 (Pa. Cmwlth. 2006) (Rule 701 applies to agency hearings).[57]

When we parcel out the testimony of PPL's witnesses, the fact observations of the Complainants concerning the effect of the construction related activity of the Project on their property stand on the same footing as the observations and testimony of the PPL witnesses in this area. Each witness is under an obligation to testify to an opinion that is rationally based on the witnesses' perception. Pa.R.E 701. The question is whether the conclusions and opinions based thereon are entitled to any further deference if they are proffered by a PPL witness having, generally, superior knowledge and training, though not on a key issue. On the question of safety hazards resulting from the Project on their property, the testimony of the PPL witnesses are not entitled to further deference.

Based on the foregoing, we shall grant the Complainants' Exceptions concerning a totality of the circumstances review. Upon engaging in such review, we find that the Complainants have met their burden of proof and their testimony supports

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[57] *See* Pa.R.E. 701 - Opinion Testimony by Lay Witness

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> (a) rationally based on the witness's perception;
>
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
>
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

the recommendation of the presiding ALJ concerning PPL's erosion deterrent actions and their effect on the Complainants' health and safety.

As discussed below in this Opinion and Order, we conclude that the vegetation management of PPL within the right-of-way was, itself, reasonable and not accomplished in violation of the Code. However, pursuant to a totality of the circumstances review of the record, the vegetation management activity of PPL, in conjunction with a condition of topsoil insufficient for revegetation that has been caused by PPL, bears a causal relationship to the harm that has been established by the Complainants.

4. Reasonable Service – PPL Construction Management

The Hartmans question the fundamental construction decisions of PPL regarding the Project. They have, particularly, criticized the decision to construct a new access route rather than use an existing route, as set forth in the initial, E&S Plan. They have further provided detailed criticism of PPL's construction decisions, including use of a "claw-back" procedure, the materials used in constructing the access route, *i.e.*, rip rap, and the overall aesthetic impact of the Project on the right-of-way. The Complainants advocate that we find unreasonable service in the PPL construction decisions and support these claims with emphasis that these decisions evidenced a disregard and/or failure to follow the E&S Plan or best practices identified in those documents.

On consideration of the record, we must reject the position of the Hartmans and deny the Exceptions of the Complainants in this area. Section 1501 of the Code does not require a public utility to provide perfect service. Rather, a public utility is obligated to provide service that is reasonable and adequate. *Analytical Lab Servs., Inc. v. Metro. Edison Co.*, Docket No. C-20066608 (Opinion and Order entered December 21, 2007).

As recognized by the Parties, a utility is under a statutory duty to provide safe and adequate service. 66 Pa.C.S. § 1501. The Project involved the participation of PPL employees, contractors and/or agents, whose competence and expertise in the process has been shown. The Complainants have, in detail, identified several instances where an alternative consideration or option for compliance with the E&S Plan for constructing the Project could have been adopted by PPL. However, the qualifications of the Complainants to contradict the PPL personnel responsible for such decisions is limited and does not rise to the level of substantial evidence to support a finding of a Code violation. Neither the Code nor Commission Regulations require that public utilities provide flawless service. *See A-Rize-N Management Co., LLC v. Pennsylvania American Water Co*., Docket No. C-2009-2119162 (Opinion and Order entered June 15, 2010). Moreover, the Commission does not sit as a super board of directors of a utility. Rather, certain managerial determinations are, necessarily, left to the sound discretion of utility management, and such management is subject to ultimate review by the Commission according to the statutory mandates of safe and adequate service.

5. Reasonable Service - PPL Vegetation Management

The Hartmans allege that PPL's herbicide application was done in an indiscriminate and unreasonable manner. They also allege that herbicide was applied by PPL contractors to the right-of-way without providing them sufficient, advanced notice, contrary to promises and/or representations by PPL employees or agents.

On review of the record, we do not agree with the Hartmans that PPL's herbicide activity surrounding their property was unreasonable so as to result in a violation of Section 1501. The record of this matter is that there was extensive contact and engagement as between the Hartmans and PPL representatives concerning the Complainants' desire to avert herbicide use on their property. Unfortunately, the contacts were not sufficient to provide the Hartmans with the opportunity to, personally, engage in

the elimination of vegetation determined to be incompatible and/or harmful, according to PPL's evaluation.

The record is equivocal concerning the timeline of the contacts between the Complainants and PPL. However, on review, the record is more supportive of the position of PPL, that the Hartmans were given a time certain in which they were to remove the vegetation deemed harmful by PPL. When the PPL contractors arrived, it was determined that certain of the harmful vegetation species had not been removed by the Hartmans. Based on this observation, herbicide treatment was performed by the contractors on behalf of PPL.

PPL's testimony is that it applied herbicide, and the record established is that a residual effect of PPL's herbicide application was the elimination of certain of the Complainants' decorative and non-threatening plants in addition to the targeted species. The Parties, however, vigorously disagree and we cannot determine on this record, whether the non-targeted vegetation will or will not be permanently harmed by PPL's actions. The Parties further disagree, and the record is not conclusive, regarding the cause for the origination of the presence of the "mile-a-minute" weed – an, admitted, harmful, invasive, weed. Notwithstanding the inability to reach an ultimate conclusion as to the re-growth of desirable plants in the Complainant's right-of-way, we find that the preponderance of the evidence standard has not been met. As a result, the record does not support a determination that the actions of PPL were unreasonable under these facts. *See Pickford v. Pa. PUC*, 4 A.3d 707, 714 (Pa. Cmwlth. 2010) - once treatment methods are deemed safe, the utility's decision to use one or the other is a managerial decision.

Based on the foregoing, we shall deny the Exceptions of the Hartmans on this issue, consistent with the discussion in this Opinion and Order.

6. Alleged Discrimination Under Section 1502 of the Code

On consideration of the Exceptions of the Complainants in support of a finding of discrimination in violation of Section 1502 of the Code, the Exceptions are denied. Chapter 15 of the Code provides the Commission with jurisdiction and authority over the service and facilities of public utilities. 66 Pa.C.S. §§ 1501-1504. And, the definition of 'service' under the Code is to be construed broadly. *Country Place Water*. However, on review of the record, we cannot find any basis on which to conclude that a cognizable claim of discrimination within the statutory intent of Section 1502 has been established against the Respondent.

Discrimination within the meaning of Section 1502 of the Code does not, according to our review of the facts of this dispute, wholly encompass the discrimination that appertains to discretionary decisions made by a utility in connection with rights and privileges associated with real property. The Commission's authority to interfere in the internal management decisions of a utility is limited to the provisions of the Code, or provisions authorizing such authority by necessary implication. It is well settled that the Commission is not empowered to act as a super board of directors for the public utility companies of this state. *Metropolitan Edison Co. v. Pa. PUC*, 437 A.2d 76, 80 (Pa. Cmwlth. 1981).

ALJ Haas appropriately discussed the scope of review on remand from the *April 2020 Order* regarding the Complainants' claims of discrimination as it involved PPL's conduct of the Project. *See April 2020 Orde*r at 21. ALJ Haas made a distinction between discrimination in EDC service provided to the Complainants as compared to its reach to include discrimination based on a difference in PPL's property restoration after completion of the Project and PPL's difference in vegetation management activity employed toward adjacent properties within the right(s)-of-way PPL held. This difference was particularly acute in the variation of PPL's treatment of property within

the rights-of-way on U.S. NPS property and the privately-owned easement at issue in this Complaint. In the *Order re Motion to Strike*, ALJ Haas reasoned:

> The Hartmans are correct that, while the Commission excluded from consideration in this proceeding allegations of discrimination in restoration activities between the two properties, it did not exclude from consideration more general allegations of discrimination in service contemplated in 66 Pa.C.S. §1502. Accordingly, I will deny PPL's Motion to Strike Hartman Exhibit A, ¶¶2, 40, 54, 57, 62-66, 74-75, 92, 112, 116-121, 132-133, 136, and Hartman Exhibit Nos. 31, 49, 50 and 51, to the extent, if any, that they support more general allegations of discrimination in construction and vegetation management activities. As noted, however, I will not consider any allegations of discrimination in restoration activities between the two properties as being outside the scope of this proceeding.

Order re Motion to Strike at 6.

There is a fine line to be drawn in accepting the proffer of evidence by the Hartmans regarding discrimination in this matter upon remand. In the *April 2020 Order* we granted, in part, the motion of PPL and excluded from our consideration the following:

> b. Complainants' allegation that PPL Electric's restoration efforts showed a preference for the National Park Service and constituted discrimination in service that violated Section 1502 of the Public Utility Code

See PPL Motion to Strike, ¶ 31(b), citing *April 2020 Order* at 20.

PPL does not dispute that neighboring properties, including privately owned land and U.S. NPS land, were afforded different treatment in both the restoration

activity it performed as part of the Project, post construction, and also in the vegetation management decisions regarding the right-of-way after the Project was completed.

Regarding vegetation management, PPL's witness, Mr. Stutzman, testified that PPL did not apply herbicides to the U.S. NPS property within the Project area. Rather, PPL engaged in "hand cut" control on these areas because that was a condition of the federal permit PPL had to secure for that property. PPL M.B. at 40 (citing PPL Stmt. 4 at 21). No such permit was required for the Hartman right-of-way or any other private landowner's property impacted by the Project. *Id*.

PPL, therefore, was precluded from performing certain activities in the exercise of its managerial discretion involving vegetation management within the right-of-way(s) on certain areas within the Project's transmission corridor as a result of agreements reached between the property owner, the U.S. government in the case of NPS, and PPL. Thus, there is no factual dispute over the difference in treatment. However, when we afford this difference in treatment its full evidentiary consideration in this Complaint, we are nonetheless constrained to deny this Exception of the Complainants.

PPL was contractually precluded from certain activity on property adjacent to or in proximity to the Complainants' property. It is on this basis that we are unable to conclude that such difference in treatment resulted in a discriminatory event that may be recognized under Section 1502 of the Code. We reach this determination while also giving full recognition to the objections of the Complainants that the difference in

treatment was directed to, both, privately owned property and (U.S.) government owned property.[58] Our conclusion is based on the following considerations.

(a) Distinctions in Utility Relations Based on Contract

First, the existence of contractual obligations attached to one property concerning a right-of-way and not to another leads this Commission into an area which falls outside of our authority. *See Stefanoski v. PA American Water Co*., Docket No. C-20078219 (Opinion and Order entered September 22, 2008) - the Commission does not have jurisdiction over disputes that require interpretations of the validity of a right-of-way; *Anne E. Perrige v. Metropolitan Edison Co*., Docket No. C-00004110 (Opinion and Order entered July 11, 2003) - the Commission had no jurisdiction to interpret the meaning of a written right-of-way agreement; *Lou Amati/Amati Service Station v. West Penn Power Co*. and *Bell Atlantic-Pennsylvania, Inc*., Docket No. C-00945842 (Opinion and Order entered October 25, 1995) - real property issues such as trespass and whether utility facilities are located pursuant to valid easements are within the exclusive jurisdiction of the Courts of Common Pleas; *Tod and Lisa Shedlosky v. Pennsylvania Electric Company*, PUC Docket No. C-20066937 (Opinion and Order entered May 28, 2008) - any attempt by the Commission to divine the intent of parties to a right-of-way regarding relocation costs, is tantamount to interpreting the right-of-way. Because the Commission lacked jurisdiction to interpret the right-of-way, complainant's Exception on the issue was granted. *See also, April 2020 Order* at 17-18.

For reasons that do not appear in this record, owners of title to land(s) on which PPL has obtained rights-of-way have negotiated terms and conditions with PPL

[58] PPL's witness, Mr. Weseloh, testified that the right-of-way agreement for the Complainants' property does cross a property line and encumbers a portion of the U.S. NPS property. PPL Stmt. 3 at 6. However, Mr. Weseloh noted that the U.S. NPS property is encumbered by two, additional, right-of-way agreements. *Id*.

concerning the grant of these rights. These negotiations resulted in the inclusion of terms and conditions that have impacted PPL's managerial discretion involving, *inter alia*, the use of herbicides and other aspects of vegetation management and property restoration. The right-of-way which burdens the Complainants' property apparently does not contain any such restrictions or prohibitions on PPL. Containing none, PPL has exercised its discretion in the treatment of non-compatible vegetation on the easement it holds for the Complainants' property. This was done using applications and procedures (herbicide) that it did not necessarily use on certain of the neighboring properties. While these facts are not in dispute, we cannot, however, draw an inference that such difference in treatment, based on contractual conditions or the lack of similar conditions and/or obligations in the right-of-way obtained by PPL for the Hartman property, is probative of discrimination under Section 1502 of the Code. To do so would be a matter of speculation.

As discussed concerning the Exceptions of the Complainants, *supra*, we find merit in their position that a "totality of the circumstances" review of the record is supported by recent caselaw addressing a complainant's burden of proof to establish a violation of unreasonable service under Section 1501. We do not, however, find that this approach is a basis on which an unfavorable inference may also be drawn to support a violation of Section 1502 under the facts of this Complaint.

Additionally, engaging in deliberation concerning PPL's disparate treatment of rights of way within the Project's corridor would result in the Commission exceeding its jurisdiction, as such inquiry would involve deliberations into private property matters and private contract issues as between parties. *See, e.g., Burek v. Pennsylvania Electric Company*, Docket No. C-20028132 (Opinion and Order entered June 27, 2003) - affirming the analysis of ALJ Larry Gesoff - the details of an agreement between a complainant and another party regarding the replacement trees and how other

party performed under the agreement is a private contractual matter and the Commission does not have jurisdiction over private contractual disputes.

In *Fairview Water Co. v. Pa. PUC*, 509 Pa. 384, 502 A.2d 162 (1985), the Pennsylvania Supreme Court held that the Commission lacks jurisdiction to determine the scope and validity of an easement. Based on the seminal decision in *Fairview Water Co*., the Commission has consistently determined that it is not the proper forum for resolving property rights controversies. Rather, such controversies are a matter for a court of general jurisdiction. *See e.g., Kuhn*.

Based on the foregoing, and further clarification discussed, we find that a decision by this Commission concerning the merits of the Complainants' contentions of discrimination regarding PPL's conduct in relation to other easements it obtained and negotiated for the Project would, necessarily, involve reaching into matters concerning the property interests of the affected parties. This is an area which we are not inclined or authorized to deliberate. *See* I.D. at 20, n.3.

We appreciate the irony[59] of taking official notice of federal standards applicable to PPL's vegetation management within the transmission corridor of the Project, while failing to attach evidentiary weight to the existence of federally negotiated prohibitions on rights-of-way applicable to U.S. held estates in land that affect PPL's discretion concerning vegetation management within the same transmission corridor. While a position which advocates for a finding of discrimination in violation of Section 1502 of the Code under these circumstances may be urged by the Complainants,

[59] *See, e.g.*, Hartman M.B. at 6.

as explained, the Commission is a creature of statute and cannot exceed its jurisdictional authority. *City of Pittsburgh.*[60]

(b) Statutory Intent of "Service" as Referenced in Section 1502

Second, we conclude that our denial of the Exceptions is supported by cases addressing "service" within the intent of Section 1502. The type of 'service' involved in the discrimination claim lends itself more to the analysis of the term's statutory intent as considered in *Interstate Gas Supply, Inc., et al. v. Metropolitan Edison Company, et al*., Docket Nos. C-2019-3013805 (Opinion and Order entered August 26, 2021)(*Interstate Gas Supply*),[61] *affirmed*, 297 A.3d 462 (April 28, 2023, Unpublished Disposition – Publication Ordered July 12, 2023), *appeal granted* March 5, 2024, No. 292 MAL 2023, and *PPL v. Pa. PUC*, 912 A.2d 386, 408-409 (Pa. Cmwlth. 2006). These cases have addressed the statutory intent of Section 1502 of the Code relating to 'service.'

In *Interstate Gas Supply,* a dispute arose between EDCs and certain electric generation suppliers (EGSs) over a billing practice known as "on-bill billing." This was

[60] Our reasoning in this regard could, possibly, be re-visited if the record disclosed that the right-of-way negotiated for federal lands expressly incorporated FERC or other federal mandates which PPL failed to consistently apply and observe in relation to the Complainants' property. Again, we acknowledge that the Hartmans have claimed, *inter alia*, that the rights-of-way on the adjacent and surrounding properties are contractually identical. They state: "Each Primrose and Linden Lane neighboring property, to include the NPS, are assigned parties to the same 1950 Right of Way agreement among the Respondent PPL Electric Utilities and Edward and Thelma Fetterhoff." *See Complainants' Mediation Request* at 1. Despite this representation, it is well settled that the Commission lacks jurisdiction to interpret easements and this position would invite the Commission to do so.

[61] Consolidated with the following dockets: *Interstate Gas Supply, Inc. v. Pennsylvania Electric Company*, Docket No. C-2019-3013806; *Interstate Gas Supply, Inc. v. Pennsylvania Power Company*, Docket No. C-2019-3013807, and *Interstate Gas Supply, Inc. v. West Penn Power Company*, Docket No. C-2019-3013808.

a practice whereby a company (EDC) includes non-commodity goods and services on its monthly utility bills to its customers. The EDCs offered their own non-commodity goods and services via "on-bill billing" to their EDC customers. The EGSs sought to require the EDCs to, similarly, provide them with the same "on-bill billing" services for non-commodity services that the EGSs provided to their EGS customers. The EGSs' request was based on a provision in the Code that required EDCs to provide customer billing for electric service provided by the EGSs. This statutory obligation was in furtherance of the goals of the Electricity Generation Customer Choice and Competition Act, 66 Pa.C.S. §§ 2801; 2802(3), to promote competition in the generation of electricity to Pennsylvania retail customers. 66 Pa.C.S. § 2807(c).

On consideration of a formal complaint filed by certain EGSs based on Section 1502 of the Code, the Commission disagreed with the premise that a difference in treatment by the utility to itself, as compared to others, fell within the prohibition of undue preferences under Section 1502 of the Code. In *Interstate Gas Supply*, the Commission stated, in pertinent part: "We read nothing in the language of Section 1502 [66 Pa.C.S. § 1502] or the decision in *Columbia*[62] to require a utility to provide to a third party the identical services the utility itself provides." *See Interstate Gas Supply* at 24.

In addition to being influenced by our position on the statutory intent of the language of Section 1502 as addressed in the dispute in *Interstate Gas Supply*, when we consider the nature of the 'service' that is involved in this Complaint, we do not find that there is a sufficient nexus between similarly situated classes of persons who are the beneficiaries of the statutory prohibition of Section 1502 of the Code, and any other similarly situated customer class. The similarly situated class of persons, *i.e.*, the Complainants and neighboring property owners, including the federal government, is

[62] *Pa. PUC v. Columbia Gas of Pa., Inc.*, Docket No. R-2018-2647577 (Opinion and Order entered December 6, 2018).

tenuous for Section 1502 to apply. This is so, notwithstanding it is the position of the Complainants that all easements pertaining to the impacted area, Linden Lane and Primrose Lane, derived from the same grant of authority by the previous land owner(s) and, presumably, have identical right of way language in the easement grant language. *See* Complainants' M.B. at 31, ¶ 78.

The difference and/or alleged preference in treatment observed by the Complainants is not, however, due to or based upon, a utility-customer relationship as within the statutory prohibition of Section 1502. Rather, such difference is, as discussed, based upon private contractually negotiated rights. *See PPL v. Pa. PUC*, 912 A.2d at 408-09, addressing the statutory intent of Section 1502:

> . . . Section 1502 protects *customers* of a public utility from being subjected to unreasonable discrimination or preferences concerning the establishment of different services for different classes of customers. In order to come within Section 1502, the conduct must relate to *the public service* the utility provides to its customers and the public. Complainants complain that PPL has discriminated against *them* because their conduct allegedly impacted Complainants' ability to compete. Complainants, however, were not customers or ratepayers. They provided consulting services to industrial ratepayers. Therefore, this Court does not agree with the Commission that this is the type of discrimination or preferential treatment addressed by Section 1502.

PPL v. Pa. PUC, 912 A.2d at 408-09; (emphasis italics original; emphasis underscored added).

Based on the foregoing, the Exceptions of the Complainants are denied on this issue.

E. Disposition of PPL's Exceptions

1. PPL's Exceptions

(a) PPL Exception No. 1

On consideration of PPL's Exception No. 1, that the ALJ erred in ruling on erosion and stormwater runoff issues, it is denied consistent with the discussion in this Opinion and Order. We find, and so conclude, that PPL overstates the necessity for any further involvement before the DCCD under the existing E&S Permit in order to comply with the recommendations of the presiding ALJ, which recommendations we shall adopt. Our bases for denial of PPL's Exception No. 1 are three-fold.

First, our *April 2020 Order* expressly referred the issue of the impact of the PPL construction and construction related activity of the Project on the Complainants' property, including (but not limited to) erosion to the soil and sedimentation. These issues were preserved and identified for the development of a record concerning any safety hazards resulting therefrom. *See April 2020 Order* at 21-22, reprinted below:

> With that said, as articulated above under the vegetation management claims, the Complainants alleged that the construction of the stone road killed surrounding vegetation which aided in preventing environmental and property damage. This specific allegation, despite being connected to environmental considerations, relates to the Complainants' vegetation management claims. Thus, as noted above, to make a determination whether PPL's construction practices constitute adequate, safe and reasonable service, in accordance with 66 Pa.C.S. § 1501, we direct the ALJ to examine on remand the impact of the construction on the Complainants' property, including but not limited to, any erosion to the soil and sedimentation on the Complainants' property and any safety hazards resulting therefrom that may be reasonably identified, and the steps that PPL proposes to

> implement in order to adhere to its statutory duty to furnish adequate, safe and reasonable service.

April 2020 Order at 21-22; (emphasis supplied).

The Complainants have met their burden of coming forward with substantial evidence of the presence of water on their property. The testimony is corroborative of the finding and recommendation of ALJ Haas concerning PPL's inadequate soil erosion measures. Therefore, the Complainants have "reasonably identified" safety hazards resulting from PPL's actions regarding the Project. The Complainants' evidence is consistent with the ALJ's recommendations and it is acknowledged that the ALJ's recommendations were based in substantial part on observations resulting from a site visit to the property.

Based on the foregoing, the position of PPL in its Exception No. 1 is contrary to our *April 2020 Order* and, therefore, denied.

Second, as stated, PPL overstates any further necessity for DCCD involvement concerning its compliance with the I.D. recommendations. This is while PPL understates, or does not fully acknowledge, the fluid, evolving nature of PPL's implementation and performance according to the construction plan (E&S Plan) that governed the Project and the discretion exercised by PPL under such plan regarding the Project.

The record in this proceeding is that it was anticipated that actual, on-site conditions could arise which would require refinement and/or modification once a project

is underway. This is typical of projects of this nature. *See* I.D. at 7, Finding of Fact Nos. 18; 19; PPL Stmt. 2 at 4-5. ALJ Haas explained the following:

> The E&S Plan as originally submitted provided for the use of existing access routes for access to the new pole pads. PPL Ex. TE-1. During the course of the Project, however, PPL made a number of revisions to the E&S Plan to accommodate various construction conditions as well as requests from the Dauphin County Conservation District (DCCD). PPL Stmt. 1, p. 11.
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> * * *
>
> Final revisions to PPL's E&S Plan were made in December 2019 and reflected the final, as-built condition of the access road to poles 75 and 76. PPL Stmt. 1, p. 11. DEP and DCCD issued approval of final closure of the E&S Permit in June 2021. PPL Stmt. 1, p. 12, 14.
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> * * *
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> With respect to the Hartman's allegation that the road was constructed in a manner that was "unplanned and unauthorized" under the PPL's E&S plan as originally submitted, PPL witness Salisbury explained that it is very common in the electric industry as well as in the construction industry generally for planned construction and excavation needs to change during the course of a project. PPL Stmt. 2, p. 4. . . . PPL's E&S Plan for this project originally contemplated the use of existing logging roads for access to the new pole pads. PPL revised the E&S Plan during the project, however, when it determined that a new switchback road constructed using rip-rap rocks would best accomplish the company's primary goal of providing a safe and stable roadway and pole pad surfaces during both initial construction as well as during ongoing future repair and maintenance efforts. As explained above, the final revision to PPL's E&S Plan was made in December 2019 and reflected

> the final, as-built condition of the access road to poles 75 and 76. PPL Stmt. 1, p. 11.

I.D. at 19; 20; 21-22; (emphasis supplied).

The testimony of PPL's witnesses further explained the changeable nature of implementing a construction plan after initial approval of the E&S Permit. *See* PPL R.B. at 6;[63] *see also*, PPL R.B. at 9.[64]

Also, PPL has, on several occasions, distinguished changes to the E&S Plan that are permissible as part of a field change. *See* PPL R.B. at 7, addressing PPL's change to the access road's path was a permissible "field change" to the E&S Plans. *See also*, PPL R.B. at 11, citing PPL St. No. 1, p. 16: ". . . the construction sequence and methodology outlined in the E&S Plans are general guidelines to assist in limiting sediment laden runoff from the construction site."

On the one hand, PPL defends its actions surrounding the Project as consistent with the E&S Permit, and, therefore, deserving of an inference of reasonableness under the Code, while simultaneously attacking the probative value of deviation from the said permit's terms and best practices that is highlighted by the

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[63] "The Complainants' lack of understanding about these terms is critical. For example, PPL Electric's change to the path of the access road was a "field change" to the E&S Plans, which, contrary to the Complainants' allegations otherwise, does not require prior approval before it is made. (Tr. at 232.) That "field change" was later memorialized in the revisions to the E&S Plans and submitted to DCCD at DCCD's request. (Tr. at 232-33)."

[64] "Although "[t]he access roads and work pads shown on the E&S Plans are the planned/anticipated construction areas designed for the project," the "field conditions often warrant slight variation to the actual location of the access roads and pads." (PPL Exh. TE-3, p. 1.). "Therefore, the entire ROW width is permitted as the LOD, to allow for construction flexibility in the field while staying in compliance with the E&S Plans and Permit." (PPL Exh. TE-3, p. 1.).

Complainants. PPL, rightfully, cites prior Commission orders in this Complaint which have determined that the Commission will not engage in an analysis concerning the proper interpretation of the terms and conditions of the E&S Permit. Interpretation and substantive review of the permit's terms have been decided as outside the scope of this Complaint and also outside the scope of the Commission's authority. *See, e.g.*, PPL R.B. at 4-11.

Again, while interposing the E&S Permit as a response to the allegations of unreasonable service in this Complaint, however, PPL defends its compliance with Section 1501 of the Code by referencing and emphasizing the fact that the agency with responsibility for issuing the permit (DCCD), closed the permit. The closure of the E&S Permit by DCCD is extrapolated by PPL as conclusive, or, according to PPL's position, strongly suggestive, of compliance with reasonable and adequate service under the Code. Particularly, concerning any findings in the record developed before the Commission of soil erosion and water runoff affecting the Complainants' home. *See* PPL Stmt. 1 at 14, 20, 21.

Based on the foregoing, PPL has emphasized the discretion it held under the approved E&S Plan to engage in on-site decisions and revisions. We find it an exaggeration by PPL to represent at this juncture that compliance with the directive in the I.D. would, in any manner, occasion or necessitate a re-application and re-permitting procedure before the DCCD as is suggested in the Exceptions.

Finally, on consideration of PPL Exception No. 1, we observe that consideration of soil erosion as part of a utility's statutory duty to provide adequate and safe service under the Code is not without substantial administrative precedent for this Commission.

As an initial consideration, Commission Regulations pertaining to the siting of transmission line facilities expressly reference consideration of soil erosion as a factor in our consideration. *See* 52 Pa. Code §§ 57.71-57.77.[65]

As set forth in our siting regulations, PPL, as an EDC, will, historically, include in its application documents, a proposed, soil and erosion practice which is, typically, detailed in conjunction with the EDC's proposed vegetation management best practice. *See e.g.*, *Applications of Pennsylvania Power & Light Company*, Docket Nos. A-00098343 and A-00098344 (Opinion and Order entered August 17, 1978) at ¶ 2:

> 2. That Pennsylvania Power & Light Company shall construct its proposed transmission line over and through the property involved in these proceedings in compliance with all State and Federal environmental laws and regulations and in accordance with the methods and procedures set forth in the

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[65] **§ 57.75. Hearing and notice.**

* * *

(e) At hearings held under this section, the Commission will accept evidence upon, and in its determination of the application it will consider, inter alia, the following matters:

* * *

(2) The safety of the proposed HV line.

(3) The impact and the efforts which have been and will be made to minimize the impact, if any, of the proposed HV line upon the following:

(i) Land use.

(ii) Soil and sedimentation.

* * *

(viii) Geologic areas

(ix) Historic areas.

(x) Scenic areas.

(xi) Wilderness areas.

(xii) Scenic rivers.

> company's manuals entitled "A Program for Vegetation Management" and "Soil Erosion & Sedimentation Control on Transmission Line Rights-of-way.

Id. at ¶ 2.[66]

Further, in various proceedings involving rail crossings under Chapter 27 of the Code, 66 Pa.C.S. §§ 2701-2704, Commission orders directing abolition and/or reconstruction of crossings regularly include language that the performance of any duties be done with proper consideration of soil and erosion for prevention of safety hazards. *See e.g., Investigation upon the Commission's own Motion into the matters pertaining to all rail-highway crossings — above the grade, below the grade and at the same grade as the tracks of the entire system of the Montour Railroad Company, a wholly owned subsidiary of the Pittsburgh and Lake Erie Railroad Company, in eleven (11) municipalities in the Counties of Allegheny and Washington*, Docket No. I-00870060 (Opinion and Order entered December 4, 2001); at ¶ 7:

> 7. That Montour Trail Council, at its sole cost and expense, within two years of service of the Commission's Order, prepare and submit to the Commission and all interested parties, plans and cost estimates for the removal of the structure at the rail-over-highway crossing designated in this proceeding as Crossing 19, said plans to include removal of the crossing abutments and wing walls (the crossing span having been previously removed), grading back the

[66] *See also, Carl A. Nolan v. Pennsylvania Power & Light Co*., Docket No. C-00956756 (Opinion and Order entered October 10, 1996) (*Nolan*) dismissing complaint alleging that, with respect to a certain transmission line, there was soil erosion and a concentration of storm water run-off onto his property and, *inter alia*, that PP&L stopped the natural flow of storm water causing it to funnel onto the property of adjacent landowners, with no express allegation of Section 1501 violation, based on primary jurisdiction doctrine as applied to a complaint alleging soil erosion.

> embankments to a slope not greater than 2:1, and seeding and mulching the area thus disturbed to prevent soil erosion.

Id. at ¶ 7; (emphasis added).

Lastly, the Commission has entertained formal complaint proceedings involving allegations of unreasonable service due, in part, to a utility's conduct in relation to soil erosion, and decided such complaints on their facts. *See Bruce D. Heffner v. PPL Electric Utilities Corporation*, Docket No. C-2016-2547516 (Final Order entered March 30, 2017) (*Heffner*);[67] *see also, Kuhn*:

> On remand, we direct the ALJ to determine the safety impact of the proposed tree removal on the Complainant's property, including but not limited to, any erosion to the soil and sedimentation on the Complainant's property and any safety hazards resulting therefrom that may be reasonably identified and the steps that DLC proposes to implement in order to adhere to its statutory duty to furnish adequate, safe and reasonable service.

Kuhn, at 22; (emphasis supplied).

In light of the foregoing regulatory and administrative precedent, we do not accept the argument of PPL that the mere closure of the E&S Permit issued by DCCD can be construed, absent more, to support an inference that no Code violation has occurred on this record. There is thus, a dual role for the Commission and other

[67] In *Heffner v. PPL*, a homeowner filed a complaint alleging that the vegetation removal performed by the utility on adjacent property changed the direction of the water flowing across a right-of-way and directed the water runoff onto the complainant's property. The complaint in *Heffner v. PPL* further alleged that the water runoff damaged the complainant's residence. Pursuant to the jurisdiction and authority of the Commission to decide service disputes between utilities and the public, we accepted jurisdiction of the dispute and it was decided on its facts. *See Heffner v. PPL*, I.D. at 9.

government agencies, in this instance DCCD and DEP, for addressing soil erosion consistent with the delegation of our jurisdiction and authority under the Code.[68]

(b) PPL Exception No. 2

In its Exception No. 2, PPL argues that, assuming there is proper jurisdiction and authority, the Hartmans did not meet their burden of proof. We disagree and shall deny this Exception, consistent with the discussion in this Opinion and Order.

Under the preponderance of the evidence standard that has been extensively addressed in *Povacz*, we determine that the Complainants have met their burden of proof that a service or facility is, more likely than not, the cause of the problem described in their Complaint. *See Povacz* at 1006 – "The preponderance burden requires a customer to prove that a service or facility is — more likely than not — the cause of the problem described in their complaint. *See Popowsky v. Pa. PUC*, 937 A.2d 1040, 1055 n.18 (Pa. 2007) ("This Court has characterized a preponderance of the evidence as tantamount to a 'more likely than not' inquiry[.]")."

PPL's evidentiary response to the Complainants' burden of coming forward is insufficient, as PPL, through its witnesses, has not countered the evidence and testimony of the Complainants concerning the presence of water on the subject property – a condition which did not exist prior to the Project. Instead, PPL has placed considerable reliance upon the mere fact that the E&S Permit was closed:

> Moreover, "the construction sequence and methodology outlined in the E&S Plans are general guidelines to assist in

[68] As addressed in *Nolan, supra*, when considering the doctrine of primary jurisdiction as between the Commission and the Court, the overriding consideration is whether the peculiar expertise of the Commission is required to resolve the dispute. In this case, the relationship of PPL's conduct, the impact of such conduct on safety, is within the Commission peculiar expertise.

> limiting sediment laden runoff from the construction site." (PPL St. No. 1, p. 16.) "In areas where the stone is to be removed, PPL Electric must restore these areas back to a permanently stabilized vegetated state, with a requirement of 70% vegetation coverage." (PPL St. No. 1, p. 16.) This 70% vegetation coverage requirement was for the entire Project, not every parcel involved in the Project. (Tr. 240.) Here, "[t]he Company achieved this restoration requirement throughout the project area, as evidenced by DCCD closing out the E&S Permit on June 17, 2021." (PPL St. No. 1, p. 16.) "There is no requirement to truck in topsoil for all restored areas of the project disturbance." (PPL St. No. 1, p. 16.) And, as noted previously, DEP and DCCD closed out the E&S Permit for the Project, evidencing PPL Electric's compliance with these provisions in the E&S Plan. (See PPL Exh. TE-4.) Also, DEP never issued any notices of violation to PPL Electric related to the Project. (PPL St. No. 1, p. 18.)

PPL R.B. at 11; (emphasis added).

The closure of the E&S Permit is, necessarily, conclusive of PPL's compliance with the terms and conditions thereof as determined by the DCCD. Such closure is not, however, conclusive of a finding of a violation of Section 1501 of the Code. The Commission is not deprived of jurisdiction pursuant to Section 1501 concerning reasonable service and facilities, including vegetation management, by virtue of the prior, closed, E&S Permit regarding earth disturbance. *See e.g., Lehet*; *see also, Mariner East*; *Matu Appeal* at *7, notes omitted: "The Commission need not refrain from evaluating whether a public utility's vegetation maintenance is reasonable under Section 1501 of the Code simply because that maintenance involves herbicide use."

Based on the foregoing, we determine that there is no conflict that arises as between DCCD and this Commission based on this proceeding.

(c) PPL Exception No. 3

Consistent with our disposition of PPL Exceptions Nos. 1-2, we reject and deny PPL Exception No. 3, that the ALJ's ordered relief to address the alleged erosion and stormwater runoff issues is unsupported, infeasible, and vague. PPL, in response to the Hartmans' Complaint, has relied upon mere compliance with the terms of the E&S Plan and Permit. With specific references to the vegetation coverage at issue, PPL has noted that the 70% vegetation coverage requirement was for the entire Project, not every parcel involved in the Project. *See* Tr. at 240; (emphasis added). PPL advises that it achieved this restoration requirement throughout the project area, as evidenced by DCCD closing out the E&S Permit. PPL Stmt. 1 at 16. Finally, PPL has admitted that: "There is no requirement to truck in topsoil for all restored areas of the project disturbance." *Id.*

Logically, the ALJ's recommendation, which we shall adopt, does not apply to the entire project area, but rather to the specific right-of-way on the Complainants property which has been the subject of litigation. PPL's Exception No. 3 is denied.

F. Disposition re the Imposition of a Civil Penalty

1. Civil Penalty Under "Rosi" Standards

As noted, the presiding ALJ concluded that the Complainants met their burden of proof concerning inadequate erosion control measures by PPL in connection with the Project. However, he did not recommend the imposition of a civil penalty. Commission Rules of Practice at 52 Pa. Code §§ 69.1201(c), *i.e.* the *Rosi* Standards,

provide for the consideration of the following factors and standards when considering a civil penalty:

> (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.

Although this Complaint has been the subject of vigorous litigation between the Parties, we conclude that the conduct of PPL is of the less egregious nature. We note the consternation of the Complainants concerning their efforts to achieve an acceptable response by PPL concerning their claims as to the Project, particularly the restoration of the right-of-way comparable to surrounding properties. However, the record indicates that the Complainants were extremely active in their contacts and exchanges through e-mail and other methods expressing their concerns to PPL. That no resolution was achieved outside of litigation does not change our conclusion.

> (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.

We conclude that the consequences of the conduct at issue is of a serious nature and related to, alleged, property damage.

(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.

We conclude that PPL's conduct was intentional.

(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.

We conclude that PPL has made efforts to modify internal practices and procedures to address the conduct at issue. The Complainants have met their burden of proof concerning one element of their formal complaint allegations – PPL's failure to take adequate measures concerning soil erosion and sedimentation. Adequate measures as to whether the formal complaint allegations have been abated are not complete. Notwithstanding, PPL has offered to: 1) ensure that notice is provided to the Complainants sufficiently in advance of any future herbicide application within the right-of-way; and 2) remove any debris left by PPL contractors, employees/agents within and along the property.

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

Although the Complainants have alleged environmental harm to certain waterways of the area and the impairment of the aesthetic quality of the surrounding area, approximately 179 landowners were affected by the Project. The Hartmans are the only landowners who have filed a formal complaint before the Commission.

(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.

The record does not indicate that there is any matter related to this proceeding and we consider it as an isolated matter.

(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.

This factor is not applicable to this proceeding.

(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.

The facts of this proceeding support a lesser penalty.

(9) Past Commission decisions in similar situations.

Commission decisions in analogous situations support a lesser penalty.

(10) Other relevant factors.

On consideration other relevant factors, including allegations related to environmental concerns under the ERA to this proceeding, we conclude that a civil penalty of $1,000 is appropriate.

V. Conclusion

Consistent with the foregoing discussion, we shall adopt the Initial Decision of ALJ Haas, as modified, consistent with the discussion in this Opinion and Order. The Exceptions of Michael and Sharon Hartman are granted, in part, and denied, in part, consistent with this Opinion and Order. The Hartmans' Exceptions are granted as to the request that the record be reviewed pursuant to a "totality of the circumstances" in order to determine whether Complainants have met their burden of proof to establish unreasonable service under Section 1501 of the Code and denied with respect to the other Exceptions, consistent with the discussion in this Opinion and Order. PPL's Exceptions are denied, consistent with the discussion in this Opinion and Order.

The above-captioned Complaint shall remain open, pending the Commission's receipt of the report as directed in this Opinion and Order. The report as directed in this Opinion and Order that PPL, within forty-five (45) days of the entry of this Opinion and Order, re-inspect the pole pads numbers 75 and 76, and the access road and shoulders associated therewith to determine if any areas of erosion or excessive runoff are still occurring and take any necessary corrective measures, shall be submitted pursuant to 52 Pa. Code § 5.591 and served upon the Parties, the Commission's Bureau of Technical Utility Services, and the DCCD. Thereafter, PPL shall file a Certificate of Satisfaction pursuant to 52 Pa. Code § 5.24 and the procedures of 52 Pa. Code § 5.24 shall be followed; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions of Michael and Sharon Hartman, filed on October 19, 2023, to the Initial Decision of Administrative Law Judge Steven K. Haas, issued October 3, 2023, in the above-captioned formal complaint are granted in part, and denied, in part, consistent with this Opinion and Order.

2. That the Exceptions of Michael and Sharon Hartman, advocating that the evidence to determine whether a violation of Section 1501 of the Code, 66 Pa.C.S. §1501, has been committed, under a totality of the circumstances review, are granted, consistent with this Opinion and Order.

3. That the Exceptions of Michael and Sharon Hartman are, in all other aspects, denied, consistent with this Opinion and Order.

4. That the Exceptions of PPL Electric Utilities Corporation, filed on October 23, 2023, to the Initial Decision of Administrative Law Judge Steven K. Haas, issued October 3, 2023, in the above-captioned formal complaint are granted in part and denied in part, consistent with this Opinion and Order.

5. That the Initial Decision of Administrative Law Judge Steven K. Haas, issued October 3, 2023, in the above-captioned Formal Complaint is, hereby, adopted consistent with this Opinion and Order.

6. That the Commission notifies the Parties that we take official notice of federal standards promulgated by Federal Energy Regulatory Commission Transmission Vegetation Management as those federal standards have been incorporated into PPL Electric Utility Corporation's biennial filings, relating to vegetation management in transmission corridors. Consistent with Commission Regulations at 52 Pa. Code § 5.408, the parties shall have twenty (20) days in which to timely request to show that the facts noticed are not properly noticed or that alternative facts should be noticed.

7. That, within forty-five (45) days of the entry of this Opinion and Order, PPL Electric Utilities Corporation shall re-inspect the pole pads numbers 75 and 76, and the access road and shoulders associated therewith to determine if any areas

of erosion or excessive runoff are still occurring and take any necessary corrective measures to prevent or minimize future erosion, including but not limited to surface re-grading, adding additional stone material and adding additional topsoil and re-seeding areas where the soil and vegetation has washed away.

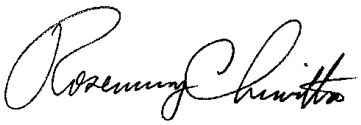
8. That the above-captioned Complaint shall remain open, pending the Commission's receipt of the report as directed in this Opinion and Order. The report as directed in this Opinion and Order shall be submitted pursuant to 52 Pa. Code § 5.591 and served upon the Parties, the Commission's Bureau of Technical Utility Services, and the Dauphin County Conservation District. Thereafter, PPL shall file a Certificate of Satisfaction pursuant to 52 Pa. Code § 5.24.

9. That within thirty (30) days of the entry date of a final Order in this matter, PPL Electric Utilities Corporation shall remit a civil penalty of $1,000, payable by certified check or money order, to "Commonwealth of Pennsylvania" with the docket number of this proceeding listed, and sent to:

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

10. That the Commission's Secretary is directed to serve a copy of this Opinion and Order upon the Dauphin County Conservation District and the Commission's Bureau of Technical Utility Services.

BY THE COMMISSION,



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: January 8, 2025

ORDER ENTERED: February 28, 2025