**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

Public Meeting held January 13, 2011

Commissioners Present:

James H. Cawley, Chairman

Tyrone J. Christy, Vice Chairman, Dissent in Part Statement

John F. Coleman, Jr.

Wayne E. Gardner

Robert F. Powelson

|  |  |  |
| --- | --- | --- |
| Pennsylvania Public Utility Commission  v.  The Peoples Natural Gas Company d/b/a  Dominion Peoples |  | C-2009-2027991 |

# 

# Opinion and Order

**BY THE COMMISSION:**

Before the Commission for consideration and disposition is a Settlement Agreement (Settlement or Settlement Agreement) originally filed on December 11, 2009, by The Peoples Natural Gas Company, d/b/a Dominion Peoples (Dominion Peoples or the Company) and the Commission’s Law Bureau Prosecutory Staff (Prosecutory Staff) collectively, “the Parties,” with respect to a formal Complaint filed by the Prosecutory Staff. Along with the Settlement Agreement, the Parties submitted a Joint Statement in Support of the Settlement Agreement (Joint Statement in Support). The Parties also submitted additional information in response to our Secretarial Letter issued June 21, 2010 (June 21 Secretarial Letter).

The Parties submit that the proposed Settlement Agreement is in the public interest and complies with the Commission’s Policy Statement concerning *Factors and Standards for Evaluating Litigated and Settled Proceedings Involving Violations of the Public Utility Code and Commission Regulations*, 52 Pa. Code § 69.1201 (*Policy Statement*). Joint Statement in Support at 4. Further, the proposed Settlement is submitted as contingent on the Commission’s approval without any modification. Settlement at 15, ¶ 54. If the Commission does not approve the Settlement without modification, either Party may elect to withdraw from the Settlement. *Id.* at 15-16, ¶ 55.

**History of the Case**

The Prosecutory Staff filed the instant formal Complaint on behalf of the Commission’s Gas Safety Division on July 24, 2009. The Complaint alleges multiple violations of the Code of Federal Regulations (CFR) and the Regulations of the Commission relative to natural gas pipeline safety. The specific incident that is the subject of the Complaint occurred on March 5, 2008.

On August 14, 2009, the Prosecutory Staff filed a letter indicating that the Parties had agreed to an extension of time, until October 7, 2009, for the Company to file an Answer. On September 29, 2009, the Prosecutory Staff filed a letter indicating that the Parties were attempting to negotiate a settlement. The Prosecutory Staff requested sixty (60) days, or until December 7, 2009, to file a settlement agreement. On November 24, 2009, the Prosecutory Staff requested an additional extension of forty-five (45) days, or until January 22, 2010, to negotiate a settlement. This request was granted by a Secretarial Letter dated December 2, 2009.

As stated previously, the Parties filed the Settlement Agreement and the Joint Statement in Support on December 11, 2009. The Commission subsequently issued the June 21 Secretarial Letter, which requested the production and presentation of additional information relating to this matter. On August 4, 2010, the Company filed its response to the Secretarial Letter (August 4 Response). The Prosecutory Staff filed its response on August 6, 2010 (August 6 Response).

**Background**

On March 5, 2008, a catastrophic explosion and fire occurred at 171 Mardi Gras Drive, Plum Borough, Pennsylvania. As a result of that explosion and fire, a single-family residence owned by the Pettinato family was destroyed. Settlement Agreement at 3, ¶ 12. As a result of the explosion and fire, Richard J. Leith was killed and his granddaughter was seriously injured. The house at 171 Mardi Gras Drive was destroyed, and two other houses were rendered a total loss. Eleven other houses sustained damage as a result of the explosion.  *Id.* at 4, ¶ 14. Dominion Peoples owns and operates the gas distribution pipelines in the area.  *Id.* at 4, ¶ 15.

On March 5, 2008, Dominion Peoples’ servicemen arrived at the site shortly after the explosion and closed the valves on the two inch natural gas main. *Id.* at 5, ¶ 20. Dominion Peoples’ personnel initiated a leak survey. *Id.* at 5, ¶ 21. Despite several valves being shut off, the ground remained on fire along the north side of the driveway at 171 Mardi Gras Drive. *Id.* at 6, ¶ 25. After being asked to do so by a Commission Gas Safety Inspector, Dominion personnel attempted to identify other valves to shut off the flow of gas to Mardi Gras Drive. The valves were frozen and required lubrication to be moved into the “off” position. *Id.* at 6, ¶ 26. Approximately three hours and fifteen minutes after the initial explosion, the ground fire along the north side of the driveway at 171 Mardi Gras Drive was extinguished. *Id.* at 6, ¶ 26.

On November 21, 2008, the National Transportation and Safety Board (NTSB) adopted a report in which the NTSB determined that the probable cause of explosion and fire was excavation damage to Dominion Peoples’ two inch distribution line that stripped the pipe’s protective coating and made the pipe susceptible to corrosion and failure. *Id.* at 4-5, ¶ 17.

Had this matter been litigated, Prosecutory Staff would have alleged that Dominion Peoples’ conduct was in violation of 49 C.F.R. § 192.13(c) (General Requirements), 49 C.F.R. § 192.614 (Damage Prevention), 49 C.F.R. § 192.747 (Valve Maintenance: Distribution Systems) and 52 Pa. Code § 59.33(b) (Safety Code). Settlement Agreement at 7-9, ¶ 33A-C. We take note of the following:

COUNT 2 – Violation of 52 Pa. Code § 59.33(b) and 49 C.F.R. § 192.614 (Continuing Surveillance and Damage Prevention).

Title 49 C.F.R. § 192.614 requires each operator of a gas distribution system to have in place a damage prevention program for pipelines that it reasonably believes could be damaged by excavation activities.

Dominion failed to follow specific procedures outlined in Dominion Standard Operating Procedure 090-Section III (F)(2) and (3) (SOP 090) with reference to inspection of the site of the original work performed by contractors Ley/Higgins at the time of the excavation and replacement work on the sewer lateral both before and after excavation. Had these procedures been followed, detection of the damaged Pipe M-2523 would have likely been detected and corrected. In failing to properly follow the provisions of its own SOP 090, Dominion additionally failed to comply with the record-keeping provisions of section (III) (F)(5) for documenting the inspection activities of Ley/Higgins at the 171 Mardi Gras site.

Settlement Agreement at 8-9, ¶ 33C.

Had this matter been litigated, Dominion Peoples would have denied all of the allegations and defended against the same. *Id.* at 9, ¶ 34.

**Terms of the Settlement Agreement**

The proposed Settlement contains a series of material terms, but those terms do not constitute an admission, a finding of any fact, or a finding of culpability on the part of Dominion Peoples in this or any other proceeding.

In order to settle the formal Complaint, Dominion Peoples has agreed to the following:

* 1. Pay a civil penalty in the amount of eighty thousand dollars ($80,000) pursuant to 66 Pa. C.S. § 3301(c). Dominion Peoples agrees that it will not include any portion of the payment of the civil penalty in any future rate proceeding.
  2. Establish a combined Damage Prevention metric comprised of six individual metrics with equal weight given to each of the following: (1) Dominion’s performance related to “who is at fault for damages facilities;” (2) Dominion’s total facility damages; (3) Dominion’s ratio of damages per 1000 tickets marked; (4) Dominion’s total cost of damages, cost per damage, and number of facility damages incurred when Dominion’s outside locator company is used; (5) ensuring that Dominion sends damage prevention materials to and offers to meet with each emergency responder and county emergency management group in its service territory, each regulated municipal water and sewer entity, and municipal and PennDOT crews once a year prior to the beginning of the construction season; and (6) monitors the number of L&I reports by Dominion.

This metric shall be filed annually on March 15 with the Public Utility Commission’s Gas Safety Office and the Office of Trial staff.

* 1. Dominion will create a performance metric for the total number of corrosion-related leaks based on corrosion leaks repaired per mile of bare steel pipe and total corrosion leaks outstanding at the year end per mile of bare steel, which should be reviewed semi-annually by Gas Safety and compared to the industry average.
  2. Dominion will create a performance metric related to total distribution system pipeline replacement, which will target historical spending over the five prior years for such repairs and will prioritize replacements by looking at a combination of: (1) Dominion’s risk ranking for its distribution system, (2) sites of active corrosion, and (3) risk assessments made under Integrity Management procedures. Within two years, Dominion will accelerate the critical valve determination and review program from five years to three years, thereby diminishing safety issues related to emergency shutdowns. Dominion will establish critical valves based upon the criteria that if an emergency shutdown is necessary, Dominion would be able to restore service to all customers within 24 hours.
  3. Refrain from committing any violations of gas safety regulations.

Settlement Agreement at 10-11, ¶ 36A-E.

The proposed Settlement Agreement and payment of the specified civil penalty of $80,000 would result in Commission Prosecutory Staff forbearing from prosecuting the formal Complaint relative to Dominion Peoples’ conduct as described in the Settlement Agreement. It would not, however, affect the Commission’s authority to receive and resolve any formal or informal complaints filed by any affected party with respect to the incident, except that no further civil penalties may be imposed by the Commission for any actions identified in the Settlement Agreement.  *Id.* at 11, ¶ 37.

We note that the Settlement Agreement is silent with respect to the maximum civil penalty that could be imposed in this matter if the case had proceeded to hearing and if the allegations were proved.

We also note that, pursuant to the Settlement Agreement at Paragraph 55, if the Settlement Agreement is not adopted by the Commission without modification, either Party may elect to withdraw from the Settlement Agreement. *Id.* at 15-16, ¶ 55.

In the June 21 Secretarial Letter, we requested additional information relating to the circumstances surrounding the incident at Plum Borough. We requested that the Parties provide us with specific information relating to Dominion Peoples’ Standard Operating Procedure 090 (SOP 090), referenced in Paragraph 33B of the proposed Settlement. We directed the Parties to specifically address the issue of whether failure to follow SOP 090 before the excavation referenced in Paragraphs 17 and 33B of the proposed Settlement Agreement contributed to the explosion or whether compliance with SOP 090 could have prevented the explosion.

In its response to the June 21 Secretarial Letter, Dominion Peoples provided a copy of SOP 090 and explained that SOP 090 is “designed to prevent damages to buried pipeline facilities and the facilities of others.” August 4 Response at 2. According to Dominion Peoples, SOP 090 provides that Dominion Peoples has a duty to inspect a site before excavation and mark the pipeline location upon receiving a one-call notification. Dominion Peoples states that this was done at the Plum Borough site. *Id.*

Dominion Peoples further states that it cannot directly respond to the questions posed by the June 21 Secretarial Letter. Dominion Peoples notes that the proposed Settlement Agreement was filed without any hearing or fact finding having been conducted. Dominion Peoples also references provisions in the proposed Settlement Agreement which expressly provide that Dominion Peoples’ conduct was not the proximate cause of the incident at the Plum Borough site, citing to Paragraphs 34, 35, 42, 50, 52 and 53 of the proposed Settlement. August 4 Response at 2. Dominion Peoples states:

We did not violate the SOP and so cannot speculate as to whether a potential violation of SOP 090 would have contributed to the explosion. As to the second part of the inquiry, (‘whether compliance with the SOP could have prevented the explosion’) we state that we followed the SOP, yet the explosion still occurred due to a third-party’s violation of the prudent practices (hand-digging) and self-reporting provision of the Pa. One-Call Act.

*Id.*

In its response to the June 21 Secretarial Letter, Prosecutory Staff states that, while it would have alleged a violation of SOP 090 had the matter gone to hearing, Dominion Peoples would have vigorously denied such an allegation. Prosecutory Staff further asserts that absent a full fact-finding hearing before an Administrative Law Judge, “the facts are inconclusive as to whether, under the particular circumstances of this case, following SOP 090 would have prevented this incident.” August 6 Response at 1.

Prosecutory Staff states further:

While it is possible that following SOP 090 could have prevented this incident, there is just no way to be certain. But what is certain is that this settlement accelerated Dominion’s process of implementing remedial measures designed to minimize the likelihood of an incident such as this reoccurring. Prior to, and during the settlement negotiation process, Dominion was cooperative in establishing and implementing several safety matrices, which are referenced in the settlement. Had the parties decided to litigate this matter, these remedial measures likely would not be in place at this time.

*Id.* at 2.

Prosecutory Staff closes with the following observation:

Finally, while investigating this matter, [this Commission’s Gas Safety Division] reviewed what documentation was available, including the NTSB report which determined that the third party excavator, not Dominion, was responsible. For the reasons stated above, Staff believed that the matter was appropriate for settlement given the inherent uncertainties associated with the facts. Moreover, the amount of the proposed penalty is consistent with the presumption that the relevant provision(s) of the CFR was violated.

*Id.* at 2.

**Discussion**

Pursuant to our Regulations at 52 Pa. Code § 5.231, it is the Commission’s policy to promote settlements. The Parties provide their own analysis of the proposed Settlement Agreement in light of the *Policy Statement* in their Joint Statement. However, the Commission must review proposed settlements to determine whether the terms are in the public interest. *Pa. PUC v. Philadelphia Gas Works*, M-00031768 (January 7, 2004); 52 Pa. Code § 69.1201.

We have set forth ten factors to be considered in the evaluation of a settlement in these types of proceedings in our *Policy Statement*. The Parties provided a thorough discussion of those factors as they relate to the terms of the Settlement Agreement. Joint Statement in Support at 4-7.

The first factor we consider is whether the conduct at issue is of a serious nature. 52 Pa. Code § 69.1201(c)(1). “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.” *Id*. The Parties’ discussion of this factor submits that the alleged conduct in this matter:

. . . involves following [Dominion Peoples’] damage prevention procedure and designation of and annual inspection of critical valves. While these are significant issues, if proven, they would not rise to the level of serious misconduct.

Joint Statement in Support at 5.

We disagree with the Parties’ assessment of this factor. While we acknowledge that there have been no factual hearings in this matter, a failure to follow damage prevention procedure and the designation of and annual inspection of critical valves would, *if proven*, rise to the level of serious misconduct. The Parties have noted that our Policy Statement provides that our standards will not be applied as strictly in settled cases as in litigated cases. 52 Pa. Code § 69.1201(b). The Parties have also brought our attention to the concept that, in settled cases, the parties “will be afforded flexibility in reaching amicable resolutions to complaints and other matters so long as the settlement is in the public interest.” *Id.* For these reasons, as well as the substantive provisions of the Settlement Agreement, our consideration of this first factor does not mandate rejection of this proposed Settlement Agreement. However, neither Prosecutory Staff nor Dominion Peoples should be under any illusion that we would not find the alleged conduct, if proven, to be very serious indeed.

The second factor we may consider is whether the resulting consequences of the conduct are of a serious nature. 52 Pa. Code § 69.1201(c)(2). “When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.” *Id.* Here, the Parties state: “In this case, the result of Dominion’s alleged conduct was not the proximate cause of damage to its facilities or to any customers’ properties or person. However, there is potential damage in situations where valves do not close.” Joint Statement in Support at 5. Our review of the proposed Settlement Agreement and the Parties’ Responses to the June 21 Secretarial Letter bring this particular factor into sharp focus. There is nothing before us which indicates that the alleged conduct of Dominion Peoples was the proximate cause of the incident in Plum Borough. To the contrary, everything presented to us, including the representations of the Prosecutory Staff and the description of the NTSB findings, supports the Parties’ position here. Again, as this is a proposed Settlement without hearing, we do not have a factual record before us. However, under all of the circumstances, we will accept the Parties’ position on this factor.

The third factor is not applicable here because it pertains only to litigated proceedings. 52 Pa. Code § 69.1201(c)(3).

The fourth factor we may consider is whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. The 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. 52 Pa. Code § 69.1201(c)(4). We note that the Settlement Agreement’s terms include three specific provisions which mandate that Dominion Peoples will establish several performance metrics and a damage prevention and control metric which are designed to specifically address the circumstances surrounding this particular incident. Settlement Agreement at 10-11. In its August 6 Response, Prosecutory Staff states: “But what is certain is that this settlement accelerated Dominion’s process of implementing remedial measures designed to minimize the likelihood of an incident such as this reoccurring.” August 6 Response at 2. Prosecutory Staff also states that Dominion was cooperative in establishing and implementing the safety matrices. *Id.* We also note that the proposed Settlement Agreement provides reporting requirements for several of the safety matrices. Settlement Agreement at 10-11.

The fifth factor we may consider is the number of customers affected and the duration of the violation. 52 Pa. Code § 69.1201(c)(5). Here, the Parties simply state that service to one house was directly affected while service to “a number of neighboring customers was interrupted so that Dominion could complete a thorough inspection of its facilities in the area for evidence of having been damaged by third parties.” Joint Statement in Support at 5-6. While the Parties’ statement here is consistent with the events as described, we find that it substantially understates the impact of the incident. Accordingly, we do not accept the Parties’ position with regard to this factor although we acknowledge the Parties’ basic premise that the alleged conduct of Dominion was not the proximate cause of the incident.

The sixth factor relates to Dominion Peoples’ compliance history with the Commission. “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.” 52 Pa. Code § 69.1201(c)(6). The Parties state that “Dominion has a strong history of compliance and compares favorably with the compliance record of other natural gas distribution companies in Pennsylvania.” Joint Statement in Support at 6.

The seventh factor relates to whether the utility cooperated with a Commission investigation. 52 Pa. Code § 69.1201(c)(7). The Parties state that Dominion Peoples has cooperated with the investigation throughout all phases. Joint Statement in Support at 6.

The eighth factor involves consideration of whether the penalty amount is sufficient to help deter future violations. 52 Pa. Code § 69.1201(c)(8). The Parties submit that the proposed penalty of $80,000 is sufficient to deter future violations. Settlement Agreement at 10; Joint Statement in Support at 2, 6. Dominion has agreed that this sum will not be recoverable through rates. Joint Statement in Support at 6. We agree with the Parties’ position on this factor.

The ninth factor examines whether the results in this proposed Settlement Agreement are consistent with past Commission decisions in similar situations. 52 Pa. Code § 69.1201(c)(9). The Parties state that they are unaware of any prior decisions which present a similar fact pattern as this incident. However, they believe that the Settlement Agreement here is not inconsistent with prior Commission decisions. Joint Statement in Support at 6.

The tenth factor provides that we may consider other relevant factors in assessing a penalty. 52 Pa. Code § 69.1201(c)(10). The Parties submit that the fact that this is a settlement which avoided litigation and produced positive results is a relevant factor for our consideration. Joint Statement in Support at 7.

Our review of all of the relevant factors reveals this to be a very close case. Nonetheless, we will approve the proposed Settlement Agreement as submitted. Several factors lead us to this conclusion. Chief among those factors are several statements surrounding the ultimate responsibility for the incident which led to this action. We believe this comment from the Joint Statement in Support sums it up best:

An investigation by the Commission’s Gas Safety Division and the National Transportation Safety Board (“NTSB”) revealed that the primary party responsible for the explosion was a sub-contractor conducting sewage excavation work on behalf of the Plum Boro Municipal Authority.

*Id.* at 2. Absent that specific factor in this action, we would be hard pressed to approve the proposal now before us.

Several other factors also support adoption of the proposed Settlement Agreement. We agree that the cooperation by Dominion Peoples in the prompt development and implementation of several damage prevention and safety matrices support approval here. We are also persuaded by the arguments of the Prosecutory Staff that the proposed Settlement Agreement satisfies the public interest “given the inherent uncertainties associated with the facts. Moreover, the amount of the proposed penalty is consistent with the presumption that the relevant provision(s) of the CFR was violated.” August 6 Response at 2.

**Conclusion**

We reiterate that this is a very close case. If one or more of the factors we have highlighted were not present, this could easily have gone the other way. However, upon consideration of all of the factors here, we find that the proposed Settlement Agreement meets the standards of our *Policy Statement*, is in the public interest and should be approved without modification; **THEREFORE,**

**IT IS ORDERED:**

1. That the Settlement Agreement filed on December 11, 2009, at this docket is approved as filed.

2. That The Peoples Natural Gas Company, d/b/a Dominion Peoples shall pay a civil penalty of Eighty Thousand Dollars ($80,000.00) within twenty (20) days of the entry of this Opinion and Order by sending a certified check or money order payable to the Pennsylvania Public Utility Commission addressed to:

Pennsylvania Public Utility Commission

P.O. Box 3265

Harrisburg, PA 17105-3265

3. That the sum paid by The Peoples Natural Gas Company, d/b/a Dominion Peoples, as directed in Ordering Paragraph 2 above, shall not be recoverable through rates.

4. That a copy of this Opinion and Order shall be served on the Commission’s Office of Administrative Services, Financial and Assessment Section.

5. That upon payment of the civil penalty required by Paragraph 2 above, the Secretary of the Commission shall mark this proceeding closed.

 **BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: January 13, 2011

ORDER ENTERED: January 14, 2011