

December 14, 2016

Via Electronic Filing

Rosemary Chiavetta, Esquire
Secretary
PA Public Utility Commission
Commonwealth Keystone Building, 2 North
P.O. Box 3265
Harrisburg, PA 17105-3265

**Re: Docket No. C-2016-2547322
Robert Mattu v. West Penn Power Company
Initial Brief of West Penn**

Dear Secretary Chiavetta:

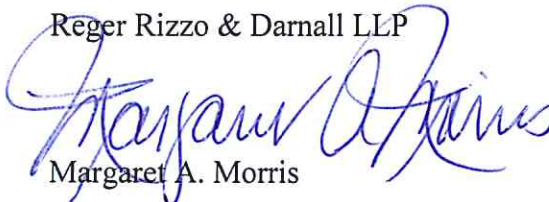
Attached for filing is the Initial Brief of Respondent, West Penn Power Company (West Penn), in the above referenced proceeding.

A copy of the Initial Brief has been forwarded to Complainant's counsel in the manner indicated on the attached Certificate of Service.

If there are any questions, please contact me.

Very truly yours,

Reger Rizzo & Darnall LLP



Margaret A. Morris

MAM/jmm
Attachment

cc: The Hon. Katrina L. Dunderdale, PA Public Utility Commission [w/enc.]
John L. Munsch, Esquire, FirstEnergy Service Company [w/enc.]
Robert A. Cinpinski, Esquire, Law Office of Robert A. Cinpinski [w/enc.]

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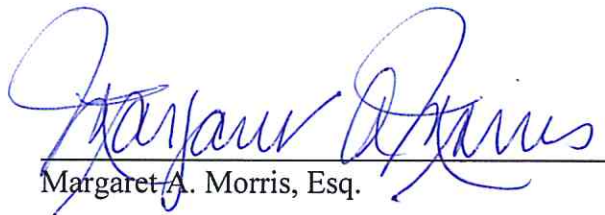
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served upon the person(s) listed below, in the manner indicated, in accordance with the requirements of § 1.54 (relating to service by a participant).

Via Electronic and First Class Mail

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Dated: December 14, 2016


Margaret A. Morris, Esq.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

ROBERT M. MATTU :
 :
 v. : Docket No. C-2016-2547322
 :
 WEST PENN POWER COMPANY :

**INITIAL BRIEF OF
WEST PENN POWER COMPANY**

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I. STATEMENT OF THE CASE

Introduction

This matter comes before the Commission as the Formal Complaint filed by Robert M. Mattu (Complainant or Mr. Mattu) against West Penn Power Company (West Penn or Company).¹ Mr. Mattu alleges that the use of herbicide on his property is unsafe. He requests that West Penn be enjoined from using any herbicide to manage the vegetation growing in the right-of-way (ROW) across his property and that West Penn be required to hand cut the vegetation in the ROW every 10-12 years to prevent interference with its transmission line. Mr. Mattu does not object to any other part of work plan as part of the Company's Transmission Vegetation Management (TVM) Program.

For the reasons set forth below, the Complaint should be dismissed and the relief requested by the Complainant denied. In sharp contrast to West Penn's expert testimony that the proposed herbicides are safe and present no danger to the Complainant's water supply, the Complainant produced only opinion testimony that herbicides are unsafe. The Complainant has failed to carry his burden of proof establishing that West Penn committed any violation of the Public Utility Code, 66 Pa.C.S. § 101 *et seq.* (Code) or any regulation, order or rule that the Commission has the authority to administer. For these reasons, the Commission should dismiss the Complaint in its entirety.

History of the Proceeding

On August 26, 2016, Mr. Mattu filed the instant Complaint alleging it is unsafe for West Penn to "spray" herbicide chemicals because of two wells and a fishpond located on his property.

On June 14, 2016, West Penn filed an Answer denying material allegations. The Company admitted that its interstate transmission line, the Kiski Valley to Cabot 138 kv line,

¹ FirstEnergy is the holding company that owns West Penn Power Company and other electric distribution companies operating in Pennsylvania. Tr. 51.

also known as TMU-652 (Transmission Line) crosses over Mr. Mattu's property but denied the proposed herbicides present any real or potential threat to the Complainant or water supply.

On June 21, 2016, an initial telephonic hearing was scheduled for July 25, 2016 before Administrative Law Judge Katrina L. Dunderdale (ALJ Dunderdale). On July 7, 2016, Judge Dunderdale issued a Prehearing Order which, *inter alia*, informed the parties how to request a continuance in the proceedings. The Respondent requested a continuance on July 15, 2016 in order to secure an expert witness for the hearing.

On July 20, 2016, ALJ Dunderdale issued the First Interim Order granting Respondent's request and rescheduling the Initial Telephonic Hearing for August 31, 2016. On August 26, 2016, Robert A. Cipinski, Esquire entered his Entry of Appearance on behalf of Complainant.

The hearing commenced as scheduled on August 31, 2016. Robert A. Cipinski, Esquire, represented the Complainant who appeared and testified on his own behalf. Margaret A. Morris, Esquire represented the Respondent; Shawn Standish appeared and testified on behalf of the Company. A further hearing was held on October 25, 2016. Nicholas Weston and Salvatore Quattrocchi appeared and testified on behalf of the Company and were qualified as experts in certain areas.

On November 29, 2016, a Briefing Order was issued by Judge Dunderdale setting the due date of December 14, 2016 for the filing of each party's brief and December 21, 2016 for filing of each party's reply brief.

II. SUMMARY OF ARGUMENT

The Complainant's sole objection to the Company's work plan is the use of herbicides within the ROW across his property. Tr. 223. He testified that herbicides are unsafe and requests West Penn be prohibited from "spraying" herbicides as long as the two wells remain his only source for water.

West Penn contends that the stump cut treatment and use of proposed herbicides to control incompatible species growing within the ROW is consistent with the Company's Transmission Vegetation Maintenance (TVM) Program and the Integrated Vegetation Management (IVM) best practices for utility ROWs. The proposed herbicides are approved for the control of vegetation by the federal Environmental Protection Agency (EPA), the Pennsylvania Departments of Agriculture and Environmental Protection (PA DA). As required by federal law, the Company strictly adheres to and applies all herbicides in accordance with the manufacturer's label for each herbicide. West Penn's expert witness testified that the herbicide is applied to the cut stump and absorbed by that specie's root system. The herbicides do not affect other species' root systems. West Penn's expert witness offered his professional opinion that the proposed herbicides are safe for use on Mr. Mattu's property.

III. LEGAL BURDEN

Section 701 of the Code provides that any person may complain, in writing, about any act or thing done or omitted to be done by a public utility in violation, or claimed violation, of any law which the Commission has the jurisdiction to administer, or of any regulation or order of the Commission. 66 Pa.C.S. § 701.

To establish a sufficient case and satisfy the burden of proof, a complainant must show that the respondent public utility is responsible or accountable for the problem described in the Complaint. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. PUC 196 (1990); *Feinstein v. Philadelphia Suburban Water Company*, 50 Pa. PUC 300 (1976). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 134 Pa.Cmwlth. 218; 221-222, 578 A.2d 600; 602 (1990), app. denied, 602 A.2d 863 (1992). A preponderance of the evidence is established by presenting evidence more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Pa. Pub. Util. Comm'n*, 67 Pa.Cmwlth. 597, 447 A.2d 1100 (1982); *Edan Transportation Corp. v. Pa. Pub. Util. Comm'n*, 154 Pa.Cmwlth. 21, 623 A.2d 6 (1993); 2 Pa.C.S. § 704. Substantial

evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Bethenergy Mines, Inc. v. Workmen's Compensation Appeal Bd. (Skirpan)*, 531 Pa. 287, 612 A.2d 434 (1992). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 194 Pa.Super. 278, 166 A.2d 96 (1960); *Murphy v. Dep't. of Public Welfare, White Haven Center*, 85 Pa.Cmwlth. 23, 480 A.2d 382 (1984).

Under these principles the Complainant, as the party seeking relief, has the burden of proof. In this case, the Complainant has the burden of proving, by a preponderance of the evidence, that West Penn is responsible or accountable for the problem described in his complaint, i.e., the herbicides to be used to control incompatible species within the ROW that crosses his property are unsafe. See, *Feinstein, supra*.

Upon the presentation by the Complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence, sometimes called the burden of persuasion, to rebut the evidence of the Complainant shifts to the Company. If the evidence presented by West Penn is of co-equal weight, the Complainant has not satisfied the burden of proof. The Complainant now has to provide some additional evidence to rebut the evidence of the Respondent. *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

While the burden of persuasion may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa.Cmwlth. 2001).

Based on the record evidence, West Penn contends that the Complainant has not made a *prima facie* case that the proposed herbicides are not safe. Establishing a *prima facie* case requires either evidence sufficient to make a finding of fact permissible or evidence to create a presumption against an opponent which, if not met, results in an obligatory decision for the proponent. *In re: Fink's Estate*, 343 Pa. 65, 74, 21 A.2d 883, 888-889 (1941); *Rogers v.*

United States, 66 F. Supp. 663, 667, relying, in relevant part, on *Roseberry v. Home Life Insurance Company*, 120 Pa. Superior Ct. 450, 454, 183 A. 121, 95 A.L.R. 749 (1936). Other than his opinion testimony, the Complainant presented no evidence. The Complainant's assertions, personal opinions or perceptions do not constitute evidence. Personal opinion, no matter how strongly held, does not constitute evidence. *Pennsylvania Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987). The Complainant's opinion testimony is insufficient to support a finding of fact that West Penn's proposed use of herbicides on his property is unsafe and a violation of the Code.

To the extent that the Commission finds a *prime facie* case has been presented, West Penn has introduced substantial evidence through its witnesses and admitted exhibits to rebut the Complainant's evidence.

Based on the record evidence, the Complainant failed to carry his burden of proof that the use of herbicides to control incompatible species within the ROW which crosses his property is unsafe.

IV. RECORD EVIDENCE

Complainant's Evidence

Complainant testified but did not introduce any exhibits into evidence. He offered only opinion testimony that he believes herbicides are "not good" (Tr. 27), he has no way to hook up to city water (Tr. 24) and fears the herbicides will leach or run off into his wells. Tr. 23. The Complainant did not offer any evidence to rebut the testimony of expert witness Quattrocchi. Mr. Mattu opined that West Penn could control the vegetation on his property by hand cutting the brush in the ROW every 10-12 years. Tr. 22-23.

Respondent's Evidence

Three witnesses testified on behalf of West Penn. Shawn Standish testified regarding the reasonableness of the Company's TVM Program; Nicholas Weston testified regarding the reasonableness of the proposed work plan; and Salvatore Quattrocchi testified

regarding the safety of the herbicides and the reasonableness of their use to control vegetation on Mr. Mattu's property.

West Penn introduced 25 exhibits, all of which were admitted into evidence.

West Penn Exhibit Number - Description of Exhibit

1. Transmission Easement for Mattu property
2. Property Owner Work Plan (revised)
3. Property Owner Refusal Letter
4. ANSI A300: Standard Practices Vegetation Maintenance
5. Best Practices-Integrated Vegetation Practices
6. CV for Salvatore Quattrocchi
7. Material Safety Data Sheet: Garlon
8. Specimen Label: Garlon
9. Material Safety Data Sheet: Milestone
10. Specimen Label: Milestone
11. Material Safety Data Sheet: Polaris
12. Specimen Label: Polaris
13. Topographical map of Mattu Easement
14. Photo: Facing South at Western Edge of Right of Way and Mattu's House
15. Photo: Right of Way and Mattu's House and Well
16. Photo: Facing North-South of Pole Sprayed North of Pole Not Sprayed
17. Photo: Locust Re-sprout on Mattu Property
18. Photo: Patch of Sassafras Re-sprout on Mattu Property
19. Photo: Height Reference of 1 year Growth of Locust Tree
20. Photo: Regrowth of Oak Stump Cut in 2015
21. Photo: One year Growth Reference for Oak Re-sprout
22. Photo: Oak Re-sprout on Mattu Property
23. Photo: Sassafras Re-sprout on Mattu Property
24. Photo: Stump Re-sprout of Brush Cut in 2015
25. Photo: Locust Re-sprout on Mattu Property

V. ARGUMENT

There is no dispute that West Penn holds a valid easement for its transmission line crossing Mr. Mattu's property. Tr. 20; WP Exhs. 1 and 13. The Complainant does not object to West Penn maintaining the incompatible vegetation within the ROW. Tr. 21. His sole objection is to West Penn's proposed use of herbicides to control the incompatible vegetation within the ROW, arguing it is unsafe and poses a threat to his family and water supply. Tr. 27, 43.

Section 1501 of the Code requires that:

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.

66 Pa.C.S. § 1501.

West Penn is obligated to provide safe and reliable service that is reasonably continuous and without unreasonable delay or interruptions. The importance of consistent and system-wide reliability is unquestioned. In furtherance of its obligation to promote reliable service and minimize the opportunity for outages caused by vegetation, West Penn implemented its TVM Program to maintain the corridors carrying its transmission lines. The introduction of herbicides for the transmission lines reflects the industry's implementation of increasingly stringent vegetation management plans. Following a widespread power outage in 2003, the attention of the federal government focused sharply on the behavior of the operators of transmission lines. Tr. 52, 54-55. The Energy Policy Act of 2005 (P.L. 109-58) authorized a new electric reliability organization responsible for creating and enforcing mandatory reliability standards. The North American Electric Reliability Corporation (NERC) assumed watchdog responsibility under the Federal Energy Regulatory Commission (FERC) for federal enforcement of reliability standards, which include mandatory vegetation clearance standards. Tr. 54-55.

Mr. Standish testified that the TVM Program is designed and complies with NERC standards, industry best management practices, and the American National Standards Institute (ANSI) standards, with the goal to ensure the safety and reliability of the Company's operations. Tr. 55-56. The Company has an absolute obligation to maintain transmission ROWs. To this end, Mr. Standish sponsored the admission of WP Exhibit 4, ANSI A300 Part Seven, 2012 Integrated Vegetation Management Utilities ROW Standard. WP Exhibit 4; Tr.67. ANSI standards require that (chemical) materials be used in accordance with federal, state and

local laws and regulations. Tr. 132; WP Exhibit 4. Witness Weston presented WP Exhibit 5, the Integrated Vegetation Management (IVM), Second Edition, Best Management Practices Manual, which is a special companion publication to the ANSI A300 Part Seven, Trees, Shrubs and other Woody Plant Management, published by the International Society of Arboriculture. Tr. 254; WP Exh. 5. Witness Quattrocchi participated in the drafting of the IVM standards reflected in WP Exhibit 5. Tr. 309.

Judge Dunderdale qualified witness Weston as an expert as to the application of pesticides and which species would be incompatible with a transmission line. Tr. 200. He identified incompatible vegetation to be removed or controlled in the ROW across the Complainant's property since it had the potential to interfere with the Transmission Line. Tr. 214, 221, 223.

The Company proposes to apply the herbicides to incompatible species in the unmaintained area using the “cut stump” application consistent with IVM best practices (Tr. 190-191) and the Safety Data Sheets for Garlon, Milestone and Polaris. Tr. 235; WP Exhibits 8, 10 and 12. The “cut stump” application means that the vegetation would be manually cut and the cambium layer of that cut stump is treated with the herbicide mix to prevent re-sprouting. Tr. 190, 231.

Judge Dunderdale qualified witness Quattrocchi as an expert as to herbicide application, the modes of action of herbicides, the environmental impacts and the safety of the herbicides. Tr. 308. He provided expert testimony that an herbicide is defined as a molecule or product that specifically controls or affects herbaceous plants and trees, with no effect on mammals. Tr. 310. Each herbicide or molecule has specific targets and each molecule controls a different plant species. Tr. 312. Molecules must attach to either water or a high-grade refined material so it can then be applied. Tr. 311.

The combination of herbicides Garlon, Milestone and Polaris, will be used to treat and control the incompatible vegetation in the ROW across the Complainant's property. Tr. 231. The herbicides Garlon, Milestone and Polaris, are registered with the EPA and PA Department of

Agriculture. Tr. 315. The EPA has determined that the proposed herbicides are available for commercial use in public utility ROWs. Tr. 315-316; WP Exh. 8, 10 and 12. The proposed herbicides or molecules to be applied at Mr. Mattu's property are brought to the site pre-mixed in a tank that is 75% carrier (high-grade refined oil) and 25% of the pre-mixed molecules. Tr. 310-312.

Expert witness Quattrocchi explained that the three herbicides would affect the different growth points within the plant and primarily focus on the photosynthetic process of that plant. Each plant goes through photosynthesis, which is the absorption of sun and nutrients in that plant. First, it will be absorbed into the plant and impact the root system. Then it will impact the stem of the plant and finally the lead tissue group and the long-term effect will control that plant. It will also prevent any regrowth. Tr. 312-313. The herbicides are applied to the cambium layer or the fresh cut stump area and then absorbed by the plant itself, which is a downward motion to the plant. The effect is on the cell tissue of that cambium layer as it moves through the plant into the roots. Tr. 310, 313. There is no movement of the herbicide off the root system in any way. Tr. 333. Molecules chemically attach to soil particles and are degraded by ultraviolet light or sunlight. Tr. 314. The herbicides attack the target species while still permitting desirable species to grow since there is no root absorption by the desirable species. Tr. 314. None of the herbicides are carcinogenic, teratogenic or mutagenic. Tr. 339. Expert witness Quattrocchi provided his professional opinion that the proposed herbicides are safe for use on Mr. Mattu's property. Tr. 333-334.

West Penn witness Standish testified that without herbicides, the Company would be unable to establish a sustainable or low growing plant community and it would be perpetually maintaining the same incompatible brush, with increasing densities. Tr. 62-32. IVM best practices include compatible species that grow aggressively to prevent incompatible species from regenerating in that site in the future. Tr. 328-329; WP Exh.5. Treatment on the cambium layer of incompatible vegetation allows desirable species to continue to grow. Tr. 314.

The Commission has previously ruled on West Penn's use of herbicides as part of its TVM Program and found that its use constitutes safe and reasonable service under Section

1501 of the Code. *Bernardi v. West Penn*, Docket No. C-2014-2453852, Opinion and Order entered May 5, 2016.

There is no record evidence to support the Complainant's position that the proposed herbicides are unsafe and pose a threat to his family or water supply. The Complainant's assertions, personal opinions or perceptions do not constitute evidence. Personal opinion, no matter how strongly held, does not constitute evidence. *Pennsylvania Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987). Even a *pro se* complainant must provide relevant and necessary information. *Groch v. Unemployment Comp. Bd. of Review*, 472 A.2d 286 (Pa. Cmwlth. 1984); *Vann v. Unemployment Comp. Bd. of Review*, 494 A.2d 1081 (Pa. 1985). Other than his opinion testimony, he presented no evidence. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. v. PA Public Utility Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 194 Pa. Super. 278, 166 A.2d 96 (1960); *Murphy v. Commonwealth, Dept. of Public Welfare, White Haven Center*, 85 Pa. Cmwlth. 23, 480 A.2d 382 (1984). The testimony of West Penn's expert witnesses should be given more weight than opinion testimony.

VI. PROPOSED FINDINGS OF FACT

1. Complainant, Robert Mattu, resides and owns the property located at 310 Schenley Road, Leechburg, Pennsylvania (service address). Tr. 18.

2. West Penn Power Company is a jurisdictional public utility providing electric service to Pennsylvania customers.

3. Mr. Mattu's predecessor in interest granted West Penn an easement across the service address property for West Penn to use for its facilities, i.e., Transmission Line TMU-652. Tr. 20; WP Exh. 1.

4. The easement granted to West Penn was duly recorded on April 24, 1968 with the Recorder of Deeds of Armstrong County in Deed Book 511 at Page 781. WP-Exh. 1.

5. The easement grants West Penn the right to cut, trim or remove trees within the limits of said easement as well as any trees beyond said limits which may interfere or threaten to

interfere with said transmission system, and the right to control the undergrowth thereon, by such methods as West Penn may determine. WP-Exh. 1.

6. Mr. Mattu does not dispute that West Penn's easement grants West Penn the right to remove vegetation from the easement. Tr. 22-23.

7. The power line that crosses Mr. Mattu's property is West Penn's Kiski Valley to Cabot 138 kv (kilovolt) line, also known as TMU-652 (Transmission Line) which consists of approximately 10 to 17,000 circuit miles. Tr. 50-51.

8. Mr. Mattu's sole objection to West Penn's work plan is the use of herbicides on his property. Tr. 22-23; WP Exh. 2.

9. By letter dated March 15, 2016, West Penn advised the Complainant of its intention to exercise its legal rights consistent with the recorded easement. Tr. 226; WP Exh. 3

10. The objective of TVM Program is to maintain safe, reliable electric service throughout its transmission facilities. Tr. 59

11. West Penn inspects the ROW for the Transmission Line on a 5-year rotation to inspect for, and remove, incompatible vegetation that may potentially interfere with its facilities. Tr. 59-60, 62.

12. Any vegetation within West Penn's ROW that may be tall enough to interfere with the overhead utilities and which impedes the ability to visually inspect the transmission corridor from structure to structure is deemed incompatible vegetation. Tr. 60.

13. The only absolute way to remove incompatible vegetation is with herbicides so that the root system of the incompatible vegetation is eliminated. Tr. 60-61.

14. The TVM Program is designed to provide an environment for compatible species to become established, which can out-compete incompatible vegetation Tr. 62.

15. On-corridor is defined as the actively maintained ROW. Tr. 65.

16. The TVM Program is implemented to eliminate all on-corridor outages and minimize off-corridor outages. Tr. 63.

17. Off-corridor outage is defined as any outage caused by a tree that is outside West Penn's ROW. Tr. 64, 88-91.

18. West Penn will go off-corridor and remove any tree with the potential to interfere with the Transmission Line if the tree is dead, diseased, structurally leaning or significantly encroaching and has the potential to interfere with the transmission facilities. Tr. 90-92.

19. The TVM Program considers the environmental impact in determining how to treat incompatible vegetation. Tr. 94-95.

20. Under the TVM Program, certified herbicide applicators are required to use branded products consistent with the product's label. Tr. 97, 100.

21. Compatible vegetation may remain on the ROW if it does not affect the safety or reliability of the Transmission Line or does not impede with West Penn's access to inspect that line. Tr. 65; WP Exh. 16.

21. The American National Standards Institute (ANSI) sets forth the national standards utilized by utilities to implement an integrated approach to the management of vegetation. Tr. 68; WP Exh. 4.

22. The TVM Program was formulated using the standard set forth, then ANSI 300. Tr. 71.

23. The TVM Program implements the industry's best practices in vegetation maintenance to ensure reliability across the transmission corridors. Tr. 73.

24. The Integrated Vegetation Management (IVM) Program, published by the International Society of Arboriculture, is the national authority on vegetation and is the standard for the safest and most effective and efficient method for controlling vegetation on utility ROWs. Tr. 79, 81; WP Exh. 5.

25. IVM best practices provide for the management of incompatible vegetation with herbicides. Tr. 72; WP Exh. 5.

26. IVM best practices provide that herbicides should be applied to any remaining stump of incompatible vegetation which has the potential of re-sprouting. Tr. 72, 81-82; WP Exh. 5.

27. Incompatible vegetation that is simply cut and not treated with herbicides will vigorously regrow at a faster rate since the roots of the vegetation have matured. Tr. 82-83; WP Exh. 5.

28. The TVM Program is current with industry standards and in compliance with federal regulations. Tr. 84.

29. Consistent with the TVM Program, Mr. and Mrs. Mattu as owners of the property through which West Penn's easement runs, were given advance written notice that incompatible vegetation was scheduled for removal. Tr. 220-221; WP-Exh. 2.

30. The ROW across Mr. Mattu's property is 100 feet wide and approximately 200 yards long. Tr. 29.

31. Mr. Weston testified as an expert as to the application of pesticides and as to species that would be incompatible with a transmission line. Tr. 200.

32. Transmission lines can sag due to temperature Tr. 261.

33. Any vegetation within 12 feet from the transmission line must be addressed immediately. Tr. 260.

34. On Mr. Mattu's property, the ground to conductor clearance for the Transmission Line is 40 to 60 feet. Tr. 275.

35. A locust tree can grow between 11 and 12 feet in one year. Tr. 275.

36. On April 28, 2015, West Penn's contractor met with Mr. Mattu to discuss the removal of trees from the easement; however, Mr. Mattu refused to agree to the use of herbicides. Tr. 214-215; WP Exh. 2.

37. Mr. Mattu requests that West Penn hand cut the brush every 10-12 years to maintain the incompatible species within the ROW is inconsistent with the TVM Program and IVM best practices. Tr. 23; WP Exh. 5.

38. Mr. Mattu has both maintained and unmaintained areas within the ROW. Tr. 217; WP Exh. 14.

39. Witness Weston is a certified arborist and holds a commercial pesticide applicator license through the Pennsylvania Department of Agriculture. Tr. 187-188.

40. Witness Weston is authorized to apply pesticides commercially to transmission ROWs. Tr. 189.

41. Incompatible vegetation is any species of tree or vegetation that may grow tall enough to interfere with the transmission facilities and the conductors or grow tall enough to become a hazard with the potential sag or sway of the Transmission Line. Tr. 60, 185.

42. West Penn proposes to apply the herbicides by the cut stump application to the incompatible species located in the ROW in the unmaintained area. Tr. 190-911.

43. The cambium layer of a tree or brush is the outer edge of the stump. Tr. 191.

44. The cut stump application is consistent with the IVM best management practice approach. Tr. 191; WP Exh. 5.

45. The tree or brush on the ROW is cut and then the herbicide is directly applied to the cambium layer of that cut stump. Tr. 190.

46. Mr. Quattrocchi was qualified as an expert as to herbicide application, the modes of action of herbicides, the environmental impacts and the safety of the herbicides. Tr. 308; WP Exh. 6.

47. The maintained area is where he mows and landscapes. The maintained area is where the spruce trees were cut and the stumps were left at his request. Tr. 217; WP Exh. 14.

48. Witness Weston met with Mr. Mattu on June 29, 2015 to further discuss the work plan that spruce trees located on-corridor would be cut, removed, and as a concession to agreeing to the work plan, the stumps would be ground. Tr. 222, 223; WP Exh 2.

49. In December 2015, all the brush in the unmaintained area on the ROW was hand cut from tree line to tree line. Tr. 223.

50. There are potentially thousands of stumps that would need to be recut by hand in the unmaintained area in the ROW. Tr. 382-383.

51. IVM best practices eliminate the ability of incompatible trees and brush to regrow since regrowth results in species growing faster and denser. Tr. 229; WP Exh. 5.

52. A custom blend of three herbicides, Garlon, Milestone and Polaris, are proposed for use at the Mattu property. Tr. 231.

53. The incompatible species growing in the unmaintained area of the ROW consists of the following species: oak, sassafras, knotweed and locust. Tr. 239-241.

54. A photograph taken on September 21, 2016, shows a locust cut in December 2015 had re-sprouted approximately 6 new trees from one stump because it was untreated. Tr. 244; WP Exh. 17.

55. A locust tree has the potential, if left unmanaged, to grow to be 60 to 80 feet tall. Tr. 244.

56. A photograph taken on September 21, 2016, shows that a sassafras tree cut in December 2015 had significant growth and density. Tr. 245; WP Exh. 18.

57. A photograph taken on September 21, 2016, shows a locust cut in December 2015 had grown approximately 10 or 11 feet in one growing season. Tr. 246; WP Exh. 19.

58. A typical growing season is May through August, but the growth of the species depends on the amount of rain and the temperature. Tr. 246.

59. A photograph taken on September 21, 2016, shows an oak tree cut in December 2015 had re-sprouted several shoots. Tr. 247; WP Exh. 20.

60. A photograph taken on September 21, 2016, shows an oak tree cut in December 2015 had grown approximately 5 feet. Tr. 247; WP Exh. 21.

61. A photograph taken on September 21, 2016, shows an oak tree cut in December 2015 had re-sprouted four shoots. Tr. 247; WP Exh. 22.

62. A photograph taken on September 21, 2016, shows a sassafras tree cut in December 2015 had re-sprouted four shoots off one stump. Tr. 248; WP Exh. 23.

63. A photograph taken on September 21, 2016, shows a locust tree cut in December 2015 had re-sprouted six shoots off one stump. Tr. 248; WP Exh. 24.

64. A photograph taken on September 21, 2016, shows that in one growing season, the cut brush in the unmaintained area grew in sheer density, which could potentially impact the transmission wires. Tr. 248; WP Exh. 25.

65. Because the cut stumps were not treated with herbicides in December 2015, the Company will have to address the likelihood of doing additional herbicide treatments just to control the regrowth. Tr. 249-250.

66. Herbicide is defined as a molecule or product which specifically controls or effects herbaceous plants and also the species, such as trees, with no effect on mammals. Tr. 310.

67. The three proposed herbicides or molecules to be applied at Mr. Mattu's property are pre-mixed in a tank mixed with an oil carrier and brought to Mr. Mattu's property. Tr. 310.

68. Molecules must attach to either water or a high-grade refined material so it can then be applied. Tr. 311.

69. The proposed herbicides are in a pre-mixed tank that is 75% carrier (high-grade refined oil) and 25% of the premixed molecules. Tr. 311-312.

70. Each herbicide or molecule has a specific targets and each molecule controls or prevents growth of a different plant species. Tr. 312.

71. The three molecules or herbicides will impact the different growth points within the plant and primarily focus on the photosynthetic process of that plant. Each plant goes through photosynthesis, which is the absorption of sun and nutrients in that plant. First, it will be absorbed into the plant and impact the root system. Then it will impact the stem of the plant and

finally the lead tissue group, and the long-term effect will then control that plant. It will also prevent any regrowth as well. Tr. 312-313.

72. The herbicides are applied to the cambium layer or the fresh cut stump area and then absorbed by the plant itself, which is a downward motion to the plant. The effect is on the cell tissue of that cambium layer as it moves through the plant into the root system. Tr. 313.

73. Treatment on the cambium layer allows desirable species to continue to grow since the desirable species' root system does not absorb the herbicide. Tr. 314.

75. Molecules chemically attached to soil particles which are degraded by ultraviolet light or sunlight. Tr. 314.

76. The three proposed herbicides are registered with the EPA and Pennsylvania Department of Agriculture. Tr. 315; WP Exh. 8, 10 and 12.

77. Garlon 4 is registered with the EPA for the control of oaks, sassafras and locust on electric power line ROWs. TR. WP Exh. 8

78. Milestone is registered with the EPA for the control of knotweed and locust on electric power and utility ROWs. WP Exh. 10.

79. Polaris is registered with the EPA for the control of knotweeds, locust, oak and sassafras along utility ROWs. WP Exh. 12.

80. The EPA has determined that the proposed herbicides are available for commercial use on public utility ROWs. Tr. 315-316; WP Exhs. 8, 10 and 12.

81. IVM best practices include compatible species which grow aggressively and prevent incompatible species from regenerating in that site in the future. Tr. 329; WP Exh. 5.

82. The herbicides applied in the cut stump treatment will not contaminate the Complainant's wells through leaching or runoff. Tr. 333-334.

83. Herbicides are used in low rates to minimize any implications of the treatment. Tr. 335.

84. None of the proposed herbicides are carcinogenic, teratogenic or mutagenic. Tr. 339.

85. All contractors who apply herbicides on behalf of the Company must be registered and a certified Applicator by the Commonwealth of Pennsylvania. Tr. 97, 230.

86. All contractors who apply herbicides on behalf of the Company must strictly adhere to the Specimen Labels for the herbicide. Tr. 331.

87. The Safety Data Sheet for the proposed herbicides references the technical actives of the molecule itself, which is close to 100% active ingredient. Tr. 343; WP Exh. 7, 9 and 11.

88. The herbicide to be applied on the ROW is not a 100% active ingredient. Tr. 343; WP Exhs. 7, 9 and 11.

89. The Safety Data Sheet is a required legal document provided by the manufacturer. Tr. 344.

90. The Safety Data Sheets for each proposed herbicide provides, *inter alia*, specific information on the chemical properties, handling and storage of that particular herbicide. WP Exh. 7, 9 and 11.

VII. PROPOSED ORDERING PARAGRAPHS

1. That the Complaint filed by Robert Mattu against West Penn Power Company at Docket No. C-2016-2547322 is dismissed.

2. That West Penn Power Company shall maintain the right-of-way crossing the land of Robert Mattu consistent with the applicable laws of the Commonwealth of Pennsylvania and its agencies, as well as consistent with the applicable federal laws and labeling of the herbicides, which may appropriately be used.

3. That the docket at Docket No. C-2016-2547322 is marked closed.

VIII. PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of this proceeding. 66 Pa. C.S. §§102, 701, 1501.

2. As the party seeking affirmative relief from the Commission, the Complainant bears the burden of proof. 66 Pa. C.S. §332(a).

3. A public utility is required to provide adequate, efficient, safe and reasonable service. 66 Pa.C.S. §§ 102 and 1501.

4. To satisfy his burden of proof, the Complainant must demonstrate that West Penn violated the Public Utility Code or a regulation or order of the Commission. 66 Pa. C.S. § 701.

This must be shown by a preponderance of the evidence. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 PA PUC 196 (1990).

5. Preponderance of the evidence means that the party with the burden of proof has presented evidence that is more convincing, by even the smallest amount, than that presented by the other party. *Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600, 602, alloc.den., 602 A.2d 863 (1992).

6. West Penn's TVM Program, including the use of herbicides to control incompatible vegetation, is reasonable. *Wagner v. West Penn Power Company*, Docket No. C-2014-234494, Final Order entered April 30, 2015; *Spirat v. Metropolitan Edison Company*, Docket No. C-2013-2367044, Final Order entered September 11, 2014; *Broman v. West Penn Power Company*, Docket No. C-2013-2356237, Final Order entered April 23, 2014.

7. Upon the presentation by the Complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence, sometimes called the burden of persuasion, to rebut the evidence of the Complainant shifts to the Respondent. If the evidence presented by the Respondent is of co-equal weight, the Complainant has not satisfied the burden of proof. The Complainant now has to provide some additional evidence to rebut the evidence of the Respondent. *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

8. While the burden of persuasion may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa.Cmwlth. 2001).

9. Assertions, personal opinions or perceptions do not constitute evidence. *Pennsylvania Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

10. The Complainant has failed to carry his burden of proof which establishes that West Penn violated the Public Utility Code or a regulation or order of the Commission in proposing to use herbicide to control vegetation within the right of way crossing the Complainant's property. 66 Pa.C.S. §§ 701, 332.

IX. CONCLUSION

The Complainant has failed to carry his burden of proof that West Penn's proposed use of herbicides to control incompatible vegetation on the ROW across his property are unsafe and will endanger his family or his water supply.

WHEREFORE, for the foregoing reasons, West Penn Power Company respectfully requests that this Honorable Court dismiss with prejudice the Formal Complaint of Robert M. Mattu at Docket No. C-2016-2547322 in its entirety.

Respectfully submitted,

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