**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Robert M. Mattu :

:

v. : C-2016-2547322

:

West Penn Power Company :

# **Initial Decision**

Before

Katrina L. Dunderdale

Administrative Law Judge

INTRODUCTION

This decision denies a formal complaint seeking an exception to a Commission-approved vegetation management plan because Complainant did not meet the burden of proof when alleging West Penn Power Company should not be permitted to spray herbicides in close proximity to Complainant’s fish pond and two water wells for his residence.

# HISTORY OF THE PROCEEDING

On April 26, 2016, Robert M. Mattu (Complainant or Mr. Mattu) filed a formal complaint with the Pennsylvania Public Utility Commission (Commission) against West Penn Power Company (West Penn) alleging it is unreasonable, inadequate or unsafe for West Penn to spray herbicide chemicals on his property near his two water wells and fish pond. Mr. Mattu requested the Commission order West Penn to not spray chemicals as long as the water wells remain his only source for water at the service address. On June 14, 2016, West Penn filed its Answer in which it admitted its interstate transmission line crosses over Mr. Mattu’s property but denied the proposed herbicides present any real or potential threat to Mr. Mattu.

On June 21, 2016, the Office of Administrative Law Judge (OALJ) issued a Call-In Telephone Hearing Notice scheduling an initial telephonic hearing to be conducted on Monday, July 25, 2016 at 10:00 a.m. On July 7, 2016, the presiding officer issued the Prehearing Order which, *inter alia*, informed the parties how to request a continuance in the proceedings.

On July 15, 2016, West Penn sent a letter to the presiding officer requesting a limited continuance because West Penn wanted to secure an expert witness. West Penn’s counsel asserted Complainant did not oppose the request, and asked to have the initial hearing rescheduled in two months. Upon request from the presiding officer to limit the length of the continuance, the parties provided three mutually-agreeable dates in August.

On July 20, 2016, the presiding officer issued the First Interim Order granting Respondent’s unopposed request for a continuance, and indicated an initial hearing would be rescheduled to August 31, 2016. On July 21, 2016, the Office of Administrative Law Judge issued a Call-In Telephone Hearing Notice which scheduled the matter for a hearing on Wednesday, August 31, 2016.

On August 31, 2016, the presiding officer convened the initial hearing as scheduled. Complainant appeared represented by Robert A. Cinpinski, Esq., who offered the testimony of Complainant and offered no exhibits. West Penn was represented by Margaret A. Morris, Esq., who offered one witness and one exhibit (West Penn Exhibit A) which was admitted into the record. During the hearing, it became clear additional information would be needed from the parties.

On September 2, 2016, the Office of Administrative Law Judge scheduled a Further Evidentiary Call-In Telephonic Hearing for Tuesday, October 25, 2016.

On October 25, 2016, the presiding officer reconvened the further hearing as scheduled. Complainant appeared and was represented by his counsel. He offered no exhibits. West Penn was represented by Margaret A. Morris, Esq., who offered fifteen exhibits,

which were admitted into the record, and presented the testimonies of three witnesses. Complainant and West Penn elected to submit briefs.

The full transcript of the hearing, containing 407 pages, was received in the presiding officer’s office on November 28, 2016. Thereafter, on November 29, 2016, the presiding officer issued the Briefing Order which required the parties to file a main brief on or before December 14, 2016, and reply briefs on or before December 21, 2016.

On December 29, 2016, the presiding officer issued the Second Interim Order Closing the Hearing Record.

FINDINGS OF FACT

1 Robert M. Mattu resides with his wife in a single family structure located at 310 Schenley Road, Leechburg, Armstrong County, Pennsylvania (service address), where they have resided since 1978. (Tr. 22, 40).

2. West Penn Power Company is a public utility, which is wholly owned by First Energy Corporation (First Energy) and which provides electric distribution service to Mr. Mattu at the service address, and provides electric distribution service within its territory. (Tr. 50, 51, 179, 180).

3. First Energy also owns a separate subsidiary named First Energy Service Company (FESC) which provides engineering, construction, accounting, legal and other services to the operating companies owned by First Energy, including West Penn. (Tr. 51, 180).

4. Since 1968, West Penn has maintained a 100-foot wide right-of-way that transects the service address property, and on which West Penn constructed a 138,000 kV electric transmission line, known as “PMU-652” or the “Kiski Valley to Cabot 138 kV line”, located at 1,070 feet above sea level to 1,160 feet above sea level. (Tr. 19, 50, 51, 158, 168, 169, 202, 204; West Penn Exhibits 1 & 13).

5. The sole water sources for the service address are two water wells located on Complainant’s property behind the residence. (Tr. 23, 28; West Penn Exhibit 13).

6. Public water is not available to Complainant at the service address or to any of his neighbors. (Tr. 23).

7. One well (Well #1) is a hand-dug well that is 15 feet deep, and the other well (Well #2) is 68 feet deep. (Tr. 23, 31).

8. Well #1 and Well #2 were dug during the 1950’s and are located at 1,070 feet above sea level. (Tr. 31, 34, 159-161, 169; West Penn Exhibit 13).

9. Both wells are situated approximately 70 feet downhill from West Penn’s right-of-way and on level ground with Complainant’s residence. (Tr. 31, 34, 159-161, 169; West Penn Exhibit 13).

10. Complainant can switch between using either the deep water well or the shallow water well for personal consumption in the residence and in the garage. (Tr. 30-32).

11. There is a water conditioner connected to the deep water well due to the iron level in the water. (Tr. 32, 39).

12. The shallow water well contains water from a natural spring located behind the residence and which is accessed through a vertical well at the base of the hillside that contains Respondent’s right-of-way. (Tr. 33; West Penn Exhibit 13).

13. Complainant’s property contains a fish pond which is located at 1,070 feet above sea level and is, in part, under the transmission line and less than 100 feet downhill from an area upon which Respondent proposes to apply herbicide. (Tr. 24, 159-161; West Penn Exhibits 13 & 15).

14. The terrain at the subject property is hilly and bottoms out (or flattens) behind the residence and behind the fish pond. (West Penn Exhibits 13 through 15).

15. Complainant’s residence sits downhill from the transmission line and approximately 70 feet from the transmission line. (Tr. 29; West Penn Exhibits 13 & 15).

16. The right-of-way covers a section of Complainant’s property that is approximately 200 yards long by 100 feet wide which includes a hilly section that is not maintained or mowed by Complainant and which West Penn proposes to spray with herbicides. (Tr. 24-30, 164; West Penn Exhibits 13 & 15).

17. On April 28, 2015, Davey Tree Service (Davey), a subcontractor for West Penn, visited the service address to assess the right-of-way, and address with Complainant the herbicides that Davey proposed to use. (Tr. 215, 216).

18. Complainant did not agree to let Davey apply herbicides on the right-of-way. (Tr. 215).

19. On May 21, 2015, a foreman from Davey contacted Complainant in an attempt to convince Complainant to agree to the herbicide application. (Tr. 215, 216).

20. On June 29, 2015, Respondent’s transmission forestry specialist (Mr. Weston) visited the service address to discuss Complainant’s concerns, to assess the right-of-way, to determine what vegetation management was needed, and to develop a work plan. (Tr. 179, 214, 220, 221; West Penn Revised Exhibit 2).

21. In November 2015, Mr. Weston returned to the service address with a representative from DOW Chemical Company (the manufacturer of the herbicides proposed for use) to assess the right-of-way in light of Complainant’s concerns. (Tr. 214).

22. On November 17, 2015, First Energy sent a letter to Complainant explaining its plan to use herbicides on the previously cut stumps and outlining its interpretation of its easement rights as established with Complainant’s predecessors-in-title. (West Penn Revised Exhibit 2).

23. Complainant expressed concern about the work plan because the proposed herbicides might leach into the water wells and travel down the steep slopes, making the water unsuitable for fish in his fish pond and making water from the two wells unpotable or unsafe for drinking at the service address. (Tr. 113, 223, 268).

24. Complainant did not object if Davey removed trees and vegetation from the right-of-way, and objected only to the use of herbicides. (Tr. 223; West Penn Revised Exhibit 2).

25. In December 2015, Davey returned to the service address and hand-cut all the brush and large trees from tree-line to tree-line across the right-of-way. (Tr. 223).

26. On March 15, 2016, Respondent sent a letter to Complainant which was identical substantively with its letter dated November 17, 2015. (Tr. 226; West Penn Exhibit 3).

27. On September 21, 2016, Mr. Weston returned to the service address in order to take photographs under and around Respondent’s transmission line. (Tr. 214, 216; West Penn Exhibits 14 through 25).

28. By September 21, 2016, the stumps Davey cut but did not treat in December 2015 showed signs of regrowth, including multiple shoots on each stump. (Tr. 243, 244, 247, 248; West Penn Exhibits 16 through 25).

29. Some trees observed in September 2016 had regrown to more than 6 feet since December 2015, and the regrowth was approximately 30 feet below the bottom of the transmission wire. (Tr. 246, 286; West Penn Exhibit 19).

30. West Penn is required to have and adhere to a transmission vegetation management plan. (Tr. 225-230).

31. First Energy determined that it would develop one plan for its operating companies, located in seven different states, for use on transmission rights-of-way for lines carrying voltage of 69 kV and higher. (Tr. 49-59).

32. Industry-wide standards for use nationally by electric utilities regarding the maintenance of right-of-way corridors have been published by the National Electric Reliability Commission (NERC) standards and the American National Standards Institute (ANSI). (Tr. 55, 65-68; West Penn Exhibits 4 & 5).

33. ANSI and the International Society of Arboriculture (ISA) are accepted within the industry as national authorities on the best practices in vegetation management. (Tr. 79, 187, 230; Exhibits 4 & 5).

34. West Penn’s program is consistent with the national standard set by the ANSI for tree management operations. (West Penn Exhibit 4).

35. ANSI defines the purpose of an integrated vegetation management (IVM) system is to “create, promote, and conserve sustainable plant communities that are compatible with intended use of the site, and discourage incompatible plants that may pose concerns, including safety, security, access, fire hazard, utility service reliability, emergency restoration, visibility, line-of-sight requirements, regulatory compliance, and environmental, or other specific concerns.” (Tr. 73, 230; West Penn Exhibits 4 & 5).

36. IVM is a “system of managing plant communities in which compatible and incompatible vegetation is identified, action thresholds are considered, control methods are evaluated, and selected control(s) are implemented to achieve a specific objective.” (West Penn Exhibit 4).

37. Compatible vegetation is vegetation that “is desirable and/or suitable to the intended use,” will not grow tall enough at maturity to affect the conductors or the transmission line, or does not impede access to inspect the right-of-way. (Tr. 60-65, 185, 328; West Penn Exhibit 4).

38. Incompatible vegetation is vegetation that “is undesirable, presents a safety hazard, or is unsuitable to the intended use of the site.” (Tr. 60, 185, 328; West Penn Exhibit 4).

39. West Penn does not want vegetation under its transmission lines to come closer than twelve (12) feet in distance from the electric line. (Tr. 257-260).

40. The transmission line’s approximate clearance, from ground to conductor, on Complainant’s property varied from 40 feet to 60 feet. (Tr. 275).

41. Because the subject right-of-way contains both compatible as well as incompatible vegetation, West Penn’s plan is to encourage the growth of compatible vegetation because: (1) it does not grow tall enough to adversely affect the safety and reliability of the transmission line; and (2) because healthy compatible growth will “out compete” and choke out the incompatible vegetation. (Tr. 62; West Penn Exhibits 16 through 25).

42. ANSI specifies for tree care operations that “when incompatible vegetation with the potential for re-sprouting is manually-controlled, herbicide should be applied to the remaining stump.” (West Penn Exhibits 4 & 5).

43. West Penn defines “trees” to be any piece of vegetation that is greater than six inches in diameter. (Tr. 90).

44. West Penn’s vegetation management plan includes the use of herbicides as a best management practice because using a cutting method only (in which roots are not eliminated) results in aggressive regrowth and produces thicker and denser vegetation. (Tr. 58-61, 82-84, 224, 341).

45. West Penn uses herbicides because it is recommended as an industry standard and because cutting a plant without simultaneously applying herbicide will result in aggressive regrowth. (West Penn Exhibits 4 & 5).

46. An herbicide is a “molecule or product which specifically controls or affects herbaceous plants and also leaf species, such as trees, with no effect on mammals.” (Tr. 310).

47. West Penn’s work plan at the service address was to do a “cut stump application” which first cuts all incompatible trees and bushes within the unmaintained portion of the right-of-way, and then applies herbicides directly to the cambium, or outer edge, of the stumps. (Tr. 190, 191, 225, 231, 310, 313).

48. The cut stump herbicide application is applied to individual stems, or stumps, and is consistent with the Transmission Vegetation Management (TVM) best management practices approach used by electric utilities. (Tr. 187, 191, 229, 332).

49. If applied correctly to individual stumps, the herbicides will not migrate down the slopes to the service address, water wells or fish pond, will be “encapsulated” within the individual plant, and will not leach into the underground water sources. (Tr. 310-329, 333; West Penn Exhibits 7 through 12).

50. The herbicides West Penn proposed its contractors would use at the service address are in a petroleum base (not a water-soluble base) and are considered safe to use up to the edge of a water source. (Tr. 98-100, 329, 339, 340).

51. In order to create the best chance of avoiding adverse consequences to the environment in and around a right-of-way, West Penn works with the manufacturers of the chemical herbicides to find the best herbicide for a specific location. (Tr. 99, 100).

52. West Penn uses “blending facilities” that combine the various herbicides together so there will be no mistakes made in the field, and works with the contractors who apply the herbicides on site. (Tr. 99, 100).

53. It is considerably less expensive for West Penn to apply herbicide to vegetation within the corridor than it is to manually cut down and remove vegetation from a corridor. (Tr. 81; West Penn Exhibit 5).

54. Stump cutting alone would result in a more negative ecological impact to the area of the right-of-way than an integrated vegetation management program using both stump cutting and individual herbicide application. (Tr. 342).

55. Under the TVM Program, West Penn completes vegetation maintenance on a 5-year cycle, and the right-of-way in question was inspected in order to identify incompatible vegetation, to remove any incompatible vegetation and to use herbicides in order to eliminate the return of the incompatible vegetation in the future. (Tr. 59, 60, 258, 320-329).

56. In the unmaintained or un-mowed areas of Complainant’s property on the right-of-way, West Penn plans to use a pre-mixed “cocktail” of three herbicides, combined with a high-grade, refined oil (acting as a carrier or medium for the herbicides), in a specified formula established by the manufacturer, and those herbicides are Garlon™ 4 Ultra (Garlon™), Milestone™ and Polarus™. (Tr. 231, 241, 310-312).

57. The pre-mix is delivered as a “tank mix” in which the oil carrier will account for 75% of the applied material and the pre-mix will comprise 25% of the applied material. (Tr. 310-312).

58. A mix of three herbicides is used because each herbicide impacts different growth points within the target plant species (i.e., incompatibles) and primarily focuses on negatively impacting photosynthesis and the root system. (Tr. 310-312).

59. The pre-mix is intended to prevent re-growth in the treated incompatible vegetation. (Tr. 313).

60. The pre-mix will take 30 to 90 days to trans-locate, or move, from the cambium layer down through the root system. (Tr. 313).

61. These three herbicides have a low “cation exchange capacity,” and attach (or adhere) strongly to the stump and plant material with relatively little leeching (or percolation) into the nearby soil. (Tr. 334).

62. “Cation Exchange Capacity” is the ability of the soil to absorb certain types of liquids or nutrients into the soil. (Tr. 335).

63. The pre-mix must not be applied in or on water primarily because the oil carrier itself would harm or negatively impact water sources. (Tr. 329-332).

64. Garlon™ is identified as a hazardous material which works by attaching to the plant’s metabolism to prevent growth and regrowth, has low toxicity if ingested, low toxicity if inhaled, low toxicity with prolonged skin contact, and has a low cation exchange capability. (Tr. 231; West Penn Exhibits 7 & 8).

65. Milestone™, which is not identified as a hazardous material, works by affecting and preventing growth and regrowth, has low toxicity if ingested, low toxicity if inhaled, low toxicity with prolonged skin contact, and has a low cation exchange capability. (Tr. 231; West Penn Exhibits 9 & 10).

66. Polarus™ works by affecting and preventing growth and regrowth of the vegetation, has minimal irritation upon eye contact, slight toxicity upon skin contact, low toxicity if ingested, low toxicity if inhaled, and has a low cation exchange capability. (Tr. 231; West Penn Exhibits 11 & 12).

67. Contraindications and warnings for Garlon™ include possible adverse effects to milk from lactating mammals if the vegetation is ingested while wet with herbicide, and with repeated exposures can affect adversely the kidney or liver in mammals but Garlon™ is not identified as a STOT-SE[[1]](#footnote-1) toxicant. (Tr. 335-336; West Penn Exhibit 7).

68. Contraindications and warnings for Milestone™ do not include possible affects from single exposures to the herbicide and mild irritation only from repeated exposures. (West Penn Exhibit 9).

69. Contraindications and warnings for Polarus™ include minimal irritations but it has low toxicity to humans from prolonged exposures. (West Penn Exhibit 11).

70. None of the three herbicides proposed for application at the service address have either teratogenic, mutagenic or carcinogenic properties or effects when diluted and applied in an oil-based solution. (Tr. 335-344; West Penn Exhibits 7 through 12).

71. The testimony offered by Robert M. Mattu was accepted as relevant and credible. (Tr. 18-45).

72. The testimony offered by Shawn Standish was accepted as relevant and credible. (Tr. 46-177).

73. Respondent’s witness, Salvatore A. Quattrocchi, was qualified as an expert in herbicide application, as well as the modes of action, environmental impacts, and the safety of herbicides. His testimony was accepted as relevant and credible. (Tr. 290-308).

DISCUSSION

Complainant owns land in Leechburg, Armstrong County, Pennsylvania, which, in addition to hilly, wooded areas, includes a residence, gardens, two water wells and a fish pond. Water at the residence is provide through two wells located towards the bottom of a slope about 70 feet from a West Penn transmission line which crosses Complainant’s property. Because of the potential for run-off and drift, Complainant objected to West Penn using herbicides to clear the subject right-of-way. Complainant asks the Commission to prohibit West Penn from using herbicides when it clears and maintains the right-of-way uphill from his residence and fish pond.

Burden of Proof

The party seeking affirmative relief from the Commission bears the burden of proof pursuant to 66 Pa.C.S.A. § 332(a). As a matter of law, a complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail.[[2]](#footnote-2) This fact must be shown by a preponderance of the evidence.[[3]](#footnote-3) A preponderance of evidence is that which is more convincing, by even the smallest amount, than that presented by the other party.[[4]](#footnote-4)

Additionally, any finding of fact necessary to support the Commission’s adjudication must be based upon substantial evidence.[[5]](#footnote-5) More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.[[6]](#footnote-6)

Pursuant to 66 Pa.C.S.A. § 701, the objected-to conduct must violate the Public Utility Code, the Commission’s regulations, or an outstanding order of the Commission. Therefore, Complainant bears the burden of proving West Penn’s refusal – to clear the right-of-way crossing his property without the use of herbicides – is a violation of some applicable statute, regulation, or order of the Commission.

Vegetation Management Programs

The issue in this complaint concerns whether West Penn’s vegetation management program complies with the Commission’s statute, regulations and orders within the scope of “service” as outlined in the Public Utility Code. Public utility service is not confined to only those actions which involve the distribution of electric service but also includes any and all acts related to the distribution of electric service, pursuant to [66 Pa.C.S.A. § 102](https://www.lexis.com/research/buttonTFLink?_m=fb6a3923c30ceb9983fb662267bb97ab&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b922%20A.2d%20996%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=96&_butInline=1&_butinfo=66%20PA.C.S.%20102&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzk-zSkAb&_md5=98070abab6da3e790136d388f57fee05). Accordingly public utility service includes vegetation management because it relates to the provision of safe and reliable electricity.[[7]](#footnote-7)

Clearly, the importance of safe and reliable electric service and transmission within West Penn is unquestioned. As an electric distribution company (EDC), West Penn must maintain its transmission corridors in order to promote reliability and minimize the opportunity for outages caused by vegetation. The manner in which this goal is achieved may vary from company to company but the Commission has established oversight requirements which include vegetation management, as specified in 52 Pa.Code § 57.198.

Complainant herein does not attack West Penn’s entire vegetation management program nor does he claim the program is unreasonable as applied elsewhere. He seeks to have the Commission require West Penn carry out its vegetation management program on his property without the use of herbicides.

Analysis

Complainant presented credible evidence of his concerns. The home, gardens, water wells and fish pond are at the bottom of a 70-foot slope, with the transmission right-of-way at the top. His home is served by only well water. Much of the area surrounding the home is wooded and slanted towards the residence. Complainant does not object to clearing the right-of-way and, except for the most hilly section, Complainant has mowed the right-of-way from the base of the hill, around the fish pond and over to the local road.

West Penn proved it is required to maintain the right-of-way in order to meet its responsibility to provide safe, adequate and reliable electric service. West Penn uses herbicides in conjunction with trimming the incompatible vegetation down to stumps in order to allow compatible vegetation to grow up and choke out the incompatible vegetation. If the right-of-way only contains compatible vegetation, then West Penn will not have to bring machinery and personnel back onto the property in five years. Choking out the incompatible vegetation can have the desirable effect of producing a right-of-way that no longer requires the public utility to enter Complainant’s property. Using the method proposed by West Penn can result in it being many years beyond the expected maintenance cycle of five years before West Penn will need to re-enter the property. Further, the herbicides West Penn will use will only be applied to the cut stumps, will remain within the plant organism, will not transfer to nearby soil or water sources, and would have no adverse effects on humans or animal life.

The single overriding issue is whether the Commission can and should prohibit West Penn from using herbicides on the transmission right-of-way that crosses the land of Complainant. This question has several components which are discussed below.

West Penn did not present testimony regarding the actual costs of mowing/trimming every five years versus using the cut-stump method with an herbicide application other than to indicate it was more expensive to trim every five years and more extensive trimming would be needed due to aggressive regrowth. However, it stands to reason that using herbicides would result in less incompatible growth and, obviously, less regrowth in turn would reduce the amount of time required to address the vegetative area during any subsequent maintenance cycles. In fact, it is reasonable to presume that West Penn and its contractors may not need to reenter the right-of-way at all in the future (except for periodic inspections by helicopter or by foot) if the compatible vegetation out-competes the incompatible vegetation as envisioned by the ANSI guidelines and West Penn’s TVM program.

Complainant asks the Commission to agree that this pre-mixed herbicide cocktail is inherently dangerous, and the application up the hill from his water wells can reasonably be expected to result in herbicides traveling from the cut stumps down to the flatter terrain by his residence and into his water wells. Complainant contends a simple lay person’s reading of the manufacturer’s warnings which accompany the herbicides clearly reveals the potential for toxic and deleterious consequences if the herbicides transfer or move from the site of application downhill to his water wells and residence.

West Penn provided sufficient evidence to show its proposal to apply the specified cocktail of herbicides on Complainant’s property, in conjunction with a cut-stump management method, is reasonable and does not violate Section 1501 of the Public Utility Code.[[8]](#footnote-8) The manufacturer’s documentation which accompanied the herbicides references toxicity potentials but only if the chemicals are ingested at full strength. In this circumstance, the chemicals will be diluted into an oil-based medium which reduces their potency and toxic impacts. In fact, West Penn’s witness clearly testified that there are more health concerns from the premium grade oil base than from the chemicals themselves, which is why the chemicals are not used around an open water source.

However, Complainant’s concerns are reasonable about the safety of the herbicide application given the location of his sole source of safe water, and the location of his personal residence relative to the site of proposed herbicide applications. The Public Utility Code provides, at 66 Pa.C.S.A. § 1501, that West Penn must provide adequate, efficient, safe and reasonable service to its customers, including Complainant. “Adequate and safe” service recognizes there can be exceptions to the standard use of herbicides, including the migration of herbicides to adjacent land which could cause unintended damage to plants and humans. These herbicides are in an oil carrier which does not mix with water, will not be generally broadcast within the right-of-way and will be applied by hand to each cut stump.

Complainant’s home, gardens, fish pond and water wells, are located less than 25 yards down a slope from the right-of-way. Complainant’s concern about an unintended migration of herbicide to an area where the use of the herbicides would endanger him and his family in addition to nearby plant and animal life is a reasonable concern. It is not unreasonable for Complainant to ask, and for West Penn to provide, reasonable and adequate assurances that the water Mr. Mattu drinks and uses on his property, and the food he grows for consumption on his property, are safe to ingest and consume.

West Penn acted responsibly when it developed its plan herein to maintain its rights-of-way and in the proposed application of its TVM program. The promotion of safe and reliable electric service and public safety are necessary goals for an EDC but this approach must allow for exceptions where the facts warrant it. Here, Complainant did not sustain his burden of establishing that this specific situation justifies additional safeguards. West Penn’s use of herbicides for vegetation management will not interfere with Mr. Mattu’s safe use of his residence.

West Penn expressed willingness during the hearing to test Mr. Mattu’s two water sources before the application of any herbicide, immediately following the application of any herbicide, and test it a third time at a later date. (See Tr. at 115 & 116). West Penn made this suggestion given the chemical properties of the herbicide mixture proposed, even though the likelihood the herbicides will leach down into the water sources is limited, and knowing West Penn’s contractors would be closely monitored to ensure the plant-killing chemicals are applied only at the base of the incompatible vegetation. West Penn’s suggestion to test the water sources is an excellent suggestion that would allay Complainant’s fears that his water and property are tainted with toxic substances. However, West Penn has not violated the Public Utility Code relating to how it worked to reassure Complainant about the safety and efficacy of the proposed herbicide application.

Accordingly, the formal complaint will be denied in the paragraphs below.

CONCLUSIONS OF LAW

1. The party seeking affirmative relief from the Commission bears the burden of proving the named utility is responsible or accountable for the problem described in the complaint in order to prevail. 66 Pa.C.S.A. § 332(a); Patterson v. Bell Tel. Co. of PA*,* 72 Pa. PUC 196 (1990); and Feinstein v. Phila. Suburban Water Co.*,* 50 Pa. PUC 300 (1976).

2. The burden of proof must be shown by a preponderance of the evidence which is more convincing, by even the smallest amount, than that presented by the other party. Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n*,* 134 Pa.Cmwlth. 218; 221-222, 578 A.2d 600; 602 (1990), app. denied, 529 Pa. 654, 602 A.2d 863 (1992); and Se-Ling Hosiery v. Margulies*,* 364 Pa. 45, 70 A.2d 854 (1950).

3. Any finding of fact necessary to support the Commission’s adjudication must be based upon substantial evidence and be more 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); Murphy v. Dep’t. of Public Welfare*, White Haven Center,* 480 A.2d 382 (Pa.Cmwlth. 1984).

4. Before Complainant can succeed in his complaint, Respondent’s actions must violate the Public Utility Code, the Commission’s regulations, or an outstanding order of the Commission. 66 Pa.C.S.A. § 701.

5. Complainant bears the burden of proving that West Penn’s proposed use of herbicides to clear the right-of-way on Complainant’s property is a violation of some applicable statute, regulation, or order of the Commission.

6. The Commission has the responsibility to ensure the public utility shall furnish and maintain adequate, efficient, safe and reasonable service and facilities. 66 Pa.C.S.A. § 1501.

7. Utility service includes the distribution of electricity and also includes any and all acts related to the provision of electricity. Burek v. Pennsylvania Electric Company*,* Docket No. C-20028132 (Opinion and Order entered June 27, 2003); [66 Pa.C.S.A. § 102](https://www.lexis.com/research/buttonTFLink?_m=fb6a3923c30ceb9983fb662267bb97ab&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b922%20A.2d%20996%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=96&_butInline=1&_butinfo=66%20PA.C.S.%20102&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzk-zSkAb&_md5=98070abab6da3e790136d388f57fee05); and PECO Energy Company v. Township of Upper Dublin, 922 A.2d 996, 1005-1006 (Pa.Cmwlth. 2007).

8. The Commission’s regulations set requirements for developing and filing a plan for vegetation management. 52 Pa.Code § 57.198.

9. Complainant failed to sustain his burden of proving Respondent should not use herbicides on the right-of-way that crosses his land.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the formal complaint filed by Robert M. Mattu against West Penn Power Company at Docket No. C-2016-2547322 is denied.

2. That the Secretary mark the formal complaint filed by Robert M. Mattu against West Penn Power Company at Docket No. C-2016-2547322 as closed.

Date: March 21, 2017 /s/

Katrina L. Dunderdale

Administrative Law Judge

1. STOT-SE is an acronym defined as Specific Target Organ Systemic Toxicity – Single Exposure. See West Penn Exhibit 7. [↑](#footnote-ref-1)
2. Patterson v. Bell Tel. Co. of PA*,* 72 Pa. PUC 196 (1990); Feinstein v. Phila. Suburban Water Co.*,* 50 Pa. PUC 300 (1976). [↑](#footnote-ref-2)
3. Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n*,* 134 Pa.Cmwlth. 218; 221-222, 578 A.2d 600; 602 (1990), app. denied, 529 Pa. 654, 602 A.2d 863 (1992). [↑](#footnote-ref-3)
4. Se-Ling Hosiery v. Margulies*,* 364 Pa. 45, 70 A.2d 854 (1950). [↑](#footnote-ref-4)
5. Mill v. Pa. Pub. Util. Comm’n, 447 A.2d 1100 (Pa.Cmwlth. 1982); Edan Transportation Corp. v. Pa. Pub. Util. Comm’n*,* 623 A.2d 6 (Pa.Cmwlth. 1993); 2 Pa.C.S.A. § 704. [↑](#footnote-ref-5)
6. 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*,* 166 A.2d 96 (Pa.Super. 1960); Murphy v. Dep’t. of Public Welfare, White Haven Center*,* 480 A.2d 382 (Pa.Cmwlth. 1984). [↑](#footnote-ref-6)
7. PECO Energy Company v. Township of Upper Dublin, 922 A.2d 996, 1005-1006 (Pa.Cmwlth. 2007). [↑](#footnote-ref-7)
8. 66 Pa.C.S.A. § 1501. [↑](#footnote-ref-8)