

**PENNSYLVANIA PUBLIC UTILITY COMMISSION  
HARRISBURG, PENNSYLVANIA 17120**

**Robert M. Mattu**  
v.  
**West Penn Power Company**

**Public Meeting June 14, 2017**  
**2547322-ALJ**  
**Docket No. C-2016-2547322**

**JOINT DISSENTING STATEMENT OF**  
**COMMISSIONER JOHN F. COLEMAN, JR. AND**  
**COMMISSIONER ROBERT F. POWELSON**

Before the Pennsylvania Public Utility Commission (Commission) is the Initial Decision (ID) denying the Formal Complaint filed against West Penn Power Company (West Penn) at the above docket. The Complainant objects to West Penn's use of herbicides to prevent the regrowth of trees within an interstate transmission line right-of-way (ROW) located on the Complainant's property. The presiding Administrative Law Judge (ALJ) determined that the Complainant failed to meet his burden of proof to warrant prohibiting the proposed use of herbicides by West Penn in the ROW on his property, and that the Complaint should therefore be dismissed. No exceptions to this ID were filed.

The Joint Motion proposes to modify the ID and grant the Complainant his requested relief. As we agree with the ID, we will be dissenting from the Joint Motion. Before we review the relevant particulars of the case, we think it would be useful to outline the areas where we do agree with the Joint Motion:

- We agree that the ALJ applied the appropriate Commission case precedent and committed no error of law or fact in reaching her conclusions to dismiss the Complaint.
- We agree that West Penn's actions and proposed actions are consistent with its Commission approved electric facilities Inspection and Maintenance plan.
- We agree that West Penn's conduct and proposed conduct was otherwise in compliance with all Commission regulations and orders, and the provisions of the Public Utility Code.
- We agree that there has been no violation of Section 1501, which governs the safety and reliability of public utility service, and which is the basis of our jurisdiction to hear this dispute.

As West Penn is not in violation of Section 1501, we must conclude that its conduct and proposed use of herbicides was safe and reasonable. If the Commission finds that West Penn's conduct is safe and reasonable, and thus in compliance with Section 1501, the Formal Complaint must be dismissed. We are unaware of any existing statutory authority or case precedent that allows the Commission to impose a higher standard than Section 1501 by which to decide such cases.

To expand on this point, we are in full agreement with prior Court decisions that the Commission is not a “super board of directors” for public utilities.<sup>1</sup> When a public utility is adhering to its tariff, and acting in compliance with all orders or regulations of the Commission, and the provisions of the Public Utility Code, we find that any associated actions are occurring within a regulatory “safe harbor.” Accordingly, the public utility has the discretion to provide service as it sees fit on that issue. In those circumstances, the Commission may not micromanage the day to day operations of a public utility, or decide on a case by case basis whether a public utility may engage in certain practices that are otherwise in full accord with the law.

Where the Commission feels that Section 1501 alone does not adequately delineate what a public utility’s safety and reliability obligations may be, the proper course is to initiate a rulemaking proceeding. The Commission does have extensive regulations governing the safety and reliability of electric utility service. In its enactment of the Electricity Generation Customer Choice and Competition Act, the Pennsylvania General Assembly expressed a preference that electric reliability standards be addressed through regulations and that they be in conformity with established industry standards:

Since continuing and ensuring the reliability of electric service depends on adequate generation and on conscientious inspection and maintenance of transmission and distribution systems, the independent system operator or its functional equivalent should set, and the Commission shall set through regulations, inspection, maintenance, repair and replacement standards and enforce those standards.

66 Pa.C.S. § 2802(20).<sup>2</sup>

The commission shall ensure continuation of safe and reliable electric service to all consumers in the Commonwealth, including:

(ii) The installation of maintenance of transmission and distribution facilities in conformity with established industry standards and practices, including the standards set forth in the National Electric Safety Code.

66 Pa.C.S. §2804(1)(ii)

We will now turn to the particular facts of this case and explain why we are in agreement with the ALJ’s decision.

The Complainant’s property is a residential service address. The service address receives its water supply from two wells located approximately 70 feet from the ROW. West Penn has maintained a 100-foot wide ROW at this location since 1968, on which it constructed a 138 kV

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<sup>1</sup> “The Public Utility Commission is not a super board of directors for the public utility companies of the State and it has no right of management of them.” *Metropolitan Edison Company v. Pa. Pub. Util. Commission*, 437 A.2d 76, 80.

<sup>2</sup> These standards are codified at 52 Pa. Code §57.198, and were promulgated in 2008.

electric transmission line. West Penn also provides electric distribution service to the Complainant. West Penn visits this ROW on a five year cycle to inspect and remove incompatible vegetation.

In 2015, a West Penn contractor notified the Complainant of the plan to use herbicides to control incompatible vegetation within the ROW. West Penn's work plan at the service address was to do a "cut stump application," which involves cutting all incompatible trees and bushes within the unmaintained portion of the ROW and then applying herbicides directly to the cambium or outer edge of the stumps.

The Complainant objected to the use of herbicides, given his personal concerns about their effect on his water supply. West Penn attempted to address the Complainant's concerns by having its transmission forestry specialist, and later, a representative of Dow Chemical Company (the manufacturer of the herbicides), visit this property and assess the proposed work plan and need for herbicides.

Initially, West Penn attempted to maintain the ROW by hand cutting trees and vegetation. A round of cutting was done in December of 2015. A follow up visit in September of 2016 demonstrated significant regrowth on the stumps of incompatible vegetation that had not been treated with herbicides. Some of the trees at issue, locusts, have the ability to grow as high as eighty feet and can grow up to twelve feet per year. The ground to conductor clearance on the property ranges from forty to sixty feet. After West Penn notified the Complainant of its intent to use herbicides, Complainant filed a Formal Complaint with the Commission in April 2016.

As with any formal proceeding, the Complainant, as the moving party, has the burden of proving, by a preponderance of evidence, that West Penn's proposed use of herbicides within a transmission line ROW violates some provision of the Public Utility Code, a Commission order or regulation.<sup>3</sup> In this matter, the Complainant did not introduce any exhibits and merely testified as to his general concern that the herbicides would leach into his well water and fish pond.

On the other hand, West Penn presented exhibits and introduced the testimony of three witnesses. These witnesses included Nicholas Weston, the forestry specialist who visited the Complainant's property, and Salvatore Quattrochi, who participated in drafting the West Penn Integrated Vegetation Management program standards. The presiding ALJ qualified Mr. Weston, a certified arborist, as an expert witness in the application of herbicides and the identification of incompatible vegetation. The presiding ALJ also qualified Mr. Quattrochi as an expert in herbicide application, modes of herbicide action, environmental impacts and safety.

After careful consideration of the evidentiary record, we believe that West Penn's intended use of herbicides here is reasonable and consistent with all applicable Commission precedent. We do not believe the Complainant met his burden of proof to show otherwise, and we agree with the decision of the presiding ALJ to dismiss the Formal Complaint.

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<sup>3</sup> 66 Pa.C.S. §332(a).

Our conclusion is based on the following record evidence provided at hearing through the exhibits and witness testimony:

- West Penn is required to have a transmission vegetation maintenance program (TVM), in order to satisfy its federally mandated reliability obligations, which are developed and enforced by the North American Electric Reliability Corporation (NERC);
- West Penn's TVM, including the use of herbicides within transmission line ROWs, is consistent with the American National Institute Standards (ANSI), NERC standards, and industry best practices;
- West Penn also abides by an Integrated Vegetation Management program (IVM). The IVM is based on a national standard published by the International Society of Arboriculture. As part of an IVM, compatible and incompatible vegetation is identified, and appropriate controls are evaluated, selected and implemented. Compatible vegetation, which is not a threat to reliability, is encouraged to grow, while incompatible vegetation is controlled. Use of herbicides is consistent with the IVM;
- ANSI also specifies that after incompatible vegetation is manually controlled, herbicide should be applied to the remaining stumps;
- West Penn identified some of the vegetation growing in the ROW as being incompatible vegetation, whose rapid growth and height may affect electric reliability;
- West Penn's witness was qualified as an expert in herbicide application, as well as the modes of action, environmental impacts, and the safety of herbicides. Mr. Quattrochi worked on the subject of herbicides for Eli Lilly and Dow Chemical Company for over thirty years. The presiding ALJ accepted his testimony as relevant and credible;
- West Penn's witness testified that the herbicide will only be applied to individually cut stumps, will remain within the plant organism, will not transfer to nearby soil or water resources, would have no adverse effects on humans or animal life, and could be safely used even to the water's edge;
- The proposed herbicides have been approved for use in vegetation management on utility ROWs by the United States Environmental Protection Agency;
- All contractors who apply the herbicide must be registered and certified as an Applicator by the Commonwealth of Pennsylvania;
- Stump cutting alone would result in a more negative ecological impact to the ROW than an integrated program that uses both stump cutting and individual herbicide application. Use of the herbicide will allow the development of sustainable, low-growing compatible vegetation. Disallowance will require more frequent visits to and disturbance of the ROW to combat incompatible vegetation;

- The use of both manual cutting and herbicides is the most cost-effective method of vegetation management within ROWs.

As stated, the Joint Motion acknowledges that West Penn's past and proposed actions do not violate any statute, regulation or order of the Commission. In fact, the proposed method of herbicide application to a cut stump was held to be reasonable by the Commission approximately one year ago.<sup>4</sup> While the Commission, as an administrative agency, is not bound by *stare decisis*, it must render consistent opinions and either follow, distinguish, or overrule prior precedent. *PECO Energy Company v. Pa. Public Utility Commission*, 756 A.2d 156 (Pa. 2002).

While the Joint Motion cites to the *Bernardi* case in a footnote, it does not clearly follow, distinguish or overrule this precedent. Rather, it proposes to establish a new type of Commission proceeding to govern disputes over the use of herbicides. Instead of filing complaints, the Joint Motion proposes that this Complaint (and any future disputes regarding use of herbicides) be converted to a "Petition for Relief." In describing the need for this new process, it is noted that complainants have had a difficult time in meeting their burden of proving that certain, proposed vegetation management practices are unreasonable. This new process will allow the Commission to, in the words of the Joint Motion, achieve a "fair result." The Commission will determine, on a case by cases basis whether an EDC can use herbicides. The Commission will apply a "totality of the circumstance" standard to such Petitions. This approach provides little if any certainty to an EDC in the development and implementation of its vegetation management program. It also seems to conflict with the General Assembly's preference that EDCs adhere to recognized industry standards.

As stated, the Joint Motion does not find that any violation of a Commission statute, regulation or order has occurred, yet bars West Penn from using its preferred form of vegetation management. This result is in direct conflict with long standing, applicable Commonwealth Court case precedent. In a prior decision involving the review of a Complaint proceeding involving Section 1501 of the Public Utility Code, the Commonwealth Court said:

"We hold that in order for the PUC to sustain a complaint brought under this section, the utility must be in violation of its duty under this section. Without such a violation by the utility, the PUC does not have the authority, when acting on a customer's complaint, to require any action by the utility."

*West Penn Power Company v. Pennsylvania Public Utility Commission*, 478 A. 2d 497 (Pa. Cmwlth. 1984). The Commission's authority to adjudicate this type of dispute derives from Section 1501 of the Public Utility Code, as both the Courts and the Commission have held on multiple occasions.<sup>5</sup> Absent finding a violation of Section 1501, the Court appears to hold that the Commission may not direct a public utility to modify its practices, as is proposed by the Joint Motion.

We believe that the Commission should make a good faith effort to review and follow all applicable Pennsylvania Court precedent when adjudicating disputes. Where potentially

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<sup>4</sup> West Penn's method of herbicide application to a cut stump was held to be reasonable by the Commission in *Bernardi v. West Penn Power*, Docket C-2014-2453852 (Order entered May 5, 2016).

<sup>5</sup> *West Penn Power Company v. Pa. PUC*, 578 A.2d 75 (Pa. Cmwlth. 1990); *Spirat v. Metropolitan Edison Company*, Docket C-2013-27367044 (Order entered September 11, 2014); *Broman v. West Penn Power Company*, Docket C-2013-2356237 (Order entered April 23, 2014).

conflicting precedent has been identified, we believe it is incumbent on the Commission to carefully distinguish its actions from such cases. The Joint Motion does not address the Commonwealth Court's *West Penn Power* decision at all. Without having done so, it seems very questionable whether any order entered pursuant to this Joint Motion satisfies *stare decisis* and Section 703 (e) of the Public Utility Code, 66 Pa. C.S. §703(e).<sup>6</sup>

Nor do we agree with the conversion of this Complaint to a Petition for Relief, and the establishment of a new form of proceeding for the adjudication of disputes involving EDC use of herbicides. None of the precedent cited in the Joint Motion involved the conversion of a formal complaint to a Petition for Relief after the record had closed, an ID issued, and Exceptions filed. It must be noted that the Complainant was represented by legal counsel in this proceeding, and that any person may file a formal complaint under Section 701 as a matter of right.

The Joint Motion notes that other complainants have had great difficulty in meeting their burden of proof in prior cases involving herbicide use in ROWs. The Joint Motion acknowledges that these complaints have failed because they have not been able to demonstrate any violation of the Public Utility Code, a regulation or order of the Commission. The Joint Motion insists that this conversion has no impact on the due process rights of the parties, and that the Petitioner still has the burden of proof. While the burden of proof may not have shifted, the Joint Motion changes the standard of review it is applying to this case. Under the new standard, and unlike prior complaints, no violation of Section 1501 must be proven. We believe that West Penn's procedural due process rights have been violated by changing the standard of review that the Commission will apply to the case after the record has closed and an ID issued.

The record for this case is devoid of any evidence that the health and safety of Pennsylvania's citizens, or its environment, has been harmed by the Commission's current regulatory scheme and EDC's use of herbicides as part of their vegetation management obligations. Before the Commission adopts a new process for adjudicating these disputes, which affect all EDCs and retail electric customers, the Commission should consult with stakeholders in an open and transparent process.


We do wish to note that we are sympathetic to the concerns raised by the Complainant here. However, our decision in this case must be based upon the facts as established by the record and comply with applicable Court precedent. Here, the substantial, credible record evidence shows that West Penn's TVM program, including the use of herbicides to manage vegetation within a transmission line ROW, is reasonable. We note that proper vegetation management within transmission line ROWs is critical to ensuring that our electric grid operates in a safe and reliable manner. We further note that West Penn's program is based on industry best practices and that West Penn commits to taking the necessary safety precautions when using herbicides within the ROW. West Penn even offered to test the Complainant's water both immediately before and after the herbicide application, and a later date as might be agreed to. Therefore, we do not believe that West Penn's intended use of herbicides as proposed in this case violates the Public Utility Code, the Commission's regulations or orders.

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<sup>6</sup> "After the conclusion of the hearing, the commission shall make and file its findings and order with its opinion, if any. Its findings shall be in sufficient detail to enable the court on appeal, to determine the controverted questions presented by the proceeding, and whether proper weight was given to the evidence." 66 Pa.C.S. §703(e).

Accordingly, because we find that the Joint Motion is not based on substantial evidence, appears to conflict with applicable Commonwealth Court precedent and several provisions of the Public Utility Code, and violates West Penn's rights to due process, we must dissent.

Date: June 14, 2017

  
JOHN F. COLEMAN, JR.  
COMMISSIONER

  
ROBERT F. POWELSON  
COMMISSIONER