**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

Public Meeting held June 14, 2017

Commissioners Present:

Gladys M. Brown, Chairman

Andrew G. Place, Vice Chairman

John F. Coleman, Jr., Joint Statement, dissenting

Robert F. Powelson, Joint Statement, dissenting

David W. Sweet

Robert M. Mattu C-2016-2547322

 v.

West Penn Power Company

**TENTATIVE OPINION AND ORDER**

**BY THE COMMISSION:**

 Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Katrina L. Dunderdale, issued on March 29, 2017, in the above-captioned proceeding. Exceptions have not been filed. However, we have exercised our right to review the Initial Decision pursuant to Section 332(h) of the Public Utility Code (Code), 66 Pa. C.S. § 332(h). For the reasons stated below, we shall reverse the Initial Decision, consistent with this Tentative Opinion and Order.

**Background**

This proceeding involves a formal complaint (Complaint) which was filed by Robert M. Mattu (Complainant) against West Penn Power Company (West Penn Power) regarding West Penn Power’s vegetation management at his property. The Complainant owns and lives on a property that has a 138 kV transmission line on a right-of-way that measures approximately 200 feet long by 100 feet wide. While the Complainant has no problem with West Penn Power’s plan to maintain its right-of-way by clearing it of brush and incompatible trees by physically removing the vegetation, he objects to West Penn Power’s proposed plan to treat the vegetation with herbicides. Specifically, the Complainant is concerned that the chemicals might contaminate the two wells that serve his house in an area that has no municipal or public water service. Additionally, the Complainant believes that the use of herbicides could be harmful to the fish pond located on his property. His home, gardens, fish pond, and two water wells that serve his home are less than twenty-five yards down a slope from the right-of-way.

**History of the Proceeding**

On April 26, 2016, the Complainant filed his Complaint against West Penn Power alleging it is unreasonable, inadequate, or unsafe for West Penn Power to spray herbicide chemicals on his property near his two water wells and fish pond. As relief the Complainant requested that the Commission order West Penn Power to refrain from spraying chemicals as long as the water wells remain his only source for water at his Service Address. Complaint at ¶¶ 4-5.

On June 14, 2016, West Penn Power filed its Answer to the Complaint (Answer) in which it admitted its interstate transmission line crosses over the Complainant’s property but denied the herbicides it proposed to use present any real or potential threat to the Complainant. Answer at 1-4.

On August 31, 2016, an initial hearing was held. The Complainant was represented by counsel, who presented the testimony of the Complainant and offered no exhibits. West Penn Power was represented by counsel, who presented the testimony of one witness and offered one exhibit (West Penn Power Exhibit A) which was admitted into the record. During the hearing, it became clear additional information would be needed from the Parties.

On October 25, 2016, a further hearing was held. The Complainant appeared and was represented by counsel and offered no exhibits. West Penn Power was represented by counsel, presented the testimony of three witnesses, and offered fifteen exhibits, all of which were admitted into the record. Additionally, the Complainant and West Penn Power elected to submit briefs.

On December 14, 2016, both Parties filed Main Briefs. West Penn Power filed a Reply Brief on December 21, 2016.

On March 29, 2017, we issued the Initial Decision of ALJ Dunderdale, in which the ALJ denied the Complaint. I.D. at 19.

**Discussion**

**Legal Standards**

As the proponent of a rule or order, the Complainant in this proceeding bears the burden of proof pursuant to Section 332(a) of the Code. 66 Pa. C.S. § 332(a). To establish a sufficient case and satisfy the burden of proof, the Complainant must show that West Penn Power is responsible or accountable for the problem described in the Complaint. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied,* 529 Pa. 654, 602 A.2d 863 (1992). That is, the Complainant’s evidence must be more convincing, by even the smallest amount, than that presented by West Penn Power. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission’s decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC,* 489 Pa. 109, 413 A.2d 1037 (1980).

 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, 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. 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, 166 A.2d 96 (Pa.Super. 1960); Murphy v. Dep’t. of Public Welfare, White Haven Center, 480 A.2d 382 (Pa.Cmwlth. 1984).

The ALJ made seventy-three Findings of Fact and reached nine Conclusions of Law. I.D. at 3-13, 18-19. We shall adopt and incorporate herein by reference the ALJ’s Findings of Fact and Conclusions of Law, unless they are reversed or modified by this Opinion and Order, either expressly or by necessary implication.

**ALJ’s Initial Decision**

In her Initial Decision, ALJ Dunderdale explained that the Complaint centers on making a determination of whether West Penn Power’s vegetation management program is compliant with our statute, regulations, and orders within the scope of “service” as outlined in Section 1501 of the Code. The ALJ also explained that public utility service includes undertaking proper vegetation management because minimizing the opportunity for service outages caused by vegetation is critical to the provision of safe and reliable electricity. The ALJ further explained that the Complainant did not take issue with West Penn Power’s entire vegetation management program, but instead sought to have us direct West Penn Power to conduct its vegetation management program on his property without the use of herbicides. Therefore, the ALJ emphasized that the overarching issue in this proceeding is whether we can and should prohibit West Penn Power from using herbicides on its transmission right-of-way that crosses the land of the Complainant. I.D. at 14-15.

The ALJ addressed the Complainant’s contention that the pre-mixed herbicide cocktail West Penn Power proposed to use is inherently dangerous and that applying it up the hill from his water wells can be reasonably expected to result in the herbicides traveling into his water wells. The ALJ found that West Penn Power provided evidence sufficient to rebut the Complainant’s contention. Specifically, the ALJ pointed to West Penn Power’s documentation that the chemicals in the herbicide will be diluted into an oil-based medium, which reduces their potency and toxic impacts. Further, the ALJ pointed to the testimony of West Penn Power’s witness 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 open water sources Therefore, the ALJ ruled that West Penn successfully demonstrated that its proposal to apply the herbicide cocktail, in conjunction with its practice of trimming incompatible vegetation down to stumps, is reasonable and does not violate Section 1501 of the Code. I.D. at 16.

The ALJ also opined that it was not unreasonable for the Complainant to expect, and for West Penn Power to provide, reasonable and adequate assurance that the water the Complainant uses and the food he grows for consumption are safe to ingest and consume. Nonetheless, the ALJ determined that West Penn Power acted responsibly when it developed its vegetation management plan (VMP) and that the Complainant failed to carry his burden of proving that the specific situation in the matter before us warrants directing West Penn Power to undertake additional safeguards. Therefore, the ALJ concluded that West Penn Power’s use of herbicides for vegetation management does not interfere with the Complainant’s safe use of his residence. The ALJ highlighted West Penn Power’s willingness to test the Complainant’s water sources before and immediately after applying the herbicides and its willingness to test the water sources a third time at a later date. The ALJ reasoned that West Penn Power’s willingness to test the water sources was an excellent suggestion that may mitigate the Complainant’s fears that his water and property are contaminated by the proposed use of herbicides. Thus, the ALJ determined that West Penn Power did not violate the Code relating to the manner in which it reassured the Complainant about the safety and efficacy of the proposed herbicide application and recommended that the Complaint be denied. I.D. at 17-18.

**Disposition**

On consideration of the positions of the Parties and the record evidence, we shall reverse ALJ Dunderdale’s Initial Decision consistent with the discussion herein. At the outset, we emphasize that the analysis of the ALJ was thorough and we find that her decision approving West Penn Power’s proposed actions was consistent with both Commission precedent and West Penn Power’s VMP. At the same time, however, we are of the opinion that simply finding West Penn Power’s planned method of clearing vegetation from right-of-way to be consistent with its VMP is not sufficient to provide an equitable result in the instant case. In our view, the VMP, filed as part of a larger Biennial Inspection, Maintenance, Repair and Replacement Plan required for all electric distribution companies (EDCs), is far too general to address each factual situation which will arise when keeping transmission line rights-of-way clear. We consistently have found that vegetation management falls within our purview, and the Commonwealth Court has supported this finding. *See PECO Energy Company v. Township of Upper Dublin*, 922 A.2d 996, 1005-06 (Pa. Cmwlth. 2007); *Megan Mohn v. PPL Electric Utilities Corp*., Docket No. C-2012-2301470 (Order entered October 11, 2012); *Yanling Chen and Jianming Hu v. Metropolitan Edison Company,* Docket No. C-2013-2397061 (Order entered November 5, 2015); *Gene R. Wagner v. West Penn Power Company,* Docket No. C-2014-2434494 (Final Order entered April 30, 2015); *Richard and Sandy Lehet v. PPL Electric Utilities Corporation*, Docket No. C-2014-2449983 (Order entered October 28, 2015); *Marlene Broman v. West Penn Power Company*, Docket No. C-2013-2356237 (Order Entered April 23, 2014); *Jan and Joyce Spirat v. Metropolitan Edison Company*, Docket No. C-2013-2367044 (Order entered September 11, 2014); and *Sarah Bernardi v. West Penn Power Co.,* Docket No. C-2014-2453852 (Order entered May 5, 2016). We strongly support timely vegetation maintenance that is vital to providing reliable and safe service to the citizens of the Commonwealth, but we recognize that there will be exceptions to the utility’s preferred methods of keeping the right-of-way clear.

Our review of West Penn Power’s Commission-approved VMP indicates that it is vague and lacking in sufficient detail to provide the owners of transmission rights-of-way and adjacent landowners any guidance in determining the circumstances under which the landowners may anticipate the manner in which the rights-of-way will be cleared. It says, in effect, that the utility will keep the rights-of-way cleared of growth that might interfere with safe and reliable electric service, using methods consistent with industry practices. The manner of clearing the growth and the circumstances under which the different methods are used are not delineated. The result is that the utility’s defense in any complaint regarding herbicide use is inevitably that the method is consistent with its Commission-approved VMP; and that it therefore, is not a violation of a statute, regulation, or order of the Commission.

However, there is a point where the use of herbicides is simply not consistent with the landowner’s ability to fully utilize the property, especially where, as is the case here, the source of water is shallow wells close to the right-of-way. Under appropriate circumstances, a landowner should be able to seek an exception to the utility’s proposed use of herbicides, and if the utility still refuses, the landowner should be able to seek relief from the Commission. At that point, the landowner should file a petition for relief rather than a complaint. The reason that this Commission has not previously sustained complaints against utilities is that no violations of a statute, regulation or order of the Commission were found. Rather, the landowners were seeking an exception to the utility’s proposed method of clearing the right-of-way. In fact, that is the nature of the request before us today.

This Commission has a history of treating pleadings by what is reflected in their content instead of by what they are labelled. For example, we have treated preliminary objections as motions for judgment on the pleadings and we have treated letters as petitions for withdrawal of pleadings or as exceptions. *See e.g., Utility Workers Union of America System Local 537 v. Pennsylvania-American Water Company*, Docket No. C-2012-2287204, 2012 Pa. PUC LEXIS 944 (Order entered June 21, 2012) (preliminary objections properly treated as a motion for judgment on the pleadings); *Katz v. PPL Electric Utilities Corporation*, Docket No. F-2010-2211384, 2011 Pa. PUC LEXIS 825 (Initial Decision issued March 16, 2011); *Cuff v. PECO Energy Company*, Docket No. C-2013-2370894, 2013 Pa. PUC LEXIS 618 (Initial Decision issued August 29, 2013); *Reynolds v. PPL Electric Utilities Corporation,* Docket No. C-2011-2255268, 2012 Pa. PUC LEXIS 8 (Order entered January 5, 2012); *Boatin v. Verizon North, Inc.,* Docket No. C-2008-2066888 , 2009 Pa. PUC LEXIS 1020 (Initial Decision issued January 29, 2009); *Application of Ram & Sita Company t/a S Day & Night Travelers,* Docket No. A-2014-2426793, 2014 Pa. PUC Lexis 513 (Initial Decision issued October 17, 2014); *Re East Norriton Water Company,* Docket Nos. A-00015790, Folder 200, P-810315, 1982 Pa. PUC LEXIS 79 (Order entered July 16, 1982) (answer treated as a protest); and *Re: Application of Renzenberger, Inc.,* Docket No. A‑00116249 F.3, 2003 Pa. PUC LEXIS 12 (Order entered February 7, 2003) (motion to dismiss treated as a petition for declaratory order). Other agencies do the same.[[1]](#footnote-1) As long as the parties’ rights are not negatively affected, and due process has been provided, there is no bar to changing the designation of a document to more accurately reflect its content and purpose. 52 Pa. Code § 1.2.

Here, the Parties have fully litigated a case filed as a complaint, although the prayer for relief, *i.e.*, a Commission directive to West Penn Power to not use herbicides on the right‑of‑way, is a request that is more suited to a petition for relief than to a complaint. The burden of proving entitlement to the requested relief lies with the proponent of the case in both complaints and petitions for relief, meaning that there would be no change in the burden of proof if the case had been brought as a petition for relief instead of a complaint. 66 Pa. C.S. § 332(a). Both parties had an opportunity to present their own cases, having been given notice and an opportunity to be heard. As the requirements of due process have been met, there is no prejudice to either side by treating this complaint as a petition for relief under 52 Pa. Code § 5.41.

In the matter before us, the Complainant has established the following relevant facts:

* West Penn Power has maintained a 100-foot right-of-way across Mr. Mattu’s land since 1968. (Finding of Fact 4).
* Public water is not available to Mr. Mattu’s residence, and his sole source of water is provided by two shallow wells. (Findings of Fact 5, 6 and 7).
* Both wells are located approximately 70 feet downhill from the right‑of‑way. (Finding of Fact 9).
* The well that is approximately 15 feet deep is served by a natural spring at the base of the hillside carrying the right-of-way. (Finding of Fact 12).
* The property also contains a fish pond located partly under the transmission line and less than 100 feet downhill from the area targeted for herbicide use. (Finding of Fact 13).
* The residence is located approximately 70 feet downhill from the transmission line. (Finding of Fact 14).
* Mr. Mattu does not object to clearing the right-of-way, only to the use of herbicides. (Finding of Fact 24).
* The pre-mix of herbicide must not be applied in or on water primarily because the oil carrier itself would harm or negatively impact water sources. (Finding of Fact 63; Tr. at 329-332).
* The herbicide 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 low cation exchange capability.[[2]](#footnote-2) (Finding of Fact 64; Tr. at 231; West Penn Power Exh. 7-8).

In addition, the record in this proceeding demonstrates that West Penn Power determines, on a case-by-case basis, the specific VMP, including herbicides, to use on rights-of-way. In fact, following several site visits, West Penn Power determined that the original herbicide work plan would be adjusted for herbicide application to the stumps and proposed the grinding of tree stumps as a concession to the Complainant because the Complainant did not want any herbicides applied due to his water wells and pond. Tr. at 215, 223-225, 268-269. West Penn Power has not performed the vegetation management at this property because of the filing of the Complaint. *Id*.

We believe that the use of herbicides, which are by their very nature hazardous, can be properly used in some circumstances. However, in the present case, the Complainant has established that his circumstances require more care in choosing and applying vegetation management methods than many other landowners’ circumstances. We note that our decision to grant this Petition for Relief is fact-specific and not intended to create a bright line test by which future cases should be evaluated. Rather, we find that the totality of the circumstances here, in this specific case, is sufficient to grant the Complainant relief by directing West Penn Power to maintain its right-of-way where it crosses the Complainant’s land by means which do not include the use of herbicides. Given this unique fact pattern, the use of herbicides would be unreasonable. Our decision in this case does not bar West Penn Power from utilizing other vegetation management methods including grinding tree stumps or assessing the vegetation growth within this right‑of‑way on a shorter time frame. We note that this is consistent with the methods used to maintain this portion of the right-of-way in past vegetation management cycles.

Because our Regulation at 52 Pa. Code § 5.41(b) requires that petitions for relief be served on the public advocates – and this was not done here – this determination will be used as a tentative opinion and order specifically for the purpose of allowing the public advocates an opportunity to intervene. If no intervention is received from the public advocates within thirty days of the entry date of this tentative opinion and order, it shall become final.

In light of the above, this Complaint in the nature of a Petition for Relief is tentatively granted, and West Penn Power shall use methods not involving herbicides on the right-of-way crossing the Complainant’s land.

**Conclusion**

Based on the forgoing, we shall reverse the Initial Decision and grant the Petition for Relief, consistent with this Tentative Order and Opinion; **THEREFORE,**

 **IT IS ORDERED:**

 1.That the Petition for Relief filed on April 26, 2016, is granted consistent with this Tentative Order and Opinion.

2.That the Initial Decision of Administrative Law Judge Katrina L. Dunderdale, issued March 29, 2017, is reversed.

 3. That West Penn Power Company is directed to forgo the use of herbicides on the right-of-way crossing Robert M. Mattu’s land without his permission.

 4. That a copy of this Tentative Opinion and Order be served on the Office of Consumer Advocate, the Office of Small Business Advocate and the Bureau of Investigation and Enforcement.

 5. That all Statutory Advocates described in Ordering Paragraph No. 4 shall have thirty (30) days from the entry date of this Tentative Opinion and Order to file for intervention and request for additional proceedings.

 6. That if no Statutory Advocate has filed a notice of intervention and request for additional proceedings within thirty (30) days of the entry date of this Tentative Opinion and Order, then this Tentative Opinion and Order shall become final without further action of the Commission.

 **BY THE COMMISSION,**

 Rosemary Chiavetta

 Secretary

(SEAL)

ORDER ADOPTED: June 14, 2017

ORDER ENTERED: July 14, 2017

1. *See e.g., Len Vando v. PA Dept. of Banking and Securities,* 2017 Pa. O.O.R.D. LEXIS 30 (January 11, 2017) (simple request treated as a Right to Know request); and *Upper Allegheny Joint Sanitary Authority v. DER,* 1989 EHB 303 (Pa. Environmental Hearing Board treated a motion for summary judgment as a motion for judgment on the pleadings). [↑](#footnote-ref-1)
2. We note that the evidence submitted does not claim “no” toxicity or “no” cation exchange capability and that water at risk of being contaminated is the Complainant’s only source of water for the residence. [↑](#footnote-ref-2)