



17 North Second Street
12th Floor
Harrisburg, PA 17101-1601
717-731-1970 Main
717-731-1985 Main Fax
www.postschell.com

David B. MacGregor

dmacgregor@postschell.com
215-587-1197 Direct
215-320-4879 Direct Fax
File #: 167817

August 29, 2017

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265

RECEIVED

AUG 29 2017

**PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU**

Re: Robert M. Mattu v. West Penn Power Company
Docket No. C-2016-2547322

Dear Secretary Chiavetta:

Enclosed for filing is the Petition of West Penn Power Company for Reconsideration of Tentative Order Entered July 14, 2017, in the above-referenced proceeding. Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,

David B. MacGregor

DBM/jl
Enclosures

cc: Certificate of Service

CERTIFICATE OF SERVICE

(Docket No. C-2016-2547322)

I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

VIA FIRST CLASS MAIL

Robert A. Cinpinski, Esquire
200 North Jefferson Street
Kittanning, PA 16201
Counsel for Robert M. Mattu


Robert M. Mattu
310 Schenley Road
Leechburg, PA 15656

RECEIVED

AUG 29 2017

**PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU**

Date: August 29, 2017



David B. MacGregor

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Robert M. Mattu

v.

West Penn Power Company

:
: Docket No. C-2016-254732
:
:
:

RECEIVED

AUG 29 2017

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

**PETITION OF WEST PENN POWER COMPANY
FOR RECONSIDERATION OF TENTATIVE ORDER
ENTERED JULY 14, 2017**

West Penn Power Company (“West Penn” or the “Company”), pursuant to Section 703(g) of the Public Utility Code, 66 Pa.C.S. § 703(g), and Section 5.572 of the Pennsylvania Public Utility Commission’s (“Commission”) regulations, 52 Pa. Code § 5.572, hereby files this Petition requesting reconsideration of the Commission’s Tentative Opinion and Order at Docket No. C-2016-254732 that became a final order on August 14, 2017 (hereinafter, the “Final Order”).¹ Reconsideration of the Final Order is warranted and appropriate for several reasons.

First, the Final Order’s finding that it would be unreasonable for West Penn to use herbicides within the transmission line right-of-way is based entirely on a newly announced and incorrect “equitable/fairness” standard that is beyond the Commission’s statutory authority. The Commonwealth Court has already decided this matter, concluding that the Commission lacks jurisdiction to grant relief where there is no violation of the Public Utility Code (“Code”),

¹ The Commission’s Tentative Opinion and Order was entered July 14, 2017. The Tentative Opinion and Order directed that the Order be served on the statutory parties, which had 30 days (*i.e.*, until August 14, 2017) from the date of the order to intervene and request additional proceedings. The Tentative Opinion and Order expressly provides that if no statutory parties request additional proceedings within 30 days from the date of the order, the Order shall become Final Order without further action of the Commission. No statutory parties intervened or requested additional proceedings before the Commission. Accordingly, the Order is now a Final Order and is ripe for West Penn’s Petition for Reconsideration.

Commission order, or Commission regulation. *West Penn Power Co. v. Pa. PUC*, 478 A.2d 947 (Pa. Cmwlth. 1984). As admitted in the Final Order, the record in this case clearly demonstrated that the use of herbicides was safe, reasonable and, moreover, was not a violation of the Code, Commission order, or Commission regulation.

Second, the Final Order failed to consider that this newly adopted “equitable/fairness” standard would have severe adverse statewide consequences for all utilities, retail suppliers, and the Commission itself. Under this new standard, any customer could ask to be exempted from any Commission-approved public utility requirements for rates and service if, in the customer’s view and the Commission’s discretion, the application of existing rates and conditions of service were determined to be “unfair” as applied to that individual customer. For example, a customer could file a petition for relief because the customer does not think it is fair or equitable that they be required to pay the tariffed rate, does not want to pay for service extensions, does not want utility facilities on their property, or does not want a smart meter installed at their service location. Similarly, utilities and retail suppliers could file for “relief” from any provision of the Code or Commission regulations where the application was subjectively viewed as “unfair” or “inequitable.” Moreover, the Commission presumably could act under this new “equitable/fairness” authority to take action wherever it lacks specific jurisdiction under the Code, *e.g.*, to award damages or regulate environmental issues. And, even if the Commission did not take such action or acted “reasonably” and “fairly,” the adoption of this new standard would clearly open the door to innumerable petitions for relief which would have to go hearings and be litigated before an Administrative Law Judge (“ALJ”) and decided by the Commission. This newly announced “equitable/fairness” standard would result in a tremendous waste of limited resources for all parties, including the Commission, and should not be adopted.

Third, the Final Order failed to consider that the Commission lacks jurisdiction over private contracts, including easement agreements. The relief granted by the Final Order essentially revised the private easement agreement to eliminate or prohibit West Penn's existing right to apply herbicides within the transmission line right-of-way, which is beyond the authority granted in the Code. Moreover, even assuming that the Commission has jurisdiction over private easement agreements, which it clearly does not, the Final Order failed to: (i) properly invoke the Commission's limited authority under 66 Pa.C.S. § 508 to revise utility contracts and (ii) make the requisite finding that the existing easement agreement was adverse to the public welfare.

Fourth, the Final Order failed to consider that nothing in the Code authorizes the Commission to regulate the use or application of herbicides. Rather, the Pennsylvania Pesticide Control Act of 1973² provides the Department of Agriculture with exclusive authority to regulate the use and application of pesticides, including herbicides. Therefore, the regulation of herbicides lies solely with the Department of Agriculture, not the Commission.

Finally, the Final Order violated the parties' legal due process rights when it, *sua sponte*, converted the formal complaint to a petition for relief, applied a new "equitable/fairness" standard, and granted relief that resulted in a revision of the private easement agreement after the record had closed. Although the Complainant and West Penn both had an opportunity to present their cases with respect to whether West Penn's proposed use of herbicides was unsafe and a violation of Section 1501 of the Code, the parties had no notice and did not have any opportunity to introduce evidence or otherwise be heard with respect to why the newly announced "equitable/fairness" standard is incorrect and beyond the Commission's authority. Moreover, the parties had no opportunity to introduce evidence and explore the serious statewide consequences

² Act of March 1, 1974, P.L. 90, *as amended*, 3 P.S. §§ 111.21-111.61.

of adopting a new “equitable/fairness” standard, and whether granting “equitable/fair” relief on the facts of this case was appropriate or would result in unreasonable discrimination in service.

These new and novel issues have not been addressed in this proceeding and, more importantly, raise important jurisdictional and due process issues that appear to have been overlooked by the Final Order. For these reasons, as more fully explained below, West Penn respectfully requests that the Commission grant reconsideration, rescind the Final Order, and adopt the Initial Decision of ALJ Katrina L. Dunderdale. In support thereof, West Penn states as follows:

I. INTRODUCTION

1. West Penn is an electric distribution and transmission company subject to the regulatory jurisdiction of the Commission.

2. West Penn owns and operates an interstate high voltage transmission line, the Kiski Valley to Cabot 138 kV line or TMU-652 transmission line, that traverses a property owned by Robert M. Mattu, the Complainant, pursuant to an easement agreement duly recorded on April 24, 1968.

3. The easement agreement grants West Penn, among other things, the right to cut, trim or remove trees within the limits of the easement, and the right to control the undergrowth thereon by such methods as West Penn may determine.

4. West Penn applies its Transmission Vegetation Management Program (“TVMP”) to all interstate transmission corridors to remove and control incompatible vegetation that could interfere with West Penn’s obligation to provide safe and reliable electric service. West Penn’s TVMP includes the safe use of 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's TVMP is consistent with the national standard set by the American National Standards Institute ("ANSI").

5. On April 26, 2016, Mr. Mattu, filed a formal complaint against West Penn alleging that it is unreasonable or unsafe for West Penn to apply herbicide chemicals within the transmission line right-of-way that traverses Mr. Mattu's property. Specifically, Mr. Mattu alleged that the use of herbicides on his property would be unsafe because of the location of his pond and two water wells. Mr. Mattu requested that West Penn be enjoined from using any herbicide to manage the vegetation growing within the high voltage electric transmission line right-of-way that traverses Mr. Mattu's property. Mr. Mattu did not object to any other part of the Company's TVMP.

6. Two telephonic hearings were held before ALJ Dunderdale. Mr. Mattu, who was represented by legal counsel, testified on his own behalf but offered no exhibits. West Penn presented three witnesses and offered 15 exhibits, which were all admitted into the record. West Penn witness Salvatore Quattrocchi was qualified as an expert in herbicide application, as well as the modes of action, environmental impacts, and the safety of herbicides. (*See Initial Decision, Finding of Fact, No. 73.*)

7. Consistent with the briefing schedule, West Penn timely filed its Brief and Reply Brief. Through legal counsel, Mr. Mattu timely filed his Brief, but chose not to file a Reply Brief. In his Brief, Mr. Mattu stated the scope of the hearing was to determine whether West Penn's work plan creates an unreasonable safety concern/hazard that is contrary to its obligation under Section 1501 of the Code. (*See Complainant Brief at 2.*)

8. On March 29, 2017, ALJ Dunderdale issued an Initial Decision denying the formal complaint. ALJ Dunderdale concluded that Mr. Mattu was not entitled to relief because

he failed to establish that West Penn's proposal to apply herbicides within the transmission line right-of-way violates Section 1501 of the Code, a Commission regulation, or a Commission order. Specifically, ALJ Dunderdale determined, based on the record evidence, that:

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.

(See Initial Decision, p. 17 (emphasis added).)

9. Neither party filed exceptions to the Initial Decision. Notwithstanding, at a public meeting held on June 14, 2017, the Commission adopted in a three-to-two vote the Joint Motion of Chairman Brown and Commissioner Sweet that directed an appropriate order be entered to reverse ALJ Dunderdale's Initial Decision.³ Commissioner Coleman and Commissioner Powelson issued a Joint Dissenting Statement that they would affirm ALJ Dunderdale's Initial Decision.

10. On July 14, 2017, the Commission issued a Tentative Opinion and Order (the Final Order), which reversed ALJ Dunderdale's Initial Decision consistent with the Joint Motion adopted three-to-two at the June 14, 2017 public meeting.

11. The Final Order emphasized that ALJ Dunderdale's analysis was thorough and found that the Initial Decision approving West Penn's proposed actions was consistent with both Commission precedent and West Penn's vegetation management plan. (Final Order, p. 6.)

³ According to the Joint Motion, the Commission exercised its authority to review the Initial Decision in the absence of any exceptions pursuant 66 Pa.C.S. § 332(h).

12. The Final Order did not find that West Penn's proposal to apply herbicides within the high voltage electric transmission line right-of-way is a violation of any statute, regulation, or order. The Final Order also did not find that West Penn's conduct was unsafe, unreasonable, or otherwise in violation of Section 1501 of the Code.

13. The Final Order found that, although West Penn's TVMP may not be a violation of a statute, regulation, or order of the Commission, "there is a point where the use of herbicides is simply not consistent with the landowner's ability to fully utilize the property." The Commission held that in these situations the landowner should file a "petition for relief rather than a complaint." (Final Order, p. 6.) Therefore, the Final Order, *sua sponte*, converted Mr. Mattu's complaint to a petition for relief even though the record had closed and the Initial Decision had been issued.

14. The Final Order opined that Mr. Mattu and West Penn both had an opportunity to present their cases and, therefore, the requirements of due process have been met and no party was prejudiced by treating the complaint as a petition for relief under 52 Pa. Code § 5.41 after the record had closed.⁴

15. Rather than requiring a violation of an applicable statute, regulation, or order of the Commission in order to grant the relief requested in the complaint, the Final Order created a new "equitable/fairness" standard. The Final Order concluded that simply finding West Penn's planned method of clearing vegetation from the right-of-way consistent with its vegetation

⁴ Recognizing that petitions for review must be served on statutory parties pursuant to 52 Pa. Code § 5.41, the Commission directed that the Tentative Opinion and Order issued July 14, 2017 be served on the statutory parties, which had 30 days (*i.e.*, August 14, 2017) from the date of the order to intervene and request additional proceedings. No statutory parties intervened or otherwise requested additional hearings and, therefore, the Order became a Final Order on August 14, 2017, pursuant to the express language in the Tentative Opinion and Order. See Footnote 1, *supra*.

management plan was “not sufficient to provide an equitable result in the instant case.” (Final Order, p. 6 (emphasis added); *see also* Joint Motion, p. 1 (“insufficient to provide a fair result”).)

16. Applying this new “equitable/fairness” standard, the Final Order found that the totality of the circumstances specific to this case was sufficient to grant Mr. Mattu relief and ordered West Penn not to use herbicides, however safe, to maintain vegetation within the transmission right-of-way that traverses Mr. Mattu’s property.

17. West Penn herein respectfully requests that the Commission grant reconsider, rescind the Final Order, and adopt the Initial Decision of ALJ Dunderdale.

II. THE STANDARD FOR GRANT OF RECONSIDERATION HAS BEEN MET.

18. The Commission’s standards for granting reconsideration following final orders are set forth in *Duick v. Pennsylvania Gas and Water Co.*, 56 Pa. P.U.C. 553, 559 (1982):

A petition for reconsideration, under the provisions of 66 Pa.C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. In this regard we agree with the Court in the Pennsylvania Railroad Company case, wherein it was said that “[p]arties ..., cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them....” What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission.

19. The Commission has cautioned that the operative language of the *Duick* standard focuses on the deliberations of the Commission, not the arguments of the parties. *See, Pa. PUC v PPL Electric Utilities Corporation*, Docket No. R-2012-2290597 (Opinion and Order entered May 22, 2014).

20. As explained below, in converting this proceeding from a complaint to a petition for relief and then granting relief to Mr. Mattu when there was no record evidence of any violation on the part of West Penn, the Final Order failed to consider several important jurisdictional and due process issues. Specifically, the Commission should grant reconsideration and rescind its Final Order because:

- A. The Final Order failed to consider that the Commission lacks jurisdiction to provide relief where there is no violation of the Code, Commission regulation, or Commission order. The new “equitable/fairness” standard announced by the Final Order is beyond the authority granted in the Code.
- B. The Final Order completely failed to consider the many adverse consequences of adopting a new “equitable/fairness” standard, and whether granting “equitable/fair” relief on the facts of this case was appropriate or would result in unreasonable discrimination in service.
- C. The Final Order failed to consider that the Commission lacks jurisdiction over easement agreements. The relief granted in the Final Order essentially amended the private easement agreement by eliminating West Penn’s right to safely apply herbicides, which is beyond the authority granted in the Code in absence of a violation of the Code, Commission regulation, or Commission order. Moreover, even assuming that the Commission has jurisdiction over easement agreements, which it clearly does not, the Final Order failed to (i) properly invoke the limited authority under 66 Pa.C.S. § 508 to revise utility contracts and (ii) make the requisite finding that the existing easement agreement was adverse to the public welfare.
- D. The Final Order failed to consider that nothing in the Code authorizes the Commission to regulate the use or application of herbicides. Rather, the Legislature has granted such authority exclusively to the Department of Agriculture, not the Commission.
- E. The Final Order violated the parties’ right to due process of law when it, *sua sponte*, converted the complaint to a petition for relief, adopted and applied a new equitable/fairness standard, and amended the private easement agreement after the record had closed. Although the Complainant and West Penn both had an opportunity to present their cases on whether

West Penn's proposed use of herbicides was unsafe and a violation of Section 1501 of the Code, the parties had no notice and did not have any opportunity to introduce evidence or otherwise be heard with respect to: (i) why the newly announced "equitable/fairness" standard is incorrect and would have serious adverse consequences for all utilities; (ii) the Final Order's amendment to the easement agreement; or (iii) whether the Mr. Mattu was entitled to relief under the new standard and whether such relief would constitute unreasonable discrimination in service.

21. These new and novel issues have not been addressed in this proceeding and, more importantly, raise important jurisdictional and due process issues that appear to have been overlooked by the Final Order. These issues clearly satisfy the Commission's standards for reconsideration under *Duick, supra*.

III. ARGUMENT FOR RECONSIDERATION

A. The Commission Lacks Jurisdiction To Provide Relief Where There Is No Violation Of The Code, Commission Regulation, Or Commission Order

22. As a creature of legislation, the authority of the Commission is limited to the powers granted by legislative enactment. *Northwestern Youth Servs., Inc. v. Dep't of Pub. Welfare*, 620 Pa. 140, 154, 66 A.3d 301, 310 (2013). The Commission may exercise only those powers that are expressly conferred upon it by the Legislature. *Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 383 A.2d 791 (1978). Importantly, jurisdiction may not be conferred where none exists, *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967), and subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy, *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa. Cmwlt. 1992).

23. This matter was initiated as complaint alleging a safety violation of Section 1501 of the Code. Section 1501 of the Code states in part that every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities. 66 Pa.C.S. § 1501.

24. Under Section 701 of the Code, a person may file a complaint against any act or thing done or omitted to be done by any public utility in alleged violation of any law which the Commission has jurisdiction to administer, or of any regulation or order of the Commission. 66 Pa.C.S. § 701; *see also* 52 Pa. Code § 5.24(a) (a person may file a formal complaint for any act done or omitted to be done in claimed violation of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission).

25. In his complaint, Mr. Mattu alleged that the use of herbicides on his property is unsafe because of the location of his pond and two water wells.

26. The unrefuted record in this case established that West Penn's proposed use of herbicides within the transmission line right-of-way is safe and consistent with industry best practice. Indeed, the Final Order did not find that West Penn's proposal to apply herbicides within the transmission line right-of-way was a violation of any statute, regulation, or order. The July 14, Order also did not find that West Penn's conduct was unsafe, unreasonable, or in violation of Section 1501 of the Code.

27. Rather than requiring a violation of applicable statute, regulation, or order of the Commission in order to grant the relief requested, the Final Order concluded that finding West Penn's vegetation method to be consistent with its TVMP is "not sufficient to provide an equitable result in the instant case." (Final Order, pp. 7-8 (emphasis added); *see also* Joint Motion, p. 1 ("insufficient to provide a fair result") (emphasis added).) As such, the Final Order converted the complaint to a Petition for Review under 52 Pa. Code § 5.41 and applied a new "equitable/fairness" standard.

28. The new "equitable/fairness" standard announced by the Final Order does not require any showing that the conduct at issue violates Section 1501. Rather, to meet this

standard, a complainant merely needs to show that it would not be fair or equitable under the complainant's specific circumstances as compared to others. (*See* Final Order, p. 11 (requiring a showing of more care than other landowners' circumstances).)

29. Applying this new standard, the Final Order concluded that "the totality of the circumstances here, in this specific case, is sufficient to grant the Complainant relief." As such, the Commission ordered that West Penn cannot use herbicides, however safe, to maintain vegetation on the right-of-way across Mr. Mattu's property even though the unrefuted record clearly demonstrated that the use and method of application of the herbicides to be safe and consistent with industry best practices.

30. The new "equitable/fairness" standard announced in the Tentative Order is beyond the authority granted in the Code. Nothing in the Code authorizes the Commission to impose a higher standard than Section 1501 or to otherwise grant a complainant relief in the absence of record evidence demonstrating a violation of any law which the Commission has jurisdiction to administer, or of any regulation or order of the Commission.

31. Although the Final Order apparently concluded a violation of Section 1501 was not required in order to grant relief where the complaint is converted to a Petition for Review, the Commission cannot confer jurisdiction it does not otherwise have by converting the case to a petition for relief under Commission's regulations. A regulation cannot grant jurisdiction, it must be within the Commission's statutory jurisdiction. *Dep't of Gen. Servs. v. Limbach Co.*, 862 A.2d 713 (Pa. Cmwlth. 2004) (a rule of procedure cannot operate to confer jurisdiction where none exists); *see also M & P Mgmt., L.P. v. Williams*, 594 Pa. 489, A.2d 398 (2007) (sound public policy cannot create jurisdiction where none exists).

32. Further, even if a regulation could grant jurisdiction, which it cannot, the Commission's regulations expressly provide that petitions for relief are available to seek "relief under the act or other statute that the Commission administers." 52 Pa. Code § 5.41(a). Thus, in order to obtain relief through a petition for relief, the petitioner must be seeking relief under the Code, *i.e.*, relief for a violation of Section 1501 of the Code.

33. The Commonwealth Court has held that in order for the Commission to sustain a claim brought under Section 1501, the utility must be in violation of its duty under this section. Without such a violation by the utility, the Commission does not have the authority, when acting on a customer's claim, to require any action by the utility. For example, in *West Penn Power Co. v. Pa. PUC*, 478 A.2d 947 (Pa. Cmwlth. 1984), customer complainants sought to recover the costs to prevent alleged stray voltage from affecting their dairy cows with regard to decreasing milk production. The Commission found that the utility's electric service was not unreasonable or unsafe or otherwise in violation of Sections 1501 or 1505 but, nonetheless, made a policy determination that the utility should pay 75% of the customers' costs for reducing the alleged stray voltage. The Commonwealth Court reversed the Commission holding that it could not grant relief to the customers without a finding that the utility breached its duty under Section 1501. *See also Peoples Cab Co. v. Pa. PUC*, 137 A.2d 873 (Pa. Super. 1958) (holding that the Commission does not have the authority to regulate or control the management decisions of a utility absent a finding that the management decision would adversely affect the public); *Philadelphia Suburban Water Co. v. Feinstein*, 383 A.2d 997 (Pa. Cmwlth. 1978) (holding that the Commission may not allocate the amount of a disputed water bill between the utility and the customer where the complainant had not met its burden of proof). Thus, the Commonwealth

Court has already decided the issue of whether the Commission can grant relief in the absence of finding a violation, and the Commission is bound by this appellate precedent.

34. Indeed, the Commonwealth Court has explained that “[a]dministrative agencies do not have the authority to order a regulated company to change lawful conduct on the theory that it is in the best interest of their customers.” *Phila. Suburban Water Co. v. Pa. PUC*, 808 A.2d 1044, 1056 (Pa. Cmwlth. 2002) (citing *Aetna Casualty and Surety Insurance Co. v. Insurance Department*, 536 Pa. 105, 638 A.2d 194 (1994)). The “Commission’s authority to interfere in the internal management of a utility company is limited. The Commission is not empowered to act as a super board of directors for the public utility.” *Metropolitan Edison Company v. Pa. PUC*, 437 A.2d 76, 80 (Pa. Cmwlth. 1981) (citations omitted).

35. Additionally, the Commission has previously recognized that it lacks jurisdiction to consider equitable remedies because it is an agency, rather than a court of law. See *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, Docket Number C-2014-2427657, 2015 Pa. PUC LEXIS 274 (June 8, 2015) (“the Commission lacks jurisdiction to consider the equitable remedy of restitution”); *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, Docket Number C-2014-2427657, 2014 Pa. PUC LEXIS 715 (Opinion and Order entered December 18, 2014) (ordering “[t]hat the following question is answered in the negative: Does the Commission have the authority and jurisdiction to order equitable remedies including restitution?”). Therefore, the Commission cannot grant an “equitable result” in this case because, by its own admission, the Commission lacks jurisdiction to do so.

36. For these reasons, and consistent with the Code, Mr. Mattu is entitled to relief only if it has been established that West Penn’s proposed use of herbicides was in violation of

Section 1501 of the Code. The record in this case, however, clearly demonstrated that the use of herbicides was safe and reasonable, including, but not limited to:

West Penn is required to have a TVMP, in order to satisfy its federally mandated reliability obligations, which are developed and enforced by the North American Electric Reliability Corporation ("NERC"). (Tr. 54-55, 225-230.)

West Penn's TVMP, including the use of herbicides within transmission line rights-of-way, is consistent with the ANSI, NERC standards, and industry best practices. (West Penn Exhibits 4 & 5; Tr. 55, 65-68, 71, 73, 79-80, 84, 187, 191, 227-229.)

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. (West Penn Exhibit 5, Tr. 60-65, 73, 185, 191.)

ANSI also specifies that after incompatible vegetation is manually controlled, herbicide should be applied to the remaining stumps. (West Penn Exhibit 4, Tr. 68, 71-72.)

West Penn identified some of the vegetation growing in the right-of-way that traverses Mr. Mattu's property as being incompatible vegetation, whose rapid growth and height may affect electric reliability. (West Penn Exhibits 14-25; Tr. 60, 62.)

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. The presiding ALJ accepted his testimony as relevant and credible. (West Penn Exhibit 6; Tr. 290-308; Initial Decision, Finding of Fact, No. 73.)

West Penn's expert 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.⁵ (Tr. 190-191, 312-315, 329-230, 333-335, 338, 357.)

The proposed herbicides have been approved for use in vegetation management on utility rights-of-way by the United States Environmental Protection Agency. (West Penn Exhibits 8, 10 and 12; Tr. 315-317.)

All contractors who apply the herbicide must be registered and certified as an Applicator by the Commonwealth of Pennsylvania. (Tr. 97, 230.)

Stump cutting alone would result in a more negative ecological impact to the right-of-way 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 right-of-way to combat incompatible vegetation. (Tr. 2290, 249-250, 328-329, 341-342, 249-250, 341-342, 382-384.)

The use of both manual cutting and herbicides is the most cost-effective method of vegetation management within rights-of-way. (Tr. 249, 341-342.)

West Penn adjusted its herbicide application to address Mr. Mattu's concerns regarding proximity to his water wells and fish pond. (Tr. 221, 223, 225.)

West Penn offered to test Mr. Mattu's water both immediately before and after the herbicide application, and a later date as might be agreed to. (Tr. 115-116.)

37. The Final Order ignored this unrefuted evidence and, instead, relied almost entirely on the distance of the water wells and fish pond from the right-of-way, 70 and 100 feet, respectively. However, the Final Order's finding that it would be unreasonable to use herbicides under these circumstances is based entirely on a newly announced and incorrect

⁵ West Penn's witness explained that the herbicides are applied to the stumps and are absorbed into the plant and the root system, which prevents any regrowth. (Tr. 312-313.) There is no movement of the herbicide off the root system in any way. (Tr. 333.) 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.) Additionally, none of the herbicides are carcinogenic, teratogenic or mutagenic. (Tr. 339.)

“equitable/fairness” standard. As explained above, this is not the correct standard as the Commission lacks jurisdiction to grant relief where there is no violation of the Code, Commission order, or Commission regulation.

38. Based on the foregoing, the Final Order failed to consider that the Commission lacks jurisdiction to provide relief where there is no violation of the Code, Commission regulation, or Commission order. The new “equitable/fairness” standard announced by the Final Order is beyond the authority granted in the Code and is inconsistent with the requirements of 52 Pa. Code §§ 5.21(a) and 5.41(a). Therefore, West Penn respectfully requests that the Commission grant reconsideration, rescind the Final Order, and adopt the Initial Decision of ALJ Dunderdale.

B. If Adopted And Applied In The Future, The New “Equitable/Fairness” Standard Announced In The Final Order Would Have Severe Adverse Consequences Statewide For All Utilities And Would Inevitably Result In Unreasonable Discrimination In Violation Of The Code

39. As explained above, the newly announced “equitable/fairness” standard is not the correct standard because the Commission lacks jurisdiction to grant relief where there is no violation of the Code, Commission order, or Commission regulation.

40. Even assuming, *arguendo*, that the Code authorizes the Commission to provide equitable relief where there is no evidence of any violation, the fundamental problem with the newly announced “equitable/fairness” standard is that, if adopted and applied in the future, it would allow customers to seek an order from the Commission directing the utility to change its lawful policy or practice simply because a customer is unhappy or believes it is unfair and they should be treated differently than other utility customers.

41. For example, if this new standard is adopted and applied in the future, an unhappy customer could petition the Commission and seek equitable relief from any service or rate provided by a public utility, including, but not limited to:

Petition for relief because the customer does not think it is fair or equitable that they be required to pay the lawful, tariffed rate;

Petition for relief because the customer does not think it is fair or equitable that smart meters be installed on their property or that they should be required to pay the costs associated with smart meters;

Petition for relief because the customer does not think it is fair or equitable that they be required to pay the costs associated with universal service programs;

Petition for relief because the customer does not think it is fair or equitable that they be required to pay the costs associated with energy efficiency and conservation plans;

Petition for relief because the customer does not think it is fair or equitable that they be required to pay the distribution system improvement charge, state tax adjustment surcharge, or other riders applied to similarly situated customers;

Petition for relief because the customer does not think it is fair that they must initiate a claim within the time period proscribed by the statute of limitations;

Petition for relief because the customer does not think it is fair or equitable that certain consumer protection provisions of Chapter 14 and Chapter 56 are applied to their factual situation;

Petition for relief because a tenant or landlord does not think it is fair or equitable to comply with the landlord-tenant provisions of Sections 1521-1533 of the Code;

Petition for relief because the customer does not think it is fair or equitable to be required to pay deposits, late fees, return check fees, restoration fees, and etc. as permitted under a Commission-approved tariff;

Petition for relief because the customer does not want to pay for service extensions;

Petition for relief because the customer does not think the Commission's termination and notice provisions are fair or equitable;

Petition for relief because the customer does not think it is fair or equitable that they be required to honor a payment arrangement in order to continue to receive utility service;

Petition for relief because the customer does not think it is fair or equitable that the billing format used by a public utility provides more or less detail than the customer deems applicable to their specific factual circumstance;

Petition for relief because the customer does not think it is fair or equitable that the utility's meter reading and billing cycle be applied to generate the customer's utility bills;

Petition for relief because the customer does not think it is fair for utility facilities to be located on their property;

Petition for relief because the customer does not think it is fair or equitable that they be required to allow the utility access to the utility facilities located on the customer's property or face termination of service;

Petition for relief because the customer does not think it is fair or equitable that they be required to allow a utility access to a right-of-way granted by an easement agreement;

Petition for relief because the customer does not think it is fair or equitable that they be required to pay for the excess generation produced by net metering customers; or

Any other petition for relief where the customer is unhappy with the lawful conduct and policies of the public utility.

While it is somewhat speculative at this point as to whether the Commission would grant any such relief, under the new "equitable/fairness" standard customers would have the right to a hearing any time they are unhappy with any of the services or rates provided by the public utility if the customer believes it is not fair and equitable on their facts. Such claims would have to be litigated before and decided by an ALJ and the Commission at tremendous cost and waste of limited resources.

42. Additionally, petitions for relief under 52 Pa. Code § 5.41 are not limited to customers. Indeed, petitions for relief could be filed by public utilities, electric generation suppliers, and natural gas suppliers, all of whom could request “equitable or fair” relief or remedies from various regulatory requirements under specific circumstances. For example, under this new equitable theory, public utilities could petition the Commission for relief from certain obligations under the Code when such an obligation is, in the utility’s view, inequitable or unfair, including, but not limited to: charging just, reasonable, and nondiscriminatory rates; seeking approval for the issuance of securities or affiliated interest agreements; not be required to obtain a certificate of public convenience for the activities enumerated in Chapter 11; filing energy efficiency and conservation plans; obtaining default supply at least cost; extending service to a particular customer on reasonable terms; or terminating service to customers during winter months.

43. More broadly, the new standard could be used by the Commission to grant “equitable/fair” relief whenever it lacks jurisdiction to otherwise take specific action. For example, the Commission has no jurisdiction over, among other things: to award monetary damages, *DeFrancesco v. Western Pennsylvania Water Company*, 453 A.2d 595 (Pa. 1982); to award attorneys’ fees, *Pa. P.U.C. v. Duquesne Light Co.*, Docket No. R-811470, 1986 Pa. PUC LEXIS 109 (Order entered May 16, 1986); to rule on the parties’ responsibilities under a private agreement, *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977); to resolve property rights controversies, *Anne E. Perrige v. Metropolitan Edison Co.*, Docket No. C-00004110 (Order entered July 3, 2003); questions of trespass and the scope and validity of a utility’s right of way, *Lou Amati/Amati Service Station v. West Penn Power Co.*, Docket No. C-00945872 (Order entered October 24, 1996); water quality issues, *Rovin v. Pa. PUC*, 502 A.2d 785 (Pa. Cmwlth.

1986); air quality issues, *Country Place Waste Treatment Company Inc. v. Pa. PUC*, 654 A.2d 72 (Pa. Cmwlth. 1995); to determine responsibility for an unpaid account balance where foreign load was present, *Ace Check Cashing v. Philadelphia Gas Works*, Docket No. C-2008-2056428 (Order entered May 21, 2010); claims under the Unfair Trade Practices/Consumer Protection Law, *Mid-Atlantic Power Supply Assoc. v. PECO Energy Co.*, Docket No. P-00981615, 1999 Pa PUC LEXIS 30 (Order entered May 19, 1999); municipal liens, *Agron Vata v. Philadelphia Gas Works*, Docket No. C-2009-2149960 (Order entered August 24, 2010); and etc. Under the new “equitable/fairness” standard, however, the Commission presumably could ignore its obvious lack of jurisdiction and confer equitable relief. Although the Commission may believe that it is fair and equitable to award such relief under the specific circumstances of a case, the fundamental flaw with this new “equitable/fairness” theory is that it simply turns the requirements of subject matter jurisdiction on their head. *See Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992) (subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy).

44. Further, if adopted and applied in the future, the new “equitable/fairness” standard is arbitrary and would be very difficult to apply. Currently, the services and rates provided by public utilities must comply with the requirements of the Code and Commission regulations. However, whether the lawful policy, conduct, or practice of a public utility is “equitable” or “fair” to particular customer’s circumstances is a completely subjective standard that, if adopted and applied in the future, will be unduly burdensome on both the utilities and the Commission to apply to each possible scenario that could arise where a customer, utility, or supplier is unhappy.

45. Importantly, directing the utility to change its lawful policy, conduct, or practice simply because a customer is unhappy or believes it is unfair and they should be treated

differently than other utility customers undoubtedly will result in discriminatory treatment of customers. The Code requires a utility to apply the terms of its tariff and prohibits unreasonable discrimination in service and rates. *See* 66 Pa.C.S. §§ 1303, 1304, 1502. However, under the new “equitable/fairness” standard, a customer that is unhappy with the lawful policy, conduct, and practice of a utility could receive entirely different rates and services than similarly situated customers. Indeed, the Final Order clearly acknowledged that the “equitable/fairness” standard could result in discriminatory treatment by stating that Mr. Mattu was entitled to relief upon a showing of more care required than other landowners’ circumstances. (*See* Final Order, p. 11.) This discriminatory result of the newly announced “equitable/fairness” standard is a direct violation of Sections 1303, 1304, and 1502 of the Code, which expressly prohibit unreasonable discrimination in service.

46. Based on the foregoing, West Penn respectfully requests that the Commission grant reconsideration, rescind the Final Order, and adopt the Initial Decision of ALJ Dunderdale.

C. The Commission Lacks Jurisdiction Over Private Contracts, Including Easement Agreements.

47. Although the Courts have held that the vegetation management is a utility service over which the Commission has jurisdiction,⁶ the relief granted by the Final Order goes too far and essentially reforms the private easement agreement between West Penn and Mr. Mattu.

48. West Penn owns a transmission line right-of-way that traverses Mr. Mattu’s property pursuant to an easement agreement duly recorded on April 24, 1968.

⁶ The Commission exercises jurisdiction over vegetation management as a part of utility service under Section 1501 of the Code, 66 Pa.C.S. § 1501. *West Penn Power Co. v. Pa. PUC*, 578 A.2d 75 (Pa. Cmwlth. 1990); *PECO Energy Company v. Township of Upper Dublin*, 922 A.2d 996 (Pa. Cmwlth. 2007).

49. The easement agreement grants West Penn, among other things, the right to cut, trim or remove trees within the limits of the easement, and the right to control the undergrowth thereon by such methods as West Penn may determine.

50. The Final Order found that West Penn's actions are "not consistent with the landowner's ability to fully utilize the property"⁷ and, as such, ordered that West Penn is prohibited from applying herbicides within the right-of-way.

51. The "equitable/fair" relief granted in the Final Order essentially revised the easement agreement. Indeed, prior to the Final Order, West Penn clearly had the right under the easement agreement to control the undergrowth by such means as it may determine, including the right to apply herbicides within the transmission line right-of-way. However, as a result of the relief granted in the Final Order, West Penn's right to control undergrowth by application of herbicides was eliminated. Essentially, the Final Order reformed the private easement agreement to permit West Penn to control the undergrowth by such methods as West Penn may determine provided it does not do so through the use of herbicides. The "equitable/fair" relief granted by the Final Order directly conflicts with the express rights granted to West Penn by the duly recorded easement agreement.

52. It is well established that the Commission does not have jurisdiction over private contractual disputes between a citizen and a utility. *Allport Water Authority v. Winburne Water Co.*, 393 A.2d 673 (Pa. Super. 1978); *Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 383 A.2d 791 (1978); *Hoch v. Philadelphia Electric Company*, 492 A.2d 27 (Pa. Super. 1985).

⁷ The finding in the Final Order that West Penn's actions are inconsistent with the landowner's ability to fully utilize the property overlooks that the landowner has already bargained away his ability to "fully utilize the property" when he negotiated and voluntarily entered into the easement agreement.

53. Moreover, the Commission lacks jurisdiction over the rights and obligations granted in easement agreements. *Fairview Water Co. v. Pa. Public Utility Commission*, 509 Pa. 384, 502 A.2d 162 (Pa. 1985) (holding that the Code does not give the Commission subject matter jurisdiction to determine the scope and validity of easements). Indeed, Commission regulations clearly state that the Commission lacks jurisdiction over right-of-way agreements, and any matters related to such agreements must be addressed in the courts of common pleas. *See* 57 Pa. Code § 57.91.

54. For example, in *Re: Lou Amati/Amati Service Station v. West Penn Power Company and Bell Atlantic-Pennsylvania, Inc.*, Docket No. C-00945872 (Opinion and Order entered October 25, 1996), the Commission acknowledged that it is without subject matter jurisdiction to adjudicate questions involving the scope of valid easements. Similarly, the Commission has found that it lacks subject matter jurisdiction to make a determination involving substantive property rights. *Perrige v. Metropolitan Edison Co.*, C-00004110 (July 10, 2003).

55. Notwithstanding, the “equitable/fair” relief granted by the Final Order directly conflicts with the recorded easement agreement by eliminating West Penn’s existing right to control undergrowth by application of herbicides. Such a result is clearly beyond the Commission’s jurisdiction over private easement agreements.

56. It would be a different situation if the Commission found that the easement agreement permitted unjust rates, unreasonable service, or discriminatory rates and service in violation of the Code or regulation or order of the Commission. Under these circumstances and findings, the Commission could then take appropriate action to require compliance with the requirements proscribed in the Code, Commission regulations, or Commission orders. *See, e.g., American Aniline Products, Inc. v. Lock Haven*, 288 Pa. 420, 135 A. 726 (1927) (agreement to

supply water free of charge is discrimination against other users and void as against public policy); *Wayne Sewerage Co. v. Fronefield*, 76 Pa. Super. 491 (Pa. Super. 1921) (private easement agreement that granted free public service in exchange for drain pipe easement is unjust and discriminatory against other users). The Commission can take appropriate action where a public utility enters a private contract or easement that results in a violation of the law or the regulatory requirements. However, the problem in this case is that the Commission is acting to revise the private easement agreement even after finding that the Company committed no violation of the Code, Commission regulations, or Commission orders. Clearly, such action is beyond the Commission's jurisdiction.

57. Even assuming, *arguendo*, that the Commission has jurisdiction over private easement agreements, which it clearly does not in the absence of finding a violation, the "equitable/fair" result adopted by the Final Order essentially amended the private easement agreement without complying with the statutory requirements of Section 508 of the Code. 66 Pa.C.S. § 508.

58. Section 508 of the Code provides the Commission with the power to vary, reform and revise utility contracts. 66 Pa.C.S. § 508. However, the Commission does not have an unrestricted right to revise contracts under this statutory authority. The Pennsylvania Supreme Court explained that the Commission's power to reform contracts is limited to modifying contracts only to protect the greater public interest:

The Commission, however, is not authorized to impair pre-existing contractual rights and duties except under limited circumstances. The appellants ask this Court to permit the Commission to abrogate the road occupancy contracts as a legitimate exercise of police power. Unless it appears, however, that these contracts adversely affect the public welfare, the legislature may not interfere with the cost allocation provisions. *Director General of Railroad v. West Penn Railways Co.*, 281 Pa. 309, 126 Atl. 767

(1924). This Court has limited the contract abrogation ambit of the Commission to particular circumstances. The Commission's power to set aside contracts does not apply to a contract which does not affect the common welfare by directly influencing rates or actual operations of the public utility. *Pittsburgh and Lake Erie Railroad Co. v. McKees Rocks Borough*, 287 Pa. 311, 135 Atl. 227 (1926). (449 Pa. at 410).

Philadelphia v. Pa. PUC, 449 Pa. 402, 410 296 A.2d 804, 808 (1972) (emphasis added).

59. The Commission is without authority to impose the newly announced “equitable/fairness” standard to revise a private negotiated agreement simply because Mr. Mattu is no longer happy with the agreement. Under the Code, Mr. Mattu is only entitled to a revision of the private easement agreement if it has been established that West Penn’s proposed use of herbicides is adverse to the public welfare.

60. Importantly, the Final Order did not invoke the authority under Section 508 in this case. Indeed, the Final Order is silent on Section 508 or the Commission’s authority to revise contracts.

61. Even if the Final Order did intend to invoke Section 508 to revise the terms of the recorded easement, the Final Order failed to: (i) provide reasonable notice and hearings as required by Section 508; and (ii) make the requisite finding that the agreement between West Penn and Mr. Mattu was adverse to the public welfare.

62. Further, even if the Final Order did intend to invoke Section 508, there is nothing in the record to demonstrate that West Penn’s proposal to apply herbicides within the right-of-way that traverses Mr. Mattu’s property would be adverse to the public welfare. Indeed, the unrefuted record evidence in this case clearly demonstrated that the use of herbicides was safe, reasonable, and consistent with industry best practices. (*See Paragraph 36, supra.*)

63. The Final Order failed to consider that the Commission lacks jurisdiction over private contracts, including easement agreements. The relief granted by the Final Order

essentially reformed private easement agreement to eliminate West Penn's existing right to apply herbicides, which is beyond the authority granted in the Code in the absence of finding any violation of the Code, Commission regulation, or Commission order.

64. Based on the foregoing, West Penn respectfully requests that the Commission grant reconsideration, rescind the Final Order, and adopt the Initial Decision of ALJ Dunderdale.

D. The Regulation And Use Of Pesticides Lies Exclusively With The Pennsylvania Department Of Agriculture.

65. The Commission is responsible for ensuring that each public utility "furnish and maintain adequate, efficient, safe and reasonable service and facilities." 66 Pa.C.S. § 1501.

66. The definition of service is broadly defined to "includes any and all acts done, rendered, or performed, and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities, or contract carriers by motor vehicle, in the performance of their duties under this part to their patrons, employees, other public utilities, and the public, as well as the interchange of facilities between the two of them...." 66 Pa.C.S. § 102. As explained above, the Courts have found that vegetation management falls within the Code's broad definition of service. (*See Paragraph 47, supra.*)

67. In this case, the Final Order barred West Penn from using its preferred form of vegetation management, however safe, concluding that the use of herbicides on Mr. Mattu's property would be unreasonable based on "the totality of the circumstances" and "unique fact pattern." (Final Order, p. 11.)

68. Although the definition of service is to be broadly construed and has been interpreted to include vegetation management, nothing contained in Sections 102 or 1501 of the Code grants the Commission authority to regulate matters regarding the application of herbicides.

69. The “use, application, and disposal of pesticides” is regulated by the Pennsylvania Pesticide Control Act of 1973 (the Pesticide Control Act). 3 P.S. § 111.23. The Pesticide Control Act provides explicit authority to the Secretary of Agriculture “[t]o determine pesticides, and quantities of substances contained in pesticides, which are injurious to the environment.” 3 P.S. § 111.27. Therefore, the regulation of pesticide use, including the application of herbicides,⁸ lies exclusively with the Department of Agriculture, not the Commission.

70. In this case, the proposed herbicides are registered with the Department of Agriculture. (Tr. 315.)

71. Although the definition of “service” is broadly defined in the Code and has been interpreted to include vegetation management, the Commission cannot usurp the jurisdiction given to other statewide agencies in the pursuit of regulating utility service. The Commission is to adjudicate matters that are within its exclusive jurisdiction, not matters within the jurisdiction of other administrative agencies. *Polites v. Pa. PUC*, 928 A.2d 388 (Pa. Cmwlth. 2007).

72. For example, in *Rovin v. Pa. PUC*, 502 A.2d 785 (Pa. Cmwlth. 1986) a water customer filed a complaint with the Commission alleging that the water company’s practices regarding fluoridation of the water it supplies its customers are not adequate, safe, and reasonable as required by Section 1501 of the Code. The Commission dismissed the complaint, finding that it lacked jurisdiction over the fluoridation issue. On appeal, the water customer argued that fluoridation of the water was a utility service and not providing all customers with fluoridated water was unreasonable and unsafe in violation of Section 1501. The Commonwealth Court found that issues of water quality are statutorily regulated by the

⁸ The Pesticide Control Act defines “pesticides” to include herbicides: “‘pesticide’ means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, and any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant.” 3 P.S. § 111.24(31).

Pennsylvania Safe Drinking Water Act and Federal Safe Drinking Water Act, and that enforcement of those statutes is specifically vested in the Pennsylvania Department of Environmental Resources and Federal Environmental Protection Agency. Although the Commission has jurisdiction over water service, the Commonwealth Court held water quality was within the regulatory purview of these environmental agencies and not the Commission's service jurisdiction. *See also Pickford v. Pa. PUC*, 4 A.3d 707, 713 (Pa. Cmwlth. 2010) ("the issue of water purity is under the exclusive jurisdiction of the DEP as it has primacy over the enforcement of the Safe Drinking Water Act").

73. Also illustrative of when the Commission's jurisdiction over utility service must yield to the exclusive jurisdiction of other statewide agencies is the Commonwealth Court's decision in *Country Place Waste Treatment Company Inc. v. Pa. PUC*, 654 A.2d 72 (Pa. Cmwlth. 1995). In *Country Place*, a complaint was filed with the Commission alleging that offensive odors emanating from a public utility's sewage treatment plant was in violation of Section 1501 of the Code. In granting the complaint, the Commission found that it had jurisdiction over the complaint because the quality of the air was a by-product of the utility service, and a violation of Section 1501 occurs from the operation of a public utility in such a manner that offensive odors are emitted. The Commonwealth Court reversed the Commission finding that, although the definitions of service and facilities in Section 102 of the Code are to be broadly construed, nothing contained in either Section 102 or 1501 grants the Commission authority, either directly or indirectly, to regulate matters regarding odors produced by a public utility. Further, the Commonwealth Court found that the Air Pollution Control Act granted specific authority to the Pennsylvania Department of Environmental Resources to regulate air contamination sources producing air pollution, which includes obnoxious odors. Therefore, the

Pennsylvania Department of Environmental Resources, not the Commission, has authority over air quality issues that are a by-product of utility service.

74. Although the Commission has jurisdiction over public utility service and facilities under Section 1501 of the Code, the authority to regulate the use and application of herbicides has been preempted by the Pesticide Control Act. Only the Department of Agriculture can act to prohibit the use of a herbicides.

75. Moreover, the Department of Agriculture already has exercised its regulatory authority to prohibit the application of herbicides to another's property without permission of the owner and the use of a herbicide in a manner that results in unwanted residue, except that such prohibitions do not apply in the case of rights-of-way. 7 Pa. Code §§ 128.103(f), (g).

76. The Final Order failed to consider that the regulation and use of pesticides, including the application of herbicides, lies exclusively with the Pennsylvania Department of Agriculture.

77. Based on the foregoing, West Penn respectfully requests that the Commission grant reconsideration, rescind the Final Order, and adopt the Initial Decision of ALJ Dunderdale.

E. The Final Order Violated The Parties' Legal Due Process Rights When It, *Sua Sponte*, Converted The Complaint To A Petition For Review, Applied A New Equitable/Fairness Standard, And Amended the Private Easement Agreement After The Record Had Closed.

78. As explained above, the Commission is without jurisdiction to impose a standard higher than Section 1501 of the Code or to unilaterally revise a private contract simply because a complainant is no longer happy with the terms and obligations. Even assuming, *arguendo*, that the Commission has authority under the Code to grant an equitable/fair result, which it does not for the many reasons explained above, the Final Order violated the parties' due process rights when it, *sua sponte*, (i) converted the proceeding from a formal complaint to petition for relief

after the record had closed, (ii) applied a newly announced “equitable/fairness” standard after the record had closed, and (iii) amended the private easement agreement after the record had closed.

79. Due process of law requires notice and opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause. *See Fiore v. Bd. of Fin. & Revenue*, 534 Pa. 511, 633 A.2d 1111 (1993).

80. The Commission, as an administrative agency, is required to provide due process to the parties appearing before them. Providing the parties with notice and the opportunity to appear and be heard satisfies the due process requirement. *Schneider v. Pa. PUC*, 479 A.2d 10 (Pa. Cmwlth. 1984).

81. This matter was initiated as formal complaint alleging a violation of Section 1501. Under Section 701 of the Code, a person may file a complaint against any act or thing done or omitted to be done by any public utility in violation of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission. 66 Pa.C.S. § 701; *see also* 52 Pa. Code § 5.21(a). Section 1501 states in part that every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities. 66 Pa.C.S. § 1501.

82. Importantly, the parties litigated and created an evidentiary record on the standard to grant relief in a complaint proceeding, *i.e.*, whether West Penn’s proposed work plan violated the Code, Commission regulations or order because the use of herbicides created a safety concern.⁹

⁹ The Prehearing Order issued by ALJ Dunderdale, specifically advised the parties that:
The Complainant bears the burden of proof in this proceeding and must show by a preponderance of the evidence that the Respondent has violated the Public Utility Code or a regulation or an Order of this Commission so that the Complainant is entitled to the relief requested in the complaint. 66 Pa.C.S. §332(a).
(Prehearing Order at ¶ 7 (emphasis in original).) Consistent with the Prehearing Order, Mr. Mattu stated in his post-hearing Brief that the scope of this proceeding was whether West Penn’s

83. Notwithstanding, the Final Order, *sua sponte*, converted the proceeding from a formal complaint to a petition for relief after the record had closed and the Initial Decision had been issued. Importantly, the parties had no notice that the case would be evaluated as a petition for relief rather than a complaint. Although the Final Order notes that the Commission has treated pleadings by what is reflected in their content rather than by what they are labeled, the converted pleadings cited in the Final Order were matters of form over substance. Here, however, the conversion from a formal complaint to a petition for relief substantively altered the standard of review rather than merely correcting the name of the pleading. Moreover, the Final Order failed to cite any precedent for converting a complaint to a Petition for review after the record was closed.

84. Further, the Final Order announced an entirely new standard of review after the record was closed. Again, the parties had no notice that the case would be evaluated under the newly created “equitable/fairness” and, moreover, the parties did not have any opportunity to address or otherwise introduce evidence to support this standard because the Final Order created and applied this new standard after the record was closed and the Initial Decision had been issued.

85. Additionally, the Final Order essentially reformed the private easement agreement to eliminate or prohibit West Penn’s existing right under the easement agreement to use herbicides within the right-of-way. The parties had no notice or opportunity to be heard on the proposed revision to the private easement agreement. Although the Commission has authority under Section 508 of the Code to revise the terms of the recorded easement, Section 508 requires that the Commission provide reasonable notice and hearings.

work plan creates an unreasonable safety concern/hazard that is contrary to its obligation under Section 1501 of the Code. (*See* Complainant Brief, p. 2.)

86. The Complainant and West Penn both had an opportunity to present their cases on whether West Penn's proposed use of herbicides was unsafe and a violation of Section 1501 of the Code. However, the parties had no notice and did not have any opportunity to introduce evidence or otherwise be heard with respect to: (i) the *sua sponte* conversion of the proceeding from a complaint to Petition for Review after the record had closed, (ii) the *sua sponte* application of a newly announced "equitable/fairness" standard after the record had closed, and (iii) the *sua sponte* revision of the private easement agreement after the record had closed.

87. Indeed, the parties had no notice and did not have any opportunity to introduce evidence or otherwise be heard with respect to why the newly announced "equitable/fairness" standard is incorrect, beyond the Commission's authority, and bad public policy. Moreover, the parties had no opportunity to introduce evidence and explore the serious statewide consequences of adopting a new "equitable/fairness" standard, and whether granting "equitable/fair" relief on the facts of this case was appropriate or would result in unreasonable discrimination in service.

88. Based on the foregoing, the Final Order violated the parties' legal due process rights and, therefore, West Penn respectfully requests that the Commission grant reconsideration, rescind the Final Order, and adopt the Initial Decision of ALJ Dunderdale.

IV. CONCLUSION

89. The Final Order's finding that it would be unreasonable to use herbicides is contrary to the record evidence in this case and, instead, is based entirely on a newly announced and incorrect "equitable/fairness" standard that is beyond the Commission's statutory authority. The Commission lacks jurisdiction to grant relief where there is no violation of the Code, Commission order, or Commission regulation.

90. The Final Order completely failed to consider the many adverse consequences of adopting a new “equitable/fairness” standard, and whether granting “equitable/fair” relief on the facts of this case was appropriate or would result in unreasonable discrimination in service.

91. The Final Order failed to consider that the Commission lacks jurisdiction over the private contracts, including easement agreements, in the absence of any violation of the Code, Commission regulations, or Commission orders. The relief granted by the Final Order essentially revised the private easement agreement to eliminate or prohibit West Penn’s existing right to apply herbicides without finding any violation, which is beyond the authority granted in the Code. Moreover, even assuming that the Commission has jurisdiction over easement agreements, which it clearly does not in the absence of any violation, the Final Order failed to: (i) properly invoke the limited authority under 66 Pa.C.S. § 508 to revise utility contracts and (ii) make the requisite finding that the existing easement agreement was adverse to the public welfare.

92. The Final Order failed to consider that nothing in the Code that authorizes the Commission to regulate the use or application of herbicides. The Legislature has exclusively vested the Department of Agriculture, not the Commission, with authority to regulate the use and application of herbicides.

93. The Final Order violated the parties’ legal due process rights when it, *sua sponte*, converted the formal complaint to a petition for relief, applied a new “equitable/fairness” standard, and granted relief that resulted in a revision of the private easement agreement after the record had closed. The parties had no notice and did not have any opportunity to introduce evidence or otherwise be heard with respect to: (i) why the newly announced “equitable/fairness” standard is incorrect and would have serious adverse consequences for all utilities; (ii) the Final

Order's amendment to the easement agreement; or (iii) whether the Complainant was entitled to relief under the new standard, and whether such relief would result in unreasonable discrimination in service.

94. These new and novel issues have not been addressed in this proceeding and, more importantly, raise important jurisdictional and due process issues that appear to have been overlooked by the Final Order. These issues clearly satisfy the Commission's standards for reconsideration under *Duick, supra*.

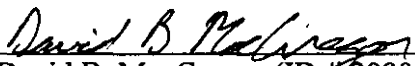
WHEREFORE, West Penn Power Company respectfully requests that the Commission grant reconsideration, rescind the Final Order, and adopt the Initial Decision of ALJ Dunderdale as explained above.

Respectfully submitted,

John L. Munsch (ID # 31489)
FirstEnergy Corporation
800 Cabin Hill Drive
Greensburg, PA 15601
Phone: (724) 838-6210
E-mail: jmunsch@firstenergycorp.com

Margaret A. Morris (ID #75048)
Reger Rizzo & Darnall LLP
Cira Centre, 13th Floor
2929 Arch Street
Philadelphia, PA 19104
Phone: (215) 495-6524
Fax: (215) 495-6600
E-mail: mmorris@regerlaw.com

Date: August 29, 2017


David B. MacGregor (ID #28804)
Post & Schell, P.C.
Four Penn Center
1600 John F. Kennedy Boulevard
Philadelphia, PA 19103-2808
Phone: 215-587-1197
Fax: 215-320-4879
E-mail: dmacgregor@postschell.com

Christopher T. Wright (ID #203412)
Post & Schell, P.C.
17 North Second Street, 12th Floor
Harrisburg, PA 17101-1601
Phone: 717-612-6013
Fax: 717-731-1985
E-mail: cwright@postschell.com

Counsel for West Penn Power Company