

STATEMENTS OF POLICY

Title 52—PUBLIC UTILITIES

PENNSYLVANIA PUBLIC UTILITY COMMISSION

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Litigated and Settled Proceedings Involving Violations of the Public Utility Code and Commission Regulation

Public Meeting held
November 29, 2007

Commissioners Present: Wendell F. Holland, Chairperson;
James H. Cawley, Vice Chairperson; Tyrone J. Christy;
Kim Pizzingrilli

Final Policy Statement for Litigated and Settled Proceedings Involving Violations of the Public Utility Code and Commission Regulations; Doc. No. M-00051875

Order

By the Commission:

Background

The Commission is establishing this policy statement in order to address the factors and standards for determining the appropriate amount of fines for violations of the Public Utility Code (Code) and Commission regulations in litigated and settled cases. The Commission currently evaluates both litigated and settled cases involving such violations according to the standards established in *Rosi v. Bell Atlantic-Pennsylvania, Inc. and Sprint Communications Company, L.P.*, C-00992409 (Order entered March 16, 2000). The Commission initially adopted the standards in *Rosi* in order to determine the amount of civil penalties to be assessed in slamming cases, as well as to evaluate settlement agreements in slamming cases. See *Pennsylvania Pub. Util. Comm'n v. PEPCO Energy Serv.*, M-00001432 (Order entered Nov. 9, 2000).

Rosi was a litigated case, in which a hearing was held before an Administrative Law Judge (ALJ) and evidence was placed in the record regarding the alleged violations. Based on that record, the ALJ then determined that the alleged violations had been committed and that Sprint Communications Company (Sprint) should pay a civil fine of \$64,000 for slamming. Sprint appealed as to the amount of the fine, and in resolving the fine amount issue, the Commission set forth the following standards the Commission would apply when determining the amount of a civil penalty in slamming cases:

1. Whether the violation was intentional or negligent. If the violation is intentional, the Commission should start with the presumption that the penalty will be in the range of \$500 to \$1,000 per day. If the violation is negligent, the Commission should start with the presumption that the penalty will be in the range of zero dollars to \$500 per day. The precise penalty amount per day will be arrived at by applying the following additional standards, while recognizing that the Commission retains broad discretion in determining a total civil penalty amount that is reasonable on an individual case basis.
2. Whether the regulated entity promptly and voluntarily took steps to return the customer to the appropriate carrier and credited the customer's account.

3. Whether the regulated entity initiated procedures to prevent future slamming.
4. The number of customers affected and the duration of the violation.
5. Whether the penalty arises from a settlement or a litigated proceeding.
6. The compliance history of the regulated entity which committed the violation.
7. Whether the regulated entity cooperated with the Commission.
8. The amount necessary to deter future violations.
9. Past Commission decisions in similar situations.
10. Other relevant factors.

Subsequently, the Commission determined that all violations of the Code and the Commission's regulations would be subject to review under the standards set forth in *Rosi. Pennsylvania Pub. Util. Comm'n v. NCIC Operator Serv.*, M-00001440 (Order entered Dec. 21, 2000). In reference to the Commission's review under the *Rosi* standards, the *NCIC Operator Services* case states the following:

This review is conducted with the purpose of developing or, in cases of settlement agreements, reviewing the appropriate penalty to be applied for all types of violations for all categories of public utilities. Clearly, the factors we consider pursuant to our decision in *Rosi* are generic in nature and can be applied in all cases. The nature of the violation (intentional or negligent), impact (customers affected and duration), extent of cooperation by the regulated entity, and compliance history are, inter alia, examples of factors that can be reviewed for all types of violations for all types of utilities.

These factors, particularly the extent of cooperation by the regulated entity and measures taken to improve compliance, have been viewed as key mitigating factors under *Rosi*, and the Commission has examined such factors to determine whether settlement agreements are in the public interest.

On August 11, 2005, the Commission adopted a proposed policy statement at this docket to address the factors and standards for evaluating litigated and settled proceedings involving violations of the Code and Commission regulations. In litigated cases, the parties have typically developed an evidentiary record regarding the alleged violation that can be evaluated by the presiding ALJ to determine the appropriate remedy. In settled cases, however, there may not be an evidentiary hearing, and the settlement may be the result of a compromise of positions and an agreement to resolve the matter without admitting culpability. Since the Commission's adoption of the proposed policy statement, parties have been citing to the policy statement and implementing the factors and standards set forth therein. In observing the parties' use of the proposed policy statement since its adoption, the Commission has found that the factors and standards as proposed work well in practice.

The proposed policy statement was published for comment in the 35 Pa.B. 5272 (September 24, 2005). The Office of Consumer Advocate (OCA), the Energy Association of Pennsylvania (EAPA), and the Peoples Natural Gas Company, d/b/a Dominion Peoples (Dominion

Peoples)¹ filed comments concerning the proposed policy statement. A summary of the comments, the Commission's resolution of the comments, and the language of the final policy statement are discussed below. The final policy statement is set forth in Annex A.

DISCUSSION

A. Introduction

The Commission finds that many of the *Rosi* standards work well in evaluating some of the litigated and settled cases involving violations of the Code and the Commission's regulations. However, all of the *Rosi* standards do not apply equally well to all utility cases, particularly those that do not deal with slamming issues. This is due to the wide variety of matters that come before the Commission, including the Commission's Bureau of Consumer Services matters, Gas Safety Division matters, the Bureau of Transportation and Safety matters, and other complaint matters before the Commission. Moreover, strict compliance with the *Rosi* standards does not allow parties adequate flexibility in reaching settlements. Thus, this policy statement will set forth new factors/standards for evaluating litigated and settled cases involving violations of the Code and the Commission's regulations. These factors may be considered by the Commission in determining if a fine or civil penalty for violating a Commission order, regulation, or statute is appropriate and if a proposed settlement for a violation is reasonable and approval of the settlement agreement is in the public interest.

Though many of the same factors may be applied in both litigated and settled proceedings, parties in settled cases should be afforded more flexibility in determining the amount of a fine, penalty, or other resolution. We encourage settlements and intend to allow the parties flexibility in reaching amicable resolutions to complaints and other matters before us so long as the settlement is in the public interest. To this end the parties to a settlement should include in the settlement agreement a statement in support of settlement explaining how and why the settlement is in the public interest. The statement may be filed jointly by the parties or separately by each individual party. Accordingly, while the standards for settlements may reflect some of those standards to be applied in litigated cases, parties will be free to propose innovative provisions that address the issues at hand but which may not strictly adhere to specific guidelines. As always, our overriding concern in these matters is that any proposed agreement reflects the public interest.

B. General Comments

1. Separate Standards for Litigated and Settled Proceedings

In its comments, the OCA recommends that the Commission adopt one set of standards for evaluating an appropriate civil penalty, whether assessed through the litigation process or agreed to through a settlement. The OCA submits that having two similar sets of standards for litigation and settlements does not serve a useful purpose, and the OCA has not found any precedent that supports such a dual standard. The OCA further states that the standards set forth in the proposed policy statement apply to some degree in any procedural context

¹ By order, entered April 13, 2007 at Docket No. A-122250F5000, the Commission approved the Joint Application of Equitable Resources, Inc., and The Peoples Natural Gas Company, d/b/a Dominion Peoples, for the transfer of all stock and rights of Dominion Peoples to Equitable Resources, Inc., and for the approval of the transfer of all stock of Hope Gas, Inc., d/b/a Dominion Hope, to Equitable Resources, Inc.

and, thus, it would be less confusing to have one set of standards to apply in the penalty phase of any case, whether litigated or settled.

Dominion Peoples and the EAPA support standards that distinguish between assessing penalties in a fully litigated case and approving a settlement in a case that was not litigated when evaluating proceedings for violations of the Code or Commission regulations. Dominion Peoples comments that strict standards are appropriate when arriving at a penalty in a case where a hearing was held, evidence was evaluated, and a final decision was issued. Dominion Peoples states that when parties are negotiating a settlement, a finding of intentional or negligent conduct is unnecessary because neither side has had the opportunity to present or cross-examine witnesses and to persuade the administrative law judge of the validity of their position. Flexible standards for evaluating whether a settlement is in the public interest will promote settlements and preserve administrative economy.

The EAPA comments that with respect to litigated cases, the proposed policy statement will increase the predictability of outcomes in relevant cases. With respect to settled cases, the proposed policy statement will provide parties with a definitive framework for structuring an agreement that is acceptable to the Commission. The EAPA believes that this would facilitate the Commission's policy of encouraging parties to reach settlements.

The Commission appreciates the commentators' thorough consideration of this issue. Based on our experience with proceedings involving violations of the Code and Commission regulations and the parties' current use of the proposed policy statement, we agree with the OCA and find that one set of standards is practical, straightforward, and easy to apply. For this reason, we have created one set of standards for both litigated and settled cases within the final policy statement. We emphasize, however, that as in the proposed policy statement, the factor regarding intentional or negligent conduct will still, in most cases, apply only in litigated proceedings and that parties to a settlement retain flexibility in applying all of the factors so that they can reach an equitable agreement that is in the public interest.

2. Preservation of Agency Authority

The OCA comments that every case should be evaluated by the Commission with some consideration of whether the outcome preserves the Commission's authority. The OCA believes that the Commission currently considers this factor in making its decisions. Nevertheless, the OCA suggests that the Commission include this factor in the final policy statement to inform parties that certain fact patterns may warrant a higher penalty or resource commitment as an exercise of Commission authority. While we agree with the OCA that agency authority is an appropriate and important consideration in Commission decisions, we will not incorporate this factor into the final policy statement. We find that the provisions of the Code and the Commission's regulations clearly set forth the Commission's regulatory authority. Enforcing these provisions by imposing penalties and fines for violations of the Code and the regulations is sufficient to emphasize and preserve Commission authority.

3. Commission Resources Expended

In its comments, the OCA presents an overview of public policy concerns it believes the Commission should consider. The OCA states that the Commission should

consider the degree of harm to the public. The OCA avers that every violation that comes before the Commission taxes the Commission's resources to some extent. The OCA reasons that administrative resources used to investigate, document, mediate, or adjudicate matters depletes the pool of resources available to the Commission and that numerous factors, such as the length and breadth of the investigation and the ability to get information from parties, affect the amount of resources that will be consumed. As such, the OCA submits that this factor should be examined on a case-by-case basis in determining the appropriateness of a penalty or settlement.

The Commission appreciates OCA's comments on this issue. We acknowledge that in certain cases a considerable amount of costs may be incurred for prosecuting and investigating utilities, including for time spent in hearings and depositions and travel time for a case. However, we decline to expressly consider such costs as a factor within the policy statement at this time.

C. Factors and Standards for Litigated and Settled Cases

1. Nature of the Violation—§ 69.1201(c)(1) and (2)

The OCA avers that the seriousness of the violation is the logical starting point for evaluating whether the amount of the penalty or settlement is appropriate based on the facts presented. The OCA agrees that whether the utility's conduct is intentional or negligent is also important, but points out that a technical or administrative error that negligently results in a customer's heat-related service being terminated in the winter, a matter of life or death in some instances, is a very serious violation regardless of whether it is intentional or negligent.

In evaluating the appropriateness of a penalty or the contents of a settlement, the OCA states that the Commission should assess whether there is a reasonable relationship between the punishment and the seriousness of the violation. The OCA reasons that because civil penalties in this context are deterrent in nature, the standards to evaluate the appropriateness of penalties are analogous to those used by the courts when evaluating a punitive damages award. As such, the OCA states that the Commission may look at the violation itself and the potential for harm, not just the actual harm sustained.²

The EAPA and Dominion Peoples submitted similar comments regarding the severity of the conduct at issue as set forth in proposed § 69.1201(1)(ii) and (2)(i). The commentators agree that the severity of the conduct should be considered when determining whether a civil penalty, fine, or other action is appropriate. However, they state that the language in the subsections is unclear because it mixes the two concepts of the severity of the conduct at issue and the seriousness of the resulting consequences. Serious conduct is defined based on the harm the conduct allegedly causes. The commentators suggest that to the extent the Commission desires that the results of the utility's conduct should be a factor in evaluating alleged violations, it would be clearer if the conduct and the results of the conduct were listed as separate factors within the policy statement. They recommend that when reviewing a decision or settlement, the Commission should examine the facts to determine whether there is a sufficient nexus between the conduct and the resulting consequences so as to warrant imposition of a higher fine or penalty.

Based on our review of these comments, we find that a logical starting point for evaluating cases includes an

examination of (1) whether the conduct at issue was of a serious nature and (2) whether the resulting consequences were of a serious nature.³ While the conduct and the consequences are listed as separate factors within the policy statement, they should be analyzed together. The Commission will consider the facts of the case in determining if there is a sufficient nexus between the conduct and the resulting consequences.

In examining the conduct at issue, conduct such as willful fraud and misrepresentation are considered more serious in nature and, thus, may warrant a higher, more significant penalty, whereas administrative filing and technical errors are less egregious and may warrant a lower, less significant penalty. In examining the resulting consequences, when consequences are serious in nature, such as personal injury or property damage, this may result in a higher, more significant penalty. The Commission will evaluate the actual harm sustained rather than engaging in any amount of speculation about the potential for harm.

2. Intentional or Negligent Conduct in Litigated Cases—§ 69.1201(c)(3)

The OCA agrees that intentional violations deserve harsher treatment than those resulting from the negligence of a utility employee or contractor. The OCA states that when facts are present that support crime or fraud, the conduct should be considered intentional.

The Commission will retain considerations regarding intentional or negligent conduct only for litigated cases due to the distinctions between litigated and settled proceedings. We emphasize that in litigated cases, parties typically have the opportunity to develop an evidentiary record regarding the conduct at issue that can be evaluated by the presiding ALJ to determine culpability and an appropriate remedy. However, in settled cases, there may not be an evidentiary hearing, and the settlement may be based on a compromise of positions and an agreement to resolve the matter without admitting culpability with regard to the alleged violation. We decline to include express language stating that when facts are present that support a finding of crime or fraud, the conduct should be considered intentional. Such facts will be included in the record evidence of the case, and the presiding ALJ has the discretion to consider those facts in determining whether an act was intentional.

3. Remediation Efforts—§ 69.1201(c)(4)

The OCA suggests that some facts to consider in addressing the utility's remedial actions include whether the utility recognized the situation and actively sought to correct its procedures so similar incidents would not occur. The Commission may also consider how quickly the utility took action once it recognized the situation. The OCA states that the involvement of top-level management in reporting and correcting the situation may also be considered in analyzing whether the utility's efforts were proactive or reactive. The OCA summarizes that a decisive, speedy correction plan may be a mitigating factor while a forced, haphazard response should be an aggravating factor in evaluating appropriate penalties or responsibilities for violations.

The Commission will retain consideration of the utility's efforts to modify its internal practices and procedures in order to address the conduct at issue and to prevent similar future conduct. We concur with the OCA's com-

² In support of this statement, the OCA cites to *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U. S. 1, 21-22 (1991) and *Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800 (Pa. 1989).

³ We emphasize that the factors set forth in the policy statement are not listed in order of importance and that each factor should be considered and weighed as appropriate based on the particular facts of a case.

ment that the speed with which the utility acted to correct the situation once it was discovered and the involvement of top-level management should be considered in evaluating whether the utility's remediation efforts were proactive or reactive. These considerations must still be analyzed within the specific fact situation of each case, and it must be recognized that certain remedial actions, such as training and improvements to internal procedures, even if started immediately, may take some time to fully implement.

4. Number of Customers Affected and Duration of the Violation—§ 69.1201(c)(5)

The OCA comments that the Commission can evaluate the facts presented regarding the number of customers involved, the duration of the violations, and the possible impact of a violation on third parties. The OCA states that aggravating factors would be present when a violation involves a large number of customers or lasts a lengthy period and, thus, a larger penalty may be appropriate. Equally significant, a violation that could potentially cause financial or other harm to innocent third parties may result in the imposition of higher fines.

Consistent with OCA's comments, the Commission will continue to consider the number of customers affected and the duration of the violation as enumerated in *Rosi*. Taking into consideration the specific facts of a case and the nature of the violation, we agree that a violation that involves a large amount of customers and that lasts a long period of time may warrant a larger penalty. The Commission, however, declines to speculate about the possibility of potential, and not actual harm, to third parties.

5. Compliance History—§ 69.1201(c)(6) and (7)

The OCA agrees that the overall actions of the utility should be evaluated with regard to its level of cooperation with the Commission and its willingness to work with other parties toward resolving the violation. Additionally, an isolated incident from an otherwise responsible utility should be a mitigating factor, while a utility that is a recurring or frequent violator should be subject to greater penalties. On the other hand, the OCA states that facts establishing bad faith support an increased penalty, and evidence of active concealment of violations or attempts to derail Commission investigations should be aggravating factors. The Commission agrees with OCA's comments regarding the utility's compliance history and the utility's level of cooperation with the Commission, and we will incorporate some of these considerations into the final policy statement.

6. Deterrence Level—§ 69.1201(c)(8)

The OCA submits that in determining whether a penalty will have a sufficient deterrent effect, review of the size of the utility, as measured by the utility's annual revenues, may be relevant. A fine that may seem like a rounding error for a major electric or telecommunications company may be significant enough to deter a small water or sewer company. Therefore, some consideration of the impact of a penalty based on the size of the utility should be examined. We concur with the OCA's comments and will incorporate this idea into the policy statement.

7. Commission Precedent—§ 69.1201(c)(9)

The OCA states that the value of Commission precedent in similar factual situations provides guidance and stability to the regulated community. While the OCA believes that parties to settlement proceedings should have the flexibility to develop new solutions that benefit

all stakeholders, precedent should always factor into any case involving violations of the Code or Commission regulations. We agree with the OCA's comments on this issue and will reflect these comments in the final policy statement. Commission precedent may be considered in both litigated and settled cases; however, parties in settled cases will have flexibility in determining whether and how this factor should be applied within the specific facts of the case in order to develop innovative solutions and to reach an equitable agreement.

8. Other Relevant Factors—§ 69.1201(c)(11)

The OCA supports this "catch-all" category to include broad-ranging factors that may be necessary in particular cases to effectively craft a penalty or assess the appropriateness of a settlement that includes a penalty. The OCA reasons that this broad category will work well when the Commission encounters factual situations that do not fit into a prescribed mold, such as natural disasters, national or political unrest, macroeconomic conditions, and other events that are external to the regulatory process. The Commission appreciates OCA's statements in support of this factor and will retain consideration of this factor in the final policy statement.

Accordingly, pursuant to section 501 of the Public Utility Code, 66 Pa.C.S. § 501, and the Commonwealth Documents Law, 45 P.S. §§ 1201 *et seq.*, and regulations promulgated thereunder in 1 Pa. Code §§ 7.1—7.4, we add a statement of policy in 52 Pa. Code Chapter 69, § 69.1201, as noted above and as set forth in Annex A; *Therefore,*

It Is Ordered That:

1. The regulations of the Commission, 52 Pa. Code Chapter 69, are amended by adding a statement of policy in § 69.1201 to read as set forth in Annex A.
2. The Secretary shall submit this order and Annex A to the Governor's Budget Office for review of fiscal impact.
3. The Secretary shall certify this order and Annex A and deposit them with the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.
4. A copy of this order and Annex A shall be posted on the Commission's website.
5. This policy statement shall become effective upon publication in the *Pennsylvania Bulletin*.
6. Alternative formats of this document are available to persons with disabilities and may be obtained by contacting Sherri DelBiondo, Regulatory Coordinator, at (717) 772-4597.

JAMES J. MCNULTY,
Secretary

Fiscal Note: Fiscal Note 57-241 remains valid for the final adoption of the subject regulation.

Annex A

TITLE 52. PUBLIC UTILITIES
PART I. PUBLIC UTILITY COMMISSION
Subpart C. FIXED SERVICE UTILITIES
CHAPTER 69. GENERAL ORDERS, POLICY
STATEMENTS AND GUIDELINES ON FIXED
UTILITIES
FACTORS AND STANDARDS FOR EVALUATING
LITIGATED AND SETTLED PROCEEDINGS

§ 69.1201. Factors and standards for evaluating litigated and settled proceedings involving violations of the Public Utility Code and Commission regulations.

(a) The Commission will consider specific factors and standards in evaluating litigated and settled cases involving violations of 66 Pa.C.S. (relating to Public Utility Code) and this title. These factors and standards will be utilized by the Commission in determining if a fine for violating a Commission order, regulation or statute is appropriate, as well as if a proposed settlement for a violation is reasonable and approval of the settlement agreement is in the public interest.

(b) Many of the same factors and standards may be considered in the evaluation of both litigated and settled cases. When applied in settled cases, these factors and standards will not be applied in as strict a fashion as in a litigated proceeding. The parties in settled cases will be afforded flexibility in reaching amicable resolutions to complaints and other matters so long as the settlement is in the public interest. The parties to a settlement should include in the settlement agreement a statement in support of settlement explaining how and why the settlement is in the public interest. The statement may be filed jointly by the parties or separately by each individual party.

(c) The factors and standards that will be considered by the Commission include the following:

(1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.

(2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a

serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.

(3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.

(4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.

(5) The number of customers affected and the duration of the violation.

(6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.

(7) Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.

(8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.

(9) Past Commission decisions in similar situations.

(10) Other relevant factors.

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