

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE  
601 NEW JERSEY AVENUE, N.W., SUITE 9500  
WASHINGTON, DC 20001-2021  
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

August 22, 2011

LONG BRANCH ENERGY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	
v.	:	Docket No. WEVA 2009-1492-R
	:	Citation No. 8086845; 05/04/2009
	:	
SECRETARY OF LABOR	:	Docket No. WEVA 2009-1493-R
MINE SAFETY AND HEALTH	:	Citation No. 8086846; 05/06/2009
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2010-467
Petitioner	:	A.C. No. 46-08637-204735
	:	
v.	:	Mine: No. 23
	:	
LONG BRANCH ENERGY,	:	Docket No. WEVA 2009-1788
Respondent	:	A.C. No. 46-01537-189869
	:	
	:	Docket No. WEVA 2010-652
	:	A.C. No. 46-01537-207468
	:	
	:	Mine: No. 27
	:	
	:	Docket No. WEVA 2010-466
	:	A.C. No. 46-01537-204725
	:	
	:	Docket No. WEVA 2010-653
	:	A.C. No. 46-04955-207470
	:	
	:	Mine: No. 25
	:	
	:	Docket No. WEVA 2010-63
	:	A.C. No. 46-08305-195555
	:	
	:	Docket No. WEVA 2010-654
	:	A.C. No. 46-08305-207472
	:	Mine: No. 18 Tunnel Mine

## ORDER OF DISMISSAL

Appearances: Michele L. P. Dean, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for Respondent/Petitioner;

Melissa M. Robinson, Esq., Charleston, West Virginia, for Contestant/Respondent

Before: Judge McCarthy

### **I. Factual and Procedural Background**

The above-captioned dockets are before me on Petitions for Assessment of Civil Penalties filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). Long Branch Energy (Long Branch) filed motions to dismiss the civil penalty proceedings based on MSHA's alleged "inexcusable delay" in filing the petitions.

Long Branch timely contested the proposed penalties in the above-captioned dockets pursuant to Commission Rule 26. The Secretary was then required to file petitions for assessment of civil penalties within forty-five days of the receipt of the timely contests under Commission Rule 28. In three dockets, the Secretary filed the petition about 7 ½ months late. In two dockets, the Secretary filed the petition about 8 ½ months late, and in one docket, the Secretary filed the petition about eleven months late. In all seven dockets at issue, the Secretary filed the late petition with a concurrent motion for leave to file out of time.<sup>1</sup> No request for an extension of time was made under Commission Rule 9.

Upon receipt of the Secretary's late-filed petitions, Long Branch timely filed oppositions and motions to dismiss for failure to establish adequate cause. The Secretary opposed the motions to dismiss, claiming adequate cause based on "excusable negligence" due to the large volume of work being handled in MSHA's District 4 office in Mount Hope, West Virginia.<sup>2</sup>

On June 1, 2011, the parties participated in a conference call to discuss, inter alia, Long Branch's motions to dismiss. The Secretary's counsel, who drafted the Secretary's oppositions in most of the dockets, indicated that he was leaving the Agency the next day and was not prepared to discuss the threshold procedural issue. Accordingly, rather than dismiss these

---

<sup>1</sup> For each docket, the belated filing is summarized in a table attached to this decision.

<sup>2</sup> Under Commission Rule 10(d), in response to a motion to dismiss, the Secretary is afforded an opportunity to provide a statement in opposition to the motion within eight days of service. 29 C.F.R. § 2700.10(d). Essentially, this statement gives the Secretary a chance to show adequate cause for the delay without the necessity of oral argument on the issue, unless otherwise ordered. Given these procedural protections, there is no further need to order the Secretary to show cause for the untimely filings.

matters outright, as I indicated that I was inclined to do based on the apparent insufficiency of the Secretary's showing of adequate cause in her filings, I noticed this matter for oral argument. The Notice of Oral Argument limited the issues to whether the Secretary has established adequate cause for the late filings, and if so, whether Long Branch has established actual prejudice from the delay. Limited testimony was permitted on these issues, if necessary.

## II. Oral Argument

On June 14, 2011, I presided over oral argument at Commission headquarters. During oral argument, the Secretary's counsel argued that Supreme Court precedent in *Brock v. Pierce County*, 476 U.S. 253 (1986) and *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003), preclude divesting a government agency of jurisdiction for failing to follow a procedural rule. Tr. of Oral Arg. at 10. The Secretary further argued that a procedural deadline can be enforced against a government agency only when Congress has expressly provided a sanction for failure to act in a timely manner. *Id.* at 11. Alternatively, the Secretary proposed that the Commission's balancing test in *Salt Lake Co. Rd. Dep't*, 3 FMSHRC 1714 (July 1981) be abolished. *Id.* at 12. Instead, the Secretary argued that the Commission should require a showing of prejudice by the operator before the Secretary must establish adequate cause for an untimely filing. *Id.* at 15.

On the issue of adequate cause, the Secretary argued that the backlog of contested penalties and lack of clerical personnel to process said backlog should be adequate cause for the delay in filing penalty petitions in a timely manner. *Id.* at 17. Until the backlog is under control, the Secretary would have the Commission ignore the 45-day deadline for filing penalty petitions. *Id.* at 32. The Secretary emphasized that all the cases at bar originated from MSHA District 4, which had a large increase in contested penalties in recent years and lacked the personnel or resources to address the problem. *Id.* at 19-20. The Secretary maintained that 94% of the contested civil penalty cases in District 4 are handled by three Conference Litigation Representatives (CLRs) and one clerical assistant, who have had to deal with an increasing number of contested penalty cases that has grown larger each year. *Id.* at 24 (referencing the affidavit of District 4 CLR Richard Hosch). When asked why the Secretary did not file for an extension of time, the Secretary's counsel argued, without evidentiary support, that the CLRs lacked the time to file such a request. *Id.* at 34. The Secretary further argued that the failure to request an extension of time does not prejudice the operator, who should have known that the citations would be litigated once it contested the violations. *Id.* at 35.

The Secretary conceded, however, that if roles were reversed, and the operator had insufficient personnel or resources to file an answer in a timely manner, the Secretary would insist that the operator be held to the Commission's filing deadlines. *Id.* at 40. The Secretary further acknowledged that having cases linger for an extended period of time, reduces the efficacy of enforcement efforts because final Commission orders within limited time periods are often necessary to trigger increased penalties and enforcement measures. *Id.* at 28. On the other hand, the Secretary argued that dismissing the instant cases would have a greater detrimental effect on the efficacy of the enforcement efforts since the citations would lose any deterrent effect. *Id.* at 29. Furthermore, the Secretary argued that dismissal would not "spur the Secretary

to action” because the tardy filings were not due to any abuse of discretion by the Secretary. *Id.* at 30.

In response to my questions, the Secretary was unable to identify a process in which District 4 could identify cases that had reached the 45-day deadline for filing a petition. *Id.* at 37. The Secretary noted in her rebuttal, however, that MSHA, as a whole, had taken several modest steps to address the backlog of contested penalties. *Id.* at 99. For example, in 2007, MSHA hired additional CLRs and revised the procedures for handling conferences with the operators. *Id.* at 99, 100. The Secretary also noted that MSHA recently (post argument) divided District 4, the largest district for coal operations, into two separate districts, which presumably will allow more resources to be allocated where needed. *Id.* at 99.

In addition to the oral argument presented, the Secretary proffered Secretary Exhibit 1, a Memorandum in Support of Secretary’s Motions for Leave to File Petitions Out of Time. The Memorandum attached three declarations from MSHA representatives and supporting Government exhibits. Exhibit 1 is the Declaration of Linda C. Weitershausen, the Deputy Director of the Office of Assessments since 2007. Attached to her Declaration are three Exhibits, A-C. Exhibit A is a spreadsheet listing the assessed and contested violations by district during 2010. Exhibit B contains charts and tables listing the assessed penalties and percentage of contested penalty cases by district between January 2007 and December 2010. Exhibit C is a printout from the Commission’s website listing the dockets before the Commission as of April 16, 2011. Exhibit 2 is the Declaration of Richard D. Hosch, a CLR who has served District 4 since 1997. Attached to Hosch’s Declaration is Exhibit A, a spreadsheet listing the assessed and contested violations between May 2009 and April 2010. Exhibit 3 is the Declaration of Noah AnStraus, a former backlog attorney for the Office of the Regional Solicitor in the Philadelphia Regional Office.

Upon receipt of Secretary Exhibit 1, I granted Long Branch the opportunity to depose the declarants. On June 30, 2011, the operator deposed CLR Hosch. On July 7, 2011, the operator submitted Respondent’s Response to the Petitioner’s Memorandum in Support of Motions to Permit Late Filing. Attached to Long Branch’s Response were three exhibits. Exhibit A is the transcript of the deposition testimony of Hosch. Exhibit B is a position letter from Bruce Watzman, Senior Vice President, Regulatory Affairs of the National Mining Association (NMA) to Roslyn Fontaine, Acting Director of MSHA’s Office of Standards.<sup>3</sup> Exhibit C is a copy of Chapter 7 of the Supplemental Appropriations Act of 2010 concerning salaries, expenses and

---

<sup>3</sup> On July 14, 2011, my office received an e-mail from the Secretary’s counsel objecting to the inclusion of Exhibit B because the statements of Mr. Watzman were not under oath or in any way verified. The Secretary asked that I include this objection as part of the record. I consider the Secretary’s objection a motion to strike and deny the motion on the grounds that the Exhibit is admissible hearsay under Commission Rule 63 and a matter of public record that can be found on MSHA’s website. *See generally MSHA v. Daanen & Janssen, Inc.*, 19 FMSHRC 665, 667 (Apr. 1997).

transfer of funds.

During oral argument, counsel for Long Branch argued that the Commission's *Salt Lake* test is binding precedent in this matter and requires that the Secretary first show adequate cause before the operator must show prejudice. Tr. of Oral Arg. at 57. The operator argued that it is inane to place the burden on the operator to show prejudice when the Secretary is at fault for the untimely filing. *Id.* at 68.

On the threshold issue of adequate cause, Long Branch argued that the Secretary's excuse for the untimely filings was not adequate cause for the long delays at issue here. *Id.* at 44. At some point, the Secretary must do more than simply state "we're too busy." *Id.* In addition, Long Branch argued that the federal government should be held to the same filing requirements as operators, since unlike most mining operations or law firms, the government often has a larger pool of attorneys, clerks, and other personnel to assist in meeting filing deadlines. *Id.* at 43. Furthermore, Long Branch argued that MSHA should have known that increased enforcement and penalties in recent years would result in higher rates of contested penalties, and MSHA did little to address the backlog, particularly in District 4, where it should have seen the obvious trend in contested penalties. *Id.* at 48, 49.<sup>4</sup>

On the issue of prejudice, the Respondent called its president, Gregory D. Patterson, who gave limited testimony. Patterson testified that he has but one personal assistant to help him quickly resolve a growing number of MSHA citations. *Id.* at 72, 78. Patterson cited the general difficulties with contesting penalties long after the time the citation initially was issued. *Id.* at 88. He testified that mines change dynamically over the course of a year and the initial condition cited has long been remedied by the time a contested penalty comes before the Commission. *Id.* at 85, 88. Additionally, Patterson testified generally that annual miner turnover is about 20% and that miners with relevant knowledge about the cited condition may have left the mine or may no longer be available to testify. *Id.* at 77. Patterson, however, could give no specifics about miners with relevant knowledge of the instant citations until discovery was completed. *Id.* at 90.

### **III. Disposition & Analysis**

#### **The *Salt Lake* Standard**

At issue is the belated filing of the Secretary's Petitions for Assessment of Civil Penalty. In the Secretary's Opposition to Respondent's Motion to Dismiss, the Secretary erroneously cites Section 105(a) of the Mine Act and relies on cases such as *Steele Branch Mining*, where the "reasonable time" test was applied to the notification of penalty, not the filing of the petition.

---

<sup>4</sup> Counsel for the operator stated that her practice has been flooded with untimely penalty petitions that pay lip service to the backlog as justification for the delayed filings, and that these cases are just the tip of the iceberg in District 4. *Id.* at 46, 50.

*MSHA v. Steele Branch Mining*, 18 FMSHRC 6, 13 (Jan. 1996).<sup>5</sup>

The correct standard for determining the time period for filing a petition for assessment of civil penalty can be found in Section 105(d) of the Mine Act. Section 105(d) states in pertinent part:

If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of penalty issued under subsection (a) or (b) of this section . . . , *the Secretary shall immediately* advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing.

30 U.S.C. § 815(d) (emphasis added). Further, Commission Rule 28(a) provides that “within 45 days of receipt of a timely contest of a proposed penalty assessment, the Secretary *shall* file with the Commission a petition for assessment of penalty.” 29 C.F.R. § 2700.28(a) (emphasis added).

The seminal Commission case that sets forth controlling principles that address the statutory language and the Commission’s 45-day rule is *Salt Lake Co. Rd. Dep’t*, 3 FMSHRC 1714 (July 1981), which is binding precedent and guides my decision today. In that case, the Secretary filed its civil penalty proposal – a simple two-page pleading consisting mainly of five short paragraphs – a mere two months late. The late penalty proposal was accompanied by an “instanter motion” to accept the late filing because of lack of clerical personnel and a high volume of cases. The respondent, *Salt Lake County*, filed an answer and motion for summary dismissal because the proposal for penalty was filed late.

In *Salt Lake*, the Commission stated that “Rule [28] implements the meaning of ‘immediately’ in section 105(d)” and that the deadline was an integral part of the Mine Act’s penalty structure. *Id.* at 1715. The Commission further observed that the purpose of section

---

<sup>5</sup> The standards pertaining to a proposed penalty under section 105(a) of the Act and a penalty petition under section 105(d) starkly differ as to their purpose and implementation. A proposed penalty under section 105(a) is submitted to the operator once the process of inspecting or investigating the alleged violation is completed under section 104 and the assessment of monetary penalty is completed under section 110(a). See 30 U.S.C. § 815(a). Such a process potentially can take an extended period of time and thus Section 105(a) affords a more generous allowance for the Secretary to submit the proposed penalty within a “reasonable time.” *Id.* See generally *Sec’y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261-62 (D.C. Cir. 2005) (examining the “reasonable time” standard as it applies to the untimeliness of the Secretary to submit the proposed penalty). As explained herein, the penalty petition, by contrast, is a relatively simple boilerplate document to be “immediately” filed, i.e., within 45 days under Commission Rule 9, after the difficult tasks of investigating the mine and assessing the penalties are completed.

105(d) is to provide for prompt and efficient enforcement. Additionally, the Commission noted that the requirement of a prompt penalty proposal puts teeth into the Mine Act's penalty structure and incidentally promotes "fair play" by protecting operators from stale claims. The Commission observed that this focus on effective enforcement rather than on creating a period of limitations is reflected in relevant legislative history cited by the judge. *Id.*

In addition, the Commission stated that while "effectuation of the Mine Act's substantive scheme, in furtherance of the public interest, is more crucial," insuring procedural fairness is an important concern under the Mine Act. *Id.* at 1716. Thus, the Commission in *Salt Lake* established the "adequate cause" test to strike a proper balance between procedural fairness to the operators and the "severe impact of dismissal of the penalty proposed upon the substantive scheme of the statute and, hence, the public interest itself." *Id.* (citing *Alumbaugh Coal Corp. v. NLRB*, 635 F.2d 1380, 1384 (8<sup>th</sup> Cir 1980)). By requiring the Secretary to show adequate cause for the untimely filing of a petition without prior permission to file late, the Commission sought to guard against cases of abuse and create a workable standard that was analogous to the one to which operators were held. *Id.* The Commission held as follows:

In order to help strike a proper balance and to insure that the Secretary does not ignore section 105(d)'s injunction to act "immediately," we hold that if the Secretary does seek permission to file late, [s]he must predicate his request on adequate cause. *Cf. Valley Camp Coal Co.*, 1 FMSHRC 791, 792 (1979) (excusing late filing of an operator's answer for "adequate cause"). Such a requirement will guard against cases of abuse and also comports with analogous leeway extended to private litigants before the Commission. *Valley Camp Coal Co.*, *supra*. Nevertheless, cases may arise where procedural justice dictates dismissal.

3 FMSHRC at 1716.

Although the Commission in *Salt Lake* ultimately denied the operator's motion to dismiss, the Commission recognized that a high case load and a lack of clerical personnel only minimally met the requirement for establishing adequate cause where the petition was filed two months late and warned that "an extraordinarily high caseload and lack of clerical personnel, might be deemed improper excuse for filing a simple, two page pleading *two months late.*" *Id.* at 1717 (emphasis added). *See also MSHA v. Phelps Dodge Morenci, Inc.*, 1993 WL 395589 FMSHRC (June 1993) (Chief ALJ Merlin). Furthermore, the Commission made clear that it would not tolerate the continued disregard for filing deadlines by admonishing the Secretary to file a request for an extension of time in future cases. More specifically, the Commission observed that "[t]he use of an instant motion could become temptation to abuse and, absent extraordinary circumstances, the Secretary is also admonished to proceed by timely extension motion when extra time is legitimately needed." *Salt Lake, supra*, 3 FMSHRC at 1717.

## ***Brock* and Progeny and 28 U.S.C. § 2462 are Inapposite**

First, I will briefly address why *Brock* and progeny are inapposite to the cases at bar. Then, I will address why 28 U.S.C. § 2462 is inapplicable. Based on this discussion, I conclude that *Brock* and progeny do not overturn Commission precedent and, therefore, *Salt Lake* provides the appropriate balancing test for disposition of this matter.

As noted above, the Secretary argues that the Supreme Court's decisions in *Brock* and progeny preclude the Commission from imposing any procedural deadline on the Secretary where Congress did not provide an explicit sanction of dismissal for untimely action by the Secretary. Mem. in Support of Secretary's Mot. at 1-3. In *Brock*, a civil case, the Court found that when the Secretary of Labor missed a deadline for making a final determination as to misuse of federal grant funds, the Secretary was not precluded from action to recover the funds after the statutorily imposed 120-day deadline. *Brock, supra*, 476 U.S. at 253. The Secretary argues that *Brock* is analogous to the present cases and, as a result, the Commission is powerless to sanction the Secretary for untimeliness.

Since *Brock*, the Supreme Court has issued several other decisions expanding *Brock*'s interpretation of time-related directives. In the criminal context, *United States v. Montalvo-Murillo* involved the application of a deadline in the Bail Reform Act of 1984, which required that a detention hearing be held "immediately" upon the first court appearance of a criminal detainee. 495 U.S. 711, 714 (1990). Despite a small delay of but a few days in excess of what the Bail Reform Act allowed, the Supreme Court held that the failure to comply with the Act's prompt hearing provision did not require the release of a person who should otherwise be detained where failure to meet the deadline did not subvert the Act's procedural scheme and the brief delay did not appear to be caused by either party. *Id.* at 711, 712, 721.

The Secretary also relies on *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003). In *Barnhart*, the Court held the Coal Industry Retiree Health Benefit Act of 1992's requirement that the Commissioner of Social Security "shall" assign coal industry retirees to companies responsible for funding their benefits before a designated date did not preclude the Commissioner from acting after the prescribed date. *Id.* at 159-63.<sup>6</sup>

The Supreme Court's more recent effort to determine the consequences of a missed deadline where the statute does not provide for one is *Dolan v. United States*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 2533, 2539-40 (2010). *Dolan* was a criminal case in which the 5-4 majority held that a sentencing court, which missed the 90-day deadline to order restitution, retained the power to do

---

<sup>6</sup> Concededly, a statute's use of the mandatory "shall" has not always led the Supreme Court to interpret the statute to bar judges of other public officials from taking the action contemplated by the missed statutory deadline. See *Dolan v. United States*, \_\_\_ U.S. \_\_\_ (2010), 130 S. Ct. 2533, 2539-40 (2010); *Brock v. Pierce County*, 476 U.S. 253, 266 (1986). But see *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 184-85 (2003) (Justice Thomas dissenting).

so, at least where the court made clear prior to the deadline's expiration, that it would do so, thus leaving only the amount of restitution at issue. *Dolan* expanded upon *Brock* by dividing procedural deadlines into three categories.

The first category is a jurisdictional deadline, an absolute and unalterable prohibition that prevents a court from permitting or taking action after the deadline is passed by stripping the court of its subject-matter jurisdiction. *See Dolan, supra*, 130 S. Ct. at 2538 (citing, *inter alia*, *John R. Sand & Gravel Co., v. U.S.*, 552 U.S. 130-133-34 (2008)). Jurisdictional deadlines must be founded upon clear legislative intent to deprive a tribunal of adjudicatory authority upon the expiration of the deadline. *Id.*

The second category is a claims processing rule that does “not limit a court’s jurisdiction but rather regulate[s] the timing of motions or claims brought before the court.” *See Dolan, supra*, 130 S. Ct. at 2538. Unlike a jurisdictional deadline, the protection of a claims processing deadline may be forfeited where a party fails to object to the tardy party’s untimeliness. *Id.*, citing *Kontrick v. Ryan*, 540 U.S. 443, 454-56 (2004) (60-day bankruptcy rule deadline for creditor’s objection to debtor’s discharge); *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (*per curiam*) (7-day criminal rule deadline for filing motion for a new trial)..

The third category, under which *Brock*, *Montalvo-Murillo*, and *Barnett* fall, “seeks speed by creating a time-related directive that is *legally enforceable* but does not deprive a judge or public official of the power to take the action to which the deadline applies if the deadline is missed.” *Dolan, supra*, 130 S. Ct. at 2538 (emphasis added) (citing *United States v. Montalvo-Murillo, supra*, 495 U.S. at 722 (missed deadline for holding bail detention hearing does not require judge to release defendant)); *Brock, supra*, 476 U.S. at 266 (missed deadline for making final determination as to misuse of federal grant funds does not prevent later recovery of funds); *Barnhart, supra*, 537 U.S. at 171-72 (missed deadline for assigning industry retiree benefits does not prevent later award of benefits). Time-related directive deadlines are primarily used to spur a court or other public official to action by a certain time, but do not normally divest the public official of the power to act if the deadline is not met. *Brock, supra*, 476 U.S. at 265.

In determining which category a deadline falls, the Supreme Court has looked to the language, context, and purpose of the statute and the public interest that the statute seeks to uphold. *Dolan, supra*, 130 S. Ct. at 2539, 2540. In *Salt Lake*, the Commission did just that. The Commission considered Congressional intent and the public interests at stake. The Commission recognized that the “Secretary is not free to ignore the time constraints in Rule [28] for any mere caprice, as that would frustrate the enforcement purposes of section 105(d) and, in some cases, deny fair play to operators.” 3 FMSHRC at 1716. Rather, Rule 28 is a “procedural rule designed to give specific and concrete form to section 105(d)’s injunction for ‘immediate’ action in order to effectuate the Mine Act’s penalty system.” *Id.* at 1717.

The Commission’s rules and MSHA’s own regulations are frustrated when petitions are not timely filed. For example, when determining the existence of a pattern of violations under 30 CFR §104.3, MSHA only examines repeated violations that have become final orders of the

Commission during the last twelve months. MINE SAFETY & HEALTH ADMIN., PATTERN OF VIOLATIONS SCREENING CRITERIA - 2010, <http://www.msha.gov/POV/POVScreeningCriteria2010.pdf>. Similarly, the way MSHA assesses penalties is disrupted when cases are not resolved promptly. In determining penalties, MSHA only considers violations that have “been paid or finally adjudicated, or have become final orders” during the preceding fifteen months. 30 C.F.R. § 100.3(c). Thus, if the Secretary were given numerous months beyond the 45-day deadline or up to five years to file a petition as suggested by the Secretary, the final order of the Commission could be so removed from the date the citation was issued, that it would become meaningless in establishing a pattern of violations.

The public interest at issue further distinguishes the present cases from *Brock* and progeny. Unlike preventing the Secretary of Labor from retrieving misused government funds as in *Brock*, requiring that a dangerous arrestee for drug trafficking offense be set free as in *United States v. Montalvo-Murillo*, depriving miners of benefits as in *Barnhart*, or depriving an assault victim of restitution in *Dolan*, the harm to the public interest if the cases at bar were dismissed for having been untimely filed, while important, appears to be less severe because the cited conditions must and have already been abated within a reasonable time after the citation was issued. 30 U.S.C. § 814(a). Put differently, miners are no longer at risk by the time the citations are contested. Rather, the enforcement of the penalties primarily promotes the welfare of the miners by serving as a deterrent against future violations and this deterrent effect must be balanced against the recognized public interest in expeditiously resolving contested penalties before the Commission. Both Congress and the Commission have made it abundantly clear that the “expeditious resolution of penalty cases” also serves an important public interest. *MSHA v. Buck Creek Coal*, 17 FMSHRC 500, 503 (April 1995); *MSHA v. Scotia Coal Mining Co.*, 2 FMSHRC 633, 635 (March 1980) (stating that “Congress has forcefully expressed its desire for the expeditious determination of whether penalties are warranted.”)

It is clear from a reading of the text of the Mine Act, that Congress did not intend the term “immediately” in section 105(d) to be a jurisdictional rule nor did Congress expressly provide that a federal rule could restrict the Commission’s subject matter jurisdiction. Such a view is consistent with Commission precedent holding that the deadline for petition filing is not to be construed as jurisdictional, a statute of limitations, or a “procedural strait jacket” requiring strict compliance. *See Salt Lake, supra*, 3 FMSHRC at 1716. Additionally, as detailed above, the deadline exists in a substantially different context than does *Brock* and its progeny. The deadlines in *Brock*, *Montalvo-Murillo*, *Barnhart*, and *Dolan* are time-related directives intended to give guidance to an official or a court to perform a task by a certain time. They are not intended, like the deadline in the present cases, to serve as a procedural limitation for parties in an adjudicatory process. Given this fact, and Rule 28’s importance to the overall legislative and regulatory scheme and the mitigated impact on the public interests involved, I find *Brock* and its progeny inapposite to the cases at bar. Thus, in my view, Rule 28’s deadline for the Secretary to file her penalty petition is most accurately classified as a claims processing rule, adopted by the

Commission to aid in the orderly transaction of its business.<sup>7</sup> As such, the decision to relax the deadline appears to lie within the Commission’s discretion. *See, e.g., Bowles v. Russell*, 551 U.S. 205, 212 (2007) (citing *Schacht v. United States*, 398 U.S. 58, 64 (1970)).

Finally, I conclude that the statute of limitations set forth in 28 U.S.C. § 2462 is not applicable to the current proceedings.<sup>8</sup> The express language of 28 U.S.C. § 2462 provides a five-year time limit for commencing an action, suit or proceeding for the enforcement of a civil penalty, but contains an exception when Congress has provided otherwise. That exception is applicable here. The deadline for the Secretary to file a petition for assessment of civil penalty was provided by Congress in Section 105(d) of the Mine Act, which is implemented by the Commission’s 45-day deadline in Rule 28(a). *See Salt Lake, supra*, 3 FMSHRC at 1715. Certainly, “immediately” cannot mean five years later.

Although the D.C. Circuit has found 28 U.S.C. § 2462 to be applicable to administrative proceedings that review an assessed penalty, it did so only after finding no controlling act of Congress that created a deadline to act. *3M Co. v. Browner*, 17 F.3d 1453, 1455 (D.C. Cir.1994). Thus, in *Browner*, the EPA attempted to initiate an administrative proceeding seeking the enforcement of a civil penalty over two years after the civil penalty was issued. *Id.* Since the controlling legislation, the Toxic Substances Control Act (TSCA) contained “no provision limiting the time within which the EPA Administrator must initiate the administrative action,” the D. C. Circuit found that the 5-year statute of limitations in 28 U.S.C. § 2462 should be applied. *Id.* at 1455, 1462. In other words, when Congress is silent on the imposition of a time restraint for commencement of a proceeding for enforcement of a civil penalty, the 5-year statute of limitations may be invoked. *Id.* at 1459, n.10 (citing *Mullikin v. United States*, 952 F.2d 920

---

<sup>7</sup> Even if the 45-day rule is more appropriately classified as a time-related directive like the rule in *Brock*, the Commission still retains the right to review the untimely filing taking into consideration equitable considerations such as the reasons for the delay, the parties responsible for the delay, and the potential harm to the operator’s case. *Dolan, supra*, 130 S.Ct. 2533, 2542. As the Supreme Court has not yet spoken on how such factors apply, I follow the Commission’s *Salt Lake* balancing approach, which is not necessarily inconsistent with *Dolan*.

<sup>8</sup> TITLE 28 – JUDICIARY AND JUDICIAL PROCEDURE, PART VI – PARTICULAR PROCEEDINGS, CHAPTER 163 – FINES, PENALTIES AND FORFEITURES, Sec. 2462, provides as follows:

Time for commencing proceedings – Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

(June 25, 1948, ch. 646, 62 Stat. 974.)

(1991)). By contrast, 28 U.S.C. § 2462 has no applicability to this matter because the deadline for the Secretary to file her petition is provided in Section 105(d) of the Mine Act, which is implemented by the 45-day requirement in Rule 28(a). *See Salt Lake, supra*, 3 FMSHRC at 1715. Accordingly, I conclude that the general catchall provision in Section 2462 is not intended to supersede Section 105(d) of the Mine Act or Commission Rule 28.

For the foregoing reasons, I reject the Secretary's arguments and apply the long standing "adequate cause" test set forth in *Salt Lake* and progeny to the instant matter.

### **Application of the Commission's Adequate Cause Test**

The Commission has held that in order to survive a motion to dismiss an untimely petition, the Secretary must first establish adequate cause for the late filing. If adequate cause is not established, the case may be dismissed and the issue of prejudice need not be decided. Only after adequate cause is established does the Commission then examine whether the delay has been prejudicial to the operator. *MSHA v. Rhone-Poulenc of Wyoming Co.*, 15 FMSHRC 2089, 2093 (Oct. 13, 1993), *aff'd* 57 F. 3<sup>rd</sup> 982 (10 Cir. 1995), citing *Salt Lake County*, 3 FMSHRC 1714 (July 28, 1981) and *MSHA v. Medicine Bow Coal Co.*, 4 FMSHRC 882 (May 26, 1982).

Concededly, the Commission has permitted the filing of untimely petitions in a number of cases based on factors such as the Secretary's extraordinarily high caseload during particular periods of time, lack of clerical personnel, or confusion over filing deadlines because of amended standards. *See, e.g., Salt Lake*, 3 FMSHRC at 1714; *MSHA v. Lone Mountain Processing Inc.*, 17 FMSHRC 839 (May 31, 1995). In recent years, some Commission judges have been accommodating when parties have filed out of time due to the Secretary's extraordinarily high caseload. *See MSHA v. Harvest-Time Coal, Inc.*, Docket No. WEVA 2009-293 (Sept. 24, 2010); *MSHA v. Harvest-Time Coal, Inc.*, Docket No. WEVA 2009-1522 (Apr. 4, 2010); *MSHA v. Long Branch Energy*, Docket No. 2009-841 (Nov. 9, 2010). However, a rule of leniency is not without bounds and an increase in the Secretary's workload is not always adequate cause when the delay is significant. *MSHA v. Phelps Dodge Morenci, Inc.*, 1993 WL 395589, \*3 (June 1993); *MSHA v. Hecla Mining Co.*, 1993 WL 395630, \*2 (June 1993). For example, in *Phelps Dodge Morenci*, then Chief Judge Merlin dismissed a case where the Secretary filed the penalty petition five months late. *Id.* Judge Merlin noted that the Secretary's caseload would continue to grow as a result of changes to the penalty structure and regulations and that excusing a petition filed so late would undermine the deadline as long as the trend continued. *Id.*

Furthermore, it is often overlooked, but particularly noteworthy, that the Congressional drafters of the Mine Act, while recognizing the need to accept untimely filings in some circumstances, stated that such actions should be "rare." S. Rep. 95-181, 95th Cong., 1st Sess., 14 (1977) Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622 (1978) (addressing the late filing of proposed assessments). In recent years, the Secretary's untimely filings have become commonplace, not rare, and I am not inclined to assume good cause based on a generic increase in workload or the Secretary's inability to provide adequate personnel,

particularly where MSHA should have been aware of a particular problem and did little to correct it.

In the present case, the Secretary contends that the increase in contested penalty assessments and a lack of clerical personnel to process them is adequate cause for an average delay of about 267 days in filing the petitions for assessment of civil penalties. In my view, these general excuses fall short of what is required to show adequate cause. The Commission has required that for long delays in filing, “the reasons [for the delay] need to be more unique and special to the particular case, e.g., distraction from investigation of a major mine accident or loss of staff to national emergency.” *Cactus Canyon of Texas, Inc.*, 25 FMSHRC 164, 169 (Mar. 3, 2003) (ALJ Schroeder).<sup>9</sup> The Secretary’s responses contain only general statements about the nature of the backlog, high caseload, and lack of personnel, which allegedly caused the untimeliness of the petitions. The specific circumstances affecting the present cases are not addressed. If such a vague and general explanation was allowed to establish adequate cause then the Commission would be forced to accept nearly every late petition. The Commission’s properly promulgated filing deadlines and the Congressional desire for expeditious determination of civil penalty petitions would be rendered meaningless.

While the Secretary suggests that the delay in filing the penalty petitions was due to “excusable neglect,” the facts indicate that this legal standard, assuming it is applicable, has not been met here.<sup>10</sup> As more fully discussed below, Hosch’s deposition strongly suggests that the repeated late petition filings in District 4 resulted from continued inattention to filing deadlines and the absence of any pro-active steps toward solution. Indeed, in my view, the record indicates that the delay in filing petitions in these dockets was more akin to “inexcusable neglect.”<sup>11</sup>

In *Pioneer Investment Services Company v. Brunswick Associates Limited*, 507 U.S. 380, 395 (1993), the Supreme Court resolved a conflict in the circuits over the meaning of “excusable

---

<sup>9</sup> Judge Schroeder continued by stating that “press of other work, inadequate clerical assistance and personal hardships” would only provide adequate cause for short delays assuming “good faith on the part of government agency management to reallocate people to cover the pending work load as quickly as possible.” *Cactus Canyon*, 25 FMSHRC at 169.

<sup>10</sup> Excusable neglect is defined as “[a] failure – which the law will excuse – to take some proper step at the proper time (esp. in neglecting to answer a lawsuit) not because of the party’s own carelessness, inattention, or willful disregard of the court’s process, but because of some unexpected or unavoidable hindrance or accident or because of reliance on the care or vigilance of the party’s counsel or on a promise made by an adverse party.” BLACK’S LAW DICTIONARY 1133 (9<sup>th</sup> ed. 2004).

<sup>11</sup> Inexcusable neglect is defined as “[u]njustifiable neglect; neglect that implies more than unintentional inadvertence. A finding of inexcusable neglect in, for example, failing to file an answer to a complaint will prevent the setting aside of a default judgment.” BLACK’S LAW DICTIONARY 1133 (9<sup>th</sup> ed. 2004).

neglect” under various federal rules and held that an attorney’s inadvertent failure to file a proof of claim by the bar date can constitute “excusable neglect” with the meaning of Bankruptcy Rule 9006(b)(1). In the absence of Congressional guidance, the Court concluded that the determination of whether a party’s neglect is excusable is an equitable one, taking account of all relevant circumstances surrounding the party’s omission. *Id.* at 395. These include the danger of prejudice to the other party, the length of delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the tardy party, and whether the tardy party acted in good faith. *Id.*

Even were I to apply these factors here, instead of the *Salt Lake* balancing test, I would reach the same result dismissing the late-filed petitions. First, Long Branch has raised a “danger of prejudice” due to the Secretary’s untimely filings.<sup>12</sup> Second, the length of delay extends significantly beyond the 45-day deadline and, as explained above, has a potential deleterious effect on prompt and expeditious resolution of civil penalty petitions, which hampers the deterrent value of heightened enforcement efforts and imposition of more severe penalties. Moreover, until the petition is filed, the adjudicatory process languishes and the potential for the backlog to grow increases at each level of review. Third, the reason for the delay was within the reasonable control of MSHA District 4 and results from a failure to recognize and deal with an obvious and growing problem and to effectively allocate resources to resolve that problem. In these circumstances, any good faith of the Secretary is discounted.

It is important to keep in mind that the untimely petitions filed by the Secretary were relatively simple boilerplate documents. By the time the operator contested the penalties, MSHA had already completed the more difficult tasks of investigating the mine and assessing the penalties. Essentially, all the Secretary needed to do to comply with Rule 28(a) was to fill in a few blanks on a template and file the petition with the Commission, a task that could easily be automated or done by any one of the number of secretarial staff or CLR’s in the District 4 office. Instead, CLR Hosch stated that the task of drafting penalty petitions for the entire district primarily fell on the shoulders of one secretary. *Respt’s Ex. A* at 31-32. There appears to have been little oversight of the Secretary’s filings and no procedures that would alert CLR’s of neglected dockets. District 4 does not keep detailed time sheets or work logs that would show the time taken to prepare each petition. *Id.* at 5-6. Additionally, there was no tickler system in place to remind the CLR’s in District 4 of impending deadlines, nor did CLR’s receive weekly or

---

<sup>12</sup> Long Branch contends that the changing mine environment and high turnover of employees will make collecting evidence difficult when the litigation is far removed from the time the citation is issued. Additionally, Long Branch argues that the delay often necessitates the litigation of multiple dockets at the same time. *Id.* Long Branch claims that if the petitions were filed on time, the cases likely would be litigated separately instead of grouped together with other late filed petitions involving the same operator. *Id.* at 17. In Long Branch’s view, a large grouping of dockets tends to increase the legal costs to operators and requires more personnel to be absent from work during discovery and litigation, thus impinging on mine operations. *Id.*

even monthly reports of upcoming deadlines. *Id.* at 7. When CLR Hosch appealed to District managers for additional assistance, his appeals were ignored despite the influx of funds in the Supplemental Appropriation and the existence of other qualified secretarial staff in the District 4 office. *Id.* at 20, 32.

Moreover, if the Secretary was not able to file certain petitions on time, Commission Procedural Rule 9 provides that a motion for extension of time may be granted for good cause shown. 29 C.F.R. § 2700.9(a). I take administrative notice of the fact that back in March 2009, well over a year before the instant petitions were due or received, CLRs were instructed by MSHA administrators always to file a 90-day extension of time request once a timely penalty contest was received. Mine operators, miners, and independent contractors also were made aware that requests for extension of time would occur as a matter of course. *See* Kevin Stricklin & Neal Merrifield, MSHA, Program Information Bulletin No. P09-05 (March 27, 2009), available at <http://www.msha.gov/regs/complian/PIB/2009/pib09-05.asp>. In the dockets before me, however, the Secretary has routinely failed to avail herself of Commission Rule 9 or the Commission's admonition in *Salt Lake* "to proceed by timely extension motion when additional time is legitimately needed" (3 FMSHRC at 1717), instead opting to simply attach a motion to accept late filing with the untimely petitions.

Furthermore, the cases relied on by the Secretary to establish adequate cause can be distinguished from the current case, or involve relatively insignificant, short delays. For example, in *Salt Lake*, the delay was less than two months. 3 FMSHRC at 1714. In *Rhone-Poulenc of Wyoming Co.*, the delay was only eleven days. 15 FMSHRC at 2094, *aff'd* 57 F. 3<sup>rd</sup> 982 (10 Cir. 1995). In *Medical Bow*, the delay was fifteen days. 4 FMSHRC at 883. While the Commission allowed delays based on the Secretary's high caseload in *Salt Lake* and *Rhone-Poulenc*, the caseload was "unusually high" over a fixed period of time. 3 FMSHRC at 1714; 15 FMSHRC at 2094, *aff'd* 57 F. 3<sup>rd</sup> 982 (10 Cir. 1995). As the Secretary acknowledged, the current high caseload is neither unusual nor an outlier. Rather, it is part of a growing trend in contested cases that has been observed over the course of several years beginning way back in 2007 in District 4. *See* Secretary's Ex. A.

The Secretary would have the Commission believe that MSHA has been caught off guard by a sudden and unpredictable influx of contested citations, and therefore MSHA has been unable to file penalty petitions within 45 days of the operator's contest. However, according to the Secretary's own figures, the increase in contested penalties is a long-established trend that began in 2007, years before the instant citations were issued. To suggest that the District 4 office did not see or expect an increase in contested penalties is simply beyond reasonable belief. It has been long known and common sense dictates that heightened enforcement and increases in the penalty structure would cause operators to contest more citations. As noted, as early as 1993, then Chief Judge Merlin warned the Secretary of this inevitable result. *Phelps Dodge Morenci, Inc.*, 1993 WL 395589, \*3. When the total penalties nearly doubled in late 2007, there was a

natural increase in the percentage of contested citations.<sup>13</sup>

The Secretary attempts to obscure this obvious trend by citing certain statistics and placing the blame on operators for filing increased contests.<sup>14</sup> Absent evidence of a bad-faith effort by operators to overwhelm MSHA with frivolously contested citations, however, the higher rate of contested penalties has little practical import on the adequate cause analysis. Operators have the statutory right to contest penalties they believe were issued in error and may have reason to think that they are justified in contesting a significant percentage of cases at the current rate.<sup>15</sup>

Finally, even after the change in the penalty structure went into effect in 2006, the Secretary has failed to show that any significant effort was made in District 4 to ensure that petitions were filed timely with the Commission. The Secretary cannot continue to assert that the increase in workload justifies her failure to process petitions when MSHA did not make timely changes to personnel or administrative policy in an effort to alleviate the obvious problem. According to CLR Hosch's deposition, District 4 has only one secretary processing penalty petitions. Respt's Ex. A at 17. District 4 has three CLRs and more than fifteen additional secretarial staff, who arguably could have done more to contribute to the timely filing of penalty petitions, and MSHA declined to grant Hosch's unspecified requests for additional help. *Id.* at 32. The day before oral argument in this matter MSHA formally announced that it was taking significant action to address the apparent inefficiency by splitting District 4 in two districts and allocating additional personnel and resources. *See*, Press Release, MSHA, MSHA's Newly Formed Coal District 12 Begins Operations (June 14, 2011) (available at <http://www.msha.gov/media/press/2011/nr110614.asp>). While the creation of a new district is a step in the right direction, the recognition of the petition backlog in District 4 comes far too late.

---

<sup>13</sup> In 2007, the percent of contested penalties was 15% and the total penalties assessed were equal to \$74,457,111. In 2008, the percent of contested penalties jumped to 23.7% and the total penalties assessed had almost doubled to \$134,501,287. Since 2008, the percentage of contested penalties and total penalties assessed has increased further and remained at elevated levels. *See* Secretary's Ex.1-B.

<sup>14</sup> CLR Hosch cites a sudden influx of 1,857 contested cases from May through June 2009, and 4,750 contested cases from August 2009 through February 2010, the months during which the instant petitions were eventually filed. While the contrast in numbers would initially indicate that the aggregate number of contested cases greatly increased, upon closer review, the two-month (May through June 2009) versus seventh-month (August 2009 through February 2010) comparisons are not comparable, and the increase in contested cases was less than 10% per month during these periods. Secretary's Ex. 2.

<sup>15</sup> Long Branch provides evidence that of the "significant and substantial" (S&S) violations contested during the fiscal years 2009 and 2010, almost 20% were later vacated or had the S&S designation removed. Similarly, of the 104(d) citations and orders litigated during this same period, almost 33% were vacated or modified to a 104(a) citation. Operator's Ex. B at 3.

The Commission has routinely denied motions to reopen when the operator fails to give adequate reason for its failure to timely contest citations. *See, e.g., MSHA v. XMV, Inc.*, 31 FMSHRC 523 (May 11, 2009), *MSHA v. Premier Chemical, LLC*, 31 FMSHRC 516 (May 6, 2009); *MSHA v. Fisher Sand & Gravel Co.*, 31 FMSHRC 513 (May 6, 2009). Despite the fact that *Salt Lake's* adequate cause test was an attempt by the Commission to comport with the analogous leeway extended to private litigants (see *Salt Lake*, 3 FMSHRC at 1716), the Secretary made clear in her oral argument that when an operator fails to contest citations in a timely manner because it is overwhelmed by the workload, the Secretary would not accept the operator's excuse as adequate cause. Tr. of Oral Arg. at 40. Operators too are constrained by budgetary and personnel issues and it is disingenuous to suggest that these problems are unique to government. In the interest of procedural fairness, I see no reason why the same adequate cause standard should be inapplicable to the Secretary where she fails to show specific cause for failing to timely file a petition.

The Secretary also relies on a series of unpublished cases where Commission ALJs have accepted petitions filed very late. *See MSHA v. Long Branch Energy*, Docket No. 2009-841 (Nov. 9, 2010) (accepting petition filed 427 days late); *MSHA v. Harvest-Time Coal, Inc.*, Docket No. WEVA 2009-293 (Sept. 24, 2010) (accepting petition filed 323 days late); *MSHA v. Harvest-Time Coal, Inc.*, Docket No. WEVA 2009-1522 (Apr. 4, 2010) (accepting petition filed 151 days late); *MSHA v. Brody Mining*, Docket No. 2009-1445 (June 3, 2009) (accepting petition filed 141 days late). These cases rely on similar rationale to permit the late filing, but provide little guidance as to the facts that justify the adequate cause analysis under the *Salt Lake* framework.

While the decisions of other judges are not binding, I am inclined to agree with the primary rationale that these cases rely upon. For example, I recognize that the 45-day filing requirement may be unrealistic given the increased number of contested citations and the large backlog. *See, e.g., MSHA v. Solar Sources, Inc.*, 31 FMSHRC 729, 730 (June 30, 2009). Similarly, I agree that neither the term "immediately" contained in Section 105(d) nor the 45-day procedural rule should be construed as a "procedural strait jacket," particularly where adequate cause is shown based on the specific facts at issue. *Salt Lake*, 3 FMSHRC at 1716.

On the other hand, allowing petitions to be filed between 7 ½ and 11 ½ months late where specific adequate cause has not been shown is less akin to a procedural strait jacket and more akin to allowing the Secretary *carte blanche* to ignore the prescribed filing deadlines. As noted, based on the facts disclosed in the current record, the excuses offered by District 4 in this case are more akin to inexcusable neglect than adequate cause.<sup>16</sup> And, while the 45-day time limit may be unrealistic, the Secretary has not asked the Commission to change its rule. Nor has the Secretary shown specific facts establishing that District 4's overall heavy workload as a result of

---

<sup>16</sup> I make no finding on the numerous other dockets from District 4, which are not pending before me and which may or may not be subject to the same infirmities. *See supra* note 4.

increased contests is adequate cause for failing to timely file the instant petitions, particularly where MSHA has had ample time since 2007 and 2008 to make changes in personnel and policy to adapt to the obvious increase in workload.

In sum, under extant Commission precedent, the Secretary must establish adequate cause for the delay in filing, apart from any consideration of whether the operator was prejudiced by the delay. *Salt Lake*, 3 FMSHRC at 1716; *Rhone-Poulenc*, 15 FMSHRC at 2093, *aff'd* 57 F. 3<sup>rd</sup> 982 (10 Cir. 1995).<sup>17</sup> In these cases, the Secretary has done nothing more than file a form instanter motion concurrently with the untimely petitions, which fails to address the specific basis justifying the delay in each individual docket. The Secretary's approach apparently presumes that the Commission will not scrutinize the reasons for and the extent of the delay, but will instead summarily grant the Secretary's motion based on the generic backlog, increase in contest rates, and failure to allocate resources. In my view, which may not be the popular view, *Salt Lake* provides otherwise.<sup>18</sup> Since the Secretary has failed to demonstrate adequate cause for the untimely petitions under the *Salt Lake* balancing test, these cases are dismissed.

In light of the foregoing, the Respondent's Motions to Dismiss are hereby GRANTED and the Petitions for Assessment of Civil Penalties are DISMISSED.

Thomas P. McCarthy  
Administrative Law Judge

---

<sup>17</sup> Although I need not reach the issue of actual prejudice under the *Salt Lake* and *Rhone-Poulenc* analysis, I have noted above that Long Branch has raised a "danger of prejudice" due to the Secretary's untimely filings, and those filings are prejudicial to the interests of efficient adjudicatory administration. *Cf. Pioneer Investment Services, supra* 507 U.S. at 395, 398; *see supra* note 12.

<sup>18</sup> While dismissal is a harsh outcome and a decision that I do not come to lightly, extant procedural rules and Commission precedent provide little room to forge a middle road. Over thirty years ago, the Commission in *Salt Lake* attempted to curb the Secretary's untimeliness with strongly written admonishments. Apparently, those warnings fell on deaf ears as the problem of untimely petitions has only grown worse over the years, and has reached a crescendo. In light of this history, it is unclear how to spur the Secretary to more timely action. In my view, procedural justice dictates dismissal here. *Salt Lake, supra*, 3 FMSHRC at 1716.

Distribution:

Michele L. Dean, Esq., Office of the Solicitor, U.S. Department of Labor, 170 S. Independence Mall West, Suite 630 East, Philadelphia, PA 19106

Melissa Robinson, Esq. and Michael T. Cimino, Esq., Jackson Kelly PPLC, 1600 Laidley Tower, P.O. Box 553, Charleston, WV 25322

/tjr

## Appendix

Docket No.	Citations Issued	Proposed Assessment Received	Contested by Operator	Petition Due	Petition Received
WEVA 2010-467	Oct-09	December 12, 2009	January 5, 2010	February 19, 2010	November 5, 2010
WEVA 2009-1788	Mar-09 & Apr-09	July 9, 2009	August 11, 2009	September 25, 2009	July 6, 2010
WEVA 2010-63	Jul-09	September 10, 2009	October 9, 2009	November 23, 2009	November 8, 2010
WEVA 2010-652	Nov-09	January 7, 2010	February 4, 2010	March 21, 2010	November 5, 2010
WEVA 2010-653	Nov-09	January 7, 2010	February 4, 2010	March 21, 2010	November 5, 2010
WEVA 2010-466	Sep-09	December 8, 2009	January 5, 2010	February 19, 2010	November 5, 2010
WEVA 2010-654	Nov-09	January 7, 2010	February 4, 2010	March 21, 2010	November 5, 2010

Docket No.	Days Late	Months Late	Motion to Dismiss Filed	Answer to Motion to Dismiss Filed	Number of Contested Citations	Penalty
WEVA 2010-467	259	8.5	November 30, 2010	December 14, 2010	7	\$3,024.00
WEVA 2009-1788	284	9.5	July 22, 2010	August 31, 2010	8	\$4,187.00
WEVA 2010-63	350	11.5	November 30, 2010	None	23	\$21,131.00
WEVA 2010-652	229	7.5	November 30, 2010	December 14, 2010	4	\$4,513.00
WEVA 2010-653	229	7.5	November 30, 2010	December 14, 2010	6	\$11,516.00
WEVA 2010-466	286	8.5	November 30, 2010	December 14, 2010	6	\$7,318.00
WEVA 2010-654	229	7.5	November 30, 2010	December 14, 2010	21	\$24,073.00

## Appendix

<b>Average</b>	<b>267</b>	<b>8.6</b>	<b>Total</b>	<b>75</b>	<b>\$75,762.00</b>
----------------	------------	------------	--------------	-----------	--------------------