

R-00943271

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

KJA

Public Meeting held May 8, 1997

Commissioners Present:

- John M. Quain, Chairman
- Robert K. Bloom, Vice Chairman
- John Hanger
- David W. Rolka
- Nora Mead Brownell

Caradon Mideast Aluminum, A Division of Caradon America, Inc. C-00968031

v.
Pennsylvania Power & Light Co.

and

Metal Industries, Inc. C-00968275

v.
Pennsylvania Power & Light Co.

OPINION AND ORDER

BY THE COMMISSION:

Before us for consideration is a Petition For Interlocutory Commission Review and Answer To Material Questions (Petition) filed by Caradon Mideast Aluminum (Caradon), a division of Caradon America, Inc., and Metal Industries, Inc. (MI), (collectively, Complainants), on April 18, 1997, in the above-captioned proceeding. Pennsylvania Power & Light Co. (PP&L) filed a Brief in opposition to the Petition on April 25, 1997.

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History Of The Proceeding

Caradon filed its Complaint against PP&L on May 30, 1996, and MI filed its Complaint against PP&L on August 21, 1996. Both Complainants sought application of a certain rate and for the rate to be retroactive. The Complaints were consolidated on September 27, 1996, by Administrative Law Judge (ALJ) Cynthia Williams Fordham.

On January 8, 1997, after extensive discovery and two Prehearings, the Complainants filed a Motion for Partial Summary Judgment which ALJ Fordham denied. The Complainants filed the instant Petition on April 18, 1997. On April 25, 1997, the Complainants filed a Brief and a voluminous Appendix in support of their Petition, and PP&L filed its Brief in opposition. On May 5, 1997, PP&L filed a Motion to Strike (Motion) portions of the Complainants' Brief and Appendix in support of the instant Petition. PP&L also filed a supporting Memorandum of Law. On May 7, 1997, the Complainants filed a Reply and supporting Memorandum of Law in response to PP&L's Motion.

Discussion

The Complainants allege in the instant Petition that the following issues are Material Questions which we should address and answer in the affirmative, and, by so doing, avoid substantial prejudice to the Complainants and shorten the proceeding:

1. Whether PP&L is required by law to apply the clear and unambiguous language of a lawfully filed and approved tariff; and
2. Whether the language "[i]nterruptible power is the twelve month average of each customer's monthly

Maximum On-peak Demand less the customer's contract Firm Power level" is clear and unambiguous.

(Petition, p.1.)

In particular, the Complaints challenge PP&L's allegations that PP&L's cited tariff language is "less than clear." (Complainants' Brief, p. 1.) The Complainants also challenge PP&L's defense of "error" in its prior communications with Caradon. (Complainants' Brief, p. 5.) Additionally, the Complainants argue that our failure to answer the questions will compel the Complainants to litigate issues related to the purpose, intent, and history of the interruptible rate which is inappropriate in the context of a the subject proceeding. The Complainants further note that the interruptible rate was the product of months of hearings involving many parties, including PP&L, the Commission's Office of Trial Staff (OTS), the Office of Consumer Advocate (OCA), the Office of Small Business Advocate (OSBA), consumers, and others. The Complainants allege that if PP&L wants to "change the language of the interruptible power to comport with its strained interpretation," then PP&L should file for a rate change. (Complainants' Brief, pp. 14-15.)

In its Answer, PP&L asserts that the Complainants cannot meet the standard of review for a petition for interlocutory review and answer to material question, (PP&L's Brief, pp. 3-5); that PP&L's interpretation and application of the tariff language is reasonable (PP&L's Brief, pp. 5-7); that PP&L's interpretation of the tariff is supported by policy and rationale for the tariff provisions (PP&L's Brief, pp. 7-11); and that the Complainant's interpretation of the tariff is inconsistent with the nature and purpose of the tariff provisions (PP&L's Brief, pp. 11-13).

Our standards for interlocutory review are found in Section 331(e) of the Public Utility Code, 66 Pa. C.S. §331(e), and in Sections 5.302 and 5.303 of our Regulations, 52 Pa. Code §§5.302 & 5.303, which provide as follows:

§5.302. Petitions for Commission review and answer to a material question.

(a) During the course of a proceeding, a participant may file a timely petition directed to the Commission requesting review and answer to a material question which has arisen or is likely to arise. The petition . . . shall state . . . the question to be answered and the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding.

§5.303. Commission action on petition for review and answer.

(a) Within 30 days of receipt of the petition by the Secretary, the Commission will, without permitting oral argument, do one of the following:

- (1) Continue, revoke or grant a stay of proceedings if necessary to protect the substantial rights of the participants.
- (2) Determine that the petition was improper and return the matter to the presiding officer.
- (3) Decline to answer the question.
- (4) Answer the question.

We interpreted the standards for interlocutory review in In re: Application of Knights Limousine Service, Inc., 59 Pa. P.U.C. 538 (1985) (Knights). We do not routinely grant interlocutory review except upon a showing by a petitioner of extraordinary circumstances or compelling reasons. Such showing may be accomplished,

for example, by a petitioner proving that without interlocutory review some harm would result which would not be reparable through normal avenues, that the relief sought should be granted now rather than later, or that granting interlocutory review would prevent substantial prejudice or expedite the proceeding.

In applying such a standard to the instant Petition, we find that the Complainants have articulated extraordinary circumstances and compelling reasons for interlocutory review. While the Complainants have not explained why the alleged harm would not be reparable through normal avenues, they have detailed why the relief should be granted now rather than later. Further, the Complainants have convinced us that granting interlocutory review would prevent substantial prejudice and expedite the proceeding. (See, Knights, pp. 540-541.)

In our evaluation of the Complainants' first Material Question, we note from the record that PP&L admits that "the disputed tariff language may not be a model of clarity." (PP&L's Brief, p.6.) There is clearly a critical issue at controversy. There is clearly a record to develop. However, it is also clear to us that additional entities beyond the parties in this proceeding have a significant stake in the interpretation of the "disputed tariff language" inasmuch as PP&L is now seeking to dispute what is allegedly "the clear and unambiguous language of a lawfully filed and approved tariff."

In our opinion, this controversy goes beyond merely interpreting the disputed language and reaches the point of recreating (or redrafting) by construction PP&L's tariff. At the very least, the OTS should participate in the revisiting of the disputed language. The OCA and the OSBA, as well as the other parties to Pa. PUC v. PP&L, Docket No. R-00943271 which gave rise to the disputed tariff language, should be served with notice of this proceeding and be given an opportunity to intervene. It should

be noted that if a clear interpretation of the disputed tariff language cannot be achieved, the disputed language should be construed against its promulgator, PP&L.

Accordingly, having reached this conclusion, we shall decline to answer the Material Questions, which involve substantial issues of questions of fact and law, consistent with Section 5.303 of our Regulations, supra. Furthermore, having reached this conclusion, we shall not consider PP&L's Motion or the Complainants' Reply.

Conclusion

We shall grant the Complainants' Petition, decline to answer the Material Questions, and direct that notice of this proceeding be served on all parties of record in Docket No. R-00943271; **THEREFORE,**

IT IS ORDERED:

1. That the Petition for Interlocutory Commission Review, filed on April 18, 1997, by Caradon Mideast Aluminum, a division of Caradon America, Inc., and Metal Industries, Inc., be, and is hereby, granted, consistent with this Opinion and Order.
2. That the Material Questions articulated in the Petition for Interlocutory Commission Review, filed on April 18, 1997, by Caradon Mideast Aluminum, a division of Caradon America, Inc., and Metal Industries, Inc., be, and are hereby, not answered, consistent with this Opinion and Order.
3. That this proceeding be, and is hereby, remanded to the Office of the Administrative Law Judge, consistent with this Opinion and Order.

4. That notice of these proceedings be served upon all parties of record in Pa. PUC v. PP&L, Docket No. R-00943271.

BY THE COMMISSION


John G. Alford
Secretary

(SEAL)

ORDER ADOPTED: May 8, 1997

ORDER ENTERED: ~~MAY~~ 12 1997