

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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| Pennsylvania Public Utility Commission | : | |
| | : | |
| v. | : | R-2016-2569975 |
| | : | |
| PPL Electric Utilities Corporation | : | |
| | : | |
| National Railroad Passenger Corporation | : | |
| | : | C-2016-2580526 |
| v. | : | |
| | : | |
| PPL Electric Utilities Corporation | : | |

ORDER SUSTAINING PRELIMINARY OBJECTIONS IN PART

On October 5, 2016, PPL Electric Utilities Corporation (PPL) filed Supplement No. 213 to Tariff Electric Pa. P.U.C. No. 201 (Supplement 213), to become effective January 1, 2017. Supplement 213 proposes an annual increase of approximately \$2.320 million in the distribution revenues received from rate schedule Power Service to Electric Propulsion (LPEP). PPL states that the National Passenger Railroad Corporation, (Amtrak) is its sole customer under rate schedule LPEP.

On December 19, 2016, Amtrak filed a complaint and new matter that the Commission docketed at Docket No. C-2016-2580526. The complaint alleges that if the Commission grants PPL's requested increase in distribution revenues, it would increase the LPEP monthly customer charge to \$319,671.00 in order to recover costs associated with upgrades to the Conestoga Substation. This is an increase from the current \$126,323.59 LPEP monthly customer charge placed in effect January 1, 2016, pursuant to the settlement in the case at R-2015-2469275.

The complaint further asserts that Amtrak will own or have supplied more than 70% of the transformer capacity for the Conestoga Substation. According to the complaint, Amtrak already owns 3 of the 7 transformers at the Conestoga Substation. Amtrak plans to deliver 2 or more transformers to replace the older transformers owned by PPL. Therefore, the proposed rate increase is unjust and unreasonable.

The new matter asserts that, pursuant to the settlement in the case at R-2015-2469275, the LPEP monthly customer charge reverted to the rate in effect prior to January 1, 2016 of \$37,100.00 per month, effective September 1, 2016. Amtrak also states in new matter that it should receive a refund of the payments for the period from January 1, 2016 to August 31, 2016.

On December 22, 2016, the Commission suspended PPL's filings, pursuant to 66 Pa. C.S. §1308(b), from January 1, 2017 until June 1, 2017. Subsequently, the Commission issued an errata notice indicating that PPL's filings were suspended until July 1, 2017.

On December 22, 2016 PPL filed an answer and new matter to Amtrak's complaint. The answer admits that PPL's filing proposes to increase the LPEP monthly customer charge from the current \$126,323.59 to \$319,671.00.

The answer denies that Amtrak will own or has supplied more than 70% of the transformer capacity for the Conestoga Substation. The answer asserts that PPL owns four of the transformers as well as the control building, control equipment and circuit breakers at the Conestoga Substation. In addition, PPL owns all of the land for the Conestoga Substation.

The answer contends that Amtrak's new matter in its complaint is procedurally improper. The answer denies that on September 1, 2016, the LPEP monthly customer charge reverted to the rate in effect prior to January 1, 2016 of \$37,100.00 per month. Rather, the answer contends the rate of \$126,323.59 per month was effective January 1, 2016 and remains in effect unless and until the Commission approves a new rate. The answer denies that Amtrak is entitled to receive a refund for payments for the period from January 1, 2016 to August 31, 2016.

The new matter states that Amtrak agreed that upgrades to the Conestoga Substation are required to provide continuous reliable and safe service to Amtrak. Amtrak has also agreed that, as the only customer served by the Conestoga Substation, it is responsible for the reasonable and prudent costs to upgrade the Conestoga Substation.

The new matter contends that the \$126,323.59 per month customer charge was set forth in the settlement in the case at R-2015-2469275, that the PPL Industrial Customer Alliance (PPLICA) joined the settlement on behalf of Amtrak, that the Commission approved the \$126,323.59 customer charge and that the charge is set forth in PPL's currently effective tariff. The new matter argues that Amtrak's request for a refund is barred as a matter of law.

The new matter alleges that the upgrades to the Conestoga Substation were due to be completed and in service by December 31, 2016. However, Amtrak and PPL agreed that PPL would temporarily discontinue work on the Conestoga Substation.

The new matter states that nothing in the settlement in the case at R-2015-2469275 provided that the LPEP customer charge would revert back to \$37,100.00 if Amtrak and PPL were unable to resolve the issues surrounding the upgrade of the Conestoga Substation. The new matter contends that Amtrak's request for a refund is a violation of the settlement in the case at R-2015-2469275. The answer with new matter requests that the Commission deny Amtrak's complaint.

Also on December 22, 2016, PPL filed preliminary objections to Amtrak's complaint. The preliminary objections reiterate the assertions in PPL's answer with new matter.

The preliminary objections request that Amtrak's request for refunds be denied for failure to state a claim upon which relief may be granted because the request is barred as a matter of law, barred by the settlement in the case a R-2015-2469275 and barred by the express terms of the agreement between PPL and Amtrak.

The preliminary objections also contend that the new matter in Amtrak's complaint does not comply with the Commission's regulations. Nothing in the Commission's regulations authorize new matter to be included in a complaint. The preliminary objections request that the Commission dismiss Amtrak's request for a refund of the LPEP charges and/or strike the new matter.

On January 3, 2017, Amtrak filed an answer to PPL's preliminary objections. The answer reiterates the assertions in Amtrak's complaint with new matter. The answer denies that Amtrak's request for a refund is barred as a matter of law, barred by the settlement in the case at R-2015-2469275, barred by the express terms of the agreement between PPL and Amtrak or because the complaint fails to conform with the Commission's regulations. The answer requests that PPL's preliminary objections be denied.

The preliminary objections are ready for decision. For the reasons set forth below, I will sustain the preliminary objections concerning the new matter in part.

The Commission's Rules of Practice and Procedure permit parties to file preliminary objections. The grounds for preliminary objections are limited to those set forth in 52 Pa.Code § 5.101(a) as follows:

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
- (3) Insufficient specificity of a pleading.
- (4) Legal insufficiency of a pleading.
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
- (6) Pendency of a prior proceeding or agreement for alternative dispute resolution.
- (7) Standing of a party to participate in the proceeding.

Here, PPL's preliminary objections assert that Amtrak's complaint fails to conform to the Commission's rules, pursuant to 52 Pa.Code §§ 5.101(a)(2) and is legally insufficient, pursuant to 52 Pa.Code §§ 5.101(a)(4). I will first address PPL's claim that Amtrak's complaint fails to conform with the Commission's rules.

PPL argues that while the Commission's regulation at 52 Pa.Code § 5.1(a)(2) permits parties to submit new matter in a Commission proceeding, new matter should be submitted with an answer. PPL points out that 52 Pa.Code § 5.62 governs new matter and provides that new matter should be submitted with an answer to seek affirmative relief, raise an affirmative defense or set forth material facts that are not a denial of averments of a pleading. PPL argues that there is nothing in the Commission's regulations that authorize new matter to be submitted in a complaint.

In response, Amtrak argues that the Commission's regulation at 52 Pa.Code § 5.1(a)(2) does not specify that new matter must be submitted in conjunction with an answer. Amtrak also asserts that any procedural defect in its complaint may be remedied by 52 Pa.Code § 1.2 which provides that the Commission may liberally construe its procedural rules. While I agree that the Commission may liberally construe its procedural rules, I disagree that such a course of action is appropriate in this case. A brief explanation follows.

The Commission's regulations at 52 Pa.Code § 5.22, governing the content of formal complaints, does not provide for including new matter in a complaint. Rather, 52 Pa.Code § 5.22(a)(5) requires that the complaint contain a clear and concise statement of the act or omission being complained of and 52 Pa.Code § 5.22(a)(6) requires a clear and concise statement of the relief sought. New matter is unnecessary in a complaint since the complaint itself should contain a complete statement of all the acts and omissions complained of as well as a statement of all the relief sought.

Amtrak's pleading in this case is actually two separate complaints. Amtrak's pleading consists of two components, the complaint and the new matter. The complaint

component is a complaint against PPL's proposed LPEP rate which Amtrak has filed pursuant to 52 Pa.Code § 5.32. In this portion of Amtrak's pleading, the burden of proof to show that the proposed rate is just and reasonable is on PPL. 66 Pa.C.S. § 315. Because Amtrak's complaint is against PPL's proposed rate, this portion of Amtrak's pleading is properly consolidated with PPL's filing.

The new matter portion of Amtrak's pleading is a complaint against PPL's current LPEP rate which Amtrak has filed pursuant to 52 Pa.Code § 5.21. In this portion of Amtrak's pleading, the burden of proof that the rate is unjust, unreasonable or illegal is on Amtrak. 66 Pa. C.S. § 332. Pennsylvania Elec. Co. v. Pa. Pub. Util. Comm'n 663 A.2d 281 (Pa.Cmwlth. 1995). Since Amtrak's new matter is a complaint against an existing rate, it can be filed at any time and is not related to PPL's filing. Amtrak's pleading is therefore actually two complaints concerning two different rates, with different burdens of proof. Amtrak should have filed two separate complaints, not a complaint with new matter.

Amtrak points out that the regulation at 52 Pa.Code § 1.2(a) provides that the presiding officer or the Commission may disregard an error or defect of procedure which does not affect the substantive rights of the parties. Since Amtrak's complaint with new matter was served on PPL, Amtrak contends that PPL had notice of the allegations in the complaint and new matter and an opportunity to file a response. Therefore, Amtrak argues that PPL's substantive rights have not been affected.

Amtrak contends that I should ignore the procedural defects of its pleading. Amtrak apparently is arguing that I should consolidate its pleading with PPL's filing, pursuant to 52 Pa.Code § 5.81, in order to secure a just, speedy and inexpensive determination of this proceeding, pursuant to 52 Pa.Code § 1.2(a).

I disagree with Amtrak's proposal because consolidating its complaint against the existing LPEP customer charge with PPL's filing will not lead to a just, speedy or inexpensive determination of this proceeding because consolidating the two complaints is inappropriate in this circumstance.

The Commission's regulations governing consolidation appear at 52 Pa. Code § 5.81, and state in relevant part:

§ 5.81. Consolidation.

(a) The Commission or presiding officer, with or without motion, may order proceedings involving a common question of law or fact to be consolidated. The Commission or presiding officer may make orders concerning the conduct of the proceeding as may avoid unnecessary costs or delay.

Whether to consolidate particular cases is left to the sound discretion of the Commission or the presiding officer.

The Commission or presiding officer have consolidated cases for adjudication; Re: Middletown Taxi Company, 50 Pa. PUC 263 (1976), for hearing; City of York v. York Telephone and Telegraph Co., 43 Pa. PUC 240 (1967), and for briefing; Clepper Farms, Inc. v. Grantham Water Co., 41 Pa. PUC 749 (1965). The Commission or presiding officer has refused to consolidate cases for any purpose. Dopp v. Williamsburg Borough Dept. of Water and Sewer, 59 Pa. PUC 25 (1984).

In deciding whether to consolidate certain cases, the Commission or presiding officer must first determine that the proceedings involve a common question of law or fact. In such cases as Application of Philadelphia Electric Co., 43 Pa. PUC 781 (1968), Pa. Pub. Util. Comm'n v. Bell Telephone Co. of Pennsylvania, 46 Pa. PUC 568 (1973) and Pa. Pub. Util. Comm'n v. Butler Twp. Water Co., 52 Pa. PUC 442 (1978), as well as those cited above, the Commission has established that the Commission or presiding officer should evaluate considerations in addition to the presence of common questions of law or fact in ruling on a motion to consolidate. These other considerations include:

1. Will the presence of additional issues cloud a determination of the common issues?
2. Will consolidation result in reduced costs of litigation and decision-making for the parties and the Commission?

3. Do issues in one proceeding go to the heart of an issue in the other proceeding?
4. Will consolidation unduly protract the hearing, or produce a disorderly and unwieldy record?
5. Will different statutory and legal issues be involved?
6. Does the party with the burden of proof differ in the proceedings?
7. Will consolidation unduly delay the resolution of one the proceedings?
8. Will supporting data in both proceedings be repetitive?

No single consideration or group of considerations or the presence of a common question of law or fact is dispositive in determining whether to consolidate proceedings. Rather, the Commission or presiding officer must evaluate all of these considerations and balance those favoring versus those disfavoring consolidating the proceedings.

After reviewing these considerations, I conclude that consolidating Amtrak's complaint against PPL's existing LPEP customer charge with PPL's filing is not appropriate. Initially, there are not common questions of law and fact. While Amtrak is correct that its pleading and PPL's filing all concern PPL's LPEP customer service charge, the questions of law and fact are not the same. Initially, the burden of proof is not the same.

In PPL's filing it has the burden of proof to show that the proposed LPEP customer charge is just and reasonable. In Amtrak's complaint against the proposed LPEP customer charge, Amtrak does not have the burden of proof to demonstrate that the proposed rate is unreasonable.

One would expect that the evidence PPL would be presenting in support of its filing would be evidence that it needs additional revenue in order to continue providing reasonable service to Amtrak, its sole LPEP customer. The evidence would presumably consist

of PPL's anticipated costs in continuing to provide that service and would be based on events that it projects will occur in the future.

In contrast, in Amtrak's complaint against the existing LPEP customer charge, the burden of proof that the existing rate is unjust, unreasonable or illegal is on Amtrak. 66 Pa. C.S. § 332. Pennsylvania Elec. Co. v. Pa. Pub. Util. Comm'n 663 A.2d 281 (Pa.Cmwlth. 1995). PPL does not have the burden of proof to demonstrate that the existing rate is reasonable since tariff provisions, including rates, approved by the Commission are prima facie reasonable. Zucker v. Pa. Pub. Util. Comm'n, 401 A.2d 1377 (Pa.Cmwlth. 1979).

One would expect that in its complaint against the existing LPEP customer service charge, Amtrak would be looking backward at the terms and conditions in the settlement agreement in the case at R-2015-2469275 and the wording of current LPEP tariff provision. In short, the proceedings do not involve common questions of law and fact.

As noted above, different statutory and legal issues would be involved if the proceedings are consolidated. In addition, the party with the burden of proof differs in the proceedings. The supporting data in the proceedings will not be repetitive but rather, separate and distinct. Consolidating the proceedings would produce a disorderly and unwieldy record and would not result in reduced costs of litigation and decision-making for the parties and the Commission. For all these reasons, consolidating these proceedings for hearing and decision is unwarranted.

Because consolidating these proceedings for hearing and decision is not appropriate, it is appropriate to strike the new matter portion of Amtrak's complaint without prejudice to Amtrak to file a separate complaint against PPL's current LPEP customer charge. That proceeding may be adjudicated separately. The balance of Amtrak's complaint will be consolidated with PPL's filing.

Since I am striking the new matter portion of Amtrak's complaint, I will not address PPL's argument that the allegations in the new matter portion of Amtrak's complaint are legally insufficient, pursuant to 52 Pa.Code §§ 5.101(a)(4).

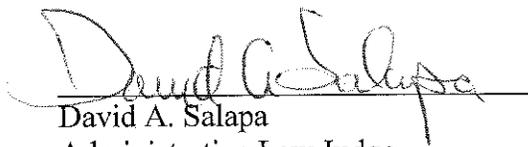
ORDER

THEREFORE,

IT IS ORDERED:

1. That the preliminary objections filed by PPL Electric Utilities Corporation at Docket No. C-2016-2580526 concerning the new matter portion of the complaint of National Railroad Passenger Corporation are sustained in part.
2. That the new matter portion of the complaint of National Railroad Passenger Corporation at Docket C-2016-2580526 is stricken without prejudice.
3. That the remaining issues set forth in the complaint of National Railroad Passenger Corporation at Docket C-2016-2580526 shall be consolidated with the filing of PPL Electric Utilities Corporation at R-2016-2569975 for purposes of discovery, litigation and decision.

Dated: January 18, 2017


David A. Salapa
Administrative Law Judge

R-2016-2569975 - PPL ELECTRIC FILED SUPP NO 213 TO PA PUC NO 201; EFF:
1/1/17, PROPOSING AN INCREASE TO RATE SCHEDULE LPEP.

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C-2016-2580526

(For National Railroad Passenger Corporation)