

**PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17120**

**Pennsylvania Public Utility
Commission
National Railroad Passenger
Corporation
Ronald J. Serafin**

**Public Meeting November 8, 2017
2569975-OSA
Docket Nos. R-2016-2569975
C-2016-2580526
C-2017-2611401**

v.

PPL Electric Utilities Corporation

MOTION OF COMMISSIONER JOHN F. COLEMAN, JR.

Before the Commission are a Petition for Interlocutory Review of Material Questions filed by the National Railroad Passenger Corporation (Amtrak) denying its Motion to Dismiss, and a Recommended Decision of Administrative Law Judge (ALJ) David A. Salapa of August 23, 2017 dismissing the above-captioned formal complaints and granting PPL Electric Utilities Corporation's (PPL) proposed rate increase. I will be moving that the Commission decline to answer the Material Questions in the Petition, and that the Recommended Decision be affirmed in part and reversed in part.

On October 5, 2016, PPL filed a request to increase annual distribution revenues from rate schedule Power Service to Electric Propulsion (LPEP). PPL filed the appropriate tariff supplement in accordance with a Commission-approved settlement at Docket Number R-2015-2469275 which reflected a customer charge of \$126,323.59 for service to Amtrak. The only customer that PPL serves under this schedule is Amtrak. The distribution service is provided through the Conestoga Substation to Amtrak in Lancaster County. PPL represented in its filing that this substation required substantial upgrades to continue to operate in a safe and reliable manner. The proposed rate increase includes approximately \$9 million in costs for capital improvements already incurred and approximately \$14 million in estimated costs for future upgrades. Amtrak filed a formal complaint in response, asserting that the proposed rate increase was not just and reasonable. In accordance with the Commission's statutory and regulatory obligations, the matter was referred to the Office of Administrative Law Judge for hearing and disposition. The Commission suspended PPL's rate filing till July 1, 2017, and this suspension was later extended to January 1, 2018 with PPL's consent.

The history of this and prior proceedings involving these two parties and this rate schedule are complex. Most relevantly, Amtrak reached the conclusion during this rate case that it could repair, operate and maintain the Conestoga Substation for significantly less cost than PPL. Pursuant to that belief, it initiated an eminent domain proceeding against PPL for the possession of the Conestoga Substation in the United States District Court for the Eastern District of Pennsylvania (District Court). Amtrak's enabling legislation does allow it to

condemn property where necessary to further the purpose of its statute. This proceeding was initiated on April 17, 2017 in the District Court. By operation of law, title for the Conestoga Substation passed from PPL to Amtrak with the filing of this declaration of taking and a deposit of the estimated compensation to PPL on April 18, 2017. Subsequently, the District Court issued an Order on May 23, 2017 prohibiting PPL from making any alterations or upgrades to the Conestoga Substation during the pendency of the condemnation proceeding. PPL was permitted to otherwise operate and maintain the substation to provide service to Amtrak.

After the issuance of the Court Order, Amtrak filed a Motion to Dismiss the case with the Commission, asserting that as PPL no longer owned the Conestoga Substation, this case should be dismissed for lack of jurisdiction. PPL filed an Answer in opposition to this Motion, asserting that it was contesting Amtrak's taking in District Court, and that the Court had not yet ruled on the merits of the dispute. The presiding Administrative Law Judge denied the Motion to Dismiss.

Subsequently, Amtrak filed a Petition for Interlocutory Review of Material Questions on June 13, 2017. Amtrak asked the Commission to find that the ALJ erred because either, one, the matter was moot or unripe due to the uncertainty over whether the upgrade work would be performed by PPL, or, in the alternative, the question of compensation owed to PPL by Amtrak has been preempted by the District Court's Order. PPL filed an Answer in opposition to this Petition, and the Commission advised the parties on June 16, 2017, that it would waive the normal thirty-day review period for the Petition for Interlocutory Review.

While this Petition remained pending, the rate case continued to be litigated before the Commission. Amtrak maintained its position that the case should be dismissed, and participated only so far as necessary to preserve its federal claims related to the eminent domain proceeding. PPL served direct testimony which was admitted into the record at the evidentiary hearing, and filed briefs to support its requested relief. PPL filed a Certificate of Satisfaction resolving the Complaint of Ronald J. Serafin, and the Commission's Bureau of Investigation and Enforcement took no position on the merits of the case.

The presiding ALJ issued a Recommended Decision on August 23, 2017 that largely approved the requested rate increase, and dismissed the formal complaints. The ALJ noted that Amtrak presented no evidence challenging PPL's position regarding the need for upgrades at the substation, the method and cost of the construction work, and the calculation of the new, proposed rate. As in any rate case that is properly before the Commission, the ALJ examined the evidence presented and found that PPL had supported its rate increase, as amended. Acknowledging the federal court proceeding, the ALJ directed that PPL be allowed to file a tariff that would be effective only after the Conestoga Substation upgrade work was completed. No exceptions were filed to the Recommended Decision, but Amtrak filed a document in lieu of exceptions in which it reserved its right to litigate these issues before the District Court.

Petitions for Interlocutory Review of Material Questions are generally not favored by the Commission. The Commission may answer or decline to answer the question, continue or grant a stay of proceedings, or find that the petition was improper. The Petitioner is to provide compelling reasons why interlocutory review will prevent substantial prejudice or expedite the

conduct of this proceeding. Because the presiding ALJ has already issued a Recommended Decision on the merits of the rate case, I believe the Petition for Interlocutory Review of Material Questions is moot and therefore, propose that the Commission decline to answer the questions posed. By dismissing the Petition as moot, we must now address the Recommended Decision approving PPL's proposed rate increase.

This appears to be the first time that Amtrak has attempted to condemn Pennsylvania public utility facilities that are "used and useful" in the provision of utility service. The intersection of Amtrak's federal court proceeding and this rate case presents several interesting and novel issues not previously addressed by the Commission. For example, would Amtrak need to apply for and obtain a certificate of public convenience to operate this substation? Is PPL's proposed rate increase preempted by the pending federal proceeding under the doctrine of conflict preemption?

I do not believe it is necessary for the Commission to reach a determination on those issues now. At the time that the tariff and Complaint were filed in this case, the Commission properly exercised its jurisdiction to resolve the contested, non-general rate increase. However, the District Court issued a valid and effective order prohibiting PPL from making any capital improvements, upgrades or alterations to the Conestoga Substation. If Amtrak prevails in that proceeding, PPL may never implement such work, and will accordingly not need to recover any associated, future costs. PPL would be able to litigate the issue of what it is owed by Amtrak for the taking of the substation and for the recovery of the \$9 million in costs associated with the already completed upgrades before the District Court.

Accordingly, I do not find that this proposed rate increase is ripe for a decision on the merits.¹ This does appear to be a case of first impression, and this fact may discourage settlement and lead to a lengthy proceeding before the District Court reaches a decision. It is also possible that the nature of service provided through the Conestoga Substation or Amtrak's associated operations at that location may change over time, and that the scope of needed upgrades and associated costs may thus require significant revision, especially if Amtrak makes any of the upgrades at its own expense in the interim. Additionally, a ruling on the merits of the rate case while the condemnation proceeding is pending may result in unnecessary, time-consuming and expensive litigation before the Courts of this Commonwealth or the United States.

For these reasons, I move that the Commission affirm, in part, the Recommended Decision² for the purposes of addressing the Petition for Interlocutory Review of Material Questions and confirming the jurisdiction of the Commission to address the proposed rate issues presented at the time of the filing in this proceeding. I also move that the Recommended Decision will be reversed, in part, as I do not find the proposed rate increase ripe for a decision

¹ Ripeness is a prerequisite for judicial review, and an actual case and controversy must exist. *Treski et al. v. Kemper National Insurance Companies*, 674 A.2d 1106 (Pa. Super. 1996). While a rate case has been filed, legal title to the substation has transferred to Amtrak, and the District Court's order prohibits PPL from carrying out any new upgrades to the substation, which represents most of the costs associated with the proposed increase. Accordingly, no actual controversy exists as to the LPEP rate given the actions in the District Court.

² Given this determination, it is not necessary to address the issue of whether the Commission is preempted by the District Court condemnation proceeding.


on the merits. Should PPL prevail on the merits of the District Court proceeding, or the parties reach a settlement that would result in PPL's continued ownership and operation of the Conestoga Substation, they are encouraged to promptly return to the Commission for any appropriate proceedings regarding the rates to be charged under the LPEP schedule. To protect the interests of its ratepayers, PPL is also instructed to track all costs it has incurred in operating and maintaining the Conestoga Substation that Amtrak has not paid for since the eminent domain proceeding commenced.

Finally, I want to note my serious concern about the effect of this dispute on the provision of safe and reliable service to Amtrak and its customers. PPL has represented that the Conestoga Substation requires a complete rebuild to operate safely and reliably, and it has provided uncontroverted testimony that Amtrak agrees with this assertion. Given that Amtrak has obtained title to the substation, and persuaded the District Court to prohibit PPL from making any capital improvements, Amtrak has effectively taken upon itself the responsibility for any consequences to public safety and accommodation due to interruptions of service resulting from the unfinished upgrade work. The Commission has little, if any, information about Amtrak's technical fitness, as it is not a certificated public utility, to carry out its duties as the owner of this substation while the federal proceeding remains pending. I would urge the parties to resolve this matter as quickly as possible, whether through settlement or an expedited litigation schedule, so that the safe and reliable provision of rail service to the public is not jeopardized.

THEREFORE, I MOVE THAT:

1. The Recommended Decision be affirmed in part, and reversed in part, and that PPL's proposed request to increase rates be dismissed without prejudice, and that the formal complaint of Amtrak is dismissed without prejudice.
2. The Commission decline to answer the Petition for Interlocutory Review of Material Questions.
3. The Office of Special Assistants prepare an Opinion and Order consistent with this Motion.

Date: November 8, 2017



JOHN F. COLEMAN, JR.
COMMISSIONER