**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

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|  | Public Meeting held November 8, 2017 |
| Commissioners Present: Gladys M. Brown, Chairman Andrew G. Place, Vice Chairman David W. Sweet, Statement, dissenting John F. Coleman, Jr. |  |

Pennsylvania Public Utility Commission R-2016-2569975

 v.

PPL Electric Utilities Corporation

National Railroad Passenger Corporation C-2016-2580526

 v.

PPL Electric Utilities Corporation

Ronald J. Serafin C-2017-2611401

 v.

PPL Electric Utilities Corporation

**OPINION AND ORDER**

**BY THE COMMISSION:**

**I. Matter Before the Commission**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Recommended Decision (R.D.) of Administrative Law Judge (ALJ) David A. Salapa issued August 23, 2017, in the above-captioned proceeding. The proceeding at Docket No. R-2016-2569975 is a non-general, proposed rate increase filing by PPL Electric Utilities Corporation (PPL). *See* 66 Pa. C.S. § 1308(b).

Also before the Commission for disposition is a Petition for Interlocutory Review of Material Questions (Petition) filed by National Railroad Passenger Corporation (Amtrak) on June 13, 2017.[[1]](#footnote-1) The Amtrak Petition was filed in response to a June 7, 2017, interlocutory order of the presiding ALJ. *See* Order Denying Motion to Dismiss (*June 2017 Interim Order* or I.O.) issued by ALJ Salapa. The Petition was filed by Amtrak in conjunction with a Formal Complaint (Complaint) against the PPL non-general rate increase filing. *See* Docket No. C‑2016-2580526. Amtrak, *inter alia*, sought dismissal of the rate increase filing based on the position that the subject matter of the rate increase – the Conestoga Substation – is no longer under PPL ownership, but is now owned by Amtrak as a result of federal eminent domain proceedings. Based on the foregoing, Amtrak takes the position that issues regarding, *inter alia*, the determination of costs for capital improvements to the Conestoga Substation that are incorporated into the rate increase proposed by PPL arenow preempted by federal law.

In lieu of filing Exceptions to the Recommended Decision, Amtrak has filed a “Notice in Lieu of Exceptions . . .” (Amtrak Notice), wherein it has relied on federal caselaw precedent to preserve its ability to litigate any pertinent factual and legal issues concerning applicable costs for capital improvements to the Conestoga Substation for adjudication before the United States District Court. Replies to the Amtrak Notice were filed by PPL and received by the Commission, September 6, 2017.

On consideration of the Recommended Decision, the Amtrak Notice, the pleadings of the Parties, including Amtrak advisory letters, and the Amtrak Petition and PPL Replies, we shall affirm in part and reverse, in part, the Recommended Decision of ALJ Salapa. We shall, consistent with the discussion in this Opinion and Order, decline to grant the Amtrak Notice (in lieu of Exceptions to the Recommended Decision) and decline to respond to the issues asserted by Amtrak as material questions in the Amtrak Petition seeking interlocutory Commission review. The Amtrak Formal Complaint, to the extent consistent with our disposition of the issues in this Opinion and Order, shall be deemed moot.

**II. Background and History of the Proceeding**

The Background and History of the Proceedings will be summarized from the Recommended Decision, the *June 2017 Interim Order*, and pleadings of the Parties. An extensive recitation of the procedural history of this matter has been set forth in the Recommended Decision at 1-12, which we need not fully repeat in this Opinion and Order.

On October 5, 2016, PPL filed with the Commission Supplement No. 213 to Tariff Electric Pa. P.U.C. No. 201, designed to produce an annual increase of approximately $2.320 million in the distribution revenues received from PPL rate schedule Power Service to Electric Propulsion (LPEP) and proposed to become effective January 1, 2017. Amtrak is the sole customer under Rate Schedule LPEP. Since the October 5, 2016 filing, PPL has voluntarily extended the proposed effective date of Supplement No. 213 to January 1, 2018. *See*, *infra*,R.D. at 9, referencing Supplement No. 226. For ease of reference, we shall refer to the rate increase filing supplement as Supplement No. 213, noting the voluntary extension.

As noted, Supplement No. 213 is a “non-general” rate increase under Section 1308(b) of the Public Utility Code, 66 Pa. C.S. § 1308(b) (Code hereafter).[[2]](#footnote-2) PPL’s Supplement No. 213 proposed changes to Rate Schedule LPEP to implement an increase in the monthly distribution charge to recover the costs of upgrades needed at the Conestoga Substation. PPL M.B. at 5. The proposed increase is designed to fully recover all the costs of the upgrades. *See* PPL M.B. at 2. And, PPL admits that the filing would result in an increase in the LPEP monthly customer charge from the current rate/charge of $126,323.59 to $319,671.00. *See* R.D. at 2;I.O. at 2, citing PPL Answer and New Matter to Amtrak Complaint.[[3]](#footnote-3)

A history of the development of Rate Schedule LPEP is set forth at pages 14-15 of the Recommended Decision. In relevant part, ALJ Salapa provided the following:

. . . PPL indicates that dating back to the 1970’s, it had Rate Schedule PRR “Pennsylvania Rail Road” which served Amtrak. PPL St. 1, p. 4.

In 1982, PPL eliminated Rate Schedule PRR and moved Amtrak to Rate Schedule LP-5, which is the rate schedule for large general service supplied from available lines of 69,000 volts (69 kV) or higher, with the customer furnishing and maintaining all equipment necessary to transform the energy from the line voltage. PPL St. 1, p. 4.

In 1985, PPL modified Rate Schedule LP-5 to include a provision for additional charges for 25 Hertz (“Hz”) cycle service and 1 hour demand due to the uniqueness of this service on PPL’s system. PPL St. 1, p. 4, PPL Ex. SRK-1.

In 1994, PPL proposed and received Commission approval for Rate Schedule LPEP. PPL St. 1, p. 4, PPL Ex. SRK-2. Rate Schedule LPEP was very similar to Rate Schedule LP-5 but modified the method of calculating demand to avoid “duplication of demand.” PPL St. 1, p. 4. According to PPL, creation of Rate Schedule LPEP in 1994 reduced Amtrak’s annual charges by approximately $607,000. PPL St. 1, p. 5.

According to the 1994 filing, PPL reviewed the proposed tariff changes with Amtrak, the only customer affected by Rate Schedule LPEP. PPL St. 1, p. 5. PPL also kept Amtrak aware of progress by providing copies and notification after the Commission approved PPL Rate Schedule LPEP. PPL St. 1, p. 5. PPL also provided copies to multiple other parties. PPL St. 1, p. 5.

PPL asserts that because of the design of Rate Schedule LPEP, Amtrak has enjoyed many benefits over the last 21 years. PPL St. 1, p. 5. PPL alleges that as investment in PPL’s system has increased over the years, this has increased the costs to other customers. However, because Amtrak has been on its own separate Rate Schedule LPEP, it has enjoyed the benefit of not incurring these increased costs experienced by other customers because of the carve-out of the 25 Hz system. PPL St. 1, p. 5. In contrast to other rate classes, the facilities associated with Rate Schedule LPEP date back to the 1930’s with only minimal additional investment, meaning that the assets serving Amtrak are fully or nearly fully depreciated, which has provided Amtrak with a lower price for the rate schedule. PPL St. 1, p. 5.

Prior to January 1, 2016, the Rate Schedule LPEP monthly distribution charge was $37,100 per month. PPL St. 1, p. 6. On March 31, 2015, PPL filed its 2015 distribution base rate case at Docket No. R-2015-2469275. PPL St. 1, p. 6. As part of its general rate increase, PPL proposed to increase the monthly distribution charge for Rate Schedule LPEP from $37,100.00 per month to $252,647.17 per month. PPL St. 1, p. 6.

The proposed increase in the Rate Schedule LPEP distribution charge was due to substantial capital upgrades required to the PPL facilities at the Conestoga Substation. PPL St. 1, p. 6. As filed in the 2015 base rate case, the upgrades needed at the Conestoga Substation were initially to be completed and placed in-service on or before Decem-ber 31, 2016, or before the end of the fully projected future test year. PPL St. 1, p. 6. The proposed $252,647.17 monthly distribution charge for Rate Schedule LPEP was to become effective on January 1, 2016. PPL St. 1, p. 6.

R.D. at 14-15.

Based on the foregoing, PPL has filed for a non-general rate increase in the context of a dispute over costs for upgrades to the Conestoga Substation that are required to provide reasonably continuous, reliable, and safe service to Amtrak. *See* I.O. at 3; PPL M.B. at 2.

The Conestoga Substation is the substation that connects Amtrak to the Safe Harbor Power Corporation’s (Safe Harbor) hydroelectric generation facility. Amtrak Brief at 1, n. 1. Safe Harbor and its corporate parent, BIF II Safe Harbor Holdings LLC, (BIF II) filed a petition to intervene in the proceedings, which petition was granted. R.D. at 9; I.O. at 7. BIF II purchases all the electric output from Safe Harbor’s generation facilities and delivers the electric power to the Conestoga Substation under a contract with an electricity supplier to supply power to Amtrak through Safe Harbor’s interconnection with the Conestoga Substation. *Id*.[[4]](#footnote-4)

By way of further background to the present controversy, PPL explains that Supplement No. 213 was filed as a result of a Commission-approved settlement reached in PPL’s base rate proceeding at Docket No. R-2015-2469275 (*2015 Rate Proceeding*). PPL maintains that the PP&L Industrial Customer Alliance (PPLICA) participated in the *2015 Rate Proceeding* and advocated on behalf of the interests of Amtrak. PPL M.B. at 2.

As part of the rate increase proposed in the *2015 Rate Proceeding*, PPL requested an increase in the monthly distribution charge for Rate Schedule LPEP. The *2015 Rate Proceeding* did not result in a litigated determination of a change to the monthly distribution charge, but resulted in a settlement, approved by Commission Order entered November 19, 2015.

Under the terms of the settlement reached in the *2015 Rate Proceeding*, PPL and Amtrak agreed to a reduction in the existing distribution charge for Rate Schedule LPEP, agreed to continue to negotiate in good faith concerning the final scope, timing, and costs of the upgrades needed for the Conestoga Substation, and agreed to reach a final agreement by no later than September 1, 2016. *See* R.D. at 15-16; PPL M.B. at 3. Under the settlement, both PPL and Amtrak acknowledged that PPL would submit a further tariff to recover costs for the upgrade of the Conestoga Substation if negotiations between the Parties did not result in a new agreement by September 1, 2016. PPL M.B. at 3.

PPL and Amtrak also entered into a separate agreement (Mutual Agreement) on September 16, 2015, as a result of the litigation in the *2015 Rate Proceeding*. Under the Mutual Agreement, Amtrak and PPL agreed to address upgrades at the Conestoga Substation separately and outside of Amtrak’s interests as a member of the PPLICA. *See* PPL M.B. at 4.

The Parties failed to reach agreement on the costs pertaining to the Conestoga Substation and PPL proceeded with the filing of Supplement No. 213. PPL has advised that, at the time PPL and Amtrak were negotiating the settlement rate in the *2015 Rate Proceeding*, PPL had incurred approximately $8.0 million in costs for the Conestoga Substation upgrade project through July 2015. R.D. at 16.

On December 19, 2016, Amtrak filed a Complaint with New Matter against Supplement No. 213. *See* No. C-2016-2580526. The Complaint alleged, *inter alia*, 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. In its New Matter, Amtrak asserted that, pursuant to the settlement in the *2015 Rate Proceeding*, on September 1, 2016, the LPEP monthly customer charge reverted to the rate of $37,100.00, per month – a charge in effect prior to January 1, 2016. Amtrak also stated in its New Matter that it should receive a refund of the payments for the period from January 1, 2016 to August 31, 2016. *See* R.D. 2; I.O. at 2.

We further note that the Amtrak Complaint raised certain factual disputes concerning the supply of transformer capacity to the Conestoga Substation. Amtrak asserted that it will own or will have supplied more than 70% of the transformer capacity for the Conestoga Substation. According to the Complaint, Amtrak already owns three of the seven transformers at the Conestoga Substation and plans to deliver 2 or more transformers to replace the older transformers owned by PPL. Based on the foregoing, Amtrak asserted that the proposed rate increase was unjust and unreasonable. *See* R.D. at 2.

On December 22, 2016, PPL Supplement No. 213 was suspended, pursuant to 66 Pa. C.S. §1308(b), from January 1, 2017 until June 1, 2017. The Commission subsequently 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 with New Matter. The Answer admitted that PPL’s filing proposes to increase the LPEP monthly customer charge from the current $126,323.59 to $319,671.00. I.O. at 2. In its Answer, PPL contested Amtrak’s representations of fact concerning ownership and/or supply of transformer capacity for the Conestoga Substation, control equipment, and circuit breakers. The Answer further contested Amtrak’s claim to entitlement to refunds.

In New Matter, PPL replied that Amtrak agreed that upgrades to the Conestoga Substation are required to provide continuous, reliable and safe service to Amtrak. PPL further stated that 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. R.D. at 3.

Also, on December 22, 2016, PPL filed preliminary objections to Amtrak’s Complaint. The preliminary objections reiterated the assertions in PPL’s Answer with New Matter. R.D. at 4; I.O. at 3.

On December 27, 2016, the Commission’s Bureau of Investigation and Enforcement (I&E) filed a notice of appearance in the proceedings.

On January 3, 2017, Amtrak filed an Answer to PPL’s Preliminary Objections, essentially restating the assertions in Amtrak’s Complaint with New Matter. Also on January 3, 2017, Amtrak filed a Petition requesting that the Commission suspend PPL’s filing, indefinitely. In support of its Petition, Amtrak alleged that it planned to purchase the Conestoga Substation and if it cannot purchase the Conestoga Substation, Amtrak alleged it would acquire the Conestoga Substation through its eminent domain authority under federal law. In the alternative, Amtrak requested that the Commission suspend PPL’s proceedings for the full nine months as authorized by 66 Pa. C.S. § 1308(b), until October 1, 2017. *See* R.D. at 5; I.O. at 4-5.

As summarized by ALJ Salapa, Amtrak’s position, summarized, was that:

 Once Amtrak acquired the Conestoga Substation . . . PPL would not own any distribution service property serving Amtrak or provide distribution service to Amtrak. If PPL did not own any distribution service property serving Amtrak or provide distribution service to Amtrak, there would be no basis to charge Amtrak for distribution services under the LPEP customer charge. Once it acquired the Conestoga

Substation, Amtrak would no longer be a customer of PPL and PPL’s filing would be moot.

*See* R.D. at 5.

PPL filed an Answer to Amtrak’s Petition in which it opposed the indefinite suspension of its filing. PPL agreed, however, that the Commission should suspend PPL’s filing for nine months. On January 11, 2017, Amtrak filed an Answer to PPL’s New Matter denying the assertions in PPL’s New Matter. I.O. at 5.[[5]](#footnote-5)

By Order dated January 18, 2017, ALJ Salapa sustained PPL’s preliminary objections, in part. ALJ Salapa struck the New Matter portion of Amtrak’s Complaint, without prejudice, because the New Matter was considered a Complaint against PPL’s existing LPEP rate, not its proposed LPEP rate. *See* I.O. at 6.

By Opinion and Order dated January 19, 2017, the Commission modified its December 22, 2016 Order and suspended PPL’s proposed supplement filing until October 1, 2017. R.D. at 6. A prehearing conference was conducted and a litigation and briefing schedule was determined. *Id*.

On March 15, 2017, Safe Harbor and BIF II filed a Petition to Intervene in this proceeding. PPL did not object to the Petition. Amtrak filed an Answer to the Petition to Intervene in which it denied that Safe Harbor and BIF II have a substantial or material interest in this proceeding. By Order dated April 5, 2017, ALJ Salapa granted the Petition.

On March 23, 2017, PPL filed a motion requesting that ALJ Salapa extend the litigation schedule established in a prior, prehearing order. This followed several motions regarding discovery disputes between the Parties. The motion alleged that the Parties had continued to discuss and analyze their respective positions. The motion further stated that the Parties believed that additional time would be helpful to evaluate the various positions and to allow them to engage in further settlement discussions. The motion stated that PPL would file a new tariff supplement suspending its filing until January 1, 2018. The motion explained that this extension would provide additional time to discuss settlement. R.D. at 8.

Based on the foregoing, ALJ Salapa granted the motion and issued Prehearing Order #4, dated March 24, 2017, which modified the litigation and briefing schedule.

On March 28, 2017, PPL filed Tariff Supplement No. 226 which further suspended the Rate Schedule LPEP rate increase proposed in Supplement No. 213 until January 1, 2018.

On May 11, 2017, Amtrak filed a Motion, pursuant to 52 Pa. Code § 5.103, to dismiss PPL Supplement No. 213. In support of its Motion, Amtrak alleged that on April 17, 2017, it initiated an eminent domain proceeding in the United States District Court, Eastern District of Pennsylvania, to acquire the certain facilities and equipment at the Conestoga Substation. *See* R.D. at 9; I.O. at 8. Amtrak argued that because PPL’s rate increase request is solely for the upgrades to the Conestoga Substation and PPL no longer owns the facility, there is no further basis for Commission jurisdiction. *Id*.

Significantly, Amtrak advised that, based on its filing of eminent domain proceedings with the District Court, title to the facilities and equipment, *i.e.* Conestoga Substation, vested in Amtrak in fee simple absolute. R.D. at 9.

Amtrak, through a letter dated May 23, 2017, advised the presiding ALJ of its intent not to submit rebuttal testimony in the rate proceeding. Amtrak advised the presiding ALJ of its intent to pursue its motion to dismiss the proceedings before the Commission and preserve its federal claims in the eminent domain docket with the District Court. *See* R.D. at 9-10; I.O. at 9. Amtrak attached to its letter a May 23, 2017 Order of the District Court. This District Court order, *inter alia*, prohibited PPL from making any capital improvements, upgrades, or alterations to the physical condition of the Conestoga Substation without the express consent of Amtrak, or its designee. *Id*.

On May 31, 2017, PPL filed an Answer to Amtrak’s Motion to Dismiss. In its Answer, PPL argued that the Commission has jurisdiction over this proceeding since the Commission has jurisdiction over public utility rates and services. I.O. at 9. PPL further argued that, until the District Court approved Amtrak’s condemnation and determined the terms under which possession of the Conestoga Substation would be given to Amtrak, PPL would continue to be in possession of, and operate, the Conestoga Substation. R.D. at 10.

On June 7, 2017, the ALJ issued the *June 2017 Interim Order*. ALJ Salapa denied the Amtrak Motion to Dismiss the rate proceeding.

On June 13, 2017, Amtrak filed the Petition seeking interlocutory Commission review in response to the *June 2017 Interim Order*. Amtrak proposed the following questions for interlocutory Commission review:

1. Whether the Administrative Law Judge’s (“ALJ”) June 7, 2017 Order dismissing Amtrak’s May 11, 2017 Motion to Dismiss erred by allowing the continuation of a proceeding addressing issues that are moot or unripe for review due to the uncertainty that PPL Electric Utilities Corporation (“PPL”) will upgrade the Conestoga Substation?
2. Whether the ALJ’s June 7, 2017 Order erred by concluding that the Commission’s consideration of compensation due by Amtrak to PPL after April 18, 2017, is not preempted by 49 U.S.C. § 24311(b), Fed. R. Civ. P. 71.1 and the federal court order?

*See* Petition at 1-2.

On June 16, 2017, PPL served updated direct testimony in the rate proceeding. The initial hearing was held as scheduled on June 19, 2017. Appearances of counsel for the Parties were duly noted. The hearing resulted in a transcript of 9 pages consisting of pages 26 through 35. R.D. at 11. At the hearing, the Parties stipulated to the admission of the previously served testimony and exhibits and waived cross-examination on that testimony. *Id*.

On June 23, 2017, Briefs in opposition and in support of Amtrak’s Petition for Interlocutory Review were filed. In addition to the Briefs filed in support of and in opposition to the Petition, Main Briefs of the Parties were filed in the rate proceeding docket (M.B. hereafter).[[6]](#footnote-6)

Additionally, we take official notice of the pleadings filed with the United States District Court, Eastern District of Pennsylvania. The proceeding before the District Court is, as noted, a federal eminent domain proceeding. *See*,PPL M.B. at 6, n. 1; *National Railroad Passenger Service Corporation v. 4.0446 Acres More or Less of Land and Fixtures & PPL Electric Utilities Corporation,* Civil Action No. 5: 17-cv-1752(JLS), Eastern District of Pennsylvania.[[7]](#footnote-7)

On June 19, 2017, Ronald J. Serafin filed a Formal Complaint with the Commission that has been docketed at No. C-2017-2611401. On July 5, 2017, PPL filed a certificate of satisfaction for the complaint filed by Mr. Serafin. R.D. at 11.

On July 18, 2017, PPL filed its Main Brief. On the same date, I&E filed a letter stating that it would not be filing a main brief in this proceeding.

As noted, Amtrak filed a notice of reservation in lieu of filing a Main Brief. The notice reserved the right to litigate in the District Court any issues related to the condemnation, transfer of possession and disposition of outstanding charges related to the Conestoga Substation.

On August 8, 2017, Amtrak filed a letter indicating that it was not filing a reply brief. In lieu of a reply brief, Amtrak filed a summary of the recent actions by the District Court.

The evidentiary record closed on August 8, 2017, as set forth in Prehearing Order #4, dated March 24, 2017. The record consists of the transcribed notes of testimony and the following exhibits: PPL Electric Statement No. 1, the direct testimony of Scott R. Koch, and PPL Electric Exhibits SRK-1 through SRK-9; PPL Electric Statement No. 2, the direct testimony of Jeffrey Byrnes, and PPL Electric Exhibits JB-1 through JB-3; PPL Electric Statement No. 3 (UPDATED), the direct testimony of Stephen J. Gelatko, and PPL Electric Exhibit SJG-1. *See* PPL M.B. at 7. PPL was the only Party to submit evidence in the proceeding.

On August 10, 2017, PPL filed a response to Amtrak’s August 8, 2017 letter. PPL’s response asserts that Amtrak’s letter is procedurally improper and seeks to have the Commission consider evidence not a part of the evidentiary record. PPL argued that the Commission should disregard Amtrak’s letter.

On August 23, 2017, the Recommended Decision of ALJ Salapa was issued. In the decision, ALJ Salapa concluded that PPL met its evidentiary burden of proof concerning its request for an increase in the distribution revenues received from Rate Schedule LPEP, although not in the amount originally requested. R.D. at 22. ALJ Salapa concluded:

The evidence outlined above supports PPL’s request for an increase in the distribution revenues received from Rate Schedule LPEP but not in the amount originally requested. PPL corrected an error in the amounts for intangible plant, land & land rights, meters and general plant used to calculate the Plant in Service shown on Exhibit 4 of its filing. PPL St. 1, p. 11. This correction results in a decrease to the total plant in service claim, from $27,151,387 to $26,667,000. PPL St. 1, p. 11, PPL Ex. SRK-7. This correction results in a decrease of the proposed increase in the Rate Schedule LPEP monthly distribution charge from $319,671.00 per month to $314,286.57 per month. PPL St. 1, p. 12, PPL Ex. SRK-7.

R.D. at 22.

 ALJ Salapa noted the failure of Amtrak to submit evidence in the rate proceeding and, on this basis, was unable to make any findings on its behalf. R.D. at 22.

The Amtrak Notice (in lieu of Exceptions) and PPL Reply were filed thereafter.

**III. Discussion**

We advise the Parties that any issue that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. [*Consolidated Rail Corp. v. Pa. PUC,* 625 A.2d 741 (Pa. Cmwlth. 1993);](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b625%20A.2d%20741%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=ad2b02d95c2a9216e83b92a3570d4785) *also see, generally,* [*University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=6&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b485%20A.2d%201217%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=9b1cc8319afd12440738bb82d74455ef)

**A. Amtrak Petition Seeking Interlocutory Commission Review**

Amtrak, in its Petition filed June 13, 2017, requested interlocutory review and answer to the following questions in response to the *June 2017 Interim Order*:

1. Whether the Administrative Law Judge’s (“ALJ”) June 7, 2017 Order dismissing Amtrak’s May 11, 2017 Motion to Dismiss erred by allowing the continuation of a proceeding addressing issues that are moot or unripe for review due to the uncertainty that PPL Electric Utilities Corporation (“PPL”) will upgrade the Conestoga Substation?

2. Whether the ALJ’s June 7, 2017 Order erred by concluding that the Commission’s consideration of compensation due by Amtrak to PPL after April 18, 2017, is

not preempted by 49 U.S.C. § 24311(b), Fed. R. Civ. P. 71.1 and the federal court order?

*See* Petition at 1-2.

 **1. Amtrak’s Position**

Amtrak takes the position that it has acquired lawful title to the property and equipment of the Conestoga Substation by operation of federal law pertaining to eminent domain and condemnation proceedings filed thereunder. Brief at 1. It is Amtrak’s position that the sole basis for PPL Supplement No. 213 (voluntarily extended by Supplement No. 226) no longer exists. Amtrak argues that issues addressed to the continuation of proceedings to establish rates for the Conestoga Substation are either moot, or unripe, and there is no longer a “case or controversy” that is justiciable before the Commission appertaining to PPL and Amtrak concerning the Conestoga Substation. *Id*.

Amtrak also relies upon and argues that the Supremacy Clause of the United States Constitution supports its position that a continuation of the proceeding before the Commission relating to the Conestoga Substation would create the risk of substantial prejudice to its rights arising under the federal condemnation statutory authority and result in judicial waste, the creation of conflicting fact records, and collateral estoppel (issue preclusion) or *res judicata* (claim preclusion) disputes regarding the outstanding charges related to the Conestoga Substation. Brief at 2.

According to Amtrak’s position, this Commission must engage in a determination of whether an approval of a tariff change would violate or conflict with an order of the federal District Court which order prevents PPL from making any alterations to the Conestoga Substation. Brief at 1; *See* Stipulation and [Proposed] Order, May 23, 2017; ECF #21, Civil Action No. 5:17:cv-01752JLS (E.D. Pa.). Pursuant to the May 23, 2017 Order of the District Court, PPL is prohibited from making any capital improvements, upgrades, or alterations of the physical conditions at the Conestoga Substation, including changes to the real property and equipment, without prior approval of Amtrak’s assigned and designated engineer.

Amtrak further relies on the doctrine of mootness in support of its position. Amtrak asserts that the chief inquiry in determining whether an issue has become moot is whether the court or agency will be able to grant effective relief. Brief at 5, citing *Consol. Pa. Coal Co. v. DEP*, 129 A.3d 28, 39 (Pa. Cmwlth. 2015). Amtrak cites cases standing for the proposition that Pennsylvania courts have found the mootness doctrine applicable when changes in facts or legal circumstances operate to remove the controversy at issue. *Id*.

Based on Amtrak’s ownership of the Conestoga Substation, Amtrak asserts that the Commission no longer has jurisdiction to decide Supplement No. 213, as that supplement is premised upon PPL’s ownership of, and improvements to (with proper legal authority), the Conestoga Substation. The ability to implement such improvements by PPL is now speculative. Brief at 6.

In addition to mootness, Amtrak further argues that the proceeding addressing costs associated with Supplement No. 213, if not declared moot, presents matters that are not ripe for Commission disposition. This is due to the legal inability of PPL to make capital improvements to the Conestoga Substation facility without the express consent of Amtrak’s assigned and designated engineer. Brief at 7-8.

Amtrak next alleges errors of fact and law regarding the *June 17 Interim Order.*  Amtrak argues that the ALJ’s conclusions that there are any costs that PPL would incur pursuant to Supplement No. 213 that can be decided in the rate case proceeding without coming into conflict with the jurisdiction of the District Court in the condemnation proceedings are legally and factually in error.

Amtrak incorporates by reference its eminent domain pleadings filed in the civil action before the District Court. These documents include: the Complaint for Condemnation; Declaration of Taking; Notice of Condemnation; deposit; and supporting documentation.

In its final section of its Brief, Amtrak identifies several federal cases involving statutory interpretation of the intent and reach of 49 U.S.C. § 24311; also § 24301(1)(1), which are relied upon by Amtrak for the argument that the terms, “outstanding charges related to the property” used in 49 U.S.C. § 24311(b)(2)(B), should be interpreted as broad enough to include proposed electric distribution rates and any costs or charges associated with the Conestoga Substation in Supplement No. 213. Brief at 9-13.

**2. PPL’s Position**

PPL takes the position that Amtrak is not entitled to the relief sought via the federal eminent domain laws. We take official notice of the position advanced by PPL in the federal eminent domain proceedings. According to PPL, Amtrak’s asserted public purpose for the condemnation is pretextual and the true purpose in condemning the Conestoga Substation (alternately, Subject Property) is to avoid PPL’s increased rates for the capital improvements required to upgrade the Conestoga Substation. *See* Civil Action No. 17-cv-01752;ECF #19, page 3 of 26.

PPL further argues that Amtrak also does not have the power to condemn the Conestoga Substation without first obtaining the Commission’s approval of the transfer under Section 1102 of the Code, 66 Pa. C.S § 1102, and without first obtaining the approval of the Federal Energy Regulatory Commission (FERC) under the provisions of the Federal Power Act, 16 U.S.C. § 824b. PPL additionally contends that Amtrak’s condemnation of the Subject Property is in breach of the September 15, 2015 Mutual Agreement that Amtrak entered into with PPL regarding the required upgrades to the Conestoga Substation. *Id*., at page 4 of 26.

In relation to PPL’s position in opposition to interlocutory review, PPL states that it has already incurred $9,338,200 of the total amount of $23,999,4431, in estimated costs for the Conestoga Substation upgrade project. *See* M.B. at 15. The total cost of the project was calculated by PPL using an industry standard, “progressive elaboration technique,” which is a technique used by PPL for all capital improvement projects. M.B. at 14.

In its Replies to the Amtrak Notice (in lieu of Exceptions), PPL objects that the issues raised in the notice are procedurally improper and untimely. PPL, essentially, takes the position that Amtrak was provided a full opportunity to submit evidence in this matter and declined to do so. For this reason, PPL relies upon an objection primarily grounded in an allegation that Amtrak has waived its right to contest any factual findings in the Recommended Decision.

**Disposition**

Pursuant to 52 Pa. Code § 5.303(a), on consideration of a petition for interlocutory review and answer to a material question, the Commission has the authority to either: (1) continue, revoke or grant a stay of proceedings if necessary to protect the substantial rights of the parties; (2) determine that the petition was improper and return the matter to the presiding officer; (3) decline to answer the question; or (4) answer the question.

Generally, petitions for interlocutory review are not favored. The preferred approach is to permit proceedings to move forward in the normal course to provide all Parties, the presiding officer, and the Commission, with a full opportunity to develop the record, brief the issues, and present arguments at each stage. *See* *Re: Phila. Gas Works Universal Service and Energy Conservation Plan*, Docket No. M-00072021 (Order entered October 23, 2009) at 3. Given the issuance of the Recommended Decision, we have before us the fully developed positions of the Parties and are able to analyze the questions raised by the Amtrak Petition in tandem with our review of the presiding ALJ’s recommendation that Supplement No. 213 be approved under the requirements of the Code.

 Because the presiding ALJ has issued a Recommended Decision on the merits of the PPL rate case under the Code, we conclude that the Amtrak Petition for Interlocutory Review of Material Questions is, thereby rendered moot. We shall, therefore, decline to answer the questions posed by the Amtrak Petition. 52 Pa. Code § 5.303(a)(3). By dismissing the Amtrak Petition as moot, we must now address the Recommended Decision approving PPL’s proposed rate increase.

**B. Recommended Decision Approving Supplement No. 213**

 ALJ Salapa found that PPL met its burden of proof that the proposed changes in rates of Supplement No. 213 were just and reasonable and should, subject to computation corrections, be placed in effect for service. The effective date would coincide with the completion of the Conestoga Substation upgrade project as proposed by PPL, and anticipated by November 2018. ALJ Salapa concluded:

The proposed increase in Rate Schedule LPEP would become effective on the date that the Conestoga Substation upgrade is completed and placed in service. PPL St. 1, p. 14, PPL M.B. 12. Customers under Rate Schedule LPEP will be given 30 days’ advance written notice before the effective date of the new distribution charge. PPL St. 1, p. 14. The Conestoga Substation project is scheduled to be completed by November 2018. PPL St. 3, p. 5.

\* \* \*

I recommend that the Commission issue an Opinion and Order directing PPL to file a tariff consistent with this decision. The tariff will become effective on the date that the Conestoga Substation upgrade is completed and placed in service. I further recommend that the Commission investigation at Docket No. R-2016-2569975 be closed, that the Amtrak complaint at Docket No. C-2016-2580526 be closed and that the complaint filed by Ronald J. Serafin at Docket No. C-2017-2611401 be closed.

R.D. at 22.

The pertinent Ordering Paragraph states the following:

2. That PPL Electric Utilities Corporation shall file a corrected tariff supplement to become effective on the date that the Conestoga Substation upgrade is completed and placed in service, consistent with the calculation set forth in PPL Ex. SRK-7.

R.D. at 23.

As noted, Amtrak did not file Exceptions to the Recommended Decision, but has relied upon its reservation of rights under federal law and its arguments raised in its Petition, Briefs, and advisory letters.

**Disposition**

On consideration of the positions of PPL and Amtrak, we shall modify the ALJ recommendation. The Recommended Decision is affirmed, in part, to confirm the jurisdiction of the Commission to address the proposed rate issues presented at the time of the filing in this proceeding. However, on review of the purposes of the costs that are proposed for recovery through Supplement No. 213, the record, and on taking official notice of the proceedings before the District Court, we conclude that the doctrine of “ripeness” counsels against adopting the Recommended Decision at this time. Based on the foregoing, we shall direct that the Recommended Decision be affirmed in part, and reversed in part, consistent with the discussion in this Opinion and Order, and that PPL’s proposed request to increase rates be dismissed without prejudice. Also, we shall direct that Amtrak’s Formal Complaint be dismissed, without prejudice.

Ripeness is a prerequisite for judicial review. And, an actual case and controversy must exist at every stage of the judicial [adjudicatory] process. *See* *Treski et al. v. Kemper National Insurance Companies*, 674 A.2d 1106 (Pa. Super. 1996) and citations. While PPL has filed a rate case pursuant to the Code regarding the Conestoga Substation, title to the substation has transferred to Amtrak, under federal law. Also, at the time of our consideration of the rate increase proposed by Supplement No. 213, the District Court’s May 23, 2017 order prohibited PPL from carrying out any new upgrades to the substation without Amtrak’s prior approval. The PPL proposed upgrades are, at this time prohibited, and represent most of the costs associated with the rate increase.

If Amtrak prevails in the federal eminent domain proceeding, PPL may never implement such work, and will, therefore, not need to recover any future costs associated with the Conestoga Substation through “rates” under the Code. ALJ Salapa, acknowledging the impact of the federal court proceeding, recommended that PPL be allowed to file a tariff or tariff supplement that would be effective for the costs for upgrades to the Conestoga Substation only after the Conestoga Substation upgrade work was completed. Consequently, PPL would be able to litigate the issue of what it is owed by Amtrak for the taking of the substation and for PPL’s recovery of, approximately, $9 million in costs associated with the completed upgrades, before the District Court.

Alternatively, 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 interest 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.

Given our determinations concerning ripeness, it is not necessary to address the issue of whether the Commission is preempted by the District Court condemnation proceeding. This proceeding 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. ALJ Salapa, while not discussing the doctrine of “used and useful,” *per se*, alluded to the concept when he analyzed the nature of the costs incurred by PPL and concluded that a Commission determination of rates for Rate Schedule LPEP could involve costs that would not conflict with the exclusive jurisdiction of the District Court to engage in a valuation of the property taken by eminent domain, *i.e.*, the Conestoga Substation.[[8]](#footnote-8)

The intersection of Amtrak’s federal court proceeding and the PPL rate case present several 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 the Conestoga Substation? Also, is PPL’s proposed rate increase preempted by the pending federal proceeding under the doctrine of conflict preemption? We need not reach these issues in the present case.

**C. Safety and Reliability Concerns**

PPL has cited reliability and safety concerns at the Conestoga Substation, both to the public and to the agents and employees at the Conestoga Substation. PPL has represented that the Conestoga Substation requires a complete rebuild to operate safely and reliably. PPL has provided uncontroverted testimony that Amtrak agrees with these assertions concerning these matters. Given that Amtrak has obtained title to the Conestoga Substation, and has persuaded the District Court to prohibit PPL from making any capital improvements without the consent of Amtrak designees, 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 record contains little, if any, information about Amtrak’s technical fitness to operate, manage, and carry out its duties as the owner of this substation while the federal proceeding remains pending. We note that Amtrak is not a certificated “public utility” under the jurisdiction and authority of this Commission. Based on the foregoing, we would urge the Parties to resolve the disputes concerning the Conestoga Substation as quickly as possible, whether through settlement or pursuant to an expedited litigation schedule, so that the safe and reliable provision of rail service to the public is not compromised and/or placed in jeopardy.

**IV. Conclusion**

For the reasons set forth above, we decline to answer the material questions raised in the Amtrak Petition based on a determination of mootness, consistent with the discussion contained in this Opinion and Order. Furthermore, we shall affirm in part and reverse in part, the Recommended Decision of ALJ Salapa; **THEREFORE,**

**IT IS ORDERED:**

1. That the Petition for Interlocutory Review of Material Questions filed by the National Railroad Passenger Corporation is, hereby, denied as moot, consistent with the discussion in this Opinion and Order and the material questions are declined.

2. That the August 23, 2017 Recommended Decision of Administrative Law Judge David A. Salapa at Docket No. R-2016-2569975 is affirmed, in part, and reversed, in part, consistent with this Opinion and Order.

3. That Supplement No. 213 to Tariff-Electric Pa. P.U.C. No. 201, which was filed at Docket No. R-2016-2569975 by PPL Electric Utilities Corporation on October 5, 2016, to become effective on January 1, 2017, and subsequently voluntarily postponed until January 1, 2018, is dismissed without prejudice, consistent with the discussion in this Opinion and Order.

4. That the Formal Complaint at Docket No. C-2016-2580526 is dismissed, without prejudice, consistent with this Opinion and Order.

5. That the Formal Complaint filed by Ronald J. Serafin in this proceeding at Docket No. C-2017-2611401 shall be terminated and marked closed.

6. That PPL Electric Utilities Corporation 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.

7. That this proceeding shall be marked closed.

 **BY THE COMMISSION:**



Rosemary Chiavetta

 Secretary

(SEAL)

ORDER ADOPTED: November 8, 2017

ORDER ENTERED: December 6, 2017

1. By Secretarial Letter of June 16, 2017, we waived the thirty-day period for consideration of petitions seeking interlocutory Commission review pursuant to 52 Pa. Code § 5.303. *See* 52 Pa. Code § 1.2(c); *also,* *C.S. Warthman Funeral Home, et al. v. GTE North, Inc.*, Docket No. C-00924416 (Order entered June 4, 1993). [↑](#footnote-ref-1)
2. A “non-general” rate proceeding under Section 1308(b) of the Code is to distinguish the filing from a “general” rate increase under Section 1308(d), which is defined, in pertinent part, as “. . . general rate increase means a tariff filing which affects more than 5% of the customers and amounts to in excess of 3% of the total gross annual intrastate operating revenues of the public utility.” [↑](#footnote-ref-2)
3. PPL, in its M.B. at 2, cites the increase as $314,286.57. [↑](#footnote-ref-3)
4. The Conestoga Substation receives 13.2 kV power from Safe Harbor Water Power Company at 25 Hz via three (3) transmission lines owned by Safe Harbor Water Power Company. PPL St. 2, p. 3. The 25 Hz power is then “stepped up” at the Conestoga Substation from 13.2 kV to 138 kV and delivered to Amtrak through seven (7) transmission lines. Amtrak owns three (3) of the transmission lines: one extends from the Conestoga Substation to an Amtrak substation in Royalton, Pennsylvania; and two extend from the Conestoga Substation to an Amtrak substation in Parkesburg, Pennsylvania. PPL owns the remaining four transmission lines that extend, approximately, 17.9 miles between the Conestoga Substation and the Pennsylvania/Maryland border. These four transmission lines then continue from the Pennsylvania/Maryland border to an Amtrak substation in Perryville, Maryland as Baltimore Gas and Electric-owned transmission lines. *See* R.D. at 19. [↑](#footnote-ref-4)
5. In anticipation that the Commission would address Amtrak’s Petition at its January 19, 2017 Public Meeting, the Parties requested a further Prehearing Conference. *See* N.T. 6-7. By notice dated January 9, 2017, the Commission scheduled a further Prehearing Conference for this matter on January 20, 2017. [↑](#footnote-ref-5)
6. Amtrak, consistent with its position concerning the Recommended Decision, did not file a Main Brief in the rate proceeding docket. In lieu thereof, Amtrak submitted a Notice of Reservation Pursuant to *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964), *et al*. [↑](#footnote-ref-6)
7. “JLS” are the initials of the presiding District Court Judge, [Jeffrey L. Schmehl](http://www.paed.uscourts.gov/judges-info/district-court-judges/jeffrey-l-schmehl). [↑](#footnote-ref-7)
8. At such time as Amtrak complied with the statutory requirements under the federal eminent domain law, *i.e.,* declaration of taking and deposit of a sum with the federal court, title in the Conestoga Substation and certain other “facilities” as set forth in the declaration of taking, vested with Amtrak. Consequently, as of the issuance of the August 23, 2017 Recommended Decision, there is a considerable issue as to whether the Conestoga Substation is property that is “used and useful” in the rendition of public service by any ratepayer of PPL. *See Pa. Elec. Co. v. Pa. PUC*, 509 Pa. 324, 502 A.2d 130 (1985); [*Scranton v. Scranton Steam Heat Co.*, 405 Pa. 397,176 A.2d 86 (1961)](http://www.lexis.com/research/buttonTFLink?_m=cba790022de990e2b7d39a27e5767a10&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b509%20Pa.%20324%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=24&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b405%20Pa.%20397%2c%20401%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=3&_startdoc=1&wchp=dGLzVzt-zSkAA&_md5=2bfb7d2f75b8bb813fd63eb3014df79f); [*Denver Union Stock Yard Co. v. U.S.*, 304 U.S. 470, 58 S. Ct. 990, 82 L.Ed. 1469 (1938)](http://www.lexis.com/research/buttonTFLink?_m=cba790022de990e2b7d39a27e5767a10&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b509%20Pa.%20324%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=25&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b304%20U.S.%20470%2c%20475%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=3&_startdoc=1&wchp=dGLzVzt-zSkAA&_md5=fd74358319ff712ab5a39719b448f825); *also* PPL Brief, at 11, n. 8. [↑](#footnote-ref-8)