



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P. O. BOX 3265, HARRISBURG, Pa. 17120

January 21, 1986

IN REPLY PLEASE  
REFER TO OUR FILE

R-850152

To All Parties

Pennsylvania Public Utility Commission  
v.  
Philadelphia Electric Company

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To Whom It May Concern:

This is to advise you that an Order has been adopted by the Commission in public meeting held January 17, 1986.

A Copy of an Order has been enclosed for your records.

Very truly yours,

Jerry Rich, Secretary

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Encls.  
Cert. Mail  
Law Bureau  
Bureau of Rates  
Mr. Patrick  
Office of ALJ

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DOCKETED  
JAN 24 1986

PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17120

Public Meeting held January 17, 1986

Commissioners Present:

Linda C. Taliaferro, Chairman  
Frank Fischl  
Bill Shane

Pennsylvania Public Utility Commission  
v.  
Philadelphia Electric Company

R-850152

OPINION AND ORDER

BY THE COMMISSION:

Before the Commission for consideration is a Petition filed by Philadelphia Electric Company (PECO) on December 26, 1985, pursuant to Section 5.302 of the Commission's Regulations, 52 Pa. Code §5.302, which seeks Commission review and answer of a material question which has arisen as a result of a ruling by Administrative Law Judge (ALJ) Joseph P. Matuschak granting a Motion in Limine filed by Commission Trial Staff (Trial Staff). The ALJ's ruling would exclude the introduction in this proceeding of certain PECO testimony regarding the prudence of PECO in delaying construction in 1976 and 1978 of Limerick Generating Unit No. 1.

The material question for which PECO seeks Commission review and answer is the following:

Whether, [contrary to the determination of the Pennsylvania Supreme Court in Pa. P.U.C. v. Philadelphia Electric Company, 501 Pa. 153, 460 A.2d 734 (1983),] the [criticism of] findings concerning the Company's 1976 and 1978 deferral announcements in the 1980 Limerick Investigation constituted a final adjudication which precludes the submission of any evidence on the prudence of such

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action in the current proceeding, other than quantification of the consequences thereof.

### Brief History of Proceedings

On September 27, 1985, PECO filed with the Commission Supplement No. 15 to its Tariff Electric-Pa. P.U.C. No. 26, designed to produce an increase in annual electric revenues, in a gross amount of approximately \$949 million based on estimated sales for a future test year ending June 30, 1986. A major issue in the instant proceeding is the proposed inclusion in rates of the capital and operating costs of the Limerick Nuclear Generating Station Unit No. 1 and 100% of Common Plant.

In the Motion in Limine filed on November 20, 1985, Trial Staff requested ALJ Matuschak to make a preliminary determination of the nature of the evidence that may be admitted into the record regarding the 1976 and 1978 delays in the construction of the subject generating unit.

ALJ Matuschak granted Trial Staff's Motion in Limine which thereby would exclude certain PECO testimony, in the instant proceeding, regarding the prudence of the 1976 and 1978 construction delays.

### Trial Staff Argument

In support of its Motion, Trial Staff argued:

1. The Commission has previously considered the prudence of the Company's construction of the Limerick Station in Re Limerick Nuclear Generating Station, 56 Pa. P.U.C. 47 (1982) aff'd 501 Pa. 153, 460 A.2d 734 (1983); and that among the issues considered by the Commission was the prudence of the Company's decision to delay construction of the Limerick Station in 1976 and 1978.

2. The Commission stated, in the prior proceeding "[W]e are of the opinion that PECO management did not exercise judgment sufficient to meet our reasonable man standard in delaying construction at Limerick in 1976, and 1978." (56 Pa. P.U.C. at 61).

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1/ The bracketed words have been deleted from the question framed by PECO. Our restatement of the material question more accurately reflects the question before us for review.

3. The Commission refused to quantify the cost of the delays to the ratepayers since it had not, at that point, been presented with a claim for recovery of any costs associated with the construction of the plants.

4. The Commission's determination concerning the reasonableness of the 1976 and 1978 Limerick construction delays was not set aside, annulled or modified by the Pennsylvania Supreme Court in its affirmance of the Commission's Limerick Investigation Order.<sup>2/</sup>

5. The Commission's prior finding of the unreasonable nature of the 1976 and 1978 Limerick construction delays meets the requirements of Section 316 of the Public Utility Code<sup>3/</sup>, and therefore is prima facie evidence of the facts found regarding the prudence of the 1976 and 1978 construction delays, and is therefore conclusive upon the parties to the present proceeding.

6. All of the parties in the prior Limerick investigation received a full and fair opportunity to present evidence directed to the issue of whether PECO was prudent

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<sup>2/</sup> The Court described the Commission's delay in construction conclusion in footnote 7 to its Opinion, where it stated:

Further, the opinion accompanying the PUC's order contained criticism, of an advisory nature, directed at PECO's decision in 1976 and 1978 to defer completion of the Limerick facilities. Such mere criticism, however, does not constitute an adjudication and cannot be reviewed on appeal.

501 Pa. at 161, 460 A.2d at 739.

<sup>3/</sup> Section 316 of the Public Utility Code, 66 Pa. C.S. §316, provides that:

Whenever the commission shall make any rule, regulation, finding, determination or order, the same shall be prima facie evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review. (Emphasis added).

(66 Pa. C.S. §316).

when it decided to delay Limerick construction in 1976 and 1978, and no useful purpose would be served by relitigating this issue in the present case.

7. Only the quantification of the effects of the 1976 and 1978 construction delays should be examined in the instant proceeding.

#### PECO Argument

PECO contends that the material question, supra, for which it seeks Commission review should be answered in the negative for, inter alia, the following reasons:

1. PECO raised this issue in the appellate proceedings which followed the 1980 Limerick Investigation in order to avoid any res judicata or other conclusive status for the imprudence discussion and was told by the Pennsylvania Supreme Court that the PUC opinion was "advisory" and that such "mere criticism" did not constitute an adjudication and could not be reviewed on appeal.

2. To make the PUC's imprudence "criticism"<sup>4/</sup> a binding finding of fact in this case in the face of the Supreme Court's decision causes substantial prejudice to PECO whose due process rights are violated by (a) ruling that a "criticism" it could not appeal is final and binding, and (b) excluding evidence which forms the basis for a critical PECO position in this proceeding developed in reliance upon the Commission's prior statements and the Supreme Court decision.

3. Exclusion of major evidence on the prudence of the 1976 and 1978 Limerick deferral announcements will prejudice PECO by creating an incomplete record, certain to be reversed on appeal, in the opinion of PECO, with the need to add the excluded evidence at a later date, contrary to the orderly conduct of proceedings in which rates are to be established for the future.

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<sup>4/</sup> The term "criticism" is taken from the Pennsylvania Supreme Court's footnote 7, supra, not from the Commission's prior Opinion and Order which contained findings directed to the issue of whether PECO was prudent when it decided to delay construction in 1976 and 1978, and which Opinion and Order was affirmed by the Court.

## Discussion

The material question concerning which PECO seeks this Commission's answer thereto comes before us pursuant to the Interlocutory Review sections of our Rules and Regulations, specifically Sections 5.301 and 5.302, 52 Pa. Code §5.301 and §5.302, which provide in pertinent part:

### Subchapter C. INTERLOCUTORY REVIEW

#### § 5.301. Interlocutory review generally.

(a) The Commission will not permit interlocutory review of rulings of presiding officers, made during the course of proceedings, except upon petition alleging extraordinary circumstances and as specified in this subchapter.

(b) Subsection (a) supercedes 1 Pa. Code §35.190 (relating to appeals to agency head from rulings of presiding officers).

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

(a) During the course of a proceeding, a participant may submit a timely petition to the Secretary requesting the Commission's review and answer to a material question which has arisen or is likely to arise. The petition shall be in writing with copies served on all participants and the presiding officer and shall state, in not more than one page, the question to be answered and the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding. (Emphasis added).

We will review the material question since we view the issue raised by the question as constituting extraordinary circumstances which will expedite the conduct of the proceeding when resolved.

Before discussing the material question presented for review, we consider it appropriate to state the entire ruling of the ALJ on the Motion in Limine filed by Trial Staff as set forth in ALJ Matuschak's Interim Order of December 20, 1985:

We render the following Interim Order:

It is ordered, first, that the Motion in Limine by Trial Staff that we make a preliminary determination of the nature of the evidence that may be admitted into the record in this rate proceeding at R-850152 is hereby granted.

Two, that the record at I-80100341, insofar as it relates to the decisions of Philadelphia Electric Company to initially construct the Limerick nuclear generating station and to delay construction of Limerick in 1974, 1976 and 1978, are incorporated by reference into the record of this proceeding.

Three, that Trial Staff's motion that we determine that the Commission's prior findings at I-80100341 that Philadelphia Electric Company's decisions in 1976 and 1978 to delay Limerick construction were unreasonable are conclusive upon the parties in this proceeding is hereby granted.

Four, that sua sponte, we further determine that the Commission's prior findings at I-80100341 that Philadelphia Electric Company's decisions initially to construct the Limerick nuclear generating station and to delay the Limerick construction in 1974 were reasonable are likewise conclusive upon the parties in this proceeding.

Five, that the evidence heretofore admitted in this proceeding insofar as it relates to the reasonableness or unreasonableness of Philadelphia Electric Company's initial decision to construct the Limerick nuclear generating station and its decisions to delay Limerick construction in 1974, 1976 and 1978, is hereby stricken and that further evidence relating thereto shall not be admissible in this proceeding. (Tr. 1374-1375).

Our Opinion and Order in Limerick Nuclear Generating Station Investigation, Docket No. I-80100341 (August 27, 1982) set forth the following discussion and findings regarding the 1976 and 1978 construction delays or extensions:

Turning to the 1976 and 1978 extensions, we note that at the time of these decisions, PECO had two and four years of additional information indicating that the decline in demand was continuing, and, despite increases in rates approved by us, further deterioration of PECO's financial condition had occurred.

The ALJ has found that the 1976 postponement was "made without careful analysis of the impact of such delay on ratepayers" and that "[c]onsumers should not be expected to pay for delay which results [from] a conscious management decision to protect its own interests without adequate weight being given to its ratepayers' interest." To the ALJ's finding of imprudence PECO has excepted, arguing that the Initial Decision fails to provide an assessment of the relative economic benefits and detriments to ratepayers and shareholders of earlier versus later plant completion, in addition to disregarding the evidence of PECO's precarious financial condition during the 1974-80 period and evidence that the reduced load growth permitted delaying completion of Limerick without threatening service reliability.

It appears, from the record before us, that PECO's 1976 and 1978 construction delays were caused by PECO's financial difficulties, which in turn were caused by its ambitious construction program and its ever decreasing load growth; conditions similar to those causing the 1974 delay. While it is true that PECO's financial condition deteriorated from its 1974 levels, we are of the opinion that, at the least, PECO's ambitious construction plans exacerbated its financial difficulties. We are convinced that PECO's financial difficulties, proffered as a reason for delaying construction, would have been less acute if construction at Limerick had been terminated.

PECO now argues that one of the prime considerations in delaying construction was a continued reduction in PECO's load growth. Although PECO's spring 1976 load forecast projected a lower load growth than earlier anticipated, it appears that even this projection was overly optimistic. We note that in PECO's 1977-78 rate proceeding, PECO reduced its forecasted growth rate from 5% to 3%. Pennsylvania Public Utility Commission v. Philadelphia Electric Company, R.I.D., 438 (February 5, 1979). Apparently, this 1978 reduction was an acknowledgement that the trend evidenced in 1974 was continuing. Despite this now obvious trend, PECO delayed construction in the hope that load would improve.

PECO's final argument, that the relative economic benefits and detriments to ratepayers and shareholders of earlier versus later plant completion favored delay, is unpersuasive. We find this argument curious in light of the fact that PECO stresses that, because load growth has declined, the Limerick Units' main purpose is to replace oil fired generating capacity. If Limerick can be economically justified when compared to a combination of alternative sources of power and the retirement of oil fired plants, which by now have been extensively depreciated, the relative benefit to current ratepayers would have been greater if the oil capacity, and their associated costs, had been retired earlier by way of compressing rather than expanding the construction schedule. Further, as the nation as a whole experienced a period of double digit inflation and rising interest rates, delaying the necessary financing did and will continue to increase the ultimate costs of the plant financing.

Considering the foregoing, we are of the opinion that PECO management did not exercise judgment sufficient to meet our reasonable man standard in delaying construction at Limerick in 1976 and 1978. Having so found, we are requested by Staff and the OCA to quantify the cost of the delay to ratepayers. We are of the opinion that to do so at

this time is inappropriate. We have not been presented, in this proceeding, with a claim for recovery of any of the costs associated with the construction of the plants. Consequently, we can make no adjustment to any claim. Further, should PECO sell all or part of the Limerick plant or its capacity to other utilities, the deduction of all or part of the costs of delay from PECO's claim, if any, would be materially affected. We therefore find it unnecessary to quantify, at this time and in this proceeding, the costs associated with the 1976 and 1978 delays. (Emphasis added).

ALJ Matuschak concluded that this Commission recognized in the earlier Limerick investigation that the construction delay issues were of such magnitude that we could not, because of time constraints, properly address these issues solely in a rate proceeding; and it was therefore necessary to hold a separate investigation in order to obtain facts regarding the construction delays. The ALJ has correctly recognized our concern, expressed at that time, which was that there would be insufficient time during a rate investigation to obtain all the facts in an orderly and expeditious manner, regarding, inter alia, the 1976 and 1978 construction delays.

Our agreement with the ALJ's interpretation of our intent to bifurcate the construction delay issues is best evidenced by our incorporation into this Opinion and Order of his conclusion in this regard:

It is apparent that the Commission, recognizing that these issues could not be adequately addressed with all the other issues involved in a rate case, when PECO would seek to include Limerick in rate base, as a pragmatic procedure, directed that such issues be determined in an independent proceeding in the nature of a bifurcation or as an ancillary or in-aid aspect of this rate case.

These issues were addressed in the Limerick proceeding in an open and full hearing in which Trial Staff and all the other parties, including PECO, had a full opportunity to develop the record on this (sic) issue.

In the Limerick proceeding, the Commission found that the initial decision of PECO to construct Limerick and the decision to delay the in-service dates of Limerick in 1974 were prudent; and that PECO's decisions in 1976 and 1978 to further delay the in-service dates of Limerick were imprudent or unreasonable. (Tr. 1372-1373).

We will now address the question of whether Section 316 of the Public Utility Code, 66 Pa. C.S. §316, is pertinent to the issue before us for consideration. Trial Staff contends that Section 316 supports its position that our findings in the prior Limerick investigation regarding the prudence of PECO's decision to delay construction of the generating unit in 1976 and 1978 are binding upon the parties in the instant proceeding because such findings were not set aside, annulled or modified on judicial review.

In our view, Section 316 clearly provides that whenever the Commission makes any finding, determination or order, that finding shall be prima facie evidence of the facts found and shall remain conclusive upon all parties affected thereby unless set aside, annulled or modified on judicial review. No reasoned interpretation of this Section would lead to the conclusion that such a finding would not remain conclusive unless or until appealed. Such findings are conclusive on the parties unless set aside, annulled or modified on judicial review. The Pennsylvania Supreme Court affirmed the Commission's Opinion and Order in the Limerick investigation at 501 Pa. 153, 460 A.2d 734 (1983). The Court did not set aside, annul or modify any findings, including the imprudence finding concerning the 1976 and 1978 construction delays.

The Supreme Court's mention of the subject findings regarding the prudence of the 1976 and 1978 construction delays was, at most, mere dicta. We interpret the Court's language as merely a recognition by the Court that since no rate claims had been made for the Limerick Generating Unit No. 1 and that since the Commission could not quantify the rate aspects of such a claim at that time, the matter was not appealable. However, regardless of our interpretation of footnote 7, it is clear that the Court did not modify the subject findings, and it did not adjudicate any issue regarding the findings. Simply stated, it is as if the findings issue had never been before the Court. Therefore the factual findings are conclusive on the parties because they have not been disturbed on appeal.

Section 316, however, provides that the Commission's findings or determinations shall be prima facie evidence of the facts found and shall remain conclusive upon all parties; therefore, the factual findings of the Commission are conclusive. Our ultimate conclusion in the prior Limerick investigation that PECO was imprudent in deciding to delay construction of the generating unit in 1976 and 1978 was a legal conclusion, as distinguished from a factual finding. This ultimate legal conclusion precludes litigation of the issue of PECO's prudence in the instant rate proceeding under the doctrine of res. judicata See Philadelphia Electric Company v. Pa. P.U.C., 61 Pa. Commonwealth Court 325, 433 A.2d 620 (1981), or collateral estoppel See Edward H. Fincher, Appellant v. The Township of Middlesex et al., Appelles., 64 Pa. Commonwealth Ct. 355, 439 A.2d 1353 (1982).

### Conclusion


In accordance with our prior discussion, and after reviewing the various pleadings of the parties, including briefs, and the pertinent transcript sections, we conclude that: (i) the material question presented is properly before the Commission for review; (ii) the material question is answered in the positive, and (iii) the ruling of ALJ Matuschak on Trial Staff's Motion in Limine is affirmed; THEREFORE,

#### IT IS ORDERED:

1. That the material question for which Philadelphia Electric Company seeks Commission review, pursuant to 52 Pa. Code §5.302, is answered in the affirmative.
2. That the ruling of Administrative Law Judge Joseph P. Matuschak on the Motion in Limine filed by Trial Staff is affirmed.

3. That the Petition of Philadelphia Electric Company for a stay of the Ruling of Administrative Law Judge Joseph P. Matuschak is denied.

BY THE COMMISSION,



Jerry Rich  
Secretary

(SEAL)

ORDER ADOPTED: January 17, 1986

ORDER ENTERED: January 21, 1986.