

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120

Public Meeting held July 24, 1986

Commissioners Present:

Linda C. Taliaferro, Chairman
Frank Fischl
Bill Shane, dissenting (Opinion Attached)

Pennsylvania Public Utility Commis-
sion, et al.

v.

Philadelphia Electric Company

R-850152
R-850152C001 -
R-850152C0014

OPINION AND ORDER

BY THE COMMISSION:

Before the Commission are two Petitions for Reconsideration and two Supplemental Petitions for Reconsideration which request that the Commission reconsider a portion of its Order entered June 27, 1986, at Docket No. R-850152, et al.

On June 27, 1986 the Office of Consumer Advocate ("OCA") filed a Petition for Reconsideration in which it asserts that the Commission erred by not finding that, with the placing in service of the Limerick 1 nuclear generating station, the Philadelphia Electric Company ("PECO") has excess generating capacity. The OCA filed a Supplemental Petition for Reconsideration on July 10, 1986, which repeats, in part, the arguments set forth in its original Petition, but which also asserts that recently enacted legislation, specifically Section 1323 of the Public Utility Code ("the

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Code") 66 Pa. C.S. §1323,^{1/} requires the Commission to reconsider the issue of whether the addition of Limerick 1 to PECO's rate base results in customers being charged for excess capacity.

On July 15, 1986, the Governor's Energy Council ("GEC") filed a Petition for Reconsideration, and on July 16, 1986 the Utility Users Committee/University of Pennsylvania ("UUC/UP") filed a Supplemental Petition for Reconsideration. Both the GEC Petition and the UUC/UP Supplemental Petition assert that Section 1323 of the Code requires the Commission to reconsider its findings regarding the issue of excess capacity.^{2/}

PECO filed an Answer to the OCA's Petition on July 7, 1986. Answers to both the GEC Petition and the OCA's Supplemental Petition were filed by PECO on July 21, 1986. In its Answers, PECO asks the Commission to deny the OCA and GEC requests for reconsideration of the excess capacity issue.

On July 17, 1986, Commission Trial Staff filed Comments to the OCA's Supplemental Petition which supports the reasoning and the request of the OCA.

1/ On July 10, 1986, Governor Dick Thornburg signed into law the amendments to the Public Utility Code contained in House Bill No. 1639.

Section 19 of the Code amendments provides that "66 Pa. C.S. §1323 (relating to procedures for new electric generating capacity) shall be applicable to all cases pending before the Commission." (Emphasis added)

2/ In its Supplemental Petition the UUC/UP adopts, by reference, the position set forth in Paragraphs 1-14 of the OCA's Supplemental Petition for Reconsideration.

History of the Proceeding

1. On September 27, 1985, PECO filed Supplement No. 15 to its Tariff Electric-Pa. P.U.C. No. 26 to become effective November 27, 1985. The Supplement was designed to produce an annual base rate increase of \$681,760,000, based upon an adjusted level of operations using a historic test year ended June 30, 1985, and a future test year ending June 30, 1986.

2. By Order entered November 1, 1985, the Commission allowed Supplement No. 15 to be suspended by operation of law, pursuant to Section 1308 of the Public Utility Code, 66 Pa. C.S. §1308, until June 27, 1986, and instituted an investigation, at Docket No. R-850152, into the lawfulness, justness and reasonableness of the proposed rates and of existing rates.

3. By Order entered June 27, 1986 (the "Order") the Commission authorized PECO to file a tariff supplement increasing annual electric operating revenues by approximately \$351 million, to be phased in over a three year period.

4. At pages 34 through 37 of the Order the Commission considered and rejected various rate base adjustments proposed by various parties for alleged excess generating capacity relating to the placing in service of PECO's Limerick 1 generating station.

Discussion

In the case of Philip Duick, et al. v. Pennsylvania Gas and Water Company, 56 Pa. P.U.C. 553, the Commission outlined the criteria which should apply in deciding whether or not to grant a petition for reconsideration.

A petition for reconsideration, under the provisions of 66 Pa. C.S. §703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. In this regard we agree with the Court in the Pennsylvania Railroad Company case, wherein it was said that "[p]arties..., cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them...." What we expect to see raised in such petitions are new and novel arguments not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission. Absent such matters being presented, we consider it unlikely that a party will succeed in persuading us that our initial decision on a matter or issue was either unwise or in error.

Id. at 559.

The basis for the OCA's Petition for Reconsideration is its contention that the Commission, in considering the issue of excess capacity, either overlooked or did not address the issue of net economic benefits to be derived from the operation of Limerick 1. According to the OCA, the matter of the economic costs and benefits of Limerick 1:

is a critically important issue which must be decided by the Commission before it can be properly determined whether all or part of Limerick 1 constitutes excess generating capacity.

(Petition, page 2)

On its face, our Order demonstrates that we did address and, consequently, did not overlook the issue of Limerick 1 economic costs and benefits in our consideration of the excess capacity issue. We find that the the OCA has

not- raised any new or novel arguments in the instant Petition, which were not previously heard or considered, and which would justify a different disposition of that issue.

We noted earlier that the OCA and UUC/UP in their Supplemental Petitions for Reconsideration, and the GEC in its Petition for Reconsideration, assert that the recently enacted Section 1323 of the Code requires the Commission to reconsider the issue of excess capacity in this proceeding. The Petitioners contend that, although an Opinion and Order was entered on June 27, 1986, it nevertheless is necessary for us to apply the statutory provisions contained in Section 1323 since, in their opinion, the case at Docket No. R-850152 remains "pending" before the Commission.

The OCA alleges the following in support of its claim that the rate case remains pending before the Commission:

1. This matter was pending before the Commission as a result of the OCA having petitioned for reconsideration on June 27, 1986, and the UUC/UP having petitioned for reconsideration on July 1, 1986.
2. A case is considered to be "pending" until its final disposition on appeal.
3. Since this case was pending and the jurisdiction of the Courts had not attached as of the effective date of the Act, this case must have been pending before the Commission when the Act was signed by the Governor.
4. An action is final in a Court only when an Order terminates the litigation between the parties to the suit by precluding the party from further action in that court.

5. The matter would be pending before the Commission at least until either the time for requesting reconsideration or the time for filing an appeal (30 days) elapsed after entry of the Commission's final Order.

On July 21, 1986, PECO filed (i) an Answer to the Supplemental Petition of the OCA and (ii) an Answer to the Petition for Reconsideration filed by the GEC. PECO contends that the instant rate proceeding was closed by our Opinion and Order entered on June 27, 1986; that said Opinion and Order is final, binding and appealable by the parties; and that the mere filing of a petition for reconsideration does not affect the finality of the June 27, 1986 Opinion and Order.^{3/} PECO also contends that if Section 1323(2) is applied retroactively to the rate proceeding, such an application would raise serious questions as to whether the statute violates the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 1 of the Pennsylvania Constitution.

PECO presents the following legal argument in support of its position that the June 27, 1986 Opinion and Order is final and no longer pending before the Commission.

The focus on finality is also the main thrust of Pennsylvania decisions concerning whether principles of res judicata will bar a party in one case from rearguing a claim raised in prior proceedings. Pennsylvania law clearly establishes, and the Commission has previously recognized, that a Commission order is final, and therefore capable of being res judicata, unless and until it

^{3/} PECO notes that Section 1308(d) of the Code, 66 Pa. C.S. §1308(d) requires the Commission to make a final decision and order within a specific period of time; otherwise, the proposed rates would go into effect.

is reversed. See Philadelphia Electric Co. v. Pa. P.U.C., 61 Pa. Cmwith. 325 336-37, 433 A.2d 620 626 (1981). Therefore, an order remains final notwithstanding the fact that an appeal has been taken from that order. Id.; see Atlantic Richfield Co. v. Bethlehem, 69 Pa. Cmwith. 6, 12, 450 A.2d 248, 252 (1982); Commercial Union Assur. Co. v. Pucci, 523 F. Supp. 1310, 1318 (W.D. Pa. 1981); Helmig v. Rockwell Manufacturing Co., 389 Pa. 21, 29, 131 A.2d 622, 626, cert. denied, 355 U.S. 855, reh denied 355 U.S. 885 (1957); Restatement of Judgments §41 and comment d, §69 and comment e.

Likewise, the mere fact that a party has made a motion before the Commission for reconsideration, or to vacate the judgement, or for a rehearing does not deprive the Commission's order of its finality and conclusiveness. See Emerson v. Everson, 494 Pa. 348, 358-59, 431 A.2d 889, 894 (1981). See also, Restatement of Judgments, Second, §13, comment f (1982) ("A judgment otherwise final for purposes of the law of res judicata is not deprived of such finality by the fact that time still permits commencement of proceedings in the trial court to set aside the judgment and grant a new trial or the like; nor does the fact that a party has made such a motion render the judgment non-final."); Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §4432, 301-02 (1981); Fed.R.Civ.P. 60(b) (expressly providing that motion to vacate does not "affect the finality of a judgment or suspend its operation). Because the Commission's June 27 Order is final and conclusive absent an order by the Commission expressly granting a motion for reconsideration, this proceeding cannot be characterized as pending before the Commission. (PECO Petition, Appendix A, pps. 2 and 3).

PECO also contends that a basic precept of statutory construction in Pennsylvania, i.e., that a law will not be construed to operate retroactively unless clearly and manifestly so intended by the General Assembly (1 Pa. C.S.A. §1926

[Supp. 1986]], supports its argument that Section 1323 of the Code is not applicable in this proceeding, citing Commonwealth v. Rockwell Manufacturing Co., 392 Pa. 339, 343, 140 A.2d 854, 856 (1958).

We find PECO's legal argument concerning the applicability of Section 1323 of the Code most persuasive. The subject rate proceeding was terminated and made final by the Opinion and Order entered on June 27, 1986, two weeks prior to the effective date of Section 1323 of the Code. It is our view that the Legislature did not intend that Section 1323 should be applied to a rate proceeding which was the subject of a final order two weeks prior to the enactment of the subject Code amendment. We note that the Legislature did not provide that Section 1323 should be applied to cases pending before the courts as it did when Section 1315, 66 Pa. C.S. §1315 was enacted. We conclude that our June 27, 1986 Opinion and Order was final on the date of its entry and we find the law in Pennsylvania to be that the filing of a petition for reconsideration does not automatically make non-final an Opinion and Order otherwise final.

Even if we were to accept the Petitioners claim that Section 1323 of the Code applies to this proceeding, we do not agree that the pertinent provisions of Section 1323 require the Commission to grant the Petitioners' request for

reconsideration on the issue of excess capacity. Section 1323(a) reads in its entirety as follows:

§1323. Procedures for new electric generating capacity.

(a) Excess capacity costs.--Whenever a public utility claims the costs of an electric generating unit in its rates for the first time and the commission finds that the unit results in the utility having excess capacity, the commission shall disallow from the utility's rates, in the same proportion as found to be excess capacity:

(1) the return on specific unit or units of any excess generating reserve;

(2) the return on the average net original cost per megawatt of the utility's generating capacity; or

(3) the equity investment in the new unit.

In addition to the disallowances set forth in this subsection, the commission may disallow any other costs of the unit or units which the commission deems appropriate.

For the purposes of this section, a rebuttable presumption is created that a unit or units or portion thereof shall be determined to be excess unless found to be needed to meet the utility's customer demand plus a reasonable reserve margin in the test year or the year following the test year, or, if it is a base load unit, it is also found to produce annual economic benefits which will exceed the total annual cost of the plant during the test year or within a reasonable period following the test year.

(Emphasis added)

The Company asserts that it is not clear from the language of Section 1323(a) that both the condition of need and the condition of economic benefit must be satisfied to

effectively rebut the presumption of excess capacity. However, for the purposes of our discussion here, we shall assume that both conditions apply.

As to whether PECO needs the Limerick 1 capacity, we have already determined in our Order (pp. 36-37) that, when it was placed in service, Limerick 1 was needed and did not result in an unreasonable reserve margin over peak requirements. The Petitioners have not raised any novel arguments on this point which we have not considered and which would cause us to reconsider our finding on the need for Limerick 1 capacity.

Regarding the condition that Limerick 1 must produce net annual economic benefits, we find that there is sufficient evidence on the record in this proceeding to demonstrate that the annual benefits derived from the operation of Limerick 1 should exceed the annual cost within a reasonable period following the June 30, 1986 test year end.

Both PECO and the OCA performed economic analyses which indicate that Limerick 1 may begin providing net annual economic benefits in 1994, or approximately eight years after the end of the future test year. (GEC Exh. 3 and OCA St. 6). The OCA insists that an interval of eight years does not constitute a "reasonable" time under the meaning of Section 1323. (OCA Supplemental Petition, p. 7). However, as PECO points out in its Answer to the OCA's Supplemental Petition (p. 7), "The basis for this claim is not clear. No workable standard or approach is suggested by the OCA."

Under the circumstances presented in this case; that is, based upon our finding that Limerick 1 capacity is needed, and also the estimated 39 year service life of that

facility, we do not consider eight years to be an unreasonable period to wait for net annual economic benefits.^{4/}

The OCA seeks to bolster its position by comparing the issue here to a recent Commission determination in Pa. P.U.C. v. Pennsylvania Power & Light Co., Docket No. R-842651 (April 22, 1985). However, that proceeding involved a claim for rate recognition of a base load nuclear unit (Susquehanna 2) that represented unneeded capacity at the time it was placed in service. PECO correctly points out in a footnote on page 12 of its Answer to the OCA's Supplemental Petition that,

"it is clearly appropriate for the Commission to consider a longer period reasonable for Limerick 1 to produce annual net economic benefits than it otherwise would for a unit whose capacity was not needed by the utility for some considerable time."

The language of Section 1323(a) unquestionably vests in the Commission the discretion to determine a reasonable period, on a case by case basis, for the production of annual net economic benefits associated with base load generating stations. In our view, the establishment of a narrow time-frame as a standard might well impede the construction of needed future base load units, and would constitute an abuse of that discretion.

^{4/} In its Answer to the OCA's Supplemental Petition (Appendix B) PECO contends that when the impact of certain adjustments as contained in the Order are factored into the economic analysis, the results indicate that Limerick 1 may produce net annual benefits in fewer than eight years.

We make no finding in this regard, but merely acknowledge the potential for such a result.

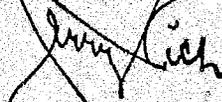
In summary, we repeat our determination that Section 1323 of the Public Utility Code is not applicable to this proceeding. However, even under the terms of Section 1323 we do not find any justification for granting the Petitioners' request for reconsideration. Limerick 1 capacity is needed and does not result in an unreasonably high reserve margin. Further, the evidence on the record in this proceeding indicates that Limerick 1 will begin to produce net annual economic benefits within a reasonable period following the test year.

Conclusion

We find that there exists no basis in the reasoning and arguments advanced by the OCA, GEC, and UUC/UP for reconsideration of our resolution of the excess capacity issue in this proceeding; THEREFORE,

IT IS ORDERED: That the Petitions for Reconsideration filed by the Office of Consumer Advocate and the Governor's Energy Council, and the Supplemental Petitions for Reconsideration filed by the Office of Consumer Advocate and the Utility Users Committee/University of Pennsylvania, all of which request reconsideration of our Opinion and Order entered June 27, 1986, in this proceeding, are denied.

BY THE COMMISSION,



Jerry Rich
Secretary

(SEAL)

ORDER ADOPTED: July 24, 1986

ORDER ENTERED: July 25, 1986