COMMONWEALTH OF PENNSYLVANIA
March 10, 1986

SUBJECT: Pa. Public Utility Commission v.
Philadelphia Electric Company
R-850152

RECEIVED

MAR 11 1986

Office of A. L. J.
Public Utility Commission

TO: William H. Smith, Chief
Administrative Law Judge

FROM: Joseph P. Matuschak JPM/bjm
Administrative Law Judge

Enclosed please find an original and a copy of:

1) a Ruling on Motion Filed on January 23, 1986 by Commission Trial Staff to Strike Testimony of Philadelphia Electric Company

2) a Memorandum Opinion on Motion to Strike of Philadelphia Electric Company

3) a Ruling on Commission Trial Staff Motion dated January 6, 1986 to Strike Testimony of Philadelphia Electric Company

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bjm

Enclosures (6)

RECEIVED
MAR 11 1986
SECRETARY'S OFFICE
Public Utility Commission

BEFORE THE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

DOCKETED
MAR 12 1986

Pennsylvania Public Utility Commission	:	
v.	:	R-850152
Philadelphia Electric Company	:	

DOCUMENT FOLDER

RULING ON MOTION FILED ON JANUARY 23, 1986 BY COMMISSION TRIAL STAFF TO STRIKE TESTIMONY OF PHILADELPHIA ELECTRIC COMPANY

Background

On December 29, 1985, Philadelphia Electric Company (PECO) filed the supplemental direct testimony of Thomas P. Hill, Joseph F. Brennan, Joseph W. Gallagher and Jack J. Carroll (PECO statements Nos. 18B, 22A, 28A and 30 and Exhibits JFB-2, JJC-1).

This testimony purported to represent PECO's response to an order entered October 30, 1985, by the Commission at Docket No. M-840375, et al.[1/] ("the ECR-8 order").

The ECR-8 order is a 167 page opinion and order issued after a two-year investigation into certain costs claimed by PECO pursuant to its Energy Cost Rate (ECR). The Commission there ordered PECO in the current

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1/ Consolidated with P-830453, M-FAC 8408, C-843999, C-844007, C-844042 and P-840493.

base rate proceeding to file a revised ECR tariff and supporting data which provides that 20% of the actual experienced energy costs will not be subject to reconciliation under Section 1307 of the Public Utility Code.

On November 27, 1985, PECO filed a timely Petition for Review with the Commonwealth Court in which, inter alia, it addressed the Commission's determination that PECO file a revised ECR tariff which provides that 20% of the actual experienced energy costs will not be subject to reconciliation under Section 1307 of the Public Utility Code.

The purpose of the testimony of Mr. Brennan (Statement 28A and Exhibit JFB-2) is to modify the Commission's 80%/20% ECR order by imposing a $35 million cap on the amount of energy costs which would not be reconciled.

Mr. Hill's statement (Statement 18B) presents PECO's position that the 80%/20% split of energy costs ordered by the Commission should be modified so as to retain the existing ECR in its present form or, in the alternative, that the 80%/20% split of energy costs should bear a cap of $35 million in annual energy expense.

On July 1, 1980, PECO established 28.178 mills per Kwh as the base cost of energy to be included in its base rates for electric service. This base cost has remained constant thereafter until PECO's current filing in which it proposes a 7.355 mill per Kwh reduction in base cost of energy to reflect anticipated energy cost savings from the operation of Limerick No. 1, or a base cost of energy of 20.823 mills per Kwh.

Fuel and energy expenses are the largest single operating expense category incurred by a utility in providing service to its customers. In 1984, this category of expenses accounted for almost 45% of PECO's operating expenses, including taxes and depreciation for PECO.

PECO proposes no change in its proposed 7.355 mill/Kwh roll-out of base energy costs to reflect the 80%/20% ECR reconciliation, since the 80%/20% ECR procedure applies to all energy costs, including base cost of fuel, and the total energy costs reflected in the customer's bill (base cost of fuel and ECR) will be stated as one amount on the customer's bill. PECO further submits that in its cost of service study (WFS-1), allocation of the proposed revenue increase, rate design, and phase-in calculations are all based upon the base cost of fuel, and that a change in this roll-out would require the complete recalculation of each of these items, so as to be unreasonable and burdensome.

Commission Trial Staff filed its motion to strike the said Statements 28A and 18B and Exhibit JFB-2 on the grounds that (1) they constitute an improper collateral attack on an order, and (2) are not in compliance with the Commission's ECR-8 order. In support of its motion to strike, Staff asserts:

1. That since PECO has appealed the ECR-8 order, under R.A.P. 1701, the Commission is without authority to modify or set aside in this proceeding the order which is the subject of PECO's appeal.

2. That the testimony is barred by application of Section 316 of the Public Utility Code, in that the factual findings that "PECO is unable to administer its ECR effectively," that the revised ECR will "produce no undue risk of substantial harm to the company," and that the revision is necessary to provide an "incentive to operate PECO's generating plants in an efficient manner and to minimize fuel costs."

3. That the testimony is barred by the principles of res judicata and collateral estoppel.

4. That, in the alternative, the testimony which is the subject of the motion should be stricken because it is not in compliance with the Commission's ECR-8 order.

PECO has responded to Staff's motion to strike, alleging that:

1. Litigation of this matter in the proceeding is required under due process.

2. Requisite conditions for application of the doctrine of collateral estoppel are not met in this case.

3. Section 316 has no application to the instant situation.

4. Pa. Rule of Appellate Procedure 1701 does not preclude litigation of the 80%/20% ECR in the instant proceeding.

Discussion

Due Process

PECO asserts that on February 28, 1984, the Company filed its Energy Cost Rate Statement No. 8 proposing an increase in its ECR charge to recover, inter alia, replacement power costs incurred during the 1983 outages at Peach Bottom 2 and 3 and the 1984 outages of Peach Bottom 2 and Salem 1. Further, that after complaints against the proposed ECR charge were filed, the Commission entered an order on March 20, 1984 at M-840375 and M-FACE 8408, suspending a portion of the Company's ECR charge, and initiated an investigation of the experienced outages for which replacement power costs were claimed and projected outages during the ECR-8 period. The order also consolidated the investigation with the show-cause proceeding commenced by the Commission on October 7, 1983.

PECO submits further that Phase III of the investigation, which was to address proposals of mechanism for reducing or creating incentives to reduce PECO's future energy costs, was not litigated prior to the entry of the ECR-8 order. The Company argues that the ECR-8 order adopting a 80%/20% ECR violated PECO's rights to notice and an opportunity for a hearing required by fundamental due process and by Section 1307 of the

Public Utility Code. It urges that this is the first opportunity to address and litigate this matter.

Without addressing the validity of PECO's averment of denial of due process in the adoption of the ECR-8 order, we are convinced that the present rate proceeding is not the proper vehicle to test such contention. The Company has raised the question of due process in its appeal from the ECR-8 order, and the proper place for litigating that issue is in the ECR-8 litigation and not in this rate case.

Appeal Procedures

We agree with Staff that in view of the pending appeal, neither can the Commission proceed further in regard to the ECR-8 order in the ECR proceeding or in this rate case.

Rule 1701 of the Pennsylvania Rules of Appellate Procedure states that:

> (a) General rule. Except as otherwise prescribed by these rules, after an appeal is taken or review of a quasijudicial order is sought, the trial court or other governmental unit may no longer proceed further in the matter.

Collateral Estoppel and
Res Judicata and Section 316

We agree with PECO that the doctrines of res judicata and collateral estoppel do not apply in this matter.

It is well settled that in administrative proceedings, the preclusion doctrines of res judicata and collateral estoppel apply only to issues, the facts of which are historic and immutable. See K. Davis, Administrative Law, §18.01 (1979); Phildelphia Electric Co. v. Pa. P.U.C., 61. Pa. Cmwlth 325, 433 A.2d 620 (1981). In 433 A.2d 620, the Commonwealth

Court applied this principle to rate proceedings. The Court said that res judicata does not apply:

> . . . to areas of ratemaking in which the facts and circumstances controlling their solutions [are] subject to change -- such as the reasonableness of rate schedules, determination of fair value and fair rate of return and propriety of items of expense. [at p. 626]

More recently, the Commonwealth Court in Keystone Water Company - White Deer District vs. Pa. P.U.C., 81 Pa. Cmwlth 312, 474 A.2d 368 (1984), reaffirmed this principle with respect to collateral estoppel. The Court said that: "Collateral estoppel is designed to prevent relitigation of issues which have remained substantially static, factually and legally." 474 A.2d at 373.

In our opinion, the reasonableness of rate schedules and their terms, including ECR rate schedules, are issues to which collateral estoppel, res judicata, or Section 316 of the Public Utility Code cannot be applied.

Well-established principles of administrative law dictate that agencies must have the flexibility to change and adapt policies to the demands of changing circumstances. The Commission's ECR-8 order was a policy statement and determination as to the future application of PECO's ECR application. By making such determination, the Commission cannot be chained to that policy forever. Under the Staff's approach, the Commission, having entered an order as to ECR-8, would be precluded from any future modification of ECR-8 and PECO would be prohibited from raising the reasonableness of ECR-8 as conditions change.

In our opinion, neither res judicata, collateral estoppel nor Section 316 provides a basis for striking of Statements 28A and 18B and Exhibit JFB-2. However, such conclusion does not provide support to PECO to submit testimony in this proceeding. The evidence presented by Mr. Hill and

Mr. Brennan, addressing the present and future financial condition of the Company and the impact of the proposed ECR modification on the Company's financial situation, in support of a modification of ECR-8 by adopting a $35 million cap on any disallowance of energy costs, is not relevant in this proceeding. Such evidence should be presented at the ECR-8 proceeding, or in a separate petition to the Commission seeking a modification of ECR-8. To that extent, such evidence, relating to the $35 million cap, whether included in Statements 28A and 18B and Exhibit JFB-2, or in subsequent testimony without specific designation, should be stricken.

Assignment in Rate Case

At P-830453, M-840375 and M-FACE 8408, the Commission, in its order dated October 24, 1985, entered October 30, 1985, directed that in this rate proceeding that we gave consideration to the following issues or criteria, in addition to any other information deemed to be relevant to a determination of a proper energy cost level for PECO:

1. The historical performance of the Company's generating units.
2. The historical performance of comparable generating units operated by other utilities.
3. Projected performance of the Company's generating units.
4. Prudent and practical generating unit performance improvements planned or anticipated by the Company.
5. Projected energy/demand requirements of the Company and PJM interconnect. [page 163]

As we view it, the Commission directed us to ensure that the correct "ingredients" were included in PECO's ECR, for without proper

ingredients the Commission's 80%/20% provision would be meaningless, could be manipulated, and would fail to establish the effect intended.

However, nowhere in such assignment do we read a mandate to review, modify, "second-guess", or overrule the Commission's 80%/20% provision. Any attempt on our part to modify the Commission's ECR-8 order, whether by imposing a $35 million cap, or otherwise, would be presumptuous and contrary to the Commission's assignment.

Consequently, testimony by Mr. Brennan or Mr. Hill seeking to modify the Commission's ECR-8 order would not be relevant and should be stricken.

Base Rate
Energy Costs

In addition to seeking a modification of ECR-8 by imposition of a $35 million cap, Mr. Hill's Statement 18B further discusses PECO's treatment of energy costs in base rates. The determination of the proper treatment of energy costs in base rates has been a proper subject for treatment in rate cases. We read no prohibition to the usual base rate treatment of energy costs in the ECR-8 order. While, in this connection there is some controversy between Staff and PECO as to the proper application of energy costs in base rates, we consider such testimony to be relevant in this proceeding. Therefore, to the extent of Mr. Hill's evidence on this score, such evidence will not be stricken.

ORDER

IT IS ORDERED:

1. That the motion of Commission Trial Staff to strike Statement 28A and Exhibit JFB-2 of Joseph F. Brennan, witness for Philadelphia Electric Company (including his subsequent testimony relating to a $35 million cap to the Commission's ECR-8 order) is hereby granted.

2. That the motion of Commission Trial Staff to strike Statement 18B of Thomas P. Hill, Jr., witness for Philadelphia Electric Company, insofar as it relates to a $35 million cap to the Commission's ECR-8 order (including subsequent testimony on this issue or in support thereof) is hereby granted.

3. That the motion of Commission Trial Staff to strike Statement 18B of Thomas P. Hill, Jr., witness for Philadelphia Electric Company, insofar as it relates to the treatment of energy costs in base rates (including subsequent testimony on this issue or in support thereof) is hereby denied.

March 10, 1986

Joseph P. Matuschak

JOSEPH P. MATUSCHAK
Administrative Law Judge