COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17120
January 2, 1986

In re: R-850152

(See attached lists)

Pennsylvania Public Utility Commission, et al.
vs.
Philadelphia Electric Company

N O T I C E

This is to advise that Public Input Hearings will be held in the captioned proceeding as follows:

Media - Thursday, January 23, 1986 - 1:30 p.m.
County Council Meeting Rooms,
Government Center Building,
Second and Orange Streets

Doylestown - Monday, February 3, 1986 - 6:30 p.m.
All Purpose Room in Student Center,
Delaware Valley College (on Route 202)

Philadelphia - Tuesday, February 4, 1986 - 1:30 p.m. and 6:30 p.m.
Sanctuary, Arch Street United Methodist Church,
Broad and Arch Streets, (Entrance off Broad Street)

The doors will open 1/2 hour before the hearing commences at each location.

The presiding officer in this proceeding is Administrative Law Judge Joseph P. Matuschak, 97 East Main Street, Uniontown, Pennsylvania 15401; telephone (412) 437-3409.

cc: Judge Matuschak
Law Bureau
Bureau of Rates
Mr. Bramson
Ms. Dickson
Ms. Crouse
File Room

Chairman Taliaferro
Commissioner Fischl
Commissioner Shane
Bureau of Consumer Services -
Mr. Lewis

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R-850152 - Parties of Record:

Robert H. Young, Esquire
Morgan, Lewis & Bockius
2000 One Logan Square
Philadelphia, PA 19103

J. H. Calvert, Jr., Esquire
Morgan, Lewis & Bockius
2000 One Logan Square
Philadelphia, PA 19103

Walter R. Hall, III, Esquire
Morgan, Lewis & Bockius
2000 One Logan Square
Philadelphia, PA 19103

Frederick H. Knight, Esquire
Morgan, Lewis & Bockius
2000 One Logan Square
Philadelphia, PA 19103

David B. MacGregor, Esquire
Morgan, Lewis & Bockius
2000 One Logan Square
Philadelphia, PA 19103

William E. Zeiter, Esquire
Morgan, Lewis & Bockius
2000 One Logan Square
Philadelphia, PA 19103

Edward G. Bauer, Jr., Vice President
and General Counsel
Philadelphia Electric Company
2301 Market Street
Philadelphia, PA 19101

Marlane Chestnut, Assistant Counsel
Veronica A. Smith, Assistant Counsel
Daniel Delaney, Assistant Counsel
Pa. P.U.C., Law Bureau
P. O. Box 3265
Harrisburg, PA 17120

David M. Kleppinger, Esquire
Edward J. Riehl, Esquire
McNees, Wallace & Nurick
P. O. Box 1166
Harrisburg, PA 17108-1166
(C001-Philadelphia Area Industrial
Energy Users Group)

Irwin A. Popowsky, Esquire
David Wersan, Esquire
Scott J. Rubin, Esquire
Office of Consumer Advocate
1425 Strawberry Square
Harrisburg, PA 17120
(C002-David M. Barasch, Consumer Advocate)

Janet Parrish, Esquire
John Hanger, Esquire
Community Legal Services, Energy Project
3638 North Broad Street
Philadelphia, PA 19140
(C003-Consumer Education & Protective
Association, International, Inc.)

Zori G. Ferkin, Legal Counsel
Governor's Energy Council
P. O. Box 8010
Harrisburg, PA 17105
(petition to intervene)

Mildred E. V. Pitts, Senior Trial Attorney
General Services Administration (LK)
18th & F Streets, N.W. - Room 4002
Washington, D.C. 20405
(C004-United States General Services Adm.)

Michael J. Ettner, Esquire
General Services Administration (LK)
18th & F Streets, N.W. - Room 4002
Washington, D.C. 20405
(C004-United States General Services Adm.)

Barbara W. Mather, Esquire
Kathryn Lewis, Esquire
Pamela Foa, Esquire
Charles Rainey, Jr., Esquire
City of Philadelphia, Law Department
One Reading Center, Fifth Floor
1101 Market Street
Philadelphia, PA 19107
(C005-City of Philadelphia)

Mark P. Widoff, Esquire
Larry B. Selkowitz, Esquire
Widoff, Reager, Selkowitz & Adler, PC
129 State Street
Harrisburg, Pennsylvania 17101
(C006-Utility Users Committee of Philadelp
Inc. and Board of Trustees of The Universi
of Pennsylvania)

Michael L. Browne, Esquire
J. Tomlinson Fort, Esquire
J. Thomas Morris, Esquire
Reed, Smith, Shaw & McClay
1600 Avenue of the Arts Building
Broad and Chestnut Streets
Philadelphia, PA 19107
(C007-National Railroad Passenger Corp.
C008-Southeastern Pennsylvania Transportation Authority)

Franklin L. Kury, Esquire
Reed, Smith Shaw & McClay
P. O. Box 11844
Harrisburg, PA 17108
(C007 & C008)

Earle H. O'Donnell, Esquire
Merrill L. Kramer, Esquire
Sutherland, Asbill & Brennan
1666 K Street, N.W., Suite 800
Washington, D.C. 20006-2803
(for Occidental Chemical Corp.)

Robert D. Luss, Esquire
Occidental Chemical Corporation
P. O. Box 699
Armand Hammer Boulevard
Pottstown, PA 19464
(petition to intervene)

Anthony G. Tummarello, Director of Energy
Occidental Chemical Corporation
P. O. Box 4020, River Park
Darien, CT 06820
(petition to intervene)

Alan R. Squires, Esquire
Greenstein, Gorelick, Price, Silverman & Laveson
900 Two Penn Center Plaza
Philadelphia, PA 19102
(C009-Pennsylvania Business Utility Users Group)

Robert A. DiFilippo, Esquire
555 East Lancaster Avenue
St. Davids, PA 19087
(C009-Pennsylvania Business Utility Users Group)

Nancy Schuster, Esquire
One Pond Street
Bristol, Pennsylvania 19007
(C010-SAGE(Senior Action Group Endeavo

Stephen Bosch, Associate Counsel
Temple University
450 Carnell Hall
Broad Street and Montgomery Avenue
Philadelphia, Pennsylvania 19122
(C011-Temple University, et al.)

Scott C. Penwell, Esquire
Duane, Morris & Heckscher
P. O. Box 1003
Harrisburg, Pennsylvania 17101
(C012-Penns, Food Merchants Assoc.)

Wayne L. Emery, Esquire
Kenneth R. Pepperney, Esquire
Rafael Caminero, Esquire
United States Steel Corporation
600 Grant Street
Pittsburgh, Pennsylvania 15230
(C013-United States Steel Corp.)

William T. Hawke, Esquire
Joseph J. Malatesta, Esquire
Malatesta, Hawke, McKeon & Morris
P. O. Box 12110
Harrisburg, Pennsylvania 17108
(for Scott Paper Company)

James A. Corrodi, Deputy Counsel and Staff Vice President
Scott Paper Company
Scott Plaza
Philadelphia, Pennsylvania 19113
(petition to intervene)

Martha W. Bush, Esquire
237 S. Melville Street
Philadelphia, PA 19139
(C014-Pennsylvania Energy Ratepayers Coalition, etc.)

R-850152 - Parties in interest:

The Honorable Clarence D. Bell
Member, Pennsylvania Senate
P. O. Box 1750
Media, Pennsylvania 19063

Rick Etheridge
Attn: Code 111
Chesapeake Division
Naval Facilities Engineering Command
Washington Navy Yard - Building 212
Washington, D.C. 20374

Joseph J. Lynch
31 Harvard Road
Norristown, Pennsylvania 19401

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

January 3, 1986

IN REPLY PLEASE
REFER TO OUR FILE

Jerry Rich, Secretary
Pa. Public Utility Commission
New Filing Section
Harrisburg, PA 17120

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SECRETARY'S OFFICE
Public Utility Commission

In re: Pennsylvania Public Utility Commission

v.

Philadelphia Electric Company

R-850152

Dear Secretary Rich:

Enclosed for filing please find an original and three copies of Trial Staff's Motion to Strike for filing in the above captioned matter. Copies have been served upon the Administrative Law Judge and the other parties.

Very truly yours,

Daniel P. Delaney
Deputy Chief Counsel

Enclosure

cc: Honorable Joseph P. Matuschak
Service List

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JAN 8 1986
SECRETARY'S OFFICE
Public Utility Commission

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

THE HONORABLE JOSEPH P. MATUSCHAK PRESIDING

PENNSYLVANIA PUBLIC UTILITY COMMISSION	:	
v.	:	Docket No. R-850152
PHILADELPHIA ELECTRIC COMPANY	:	

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MOTION TO STRIKE

AND NOW, this 3rd day of January 1986, comes the Trial Staff of the Pennsylvania Public Utility Commission (Trial Staff) and moves to strike portions of the evidence sponsored by the Philadelphia Electric Company (PECO) in the above-captioned matter. In reliance on the Presiding Officer's ruling on the Trial Staff's Motion in Limine (Tr. p. 1370-5), the Trial Staff moves that the following evidence be striken:

1. PECO Statement No. 1: Direct testimony of Vincent S. Boyer.

   a. p. 16, lines 21-8
   b. p. 17, lines 5-50
   c. p. 18, all
   d. p. 21, all
   e. p. 22, all
   f. p. 23, lines 1-25
   g. Transcript page 1007, line 19 to line 17 of page 1008

DOCUMENT FOLDER

2. PECO Statement No. 3: Direct testimony of Joseph F. Paquette, Jr.

   a. p. 31, line 21, years "1976 and 1978"
   b. p. 32, lines 2-4, 16-27

c. p. 33, all
d. p. 34, all
e. p. 35-47, all
f. p. 48, lines 1-4
g. Appendix A, Appendix B, Tables 8, 12, 14, 15, 16, 17

3. PECO Statement No. 8: Direct testimony of Love and Kononetz, Theodore Barry & Associates.

a. p. 31-45, all
b. p. 258-83, all
c. Transcript pages 1223 to 1256, line 8

4. PECO Statement No. 10: Direct testimony of William A. Abrams.

a. p. 5, lines 10-3
b. p. 20, lines 25-7
c. p. 21-29, all
d. p. 30, lines 1-10
e. Exhibits 5, 6, 7, 8, Schedules 8, 9, 10
f. Transcript pages 1418, line 16 on, all of pages 1420 to 1427, page 1428 to line 2

5. PECO Statement No. 11: Direct testimony of Dr. Lewis J. Perl.

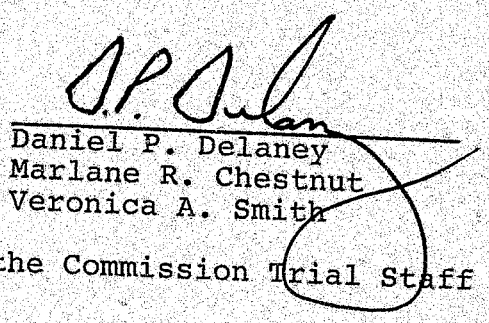
a. p. 3, lines 33-7
b. p. 5, lines 22-30
c. p. 9, lines 1-38
d. p. 23, lines 30 to 50
e. p. 24 to 28, all
f. p. 29, lines 1-5
g. Schedule 7, p. 1-4
h. Transcript pages 882-3 all, page 886 lines 4 to 25, pages 887-891, all

6. PECO Statement No. 15: Direct testimony of William H. Hieronymus.

a. p. 37, lines 19-24
b. p. 38, lines 1-6
c. p. 57, lines 18-22
d. p. 58-67, all
e. Exhibits WHH-4, WHH-5, WHH-6, WHH-7, WHH-8, WHH-9, WHH-10
f. Transcript pages 698, line 13 to the end of page 707

WHEREFORE, the Trial Staff respectfully requests the Presiding Officer to strike the above described portions of the evidence in this proceeding as required by the ruling on the Staff's Motion in Limine.

Respectfully submitted,



Daniel P. Delaney
Marlane R. Chestnut
Veronica A. Smith

For the Commission Trial Staff

G-28 North Office Building
Harrisburg, PA 17120
(717) 783-3190

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon parties of record in this proceeding in accordance with the requirement of 52 Pa. Code §1.54.

Dated this 3rd day of January, 1986

D. P. Delaney

Daniel P. Delaney

For Commission Trial Staff

MORGAN, LEWIS & BOCKIUS
COUNSELORS AT LAW
2000 ONE LOGAN SQUARE
PHILADELPHIA, PENNSYLVANIA 19103
TELEPHONE: (215) 963-5000
CABLE ADDRESS: MORLEBOCK
TELEX: 83-1315

WASHINGTON
NEW YORK
LOS ANGELES
MIAMI
HARRISBURG
LONDON

WALTER R. HALL II
DIAL DIRECT (215) 963-5700

January 6, 1986

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SECRETARY'S OFFICE
Public Utility Commission

Jerry Rich, Secretary
Pennsylvania Public Utility
Commission
P. O. Box 3265
Harrisburg, PA 17120

Re: Pennsylvania Public Utility Commission
v.
Philadelphia Electric Company, Docket
No. R-850152

Dear Secretary Rich:

Enclosed for filing are an original and nine copies of the Brief of Philadelphia Electric Company in Support of Petition for Commission Review and Answer to a Material Question, as well as nine copies of separately bound appendices to this Brief. Also enclosed is an additional copy of these documents to be time stamped and returned in order to acknowledge their receipt by the Commission.

As indicated by the attached Certificate of Service, copies of the enclosed documents have been served upon the Administrative Law Judge and all parties of record.

Sincerely yours,

Walter R. Hall II

Walter R. Hall, II

Counsel for Philadelphia
Electric Company

DOCUMENT
FOLDER

/paa
Encl.
cc: The Honorable Joseph P. Matuschak
All Parties of Record

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JAN 6 1986

SECRETARY'S OFFICE
Public Utility Commission

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA PUBLIC UTILITY COMMISSION, et al.	:	
v.	:	Docket No. R-850152
PHILADELPHIA ELECTRIC COMPANY	:	

APPENDICES TO BRIEF OF PHILADELPHIA ELECTRIC COMPANY IN SUPPORT OF PETITION FOR COMMISSION REVIEW AND ANSWER TO A MATERIAL QUESTION

Robert H. Young
Jay H. Calvert, Jr.
Walter R. Hall, II
David B. MacGregor

Counsel for Philadelphia Electric Company

OF COUNSEL:

Edward G. Bauer, Jr., Esquire
Vice President and General Counsel
Philadelphia Electric Company
2301 Market Street
Philadelphia, PA 19101

MORGAN, LEWIS & BOCKIUS
2000 One Logan Square
Philadelphia, PA 19103

DATED: January 6, 1986

DOCKETED
JAN 7 1986

APPENDIX A - TRIAL STAFF'S MOTION IN LIMINE (NOVEMBER 20, 1985)

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

November 20, 1985

IN REPLY PLEASE
REFER TO OUR FILE

Jerry Rich, Secretary
Pa. Public Utility Commission
New Filing Section
Harrisburg, PA 17120

In re: Pennsylvania Public Utility Commission
v.
Philadelphia Electric Co.
R-850152

Dear Secretary Rich:

Enclosed for filing please find an original and three copies of the Trial Staff's Motion in Limine for filing in the above captioned matter. Copies have been served upon the Administrative Law Judge and the other parties.

Very truly yours,

Daniel P. Delaney
Deputy Chief Counsel

DPD:jaf

Enc.

cc: Honorable Joseph P. Matuschak
Service List

BEFORE THE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

THE HONORABLE JOSEPH P. MATUSCHAK PRESIDING

PENNSYLVANIA PUBLIC UTILITY COMMISSION	:	
V.	:	R-850152
PHILADELPHIA ELECTRIC COMPANY	:	

MOTION IN LIMINE

AND NOW, this 20th day of November 1985, comes the Trial Staff of the Pennsylvania Public Utility Commission (Trial Staff) and moves the Presiding Officer to make a preliminary determination of the nature of the evidence that may be admitted into the record in the above captioned matter. In support of its motion, the Trial Staff respectfully represents the following:

1. This proceeding was initiated on September 27, 1985 with the filing by the Philadelphia Electric Company (PECO) of Supplement No. 15 to its Tariff Electric - Pa. P.U.C. No. 26. Supplement No. 15 is designed to produce an increase in the Company's annual electric revenues of approximately $670.7 million based on budgeted sales for a future test year ending June 30, 1986. A major issue in this case is the proposed inclusion in rates of the capital and operating costs of the Limerick Nuclear Generating Station Unit I and 100% of Common Plant.

2. The Commission has previously considered the prudency 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). Among the issues considered there by the Commission was the prudency of the Company's decision to delay construction of the Limerick Station in 1976 and 1978. After reviewing the presiding Administrative Law Judge's conclusion that the 1976 and 1978 delays were unreasonable and the partys' exceptions to that conclusion, the Commission stated the following:

> [W]e are of the opinion that PECO management did not exercise judgement sufficient to meet our reasonable man standard in delaying construction at Limerick in 1976 and 1978.

56 Pa. P.U.C. at 61.

The Commission then 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 of the costs associated with the construction of the plants.

3. Section 316 of the Public Utility Code, 66 Pa. C.S. §316, provides in pertinent part:

> 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.

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. The Court described the Commission's delay 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.

5. The Trial Staff respectfully submits that the Commission's prior finding of the unreasonable nature of the 1976 and 1978 Limerick construction delays meets the requirements of Section 316 and therefore is prima facie evidence of the facts found and conclusive upon the parties to the present proceeding.

6. No party should be permitted to relitigate this issue in the current proceeding. All of the parties in the Commission's prior Limerick Investigation received a full and fair opportunity to present evidence concerning the prudency of the Company's decision to delay Limerick construction in 1976 and 1978. No useful purpose would be served by relitigating this issue in the present case. Moreover it would be a misuse

of the Commission's limited administrative resources to reconsider this already resolved issue in the present case. The Trial Staff submits that the only part of this issue that should be examined in the instant proceeding is the quantification of the effects of the unreasonable construction delays upon the Company's Limerick rate base claim.

WHEREFORE, the Trial Staff respectfully requests the Presiding Officer to rule that the Commission's prior finding that Limerick 1976 and 1978 construction delays were unreasonable is prima facie evidence of that finding and conclusive on the parties to this proceeding.

Respectfully submitted,

Marlane R. Chestnut

Veronica A. Smith

Daniel P. Delaney

For the Commission Trial Staff

G-28 North Office Building
Harrisburg, PA 17120
(717) 783-2804

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon parties of record in this proceeding in accordance with the requirement of 52 Pa. Code §1.54.

Dated this 20th day of November, 1985

Daniel P. Delaney

For Commission Trial Staff

APPENDIX B - PECO ANSWER TO MOTION IN LIMINE (DECEMBER 5, 1985)
(WITHOUT APPENDICES)

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA PUBLIC UTILITY COMMISSION	:	
v.	:	Docket No. R-850152
PHILADELPHIA ELECTRIC COMPANY	:	

ANSWER TO
MOTION IN LIMINE

NOW COMES Philadelphia Electric Company ("PECO" or the "Company"), by its Counsel, and answers and requests denial of the Motion In Limine of the Pennsylvania Public Utility Commission Trial Staff ("Trial Staff"), as follows:

1. Admitted.

2. Admitted in part, denied in part. It is admitted that the prudence of the Company's construction of the Limerick Station was generally reviewed by the Commission in Re Limerick Nuclear Generating Station, 56 Pa. P.U.C. 47 (1982), aff'd, 501 Pa. 153, 460 A.2d 734 (1983) (hereafter referred to as 1980 Limerick Investigation). It is denied, however, that either the Administrative Law Judge ("ALJ") or the Commission in that proceeding adjudicated, determined, found or ordered that the 1976 and 1978 decisions to defer construction were unreasonable or the result of imprudent management. To the contrary, as explained below in New Matter, the ALJ and Commission stated, in advisory dicta, only that the deferral decisions may have been unreasonable, but concluded that no adjudication, determination, finding or order could be made as the issue was not ripe for decision in that proceeding.

3.-5. Admitted in part, denied in part. It is admitted that Section 316 has been accurately quoted. However, as established more fully below, the Commission's 1980 Limerick Investigation Order contained no "finding, determination or order" respecting the 1976 and 1978 completion deferral decisions, a fact the Commission itself has recognized on several occasions. Moreover, even if it could be found that the Commission had intended to render a "finding, determination or order" as to this matter, such "finding, determination or order" was "set aside, annulled or modified on judicial review". Accordingly, the requirements of Section 316 are not present to permit "conclusive" or even "prima facie" effect to be given the 1980 Limerick Investigation Order as to this matter.

6. Denied. The presentation of evidence and argument respecting the prudence of the 1976 and 1978 construction - completion deferral decisions in the instant rate proceeding is entirely appropriate and, indeed, necessary. As described more fully both above and below, this issue was not resolved in the 1980 Limerick Investigation as it was not ripe for adjudication at that time as was expressly held by the Commission and also by the Pennsylvania Supreme Court. Accordingly, the presentation of evidence and argument on the matter does not constitute its "relitigation" as alleged by Trial Staff. Moreover, as described below, efficient administrative procedure and the lateness of the Motion's filing also require its rejection.

New Matter

7. The Trial Staff asserts that the Company's 1976 and 1978 decisions to defer Limerick construction were evaluated by the Commission in the 1980 Limerick Investigation and found to be the product of unreasonable management. The Trial Staff avers that this prior determination meets the requirements of Section 316 of the Public Utility Code (66 Pa.C.S. §316) and is, therefore, conclusive as to the reasonableness of these decisions and cannot be relitigated in this proceeding.

The Motion should be denied for three reasons: 1) the Commission did not render an adjudication, make a determination or issue a finding respecting the Company's 1976 or 1978 construction deferrals in its 1980 Limerick Investigation Order; 2) the Supreme Court affirmed, based on representations made to it by the Commission, that the Commission had failed to issue such an adjudication, determination or order; and 3) as the instant proceeding is the first proceeding in which the Company has claimed rate base inclusion of the costs of Limerick, this proceeding is the first proceeding in which the issue is ripe for decision and thus the first proceeding in which the Company has had the opportunity to exercise its statutory and constitutional right to present evidence and argument on this issue. See 66 Pa. C.S. §332(c).

8. In Pa. P.U.C. v. Philadelphia Electric Co., 501 Pa. 153, 460 A.2d 734 (1981), PECO, anticipating just such an attempt by others to use the prior proceedings as preclusive on the prudency of the 1976 and 1978 deferral decisions, challenged the validity of the Commission's discussion of the subject. However, the Supreme Court held that the Commission's discussion on the subject was merely criticism, did not constitute an adjudication and would not be reviewed on appeal. 460 A.2d at 739 n.7. Thus, the only relevant final adjudication by the Supreme Court in the 1981 appeal was that the Commission's discussion of the prudency of the 1976 and 1978 deferral decisions was not a final order binding on PECO! Trial Staff's rather bizarre citation of this holding for precisely the opposite point is certainly unpersuasive in the extreme.

In light of the Supreme Court's holding, the Commission has clearly not rendered a "finding, determination or order" within the meaning of Section 316. A determination or order of an administrative agency is generally defined as the equivalent of an adjudication and must comply with the due process requirements of reasonable notice and hearing in order to be valid and binding. See, 2 Pa. C.S. §§101, 504; Allegheny Ludlum Steel Corp. v. Pa. P.U.C.,

501 Pa. 71, 459 A.2d 1218 (1983); Schanz v. Bureau of Corrections, 52 Pa. Cmwlth. 300, 415 A.2d 978 (1980). Similarly, an administrative finding generally refers to formal agency action which resolves a particular matter, and such findings generally comprise and must support the agency's adjudication. 2 Pa. C.S. §507; Mack Trucks, Inc. v. Unemployment Compensation Board of Review, 77 Pa. Cmwlth. 74, 465 A.2d 87 (1983); Tate v. Antosh, 3 Pa. Cmwlth. 144, 281 A.2d 192 (1971); Thomas v. Unemployment Compensation Board of Review, 144 Pa. Super. 369, 19 A.2d 488 (1941). Since the Commission's discussion is not an adjudication, it does not fall within the types of Commission action contemplated by Section 316.

Moreover, it has been repeatedly held that Section 316 can be applied only to preclude collateral attack of a final, appealable Commission Order where a party has failed to properly exercise its right to appeal the matter at issue. See, e.g., Allegheny Steel Co. v. N.Y. Cent. R. Co., 324 Pa. 353, 188 A. 332 (1936); N.Y. and Pa. Co. v. N.Y. Cent. R. Co., 281 Pa. 257, 126 A. 382 (1924), rev'd. on other grounds, 271 U.S. 124 (1926); Erie v. Pa. P.U.C., 60 Pa. Cmwlth. 106, 430 A.2d 1037 (1981); Philadelphia Suburban Water Co. v. Dept. of Trans., 36 Pa. Cmwlth. 8, 387 A.2d 501 (1978); accord, Pa. Petroleum Ass'n. v. Pa. Power and Light Co., 32 Pa. Cmwlth. 19,

377 A.2d 1270 (1977), aff'd., 488 Pa. 308, 412 A.2d 522 (1980); York Teleph. and Teleg. v. Pa. P.U.C., 181 Pa. Super. 11, 121 A.2d 605 (1956).

Indeed, Section 316 merely codifies the doctrines of res judicata and collateral estoppel. An essential requirement for each doctrine, and thus also for Section 316, is that a prior final adjudication on the merits must have been rendered. Where a controversy is not the subject of a final order and is thus not ripe for appellate review, there can be no res judicata or collateral estoppel effect. See, e.g., Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955); Bearoff v. Bearoff Brothers, Inc., 458 Pa. 494, 327 A.2d 72 (1974); Gallery v. Municipal Authority of Blythe Twp., 432 Pa. 307, 243 A.2d 385 (1968); Safeguard Mutual Life Ins. Co. v. Williams, 463 Pa. 567, 345 A.2d 664 (1975); Schuback v. Silver, 461 Pa. 366, 336 A.2d 328 (1975); Fincher v. Middlesex Twp., 64 Pa. Cmwlth. 355, 439 A.2d 1353 (1982); Restatement (Second) of Judgments §27 (1982). In view of the Supreme Court's holding, and indeed the language in the Commission's Order itself as will be described below, res judicata, collateral estoppel and Section 316 clearly do not apply.

9. The Commission itself has stated, both in its Orders and in its submittals to the Supreme Court during the appeals procedure, that it made, in its 1980 Limerick Investigation Order, no adjudication that could constitute a determination or finding subject to the conclusiveness of res judicata, collateral estoppel or Section 316, as respects the 1976 and 1978 deferral decisions. For example, in its October 10, 1980 Order initiating

the Investigation, as amended by letter dated November 8, 1980, the Commission stated that the purpose of the Investigation was to gather information in order to facilitate a future determination of the reasonableness of Limerick costs when claimed in a future rate proceeding:

> "We are opening this investigation proceeding so that information can be gathered in an orderly and expeditious manner, before PECO seeks to include Limerick in its rate base as used and useful property. This approach will enable us to proceed without the pressures of time associated with rate cases.
>
> We realize, of course, that Limerick is under construction and that it represents a major, and controversial, undertaking by PECO. However, although we agree with the OCA that a Limerick proceeding should be opened, we do not agree that the Rule to Show Cause requested by the OCA is appropriate. We must first proceed to gather facts. We can then reach conclusions and enter whatever orders we deem to be appropriate." (Order, p. 1)

A review of the briefs filed before the Commission further illustrates the lack of any belief by the parties that a final adjudication concerning the construction deferral decisions was to be made in the 1980 Limerick Investigation. As expressed by Trial Staff:

> "[the Commission should] wait until Limerick is claimed in rate base to determine whether the cost of management ordered delays, particularly the 1976 and 1978 delays, should be disallowed." (T.S. Main Brief, p. 2; Appendix A).

> Trial Staff suggests that this issue [i.e., a rate base adjustment associated with the deferral issues] should therefore be considered again and more fully at the time PECO seeks to include Limerick in rate base." (emphasis added; T.S. Main Brief, p. 11; Appendix A)

This position was, in fact, subsequently adopted by the ALJ who did not find that the deferral decisions were unreasonable, but rather concluded that such a determination should be deferred until a future rate proceeding, as follows:

> "I agree with Trial Staff that any decision now would be advisory only. This Commission cannot bind the future Commission that must decide PECO's claim for rate base treatment of these plants when they become commercially operable. Furthermore, this proceeding is a fact-gathering one. For purposes here, it is sufficient to note that the decisions to postpone Limerick were, in part, the result of management's discretion as well as financial circumstances. In a subsequent proceeding, consideration can be given to the extent to which these delays were caused by financial and other external constraints and the extent to which management's fear of Commission sanctions entered into these decisions. Such a proceeding would also be an appropriate forum to quantify the effects of these delays. Such a record does not exist at the present time." (emphasis added; Recommended Decision, pp. 54-55; Appendix B)

Further, the Commission's final Order in the 1980 Limerick Investigation expressly states that a determination, finding or adjudication was not made. It is true that, as respects the 1976 and 1978 deferral decisions, the Commission criticized the Company, stating: "PECO management did not

exercise judgment sufficient to meet our reasonable man standard in delaying construction..." (Order, p. 17; Appendix C). However, the Commission found it inappropriate to determine the extent to which such unreasonable management decision-making had affected, if at all, the reasonable cost of the Limerick Station:

> "We note at the outset of our discussion, that to adopt any proposed adjustments or calculations presented to us, at this time, would be inappropriate. The record presented is inadequate to guage [sic] the costs of delay. Nor is the issue ripe for decision. Only when the plants are complete and the attendant costs claimed will the costs of delay be suseptible to accurate assessment." (emphasis added; Order, p. 13; Appendix C)

The Commission's Order, comprising the ordering paragraphs at page 29 of its Opinion and Order, set forth no finding, determination or order respecting the deferral decisions.

Because of a specific concern that in the future Limerick 1 rate proceeding, a party would seek to have ascribed conclusive or res judicata effect to the Commission's discussion of the 1976 and 1978 deferral decisions, PECO appealed that portion of the Commission's Opinion. It explained the purpose of its appeal to the Court as follows:

> "It is PECO's position that this Honorable Court should likewise decline to review these determinations, because the PUC's statements and directive do not constitute a final adjudication and have no res judicata effect. PECO does request that this Court, unlike the Commonwealth Court, expressly hold in its Order that each of these determinations is at present not reviewable and without res judicata effect.

> An explicit statement to this effect is essential to avoid future pointless controversy over the meaning of these statements and directive and to reduce the financial uncertainty imposed by them upon PECO, which uncertainty increased capital attraction costs to the injury of both PECO and its ratepayers....
>
> Clearly the PUC's criticisms of PECO's 1976 and 1978 deferral decisions are not presently reviewable. The PUC has neither determined whether PECO should be penalized for its actions nor what the form or magnitude of any such penalty should be. Rather, it has explicitly held that the controversy is not ripe for its decision, much less that of this Court. The PUC has thus not rendered a final judgment as to any legally cognizable matter.

In response to the Company's argument, the Commission expressly noted in its Brief before the Pennsylvania Supreme Court that an adjudication had not been made as respects the 1976 and 1978 deferral decisions:

> "The Commission further agreed with the ALJ that, this proceeding was not appropriate for resolving the total amount of the increases in the construction costs brought on by the delays, or for determining whether or not PECO could later recover those increases .... The Commission also reserved judgment on PECO's right to recover the costs of delay-induced increase until PECO actually seeks reimbursement in a subsequent proceeding." (emphasis added; Commission Brief Before the Supreme Court, pp. 11-12; Appendix E) 1/

1/ Although at other locations in its Brief, statements are made which appear inconsistent with the above quotation, i.e. apparently asserting that a determination had been made, the significance of these statements is unclear and this position was clearly rejected by the Supreme Court.

Clearly, in light of these, the Commission's own statements made to the Supreme Court, Staff's position must be recognized as error and its Motion denied. Accepting these representations of the Commission, the Supreme Court characterized this portion of the Commission's Order as follows:

> "[T]he opinion accompanying the PUC's order contained criticism, of an advisory nature, directed at PECO's decisions 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." Pa. P.U.C. v. Philadelphia Electric Co., 501 Pa. 153, 460 A.2d 734, 739 n.7 (1983).

As described above, as the language cited by the Trial Staff is not an adjudication or the result of an adjudication, it is not a "finding, determination or order" which can be given conclusive effect pursuant to Section 316. 2/

2/ Moreover, barring adjudication on the project deferral issue in this proceeding would clearly be a violation of the Company's due process rights. The Commission's use of language respecting the 1976 and 1978 deferrals was, according to the Supreme Court, mere "criticism of an advisory nature", and not an "adjudication" of the specific facts and issues warranting appellate review. As the Commonwealth Court has stated:

> "It is clear that 'where an administrative agency, pursuant to delegated power, promulgates an order definitive, basic findings of fact are essential to the validity of its action, and such findings must be sufficiently specific to enable the court in reviewing that action to pass upon questions of law . . . . Failure to make the requisite findings is a violation of due process' " [Citing Gottshall v. Batt, 71 Dauph. 383, 399

10. The principal issue in this proceeding is the reasonableness and prudence of costs associated with Limerick 1 and Common Plant. Resolution of this issue will require an examination of numerous, complex and interrelated factors. For the first time, the reasonableness of the deferral decisions is ripe for adjudication, and the Company has a statutory and constitutional due process right to submit testimony and develop a full record on this issue. 66 Pa. C.S. § 332(c); Town Development, Inc. v. Pa. P.U.C., 50 Pa. Cmwlth. 104, 411 A.2d 1317 (1980); In Re Shenandoah Suburban Bus Lines, 355 Pa. 521, 50 A.2d 301 (1947). The Trial Staff's Motion would clearly violate these rights.

Continued

(1958).] Begis v. Industrial Board of the Department of Labor and Industry, 9 Pa. Cmwlth. 558, 562, 308 A.2d 643, 646 (1973).

See also McKinley v. State Board of Funeral Directors, 5 Pa. Cmwlth. 42, 46, 288 A.2d 840, 842 (1972); State Real Estate Commission v. Bewley, 1 Pa. Cmwlth. 85, 94-95, 272 A.2d 531, 535 (1971).

* * *

To summarize on this point, due process requires that this Court be presented with an adjudication which indicates what the affected party has done or failed to do, and which specific factual and legal conclusions were made to justify the administrative action." Norwood v. Pa. State Horse Racing Commission, 16 Pa. Cmwlth. 219, 328 A.2d 198, 204 (1974).

See also D'Anjollel v. State Board of Funeral Directors, 3 Pa. Cmwlth. 64, 280 A.2d 123, 126 (1971); Erie Lighting Co. v. Pa. P.U.C., 131 Pa. Super. 190, 198 A.901, 903 (1938).

Moreover, the Trial Staff's Motion, if granted, would eliminate from consideration by the Commission substantial evidence which bears directly on the reasonableness of Limerick costs. The Commission should not be so limited in its review. Given the Commission's finite resources and the seven month period within which it must render a final order, a full and complete record on this issue should be developed. The Commission can then determine to what extent it will adopt its prior discussion of the deferral decisions and reject the additional evidence already submitted by the Company. Thus, principles of procedural efficiency also support denial of the Motion of Limine.

WHEREFORE, for the reasons stated above, the Philadelphia Electric Company respectfully requests that the Trial Staff's Motion in Limine be denied.

Respectfully submitted,

Robert H. Young
William E. Zeiter
Walter R. Hall, II
Jack E. Jerrett

Counsel for Philadelphia
Electric Company

OF COUNSEL:

Edward G. Bauer, Jr., Esquire
Vice President and General Counsel
Philadelphia Electric Company
2301 Market Street
Philadelphia, PA 19101

MORGAN, LEWIS & BOCKIUS
2000 One Logan Square
Philadelphia, PA 19103

DATE: December 5, 1985

APPENDIX C - TRIAL STAFF'S REPLY TO NEW MATTER
(DECEMBER 16, 1985)

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

December 16, 1985

IN REPLY PLEASE
REFER TO OUR FILE

Jerry Rich, Secretary
Pa. Public Utility Commission
New Filing Section
Harrisburg, PA 17120

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

Dear Secretary Rich:

Enclosed for filing please find an original and three copies of Trial Staff's Reply to New Matter for filing in the above captioned matter. Copies have been served upon the Administrative Law Judge and the other parties.

Very truly yours,

D. P. Delaney

Daniel P. Delaney
Deputy Chief Counsel

DPD:caw

Encl.

cc: Honorable Joseph P. Matuschak
Service List

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

THE HONORABLE JOSEPH P. MATUSCHAK PRESIDING

PENNSYLVANIA PUBLIC UTILITY COMMISSION	:	
	:	Docket No.
v.	:	R-850152
	:	
PHILADELPHIA ELECTRIC COMPANY	:	

REPLY TO NEW MATTER

AND NOW, this 16th day of December 1985, comes the Trial Staff of the Pennsylvania Public Utility Commission (Trial Staff) and Replies to the New Matter of the Philadelphia Electric Company (PECO) contained in PECO's Answer to Motion in Limine and respectfully represents as follows:

7. Admitted in part and denied in part. The allegations in the first unnumbered paragraph are admitted. The allegations in the second unnumbered paragraph are denied as legal conclusions to which no responsive pleading is required. By way of further response, the Trial Staff notes that with respect to subparagraph 1) the Commission Order at I-80100341, entered August 27, 1982, states as follows:

> Considering the foregoing, we are of the opinion that PECO management did not exercise judgement 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.

56 Pa. P.U.C. at 61. (Emphasis added.)

Clearly the Commission's language indicates that a finding of unreasonable management action was made.

With respect to subparagraph 2) Trial Staff asserts that the Pennsylvania Supreme Court did not rule on the issue other than to generally affirm the Commission Order.

With respect to subparagraph 3) Trial Staff admits that this is the first case in which PECO has claimed rate base inclusion of the costs of Limerick. However, Trial Staff denies that this is the first opportunity PECO has had to litigate the propriety of its management actions. Indeed, PECO in defending its decision to delay Limerick construction argued to this Commission as follows:

> PECO urges the Commission to reject Trial Staff's various arguments in its Order concluding this proceeding. As noted in the Commission's Order of October 10, 1980, a principal purpose of this investigation has been to examine "the cost of construction delays at Limerick and whether those delays were reasonable". Trial Staff and all other parties to this investigation, including PECO, have had a full opportunity to develop the record upon this issue.

PECO Reply Brief, I-80100341, p. 116. (Emphasis added.) (Copies of pp. 116-117 have been attached as Appendix 1 to permit the Administrative Law Judge to understand the context of PECO's admission.)

In essence PECO has had the opportunity to exercise its statutory and constitutional right to present evidence and argument on the issue of its prudency in delaying Limerick construction. The Commission finding, quoted above, simply bifurcated the issues of prudency and the appropriate remedy. The issue of the Company's prudency has been resolved adversely to PECO in the Investigation at Docket No. I-80100341. The only remaining issue for the instant proceeding is the quantification of the appropriate remedy.

8. Admitted in part and denied in part. The vast majority of the legal arguments contained in paragraph 8 are denied as set forth more specifically below. Those few allegations which are admitted will be so noted.

The crucial premise upon which PECO's arguments rest is its unsuccessful attempt to equate a "finding" with an "adjudication" or with a final "order" or with a "determination". Trial Staff disagrees with this premise. Even if it is true that the Pennsylvania Supreme Court held that this Commission's finding of managerial imprudence in PECO's 1976 and 1978 deferral decisions was not a reviewable adjudication, that holding is not determinative on the conclusiveness of this Commission's finding. The importance of the Supreme Court's action is that it affirmed the Commission's final order and that it did not set aside, annul or modify the finding. 66 Pa. C.S. §316. Trial Staff submits that the distinction PECO refuses to recognize is that, even if the finding was not an adjudication and was not viewed as an adjudication by the Supreme Court, the plain language of the statute makes

the finding binding on the Company and the parties to this proceeding because it was reviewed by the Court and was not set aside, annulled or modified.

Trial Staff agrees that a finding resolves a particular issue. Further, it agrees that an adjudication must be supported by the appropriate findings. Indeed those factors highlight the difference between an adjudication and a finding: Findings resolve issues. Adjudications resolve cases. In a case the size of the first Limerick Investigation the Commission made many findings resolving many issues, but simply because not all of the findings are needed to support the portion of the adjudication on appeal does not make those additional findings subject to subsequent attack in this proceeding.

PECO argues (p. 5) that the only use for Section 316 is to preclude a collateral attack on a Commission order where a party has failed to appeal the same order in an appropriate fashion. Trial Staff disagrees and submits that it would be more accurate to say that the reported cases deal only with collateral attacks on Commission orders. However, the language of the statute is far more encompassing than including only Commission orders. Section 316 is stated in the disjunctive and also includes rules, regulations, findings and determinations. The fact that no reported case has interpreted the remaining language does not limit the application of the section.

Trial Staff also disagrees with PECO's suggestion (p. 6) that Section 316 merely codifies the doctrine of

res judicata and collateral estoppel. Trial Staff will not repeat the criteria for res judicata and collateral estoppel. See Safeguard Mutual Life Insurance Co. v. Williams, 463 Pa. 567, 574, 345 A.2d 664, 668 (1975) (elements of res judicata and collateral estoppel). Instead, Trial Staff notes that Section 316 requires only two conditions be met: First, there must be a prior finding made by the Commission. And second, the finding shall not have been disturbed upon appellate review. With respect to PECO's liability for its imprudent managerial decisions in 1976 and 1978 both conditions have been met, and the statute should be applied.

PECO's attempt to equate res judicata or collateral estoppel with Section 316 is another effort to equate a finding with an adjudication. The case most analogous to the current controversy demonstrates the difference in operation between them. In Philadelphia Electric Company v. Pennsylvania Public Utility Commission, 61 Pa. Commonwealth Ct. 325, 433 A.2d 620 (1981), the Commission excluded $9.7 million from PECO's rate base as being the amount attributable to the mismanagement of the construction of the Salem Nuclear Generating Unit I. In a prior rate case PECO had litigated the prudency of its management responsibility, and the Commission had disallowed $10.5 million in rate base. PECO appealed the prior rate case including the $10.5 million adjustment. PECO attempted to relitigate the prudency of the Salem I management decisions in the second rate case. The Administrative Law Judge struck the proffered evidence on the basis of res judicata and

certified the question to the Commission. The Commission upheld the Administrative Law Judge and eventually made a $9.7 million adjustment in its final order. The Commonwealth Court upheld the decision to exclude the evidence based on res judicata as valid when decided. However, since during the interim the Court had reversed the prior rate case ($10.5 million), it was required to reverse the Commission on the $9.7 million issue also. Id. at 331-337, 433 A.2d at 624-626. The similarity between the Commonwealth Court decision and the instant case is striking. In the instant case PECO is once again attempting to litigate the prudency of its prior management decisions. The Commission has in a prior case (I-80100341) ruled that the decisions in question were imprudent. PECO had appealed the prior case. In the PECO case, cited above, the prior Commission Order, which determined liability and quantified damages, was entitled to res judicata effect. Only the reversal of the prior quantification finding prevented the Court from upholding the subsequent Commission Order which had adopted the prior finding. In the instant case the failure of the appellate courts to set aside, annul or modify the finding of managerial imprudence at I-80100341 leads to the same conclusion (preclusion of relitigation of the issue) by operation of Section 316 and not by res judicata.

9. Denied. The allegations and arguments contained in paragraph 9 are denied as more specifically set forth below. If there are any allegations which can be admitted, they will be so noted.

Trial Staff does not dispute that the time has come to determine the costs of Limerick Unit I and Common Plant which will be included in PECO's rate base. However, PECO refuses to recognize that by virtue of the Commission's prior finding it can only recover, at most, total costs less any amount attributable to the cost of its imprudent managerial decisions to defer construction in 1976 and 1978. The portion of the Commission Order quoted (p. 7) by PECO, read in context, gives the Company the appropriate notice that the findings made in the Investigation could well impact PECO's rate base.

That portion of the Trial Staff Main Brief quoted by PECO (p. 7) should be read in context as prefaced by the following:

> Trial Staff further suggests that unless the Commission finds the economics of the situation so compelling that PECO must be ordered to change its course, it does not make regulatory sense to order or approve any construction plan at this time.

Trial Staff Main Brief, p. 1. See Appendix A to PECO Answer (Emphasis added.)

In fact the Commission did find the situation compelling and gave PECO the option of discontinuing construction of Unit 2 or losing Commission approval of funding sources. 56 Pa. PUC at 67-71. The second quote (p. 8) from the Trial Staff Main Brief should also be read in context. It was introduced with the following:

> Trial Staff submits that the evidence in this case establishes that PECO's management was imprudent in postponing Limerick in 1976 and 1978. For two reasons, however, Trial Staff recommends that the Commission defer decision on this subject:

Trial Staff Main Brief, p. 11. See Appendix A to PECO Answer. (Emphasis added.)

Obviously Trial Staff recognized that there was sufficient evidence to support the finding of imprudence, and the Commission chose to make the finding and to order PECO to change its course. Thus, neither of the passages quoted by PECO from the Trial Staff Main Brief should be construed as wholehearted endorsements of PECO's position.

It may be true that Administrative Law Judge Klovekorn adopted the Trial Staff position. However, it should be emphasized that he too believed PECO had not given careful consideration to the ratepayers' interests.

> In summary, it appears that the company's action in postponing Limerick in 1976 and 1978 was made without careful analysis of the impact of such delay on its ratepayers.
>
> In addition, the record shows that a factor in these decisions was the potential impact of Limerick on the company's capacity and reserve margins and the adverse effect this would have on the company's rate allowances. Consumers 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.

Initial Decision, p. 54. See Appendix A to PECO Answer. (Footnote deleted.)

Again ALJ Klovekorn hardly endorsed the Company's actions. More importantly, the Commission chose to continue where the

Administrative Law Judge stopped and made the finding of imprudency quoted previously. (See ¶ 7 above.) 56 Pa. PUC at 61.

PECO's careful editing of the quote (p. 9) from the Commission Order, entered August 27, 1982, omits the crucial last sentence of the paragraph.

> Accordingly, we shall not attempt to quantify the costs of the various delays at this time.

56 Pa. PUC at 58 (emphasis added). See also Appendix C to PECO Answer.

Thus, the Commission specified, as conceded by Trial Staff, that the quantification of damages was not resolved. Again, it is the issue of quantification that remains to be litigated in the instant proceeding.

PECO's discussion of its alleged challenge in the Supreme Court to the Commission's finding of imprudence evidences a fundamental misunderstanding of the appellate review applied to the Limerick Investigation. PECO did not, as it represents (p. 9), appeal to the Supreme Court; the Commission did. Examination of Appendix D to its Answer, the source of its quote (pp. 9-10), reveals that PECO has quoted its brief as an appellee before the Supreme Court. Nor could the quote taken from the Commission-Appellant's brief have been written in response to the Company's argument (p. 10). Obviously, as the appellant, the Commission brief was filed first. In addition, the quoted portion is taken from the Commission's Statement of the Case which was not argumentative in nature.

Trial Staff does accept PECO's footnote 1 (p. 10) which indicates that later portions of the Commission brief asserted that a finding of imprudence was made. Trial Staff submits that the flawed logic of PECO's incorrect procedural recitation of the first Limerick Investigation appellate review does nothing to support the conclusion (p. 11) PECO again strains to reach. At the risk of being repetitious, PECO's continued attempts to equate a finding (of imprudence) with an adjudication simply does not comport with the plain language of Section 316.

Finally, there is sufficient evidence to undermine PECO's "lack of due process" argument. See PECO Answer, footnote 2, pp. 11-12. The quoted portion (p. 7) of the Commission Order, October 10, 1980, ~~initiating the Limerick~~ Investigation gives notice of the possibility ~~of~~ an impact on PECO's rate base. The admission in PECO's Reply Brief, quoted above (See ¶ 7 above and Appendix 1, p. 116), demonstrates that PECO availed itself of the opportunity to litigate the issue. The Commission then based its finding of imprudency upon the evidence introduced by the parties, particularly PECO's Mr. Paquette. Thus, PECO has already received all of the due process to which it is entitled on the issue of liability for imprudence.[1/] See Cohen v. Pennsylvania Public

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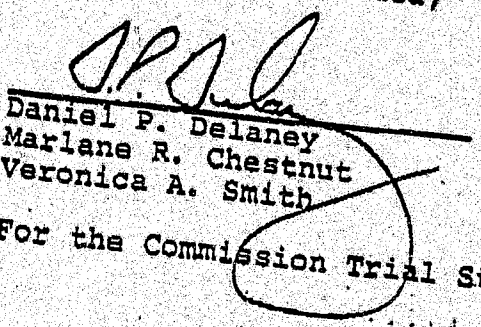
1/ For a succinct statement of due process requirements see Smith v. Pennsylvania Public Utility Commission, 192 Pa. Superior Ct. 424, 429, 162 A.2d 80, 83 (1960).

Utility Commission, 78 Pa. Commonwealth Ct. 545, 554-556, 468 A.2d 1143, 1148-1149 (1983); aff'd. ___Pa. ___, 493 A.2d 653 (1985).

10. Admitted in part and denied in part. Trial Staff admits that the instant proceeding is the first time the parties will face the issue of the inclusion in rate base of the costs associated with Limerick I and Common Plant. Further, Trial Staff admits that PECO is entitled to all reasonable due process rights with respect to that issue. However, as indicated above, Trial Staff denies that this case should present any opportunity to PECO to relitigate the reasonableness of the 1976 and 1978 deferral decisions. The issue of the reasonableness of the deferral decisions was litigated in the 1980 Limerick Investigation wherein PECO received all due process rights to which it was entitled. (See discussion ¶ 9 above). That issue was resolved adversely to PECO and that finding has not been disturbed upon appeal. Relitigation is now foreclosed by the operation of Section 316 of the Public Utility Code. There is no reason to burden the record in this proceeding with any evidence beyond the finding of imprudence set forth by the Commission Order at I-80100341, entered August 27, 1982. To do otherwise would be contrary to the plain language of Section 316.

WHEREFORE, the Trial Staff respectfully requests the Presiding Officer to rule that the Commission's prior finding that the Limerick 1976 and 1978 construction delays were unreasonable and imprudent is prima facie evidence of that finding and conclusive on the parties to this proceeding.

Respectfully submitted,



Daniel P. Delaney
Marlane R. Chestnut
Veronica A. Smith

For the Commission Trial Staff

G-28 North Office Building
Harrisburg, PA 17120
(717) 783-2804

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon parties of record in this proceeding in accordance with the requirement of 52 Pa. Code §1.54.

Dated this 16th day of December, 1985.

Daniel P. Delaney

For Commission Trial Staff

APPENDIX 1

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

COPY

RE: LIMERICK NUCLEAR GENERATING : DOCKET NO. I-80100341
STATION INVESTIGATION : (1980)

REPLY BRIEF OF THE
PHILADELPHIA ELECTRIC COMPANY

Before Administrative Law Judge Joseph [illegible]born

Robert H. Young
Walter R. Hall, II
Michael G. Nearing
Larry R. Chatzkel
Margaret B. Dardess

Counsel for Philadelphia
Electric Company

NSEL:
rd G. Bauer, Jr., Esq.
President & General Counsel
e A. McKenna, Esq.
stant Counsel
adelphia Electric Company
Market Street
adelphia, PA 19101

AN, LEWIS & BOCKIUS
South Broad Street
The Fidelity Building
adelphia, PA 19109

February 3, 1982

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Pa. P. U. C.
Law Bureau

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PUBLIC UTILITY
COMMISSION
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F. Brief of the Trial Staff.

In its Brief, Trial Staff asserts that PECO should be charged with responsibility for various imprudent decisions as respects the Limerick construction schedule made in connection with the schedule extensions in 1976 and 1978. Despite these assertions, however, Trial Staff does not propose that any present penalty be assessed against the Company, but rather requests that the issues which it defines should be reserved and reviewed by the Commission upon Limerick's introduction into rate base.

PECO urges the Commission to reject Trial Staff's various arguments in its Order concluding this proceeding. As noted in the Commission's Order of October 10, 1980, a principal purpose of this investigation has been to examine "the cost of construction delays at Limerick and whether those delays were reasonable". Trial Staff and all other parties to this investigation, including PECO, have had a full opportunity to develop the record upon this issue. PECO believes that it is clear from a review of Trial Staff's Main Brief and that of PECO (pp. 286-308), that Trial Staff has failed to prove any management decision which could properly be characterized as imprudent on applicable legal and regulatory principles as defined in PECO's Brief (at pp. 296-298). Further, the implied threat inherent in Trial Staff's deferral request that

such a penalty be imposed upon completion of the plant obviously imposes a risk to the Company and its investors that increases the costs of plant financing and completion. Accordingly, recognizing that proper notice and a full hearing opportunity has been provided as to Trial Staff's asserted "imprudence issues" and based upon the overwhelming evidence of record as described in PECO's Main Brief, Trial Staff's allegations should be rejected.

In addition to the obvious inaccuracies and unsubstantiated assertions which are the basis of Trial Staff's position as described in PECO's Main Brief, there are several major deficiencies to Trial Staff's arguments which should be noted. First, Trial Staff implicitly assumes, without demonstration, that earlier completion of Limerick (i.e. earlier than the Forecast 5 Schedule) would have been beneficial to ratepayers (T.S.M.B., p. 5). This is a matter of empirical analysis, which would require examining the effect upon PECO's operations and revenue requirements of Limerick completion at Trial Staff's earlier proposed dates and employing best estimates of cost conditions. Trial Staff has not attempted any such analysis, but rather argues on the basis of generalized notions that earlier plant completion would have resulted in a lower plant price tag.

APPENDIX D - TRANSCRIPT FOR DECEMBER 20, 1985 HEARING CONTAINING ORAL ARGUMENT AND ALJ'S RULING ON MOTION IN LIMINE

COMMONWEALTH OF PENNSYLVANIA

PUBLIC UTILITY COMMISSION

- x

Pennsylvania Public Utility Commission, et al. : versus Philadelphia Electric Company. : Docket No. Investigation into a requested $660 million : R-850152 annual rate increase. :

Further Hearing :

- x

Pages 1304 through 1577

Hearing Room No. 1
North Office Building
Harrisburg, Pennsylvania

Friday, December 20, 1985

Met, pursuant to adjournment, at 9:32 a.m.

BEFORE:

JOSEPH MATUSCHAK, Administrative Law Judge

APPEARANCES:

MARLANE R. CHESTNUT, Esquire
VERONICA SMITH, Esquire
DANIEL P. DELANEY, Esquire
P.O. Box 3265
Harrisburg, Pennsylvania 17120
(For PUC Trial Staff)

WALTER R. HALL, II, Esquire
Morgan, Lewis & Bockius
2000 One Logan Square
Philadelphia, Pennsylvania 19103
(For Philadelphia Electric Company)

APPEARANCES (Continued):

IRWIN POPOWSKY, Esquire
SCOTT J. RUBIN, Esquire
DAVID WERSAN, Esquire
1425 Strawberry Square
Harrisburg, Pennsylvania 17120
(For the Office of Consumer Advocate)

DAVID M. KLEPPINGER, Esquire
McNees, Wallace & Nurick
100 Pine Street
Harrisburg, Pennsylvania 17108
(For Philadelphia Area Industrial Energy Users Group)

J. THOMAS MORRIS, Esquire
Reed, Smith, Shaw & McClay
1600 Avenue of the Americas
Broad and Chestnut Streets
Philadelphia, Pennsylvania 19107
(For SEPTA and AMTRAK)

MARK WIDOFF, Esquire
129 State Street
Harrisburg, Pennsylvania 17101
(For University of Pennsylvania and Utility Users Group)

CHARLES RAINEY, Esquire
Fifth Floor
1101 Market Street
Philadelphia, Pennsylvania 19107
(For City of Philadelphia)

ZORI G. FERKIN, Esquire
Eleventh Floor
300 North Second Street
Harrisburg, Pennsylvania 17101
(For Governor's Energy Council)

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C O N T E N T S

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
William A. Abrams				
By Mr. Hall				
By Mr. Delaney	1376			
By Mr. Rubin		1378		
		1432		
Joseph F. Paquette, Jr.				
By Mr. Hall				
By Mr. Delaney	1445			
By Mr. Wersan			1567	
By Ms. Ferkin		1448		
By Mr. Rainey		1504		
By Mr. Kleppinger		1528		1569
		1549		
		1561		

E X H I B I T S

NUMBER	FOR IDENTIFICATION	IN EVIDENCE
PECo Statement		
No. 10 (Abrams)	1377	1377
No. 3 (Paquette)	1447	1447
Staff Exhibit		
No. 13 (IR-OCA-10-3)	1481	1502
No. 14 (PECo Statement No. 9 from I-80100341)	1491	1502
No. 15 (Transcript excerpts from 3-31-81 in I-80100341)	1492	1502
No. 16 (Excerpts from PECo brief in No. 2365 Comm. Ct. 1982)	1496	--
No. 17 (Excerpts from reply brief in No. 2365 Comm. Ct. 1982)	1496	--
No. 18 (Portion of answer and application opposing petitioner's application for stay pending appeal in No. 23 E.D. Appeal 1983)	1496	--

E X H I B I T S (Continued)

NUMBER		FOR IDENTIFICATION	IN EVIDENCE
OCA Exhibit			
No. 65	(letter of 10-25-85 and attachments)	1431	1431
No. 66	(memo of 8-12-85 meeting)	1504	1548
No. 67	(Excerpt from PECo 1977 annual report)	1507	1548
No. 68	(Excerpt from PECo 1978 annual report)	1510	1548
No. 69	(memo of 8-16-76 meeting)	1512	1548
No. 70	(letter of 3-18-77 to Federal Power Commission)	1518	1548
No. 71	(IR-OCA-3-5)	1521	1548
GEC Exhibit			
4	(DR-TPH1-GEC)	1536	1548

PROCEEDINGS

ADMINISTRATIVE LAW JUDGE JOSEPH MATUSCHAK: This is the time and place for further hearing in the matter of Pennsylvania Public Utility Commission against the Philadelphia Electric Company, Docket Number R-850152.

Before we proceed with further testimony in this matter we have scheduled oral arguments on the motion in limine of the Commission Trial Staff.

MR. DELANEY: Your Honor, with your indulgence, what I propose to do is briefly state the basis of the motion and allow the company to respond to that, and then have a rebuttal opportunity after that.

JUDGE MATUSCHAK: Very well.

MR. HALL: Mr. Delaney, you will be making your argument though, I take it, and the company will have an opportunity to respond to that?

MR. DELANEY: Surrebuttal; is that what you are stating?

MR. HALL: It does seem to me that your obligation is to state more than simply the basis for the motion. You make your argument, we reply and then you have rebuttal.

MR. DELANEY: Certainly.

Your Honor, as I see it, one of the major issues in this case, if not the major issue, is the introduction

into rate base of Limerick Unit No. 1. Now, people who have traced the development of the construction of plant through the Commission proceedings would have to see this event as almost anticlimatic in the way that the plant has gotten tremendous amounts of attention by the Commission in the period of its construction.

I have attempted to trace that back, and I note that as far back as June 1978 in R.I.D. 438 there was an extensive hearing conducted before you concerning facts of the plant's construction.

I would note that in the initial decision -- or actually the recommended decision at R-79060865 Judge Klovekorn devotes an extensive part of his recommended decision to reviewing the plant's construction and the positions of parties in the case concerning whether the plant should be finished, or complaining about the delays in its construction.

These were part of rate cases in which this issue was raised in a limited manner.

JUDGE MATUSCHAK: It 438 it was not directly involved. In the beginning of that rate case the company indicated it would not delay construction of Limerick 1 and 2, and before the case was concluded the company changed its position and determined that it would delay construction of Limerick 1 and 2 two years; and although

not directly involved in the rate case, itself, we reported it as a related matter to the Commission and suggested that the Commission look into it before further moneys were expended,to determine whether that was in the public interest.

MR. DELANEY: Yes, I would note that the change in position by the company in the course of the litigation in that case caused you to conduct an extensive hearing on, I believe, June 13, 1978 in that proceeding when the company presented witnesses and arguments on the issue of the construction of the plant.

There were more extensive examinations subsequent to these two rate cases, and those examinations are the 1980 Limerick investigation conducted before Judge Klovekorn and the subsequent Limerick 2 investigation just recently concluded in the spring of this year before Administrative Law Judge Turner, and resolved by a Commission Order of December 5th.

The basis of the Staff's motion goes to what we believe to be clear findings in the Commission's first Limerick 1 Order. Judge Klovekorn issued an extensive recommended decision in that case. In the course of his decision he reviewed -- well, let me back up a little bit.

As is not uncommon in extensive Commission investigations, it was initiated by a series of Commission Orders.

These Orders identified issues to be examined in the course of the investigation. One of the subsequent Orders after the initial beginning of the investigation defined as one of the areas to be examined in the investigation the facts of the delays in the Limerick construction and whther those delays were reasonable.

The proceeding then went on I believe 39 hearing days and over 4,000 pages of transcript. Judge Klovekorn issued a recommended decision that comprehensively examined many of these issues.

There is an extensive discussion of both the company's testimony and the intervenors' testimony on the issue of the reasonableness of the company's delay in 1974, 1976 and 1978 in the construction of the Limerick plant.

What Judge Klovekorn concluded was that the '74 delay was reasonable, but the '76 and '78 delays were not.

JUDGE MATUSCHAK: I think he further concluded that the initial decision to construct Limerick was also reasonable.

MR. DELANEY: Yes, he did. But I am focusing primarily on the delays.

Everyone filed exceptions on the decision to the Commission, and the Commission made its decision in May of 1982, and then finally issued an extensive Order on it, resolving the investigation, in August of 1982.

That Order adopted many of Judge Klovekorn's findings and also had its own independent discussion of several of Judge Klovekorn's conclusions. One of the conclusions tht is expressly adopted, and in fact to some extent elaborated on, in the Commission's opinion is the reasonableness of the '76 and '78 delays.

I have in my reply to the company's new matter a brief paragraph excerpt of the Commission's conclusion. If you will bear with me, I will read it very quickly.

"Considering the foregoing," -- which was the discussion of the evidence about the delays in Judge Klovekorn's conclusions -- "we are of the opinion that PECo's management did not exercise judgment sufficient to meet our reasonable man standard in delaying construction at Limerick in 1976 and '78. Having so found, we were requested by Staff and the OCA to quantify the cost of 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 a claim for recovery of any of the costs associated with construction of the plants; and, consequently, we can make no adjustments to any claims.

"Further, if PECO should sell all or part of the Limerick or its capacity to other utilities, the deduction of all or part of the cost 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 '78 delays."

The line that I just read are contained at 56 PA PUC, page number 61.

Essentially what the Commission did was adopt the approach that Judge Klovekorn had taken to the matter, which was to make a finding of unreasonable action on the part of the company, but to delay to a later time the actual quantification of the effects of the delay.

Finally, following the issuance of the Order the company appealed it to the Commonwealth Court, and with a lot of procedural skirmishing the Commonwealth Court reversed the Commission's opinion in December of 1982, and issued a decision, an actual opinion, on the matter in January.

At the Commission's request, the matter was argued in front of the Supreme Court on its April list, and in May of 1982 the Supreme Court entered an opinion which reversed the Commonwealth Court opinion and affirmed the Commission's initial Limerick decision of August of '82.

I should note at this point that among the issues that were litigated in the Commonwealth Court was included a substantial evidence attack by the company on the Commission's findings concerning the prudency of the '76 and '78 construction delays.

Those issues were carried up to the Supreme Court, and the Supreme Court really mentions them only in a footnote to its Opinion, and in effect chooses not to rule on that part of the appeal at that time. And the footnote I have cited in my original motion, Footnote 7 to the Opinion, which is at page 501 PA 161 and 460 Atlantic 2nd 739, states, "Further, the opinion accompanying the PUC's Order contained criticisms of an advisory nature directed at PECo's decision in 1976 and '78 to defer completion of the Limerick facilities. Such mere criticism, however, does not constitute an adjudication and cannot be reviewed on appeal."

The overall action of the Supreme Court, however, was to affirm the Commission's Order and reinstitute it.

There were subsequent filing by the company in compliance with the Commission's 1982 order.

At this time, however, the essence of our motion goes to the kinds of evidence that you should receive in the present case. It is doubtlessly true that the company is not first making its claim for the inclusion of the Limerick 1 unit in its rate base in this case.

What we argued in our motion is that in view of the Commission's -- in my opinion -- express findings of unreasonable conduct by the company in delaying the construction in '76 and '78, that the company should not

be permitted in this proceeding to introduce additional evidence on that issue, and, secondly, to relitigate the facts, which I believe have been conclusively established in the prior Investigation Order.

What we have relied on in our motion in limine is Section 316 of the Public Utility Code. In part what that section says is 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."

JUDGE MATUSCHAK: Isn't the problem therein that the Supreme Court stated that it was not appealable and they would not review it? Isn't that section conditioned upon review?

MR. DELANEY: I don't believe so, Your Honor. What the company has argued in its answer is that the language of the Supreme Court's Footnote 7 says that the conclusion was not an adjudiction; therefore, it makes this section inoperative. And I would submit that that's not supported by the wording of the section.

If you will note, the section is stated to encompass a number of actions by the Commission. These are stated disjunctively; it's not that each one has to be a rule

or regulation or finding, but that any of these will do. And I will submit that in the Commission's own language in the Limerick 1 Order it said that they had found that that the company was unreasonable in its delays.

JUDGE MATUSCHAK: The only problem we have, or the only difficulty we have is that that section seems to indicate if there is a finding or determination or order, after a review by the Court that that matter will be conclusive and in the nature of res judicata, available in any other proceeding as estoppel or res judicata in those proceedings. We don't have that here. We don't have that here.

MR. DELANEY: My response would be, Judge Matuschak, that the wording in the section give the effect, the operative effect described in the first several clauses of the section. The language that you just recited to me is introduced by "unless set aside, annulled or modified on judicial review." I don't think there is a connection between the two. I don't --

JUDGE MATUSCHAK: But the Court says: we are not even going to look at it. It is not appealable; we are not going to look at it. So if they don't look at it, they can't annul it or modify it or do anything else.

MR. DELANEY: Exactly.

JUDGE MATUSCHAK: You are not contending in this

case that any finding of the Commission in the Limerick investigation is binding on anybody in any case in any manner, are you?

MR. DELANEY: The Limerick 1, yes. The purpose of our motion is to say that the unreasonable construction delay findings are binding on the company and conclusive of the facts found in this proceeding.

JUDGE MATUSCHAK: But the section, itself, says that that result or that conclusion is only available upon review by the Courts.

MR. DELANEY: I disagree because the last section which describes judicial review, in my belief, is stated conditionally. I don't think that the first part of the section needs the affirmance upon judicial review to be effective.

JUDGE MATUSCHAK: There may be other grounds upon which your position might be well-taken, but I don't think it is on the grounds of 316. I don't think 316 has anything to do with this.

MR. DELANEY: We haven't argued in front of you that res judicata or collateral estoppel applies; our argument has been solely on 316. What we are offering to you in this proceeding -- or the position that we are taking -- is not uncommon in the Commission There will be proceedings where one conclusion is reached, and then

there will be subsequent proceedings where that is applied. I know, Judge Matuschak, you did the CAPCO investigation Order.

JUDGE MATUSCHAK: Yes, we have that.

MR. DELANEY: That was an extensive proceeding on the prudency of cancellation decisions concerning construction of nuclear power plants. The conclusion was made --

JUDGE MATUSCHAK: And the prudency of some delays in that case too.

MR. DELANEY: Correct. And then subsequently they were applied in Penn Power and I believe in the Duquesne Light rate cases, again findings being made in prior Commission orders and being applied in a subsequent one.

There is an even more direct example, I think, in the Beaver Valley investigations. Then you had a long multi-year investigation again dealing with prudency in the operation of nuclear power plants or matters related to nuclear power plants. There was a series of Commission orders. One of the Commission orders assessed liability, and then the investigation continued on quantifying the effects of purchased power due to outages the Commission found to be unreasonable.

JUDGE MATUSCHAK: I think you are on stronger grounds there.

MR. DELANEY: I would note that through that period

Duquesne Light was appealing all the interim Commission orders.

JUDGE MATUSCHAK: How long did the investigation of Limerick 1 take? Didn't that take about two years?

MR. DELANEY: Nearly two years.

JUDGE MATUSCHAK: And there were 38 hearing dates in that investigtion.

MR. DELANEY: That's correct. That's my understanding.

What we argued to you though is that I believe that all the conditions of Section 316 have been met. I don't believe the section is written in such a way that requires judicial review for the conclusive effect of the prior finding on a case to have application, and I think, in my view, that position is supported by the wording of Section 316,which has the conditional word "unless" that precedes the description of the effect of judicial review.

I don't know if you have any questions, Your Honor. Otherwise, I would have Mr. Hall respond, and then I may have some rebuttal.

JUDGE MATUSCHAK: I want to hear from the company first.

MR. DELANEY: Thank you, Your Honor.

MR. HALL: If Your Honor please, are you limiting argument to the company and and the Trial Staff?

JUDGE MATUSCHAK: Does anyone else take the position of the Commission Staff in this proceeding?

MR. WERSAN: Yes, Your Honor.

JUDGE MATUSCHAK: You may be heard.

There is one question I want to ask Mr. Delaney first.

MR. DELANEY: Surely, Your Honor.

JUDGE MATUSCHAK: Mr. Delaney, you are asking us in this proceeding to accept the Commission's determination or finding that the Philadelphia Electric Company's decisions with regard to the 1976 and 1978 delays were not reasonable?

MR. DELANEY: That's correct, Your Honor.

JUDGE MATUSCHAK: All right. Now, the Commission in that investigation also determined that Philadelphia Electric's decision on the initial construction and Philadelphia Electric's delay decision in 1974 -- and ALJ Klovekorn took the same position -- that those decisions were reasonable. Now you are submitting half a cake here. What about the other half?

MR. DELANEY: The Commission Staff has not presented any positions in this case and will not to contest those other findings.

JUDGE MATUSCHAK: That's what I wanted to know.

MR. WERSAN: Your Hoonor, the Consumer Advocate supports the motion in limine by Staff. I think Mr.

Delaney's filing and his arguments are fairly comprehensive, but there are a few things I would like to note. The thing that the Consumer Advocate's office finds relevant is the facts that we are talking about here occurred in the 1976 to 1978 time period, and they were known, they were done, they were finished by the time of the Limerick investigation.

The company had notice that those delays were going to be litigated. They presented direct testimony directly on it. In fact, they appended that testimony to their current testimony in this case to show what it was that they stated at that time.

We believe, therefore, that the company had adequate notice and opportunity to litigate those issues.

It is our understanding that the reason the original investigation proceeded was because the issues that were involved were too lengthy and too involved to go into a normal rate case; and in fact there was a concurrent rate case going on at the time that did not include these issues.

The OCA is not planning to litigate the '74, or the prudency or reasonableness of any other delays in this case or the company's decisions to go forward; rather the OCA intends to present evidence on the costs of those delays and how they should be treated in this case.

We think the Beaver Valley investigation is on point. The Commission often bifurcates investigations, first to

make a finding of liability; and if a finding of liability or unreasonableness is found the Commission will then go and quantify that. And I think that's appropriate in this case.

Taking that position, of course the company then from the final decision in this case could appeal the entire package, the reasonableness and costs. That only, in our opinion, makes sense. But we will not be relitigating that issue -- or we certainly do not desire to relitigate that issue unless you hold it open.

JUDGE MATUSCHAK: It would be your position that the Supreme Court would refuse to accept or review findings of fact piecemeal by piecemeal?

MR. WERAN: I don't think they would if it is presented in a final order by the Commission. In the Beaver Valley case it has been a series of proceedings that I think is still before the Commonwealth Court, and the record in that case is quite extensive and a number of Commission orders are referred to, and have to be referred to in the briefs in order to present the complete picture.

JUDGE MATUSCHAK: I think the Supreme Court indicated, if they didn't exactly say, that the matter was not ripe for decision. and the Commission's findings in the matter and their conclusions were not final adjudications.

MR. WERSAN: I think there was not a need at that

time to finally resolve this, as perceived by the Supreme Court. The issue of what would happen in the future with Limerick 1 was yet to come, whether or not the company would present it in rates, whether it would attempt to sell it as it did a portion of its share in Salem 2; a number of things have happened in the intervening period.

So we think the proceeding, the progression, is logical, and it is now time to decide how much those delays cost.

JUDGE MATUSCHAK: Do you think the Commission Staff's reliance on 316 is valid? That section provides that findings of fact, conclusions, determinations and orders of the Commission shall be conclusive upon review. In this case the Supreme Court refused to review it, refused to hear it, said it wasn't appealable; so can we rest on 316, or does 316 have anything to do with this proceeding?

MR. WERSAN: I haven't phrased my arguments in terms of 316. I don't mean to cast light on the Staff's position. We haven't pursued it from that angle. In terms of perceiving this as a continuing litigation we are not yet at the stage where a final determination or adjudication is presented for the Court to resolve and to use as collateral estoppel in the future.

JUDGE MATUSCHAK: Staff has also taken a position

that this is in the nature of a bifurcated position by the Commission. It took a position and it decided to determine it preliminarily for inclusion in the coming rate case.

MR. WERSAN: We agree with that, Your Honor.

JUDGE MATUSCHAK: In that case, I think there is more solid ground.

MR. WERSAN: That is all I have to say. Thank you, Your Honor.

JUDGE MATUSCHAK: Mr. Hall?

MR. HALL: Thank you, Your Honor.

If Your Honor please, the company's position on this matter is simple and straightforward. At the conclusion of the 1980 Limerick investigation and after noting the apparent criticisms of the the company's decision-making respecting the 1976 and 1978 deferral decisions, the company appealed the Commission's 1982 Order.

The Commonwealth Court reversed that Order in its entirety. Following an appeal by the Commission Staff, the Supreme Court affirmed the Commission upon the single issue of what the Court termed the Commission's adjudication. The Court used that word with respect to the application of Section 1903, the Commission's authority to refuse to register securities certificates to be used

for the purpose of constructing Limerick 2.

In its Order, and at the specific request of the company, the Supreme Court reviewed the Commission's language stating the criticisms with respect to the company's decision-making of the 1976 and 1978 deferral decisions. The Court held with respect to that language that it constituted -- and I quote here -- "mere criticism;" further , that it was -- and I quote again -- "of an advisory nature." And finally -- and I quote again -- "it did not constitute an adjudication and cannot be reviewed on appeal."

In making those determinations, I believe the Supreme Court has established the law for this case, and has established conclusively the effect and significance of the Commission's language respecting the 1976 and 1978 decisions. That effect is that those are not final conclusions, determinations or findings.

JUDGE MATUSCHAK: Let me ask you, Mr. Hall, would you also state that the conclusion of the Commission that the initial decision of the Philadelphia Electric Company initially to construct Limerick, and PECo's decision in 1974 to delay the construction of Limerick are also open questions in this proceeding, and are not binding on us or on the parties to this proceeding?

MR. HALL: Your Honor, those particular issues were not appealed to the Supreme Court. We have no --

JUDGE MATUSCHAK: I know, but whether they were appealed or not, the Supreme Court said that those matters, the delays, were mere criticisms and were not appealable, and they were not going to review them. Doesn't the same matter apply as to the '74 delay and the original construction of Limerick? Do you want the Commission and the Consumer Advocate to come in and try those issues again in this proceeding?

MR. HALL: I believe that is a matter for Your Honor to determine. However, the Supreme Court's --

JUDGE MATUSCHAK: If we say that the '76 and '78 decisions are final, then don't we have to say that the Commission decision as to the original construction and the '74 delay are also -- excuse me. If you take the position that the '76 and '78 delays are not final and they are open to be relitigated in this proceeding, then must we not also take the position that the Commission's finding that the original investment in Limerick by PECo's and PECo's '76 delay are also open questions to be litigated in this proceeding?

MR. HALL: No, Your Honor, I don't believe that you can reach that conclusion. That is a conclusion that you can reach under the Supreme Court's order, but I don't think it is necessarily the correct conclusion.

JUDGE MATUSCHAK: The Supreme Court didn't make

any order.

MR. HALL: Your Honor, the Supreme Court reviewed specifically the Commission's language and the Commission's statements respecting the '76 and '78 decisions, reviewing the language in the order on those decisions.

JUDGE MATUSCHAK: Didn't the Commission use the same language about the '74 delay as it used about the '76 and '78 delays? And if those were, as you say, advisory, wouldn't the Supreme Court have taken the same position?

MR. HALL: No, I don't believe so, Your Honor. The Commission with respect to the 1976 and 1978 deferral decisions said the issue was not ripe for decision. Now, the Commission in --

JUDGE MATUSCHAK: Neither was the Commission's '74 delay a matter that would have been ripe for decision on that same theory.

MR. HALL: If Your Honor chooses to decide that, I would not dispute it. However, I do not believe that the Supreme Court Order classifies decisions other than the '76 and '78 deferral decision language. That is what the Court reviewed. The Court reviewed that langauge.

JUDGE MATUSCHAK: The Court didn't review it. The Court just said: we are not going to review it; it is not appealable. We noticed it, but we are not going to review it.

MR. HALL: But in reaching that conclusion, the Court reviewed the langauge. The company requested the Court to review it, and the Court in fact reviewed it, and issued the footnote in its decision specifically deciding the issues which the company had presented to it.

The other findings of the Commission -- or statements of the Commission --

JUDGE MATUSCHAK: The Court did not review it because they said, "Such mere criticism, however, does not constitute adjudication and cannot be reviewed on appeal."

MR. HALL: But to do that the Court had to review and determine the effect of the Commission's langauge in the section dealing with the '76 and '78 deferral decisions. They did that. That was specifically presented to them by the company, and they rendered a decision which said: this is not an adjudication; it is not an appealable issue. That is the determination by the Supreme Court.

JUDGE MATUSCHAK: Did the Commission's finding concerning the '76 and '78 delays have any effect -- did it aggrieve anybody; did it have any effect upon anybody, standing alone?

MR. HALL: The Supreme Court concluded, based upon is review of the language in that decision, and based upon

the representation that was made to it by the Commission as to what that language meant, and particularly that it did not constitute a determination or adjudication, that no, it did not aggrieve because in fact it was "mere criticism." It was a mere advisory statement.

JUDGE MATUSCHAK: I think the Supreme Court adopted the language that either the Commission Staff or the company had used in their brief. Isn't it true that the finding of the Commission as to the '76 and '78 delays as being unreasonable did not bind anybody, had no effect on anybody standing along, had no effect on anybody and did not bind anybody, and they would not bind anybody until the Commission determined what effect that would have on the company's request for reimbursement of the costs that were caused by those delays?

MR. HALL: Your Honor, that is not what Trial Staff is contending. Trial Staff is contending in this proceeding that in fact that language in the Commission Order does bind the company, that it is final, that it is conclusive, and that all that is left to be done is to quantify the loss to the company with respect to that.

JUDGE MATUSCHAK: Let me ask you: here is a proceeding that the Commission said in its Limerick decision at I-80100341-- they said that they concluded that the investigation should be open so that the information can

be gathered in an orderly and expeditious manner before PECo seeks to include Limerick in rate base as used and useful property. Further it said, "We conclude that an independent investigation of Limerick is appropriate so as to prevent the pending rate investigation from becoming burdened with additional issues which would have to be decided within the statutory period set forth in Section 1308 of the Public Utility Code."

And we note that in that proceeding 38 days of hearings were held. Now, there were some other issues besides the Limerick delays, the construction delays; but that proceeding extended over a period of about two years. Wasn't the Commission trying to be pragmatic about the thing and say: well, here's the Limerick delays --the delays and construction issues are of such vast importance and are so complicated that they cannot be dealt with in a rate case proceeding in the time constraints of a rate case poceeding; so we are going to decide that issue preliminarily so that those issues will not have to come up again in the rate case itself? Isn't that what you feel that the Commission felt or considered in that case?

MR. HALL: Your Honor, I did not read that into the Commission's order in establishing the investigation. The Commission said: this is a factfinding investigation; we are seeking to accumulate facts. That does not, in

my view, give the appropriate and constitutionally required notice of precisely what the Commission is going to rule and what the ultimate decision would be.

JUDGE MATUSCHAK: We are troubled a little bit, to be frank. We are troubled a little bit by three things, first, the Commission's statement that it is initiating a factfinding investigation. Second we are troubled a little bit by ALJ Klovekorn's statement that this matter can be brought up at an additional time; and, third, we are disturbed a little bit by the language of the Supreme Court that says that the Commission's discussions and conclusions were merely advisory. Frankly, we are a little troubled by that, but basically we go to the heart of the thing and we see the Commission recognizing that the Limerick construction delays were of such magnitude that they could not properly be addressed in the rate case.

This is what we think was a pragmatic decision, to say: well, those issues we are going to take out of the rate case and decide independently where we don't have any time constraints, and that's exactly what they did.

MR. HALL: I would agree with you, Your Honor, up to the point of the decision. The Commission obviously chose to hold an investigation to obtain facts. By obtaining those facts the Commission would be

able and the Staff and other parties would be able to formulate their positions and to litigate the issue in the appropriate rate case, and I believe that is what the Commission was ordering.

JUDGE MATUSCHAK: The language of the Commission -- that is to investigate facts -- that disturbed me. However, after they said that they said -- they used the other langauge; they said: we concluded that Limerick issues were of such magnitude that, in effect, they cannot be addressed adequately in a rate case, so we are going to put them where we can resolve those issues where we don't have the time constraints.

MR. HALL: Your Honor, I do not read the Commission's Order -- and throughout the proceeding there was clear uncertainty with respect to what the Commission's intent on the matter was. It was the position of many of the parties that the Commission could not find or adjudicate in that particular order. And, of course, there was uncertainty in the ALJ's language in the determination which held that:no, we don't decide this matter; we don't issue a finding or conclusion.

However, Your Honor, I think the point is that in the Commission's Order there was not a clear notice that these matters were to be adjudicated in a rate case context and with the rate case issues, and that I think is a problem

with respect to the provision of appropriate due process.

Further, and finally, I think the Supreme Court in this case reviewed the effect of the Commission's Order and determined that it was not a final and conclusive order.

I do have one other argument to make to Your Honor, which I think is significant, in response to Trial Staff's position --

JUDGE MATUSCHAK: Doesn't the Supreme Court saying it wasn't a final order destroy your position that it was a final order -- didn't the Supreme Court decision or finding that there was not a final order destroy your contention that the original investments and the '74 decision should be open in this proceeding and relitigated here?

MR. HALL: It is not my position, Your Honor, that any part of the Commission's Order was final, other than that part which the Supreme Court determined, that being the issue of whether or not the Commission had authority under Section 1903 to refuse to register securities certificates.

JUDGE MATUSCHAK: What is wrong about the Commission recognizing the magnitude of the problem involved in the Limerick construction delays; what is wrong in the Commission decision that those things were of such magnitude that

within the time constraints of a rate case with all the other issues that come up in a rate case that it is impossible to properly address the Limerick issues, and so preliminarily stating that we will resolve those issues for incorporation into the rate case, itself?

MR. HALL: Your Honor, if the Commission is clear in the notice that it provides to the litigants as to what its intent is --

JUDGE MATUSCHAK: Let me ask you in that connection this: wasn't this an investigation that was referred to an Administrative Law Judge and didn't you, the company, and all the parties have an opportunity to present evidence and to cross-examine the witnesses, and to file briefs with the Administrative Law Judge, to take exceptions to the Administrative Law Judge's decision to the Commission; didn't all the parties have that opportunity?

MR. HALL: Yes, Your Honor. The company did have that opportunity, as did the other parties. However, the issues of the proceeding were not clear with respect to the effects of the matter in a subsequent rate decision. I think that, under due process concepts of notice, would prevent this proceeding, the first Limerick investigation, from being used conclusively.

JUDGE MATUSCHAK: It is your position that we have to start de novo on the Limerick issue in this rate case?

MR. HALL: It is my position, Your Honor, that the Supreme Court has ruled that the Commission did not issue an adjudication with respect to the '76 and '78 decisions, and that since the Commission did not issue an adjudication, as its order indicates it did not, in my opinion, and as the Supreme Court has determined it did not, that those specific issues are not precluded in this proceeding.

JUDGE MATUSCHAK: Well, it was not an adjudication because the finding that the Commission made had no effect on anybody, and until it does have an effect on anybody it wouldn't be an adjudication, would it?

MR. HALL: I disagree with that, Your Honor. If the Commission had issued a final adjudication holding that the company was imprudent with respect to the 1976 and 1978 deferral decisions, and simply because the Commission did not choose to quantify the specific costs related to that decision, that would not prevent the Order from affecting the company.

JUDGE MATUSCHAK: How could it affect the company; how could -- standing alone how could a finding by the Commission that PECo's delay decisions were imprudent, how could that affect the company, standing alone with nothing more?

MR. HALL: Obviously, it would put a very serious cloud over the company, its future earnings, its financial

condition, it would afect --

JUDGE MATUSCHAK: It wouldn't cost the company a penny.

MR. HALL: It would cost the company's shareholders a significant penny, I suspect.

JUDGE MATUSCHAK: It wouldn't prevent the company -- it wouldn't state the company was not allowed to recover any moneys that were the result of those delays.

MR. HALL: Your Honor, if it does not state that the company is denied the opportunity to recover the costs of those delays, then it seems to me the Commission has not rendered a decision; it has not rendered an adjudication. Then it is not conclusive upon the company. And that is what the Supreme Court held.

JUDGE MATUSCHAK: Suppose the company had no other evidence to offer in this case on the Limerick matter. Suppose the company had no further evidence to offer other than what it offered in the Lmerick investigation. Is it your position then that we must go through that litigation in this rate case again?

MR. HALL: It is my position, Your Honor, that the issue of the 1976 and 1978 decisions are not precluded. I believe the Supreme Court's order clearly held that.

JUDGE MATUSCHAK: What you are telling us is that

the Commission's investigation served no useful purpose.

MR. HALL: I don't say that at all, Your Honor.

JUDGE MATUSCHAK: What purpose would it have served if the findings from that case have no effect and all the matters have to be relitigated?

MR. HALL: Two things, Your Honor. The Commission's 1980 Limerick investigation was a very broad-based proceeding. The major focus and function of that proceeding and the major attention expended on that proceeding by both the company and the parties were with regard to the issue of whether construction of the Limerick units should be permitted to continue.

JUDGE MATUSCHAK: Let me change it then. Are you telling us that the Commission's investigation of the original construction of Limerick, the prudency of that decision, and the Commission's consideration of whether the delays in '74 and '76 and '78 were prudent or not have no effect?

MR. HALL: Your Honor, I don't believe the Commission made decisions with regard to whether the '76 and '78 deferral decisions were prudent or not. I believe the Supreme Court has reviewed the Commission's langauge and has held that they did not.

JUDGE MATUSCHAK: I think the Supreme Court -- if it is merely a finding of fact and there are other

facts to be found, then is it your position that as each fact is developed that any of the parties have the right to go to the Supreme Court and have that fact reviewed, or do they have to wait for a final decision in the matter before the Supreme Court will review all the facts in any order that the Commission will issue them?

MR. HALL: Your Honor, I believe that the Commission has to make its decision in a single proceeding. I don't believe that the Commission can have separate dockets and separate proceedings and seek to in those separate dockets and separate proceedings issue rulings with regard to a piece of this puzzle and a piece of that one and then try to fit them all in at some future time.

That is what the rules of res judicata and collateral estoppel have been developed to regulate, and those rules do not apply here. There is no issue preclusion under res judicata or collateral estoppel.

Unless those rules apply then I don't think the Commission can issue subsidiary determinations in different dockets and different cases directed at different purposes, and at the end of that whole process, that very diffuse process, which prevents the litigants from properly focusing on the issues in the proceeding, come forth with a ruling that says: you are bound by all of these disparate matters put together. That prevents the

litigants, in my view, from fully and thoroughly presenting to the Commission the facts in an organized and appropriate manner to permit an informed and reasoned decision.

JUDGE MATUSCHAK: You have already done that, and isn't there a due process involved in having those findings of the Commission in the Limerick case incorporated in this case, and then the whole thing adjudicated and reviewed by the Apellate Courts?

MR. HALL: I do not believe so, Your Honor. I do not believe that the company has had its full opportunity to present to this Commission the facts and information respecting these decisions and their full effects. The 1976 and 1978 deferral decisions were but a small part of a much larger investigation whose major purpose and effect was directed at should Limerick continue; and that is where most of the attention of the parties, of the Commission and the Administrative Law Judge were held, and throughout the proceeding the Administrative Law Judge and the parties generally did not view the deferral decisions as a fact-gathering exercise as being one that would result in a final order adjudicating prudency.

It was not until the Commission issued its order that that was done.

JUDGE MATUSCHAK: Is it your position that all of the litigation before the Administrative Law Judge and the

exceptions directed to the Commission, all of that was a useless exercise?

MR. HALL: Not at all, Your Honor. I think in part --

JUDGE MATUSCHAK: What purpose did it serve?

MR. HALL: The first major purpose and principal purpose of the proceeding was to determine whether or not the Commission should permit the issuance of securities certificates or should take some other action related to whether Limerick 1 and 2 should continue. That was the principal purpose.

Beyond that, the second purpose that I saw was that the Commission had available to it -- and the other parties to that proceeding were given available to them -- a statement of the facts, and of the general parameters of the company's decisions respecting the construction of Limerick, the decisions to continue, the decisions to defer, the construction management processes; all of those being made available to those parties prior to the initiation of the rate case for use by those parties in preparing themselves for the ultimate case in which the issues would be clearly drawn and decided.

Now if Your Honor please, there is one other point -- there are several other points that I would like to make. One is that under the Administrative Agency Law

and under this Commission's regulations, if Trial Staff's position were correct that a finding, such as Trial Staff asserts the langauge on the '76 and '78 decisions is, is conclusive on the company and cannot be reviewed in this proceeding, then in fact that language would have to constitute an adjudication.

It would, under the prescriptions of the Administrative Agency Law and this Commission's own regulations, be required to be an adjudication. The Supreme Court has held that it is not. An adjudication as stated in this Commission's regulations, and in similar language and similar provisions as provided with respect to the Administrative Agency Law, is defined as follows: An order, decree, decision, determination or ruling by the Commission affecting personal or property rights, privileges, immunities, duties,liabilities or obligations of the parties to the proceeding in which the adjudication is made.

It is my position that if Trial Staff is correct that the Commission can make -- or has made -- a finding which is final and conclusive on the company with respect to imprudence with regard to the 1976 and 1978 decisions, that would certainly be a ruling by the Commission which would affect personal and property rights.

If one looks at the case law under these provisions, one finds that a ruling can be considered as one affecting

personal and property rights even though there are to be subsequent proceedings which shall deal with the same matter and shall even address the same matter. It is not required that this be the last step in whatever administrative process is involved.

I would refer Your Honor to Allegheny Ludlam Steel Corporation versus Pennsylvania PUC, 459 Atlantic 2nd, 1218, where the Supreme Court held that a Commission approval of an ECR, though that ECR was to be subject to further examination through a 1307(e) reconciliation process, and through the possibility of complaints relating to prudency, was an adjudication, and was reviewable.

I would refer you to Baker versus the Pennsylvania Human Relations Commission, 462 Atlantic 2nd 881, a Commonwealth Court decision in 1983, and also Commonwealth versus the Borough of East Washington, 351 Atlantic 2nd, 687, in which decisions by administrative agencies other than the Commission were held to be adjudications though in fact those decisions were subject to de novo review by the Court of Common Pleas.

JUDGE MATUSCHAK: In the Allegheny Ludlam case the original Commission proceedings involved whether the rates charged were proper, and the Commission determined that they were not, that they were excessive. And the statute provided that there be no reparations unless there was

a petition filed for reparations, and that the Commission's finding that the rates were excessive was a final decision; and unless an appeal was taken that there could be no petition for reparations allowed. Is that what you are referring to?

MR. HALL: I don't believe so, Your Honor. There are several Allegheny Ludlam cases. This particular one involved a challenge by Allegheny Ludlam to the constitionality of the Commission's processes in approving ECR changes at the beginning of the ECR year, and one of the issues that arose in that proceeding is whether that process constituted an adjudication, because in fact the matter was to be reviewed further by the Commission in the 1307(e) process and the rates were not considered Commission-made rates.

The Court reviewed the allegations of Allegheny Ludlam that the matter was in violation of due process, and treated the Commission's approval of the ECR as an adjudication to do that, and found it to be so, and then rejected the due process arguments of Allegheny Ludlam.

JUDGE MATUSCHAK: I don't think anyone contends in this case that the Commission's finding of competency or adjudication -- I don't think anybody is alleging that they were adjudications. The Supreme Court said there weren't,and the Commission Staff said there weren't, and

the company said there weren't. I think everybody agrees that they are not adjudications. But does the outcome of this motion depend on whether the Commission's conclusions and findings in the Limerick investigation were adjudications or not?

MR. HALL: Your Honor, I believe that it does. I believe that unless in fact those statements in the Commission's opinion are adjudications then this Commission cannot place them upon the company as being conclusive.

JUDGE MATUSCHAK: Is it your position that under Section 1308 that if the Commission perceives issues that may arise in the pending rate case, that the Commission cannot -- if they conclude that those issues cannot be determined within the time constraints of 1308 that the Commission does not have the right to determine preliminarily those issues which it perceives cannot be adequately discussed and reviewed and addressed in the rate case?

MR. HALL: Your Honor, I don't believe that we reached that question in this case. In this case the Pennsylvania Supreme Court has ruled that the Commission did not make an adjudication or decision respecting --

JUDGE MATUSCHAK: You haven't answered my question. The question is: is it your position that the Commission perceiving certain issues that are of such magnitude that

it is physically impossible to adequately and properly addresss those issues with all the other issues, the general issues in the rate case, within the time constraints of the rate case, that the Commission does not have the right to extract those issues and treat them preliminarily for inclusion in the pending rate case?

MR. HALL: Your Honor, we did not object to the Commission's initiating the Limerick investigation proceeding. My position on this motion has not required me to examine the question you just asked. I don't at this point have any position as to whether the Commission could extract such issues from a rate case.

We certainly at Philadelphia Electric Company had no objection in 1980 to the Commission's investigating and obtaining facts, assisting itself in performing its regulatory functions by holding the investigation that it did, and we did not object.

JUDGE MATUSCHAK: When the Commission initiated its investigation they said: We consider it appropriate so as to prevent the then-pending rate investigation from becoming burdened with additional issues which would have had to be decided within the statutory period set forth in 1308 of the Public Utility Code. Isn't that what the Commission says? If you don't take this issue of Limerick out, then there will not be an adequate opportunity to

resolve and to adjudicate all the issues that may arise in the rate case within the statutory period of time, and so that is the reason we are going to take this issue out and advert that their conclusion in that independent investigation will become a part of the rate case?

MR. HALL: I don't believe that the Commission's order said it was going to do that. I think --

JUDGE MATUSCHAK: They didn't say it, no, but didn't they imply it when they said that, that they will take this out so it won't have to be a burden with the other issues that will be in the rate case; didn't they imply that that was to be part of the rate case, itself?

MR. HALL: Your Honor, I read the Commission's Order as saying that we are initiating an investigation to gather facts, to gather facts in advance of the rate case. It is not clear to me and it was not clear to me in the litigation of that proceeding that the Commission intended that investigation, that early proceeding, to actually adjudicate the issues which it wanted facts gathered on.

As we, the company, and as I understood the order as we went through the process, indeed, the Commission was gathering facts, it was obtaining information in preparation for litigation in the decision of the rate case. And that is the way we read the Commission's order.

And I think the Supreme Court in its review of the Commission's result has affirmed that that is what has occurred.

JUDGE MATUSCHAK: Very well.

MR. HALL: If Your Honor pleae, I believe I have one or two additional points that I would like to cover. As Your Honor is aware, the Trial Staff motion relies upon Section 316 of the Code. The Commission Staff does not assert that under either res judicata or collateral estoppel principles that the company could be barred in this proceeding or that the Commission is precluded from reviewing the '76 and '78 decisions --

JUDGE MATUSCHAK: I think we will agree with you that Section 316 does not apply here in this instance.

MR. HALL: In that regard,Your Honor, I would merely make one other statement, which is that 316 has been in the Code for as much as seventy years in various forms; it has never been interpreted in any application, to my knowledge, by the Court or by the Commission to apply in circumstances or to achieve the result that Trial Staff is seeking to achieve here.

JUDGE MATUSCHAK: We think the Commission Staff's reliance on 316 is unfounded. We don't think it has anything to do with this issue.

MR. HALL: Secondly, Your Honor, I think the alternative position which the Commission Staff has

presented to you here today is that the Commission should be permitted to have several different orders involving pieces of a single adjudication, and they have advanced the Beaver Valley orders as being an example of this.

I would argue to Your Honor -- and I believe it is in fact the case -- that that is not an analogous situation to this hearing. In Beaver Valley there were three orders. The first order was a rate order. In that first order the Commission did not adjudicate any part of the issue respecting the prudency of the outages at Beaver Valley. The issue was simply raised on the record, the issue was raised as being a question of whether Beaver Valley was used and useful and should be included in rate base, and alternatively should because of the outage the company be denied recovery of energy costs.

JUDGE MATUSCHAK: Then the case that has some implications, that has some similarity to this case, is the CAPCO investigation which involved some Ohio utilities in two jurisdictions, the Duquesne Light Company and Pennsylvania Power Company. And in that case the issues were whether the delays that were made in construction were imprudent.

There was also the issue of whether the construction of seven nuclear plants in the first instance was prudent, and there was also the issue of whether upon cancellation

of four of those nuclear plants the companies' sunk costs should be recovered in a rate case.

MR. HALL: If Your Honr please -- and Your Honor was the Administrative Law Judge --

JUDGE MATUSCHAK: Those issues, especially the one regarding the recovery of some costs, was not litigated in the rate case, itself. The Commission says that the ALJ allowed recovery without return; we adopted his decision, and so we are complying with that resolution.

MR. HALL: If Your Honor please, there may be a distinction between the two cases. I am not as intimately familiar as you are with the CAPCO investigations. The distinction that I would see is that in this case it is clear, based upon the Supreme Court's review and determination, that the Commission did not decide the issues of which Trial Staff is seeking to conclude the company on here.

Similarly, as I recall from the CAPCO investigation, the Commission did not decide the deferral decision issues in that investigation either, to the best of my knowledge. The issue that may have been decided in CAPCO -- and it may be that all of the parties agreed with that -- was the issue of prudency of the cancellation of those earlier nuclear plants. That may have been an issue that all parties agreed upon.

I am not aware, Your Honor, of the basis of the Commission's conclusion in the Duquesne and Penn Power rate cases as to why that issue would not be relitigated. It may simply be that the parties all agreed that in fact those costs were imprudent, based upon the facts gathered in the CAPCO investigations, and it may be that the CAPCO order did not address them. I don't know that.

JUDGE MATUSCHAK: They didn't agree because those issues were challenged in the rate case, itself. Those issues were challenged on appeal in the rate case, itself.

MR. HALL: Your Honor, I am not sure they were challenged on the question of imprudency. They were challenged on the question of whether or not they Commission had the authority as a ratemaking matter to approve and permit the recovery of sunk costs. I don't think it was argued that sunk costs were imprudent at all.

JUDGE MATUSCHAK: We will agree that there may have been a difference in that the Commission in that case as to the recovery of sunk costs may have been a policy statement, a policy finding, rather than a finding of fact as the Commission found in this case. There may be that difference.

MR. HALL: One final comment, Your Honor: on this particular matter with respect to the Beaver Valley decisions, I do want to be clear that it is the company's under-

standing that the Commission essentially issued a single major decision in Beaver Valley, that being the second order on the issue of energy cost recovery. The third order was simply an order on reconsideration. I believe that is a single investigatory proceeding on a specific issue involved as established in a Commission investigation at a single docket number.

Here we are talking about two dockets four years apart with a different rendition of issues.

If Your Honor would give me a moment?

JUDGE MATUSCHAK: Yes.

(Pause.)

MR. HALL: One final matter which I would like to call to Your Honor's attention is that the company perceives very serious difficulties in attempting to effectuate the Trial Staff's theory of bifurcation if it were to be attempted by the Commission. The company does not perceive how one would quantify the costs of deferral in the 1976 and 1978 decisions in any reasonable manner if one were to attempt to say or hold that the company's decisions have been found imprudent.

One would need to know the basis of those decisions and the basis of Commission adjudication with respect to a number of facts that were presented to the Commission in the first Limerick investigation, and had been represented

here, but which were not adjudicated expressly by the Commission in its order. And, therefore, the company is unable to perceive how Your Honor and how the Courts in reviewing, and how the current Commission sitting today, could examine that 1982 order and say: there there was a determination of prudency; our role now is simply to quantify it.

If you look at the facts relative to the time period required for Limerick construction, they are a very interrelated and difficult set of facts, and principally the question of the company's financial ability to litigate further. What the Trial Staff and the Consumer Advocate are asking you to do, Your Honor, I believe is to establish that, and having established that I think Your Honor will find it extremely difficult to come up with any quantification that says the company couldn't have built this plant any more differently than Susquehanna or anyone else.

I think Your Honor has to have -- all I'm trying to say is I think Your Honor has to have, and I think the Commission now has to have all pieces of this puzzle before it, all facts, all evidence for it to review in order for it to make an informed and knowledgeable decision with respect to what the costs are and what costs would be prudent or imprudent related to the length of time

required to construct Limerick.

JUDGE MATUSCHAK: Are you stating, Mr. Hall, that we should in this proceeding, this rate case proceeding, condense the Limerick issues together with all the other issues involved in the rate case proceeding, that we should condense the Limerick issues which took two years to resolve, that we should condense those issues and, together with all the other issues in this rate case, into the statutory period provided under 1308?

MR. HALL: If Your Honor please, Your Honor does not have before you 90 percent of the issues in the Limerick 1 investigation. The major focus and effort in that investigation was, as with the Limerick 2 investigation just concluded, should the plant go forth. And 90 percent of the testimony in evidence -- or even a higher percentage -- was directed to that subject.

The parties, I believe, and the Commission have before them, and have had before them for some time, the factual underpinnings and prerequisites with respect to the company's decision-making in the late '70s and early '80s with regard to the construction of Limerick. That I think should permit the parties and the Commission -- I think it was the purpose of the first Limerick investigation to obtain that data to permit the parties and the Commission to decide that issue in this proceeding under

the statutory time period.

I thank you, Your Honor, for the opportunity for oral argument.

JUDGE MATUSCHAK: When you are ready.

MR. DELANEY: Thank you, Your Honor.

Let me start with one of the last things that Mr. Hall said. He seemed to indicate that the posture that our motion would put you in was deciding something that couldn't be decided, that is the quantification of the costs of the delay.

Well, we indicated in our prehearing memorandum that it was our intention to really present before you evidence that will lead to a conclusion of what were the effects on the ratepayers of the delay. That is an issue to be confronted in our view in this case, and you will have new evidence to do that; so I don't think that is a legitimate concern.

JUDGE MATUSCHAK: I think you have another issue as to whether the decisions of the company were prudent or not, whether they are entitled to recover all or any of their expenditures caused by any of the delays.

MR. DELANEY: Let me address what Mr. Hall said as I scribbled it down. He spoke for about 50 minutes. I don't think my reply will be that long.

The points that he raised, I would have to say that I don't agree with any of them, really. Initially I would note an inconsistency in Mr. Hall's position. You asked him several times about the effect of the Commission findings in the prior order favorable to the company. I tried to

listen as carefully as I could. I don't know that Mr. Hall gave you the same answer every time you asked it.

I think that a consequence of our motion is that at least the Trial Staff doesn't intend to contest the prior findings that were favorable to the company -- I view this as the company taking the bitter with the sweet -- the favorable findings about the prudency of the decision to construct and continue construction. I think they held the '74 delay certainly was reasonable. I think they even addressed the siting of the plant. To my knowledge, the Staff is not contesting any of those things. I can't speak for the other parties.

You spoke in some detail about the language of the Supreme Court's opinion in the footnote. I think what you really have to understand in terms of interpreting the language of the Supreme Court is the appellate buzz words that are contained in the footnote. I think that reading is necessary by the way appellate avenues are opened to Commission orders.

The Commission orders are everyone is guaranteed a right of review in I believe it's Article 9 of the Pennsylvania Constitution. That right of review is implemented by the Pennsylvania Rules of Appellate Procedure, and Chapter 15 is the section of those rules that address

appeals of Commission orders.

It uses very general language about what is appealable and the result of this is that a frequently litigated issue in terms of appellate litigation is: what kind of order can be reviewed by an Appellate Court of an administrative agency. The rules and the statutes themselves don't really provide that much guidance.

There are basically two ways it can be done. There is the 702(b) method which allows someone who has an interlocutory order to request permission and then have it reviewed in the Appellate Court. Then the other language says that the final orders can be reviewed. I think if you open up any Advance Sheet of the Pennsylvania Reporter, you will find cases that try and figure out what is an appealable order.

There are several lines of cases that try to address that issue. Many of them are based on, I think, a 1952 U.S. Supreme Court case called Cohen versus Beneficial Finance.

I raise this only because one of the analyses used in determining whether something is final for purposes of appeal look to the effect of the order on the party. Often the courts use the language of trying to determine whether it was an adjudication.

In my view, the language that is in this Pennsylvania

Supreme Court footnote that talks about the Commission's fi
ing uses some of these terms in dealing with it. I don't
think the fact that they refuse to review the finding at
this point has anything really to do with the basis of our
motion which looks to a section of the Public Utility Code,
which in my view again does not require withstanding
judicial review as a condition precedent to its application.

Again, I think all that is required is, a prior
Commission finding unannulled or set aside on judicial
review is conclusive on the parties subsequently. In my
view, all of those conditions are met in the current case.

Now, there was a lot of language in the company's
answer and reply about language in the briefs. Well, I
think that the company is somewhat on thin ice by raising
these things because what they've tried to cite as the
Commission's position -- and so there is no misunderstanding,
when these things are in the court, it's the Commission
taking the position, not the Trial Staff -- that we
conceded issues in our brief. Let me see if I can find
the language here.

(Pause.)

MR. DELANEY: Yes, page 10 of their reply quotes
language from our brief and construes it to be some kind
of concurrence in their position.

Well, in my view that kind of argument really isn't

supported by the facts and really isn't worthy of the compan
That little quote there is taken from a brief of about
70 pages and it's taken from the statement of the case.

If you read the appellate rules on what you are permitted to do in the statement of the case, you're not supposed to make argument. This was a summary of the Commission orders.

I think the company has some implication of the tentative nature of this kind of statement by virtue of the footnote which says that, although they can't understand them, statements are made later in the brief that seem to suggest it's a finding.

Well, I will certainly be glad to provide you a copy of our brief and you can see that the position of the Commission throughout the litigation was that these were binding findings on the company, and I would sumbmit that the company certainly had the same view since they initiated the appellate litigation and took these issues as far as they could take them and they went all the way to the Supreme Court.

So I don't think there was ever any misunderstanding on the part of the company of the nature of the Commission's actions. If there were, then I have to wonder why they bothered to appeal them.

Now, I would have to comment that the company's

position on the efficacy of Commission investigations to me makes no sense at all. What Mr. Hall seems to be saying is that the Commission can hold extensive hearings and produce thousands of pages of transcript, can put all kinds of resources into an investigation that collects facts, the company can spend millions of dollars in litigating a case -- and I would note that in the present case that the company has a claim for its litigation expenses in the Limerick 2 case of $5.5 million -- what Mr. Hall seems to be indicating is that all of this can be spent, all of this effort can be made, the Commission can grind out orders, parties can file briefs, we can go to appellate courts, and none of it is binding on the company; it has no effect at all.

Well, I think that stands a lot of Pennsylvania administrative law on its head.

There is another interesting part to this. If you read the portion of Judge Klovekorn's decision that we are dealing with, you will see that there is an extensive recitation on the issue. In my view, once you read his rather detailed explanation of the evidence that was in front of him, he then concludes and makes a finding that is adverse to the company on the issue, and, indeed, he details in his order much of the same kind of evidence that you will hear today.

In my view, the reason that he does not accept the finding or make a finding that is consistent with the company's position is because of a credibility determination. This is certainly my interpretation. You can certainly read it and draw your own conclusion. But it is my belief after laying out lots of evidence that the company produced, he makes a conclusion contrary to their position.

Now, if that is true, if the conclusion adverse to the company by the Administrative Law Judge is based on credibility, then what is the point of now having that relitigated in front of you and for you to draw the opposite conclusion with the same witness giving practically the same evidence, same testimony?

In fact, the company has produced as part of one of its witness' statements today a copy of the exact testimony given in March of 1981 in front of Judge Klovekorn. Are you now to redecide and second-guess Judge Klovekorn's credibility decision? I don't think that is what administrative law and the idea and finality of litigation is all about.

It is not appropriate that people continue to litigate until they finally get it right. I submit that the company had a full shot at this the first time through; and, indeed, if you look at my reply to their New Matter, I quote part of their exceptions. That is on page 2.

Let me just read the quote. "PECo urges the Commission to reject Trial Staff's various arguments in its order concluding this proceeding. As noted in the Commission's order of October 10, 1980, the principal purpose of this investigation has been to examine the cost of construction delays at Limerick and whether those delays were reasonable. Trial Staff and all other parties to this investigation, including PECo, had a full opportunity to develop the record on this issue."

I am impressed really with Mr. Hall's ability to have a straight face and say in front of you that the company did not have an opportunity to litigate this. Anyone remotely familiar with the volume of evidence in the Limerick 1 investigation knows that the company had more than adequate opportunity to present its evidence and, indeed, is again trying to present the same evidence with the same witnesses in front of you today.

Now, I would note that the company has introduced this due process element into its reply and that the company really never had notice that somehow sooner or later one of the findings in the initial investigation was going to be applied against them in a subsequent rate case.

Well, in my view that is simply not supported by the series of orders that the Commission entered through this period, each of which becomes more increasingly defined

in terms of the issues to be examined in the proceeding. It clearly states that one of the issues is the reasonableness of the delays.

Now, I would submit that recently Commonwealth Court has resolved these kinds of due process challenges in a way that is fatal to the company's position on this. I will simply cite the case to you and you can read it and draw your own conclusion. It is contained in our reply to their New Matter. It is a case called Cohen versus the Pennsylvania Public Utility Commission at 78 Commonwealth Court 545, 468 A.2nd 1143. That deals with the specific issues of notice in the beginning of a proceeding of a potential adverse result.

Again, that raises the question to me: if the company did have notice in the first case that it might have an adverse result, why is it introducing identical testimony in this case?

I would note that in the appellate litigation, the company never litigated the issue that the Commission's orders were not final in terms of the August, 1982 Limerick investigation order. The company took it to court very promptly and litigated it as well as they could through the period. They never raised an issue that somehow the order was not final.

Now, there was a lot of discussion about the use of

evidence and whether findings in one proceeding could be used in another. I would first direct your attention to another footnote in the Supreme Court's decision which is Footnote No. 5. That footnote addresses an argument expressed by the company, again a due process argument about use of evidence from a contemporaneous rate case and the Limerick 1 order. The court upholds that saying that the company had not been deprived of due process in that result.

I would note that I think the CAPCO decision is very on point in terms of having a prior finding. I would note that the proceedings in that case that I am familiar with had an investigation in which you were the Presiding Officer, Judge Matuschak, in which you concluded that actions of the company, Duquesne and Penn Power, cancelling nuclear power plants being constructed in Ohio was prudent. That issue was then subsequently accepted in a later rate case; again, a finding made at another docket in a time prior to the rate case adjudications and then subsequently being applied in the later cases.

Now, Mr. Hall has made statements that such a result is impossible and illegal. Well, I would cite to you a 1982 Commonwealth Court case which raises this issue pretty directly, a case that I litigated for the Commission, called City of McKeesport versus the Pennsylvania Public Utility Commission, which is at 65 Commonwealth Court 179, 442 A.2nd 30.

In that case, briefly it involved a municipal authority providing water service out of its territorial limits. It, without coming to the Commission, raised its rates. People subsequently complained to the Commission about the illegal nature of the rates. The Commission held the rates to be illegal.

The borough then took an appeal to Commonwealth Court saying -- excuse me. At a subsequent proceeding, there were refunds ordered by the Commission.

The borough took an appeal and one of the issues that addressed the opinion is that it was the borough's position that it was impossible for findings in one order to be then applied in a subsequent order, and the court clearly upholds that procedure.

Now, I would note, as you discussed, there is Commission precedent for this which is the Beaver Valley case. I don't agree with Mr. Hall's description of the Beaver Valley case. I think if you read through the orders, you will clearly see that the issue of liability is determined in a prior order and the subsequent and final proceedings in the case go to quantification of purchased power costs, right on point with what we are advocating to you.

Now, there was a lot of discussion about adjudications and the requirement of adjudication. They described another case that I had done in the Commonwealth Court called

Allegheny Ludlum Steel Corporation. I don't think it really supports what Mr. Hall advanced it for. That case was a little bit unusual, because instead of being an appeal of a Commission order, it was an original jurisdiction action in the Commonwealth Court. Basically what it was was a declaratory order action.

The steel company was advancing that the Commission's actions in making a preliminary approval of a new BCR for West Penn Power was illegal because of the way the Commission had actually adopted the order, which was simply acting on a report at a public meeting, because they had not had an opportunity to have due process opportunities prior to when the Commission acted.

The issue of whether or not it was an adjudication really went to the case law about what due process requires. The Pennsylvania law and, as I understand, the U.S. Supreme Court law in a case called Matthews versus Elridge says that due process opportunities come into play when there is an adjudication or the prospect of an adjudication which then requires that the party be afforded due process. That is how the adjudicatory language enters that case, and I don't think it supports what I understood Mr. Hall to be arguing.

Now, again, developing that thought a little more, the presence of an adjudication in my view is not required

for the operation of Section 316, and I think that is supported by several of the things that Mr. Hall said.

He read to you sections of the Commission's regulations and the definition of adjudication in the Administrative Agency Law. Surprising in my view and conclusive of my argument I would submit is the fact that when they define adjudication, the word "finding" is not included in the recitation of events that give rise to an adjudication. In my view, that supports the idea that a finding is not necessarily an adjudication. In fact, we submit in our reply that a finding concludes an issue; an adjudication concludes the case. There is a distinction between the two. I think it is recognized in the case. The cases the company cites in its Answer, I believe, support our recitation of the difference between the two.

I would note just finally that the order of August, 1978 that we had discussion about this morning by its own terms declares itself to be a declaratory order. So I would think the fact that that language is expressly in the order should alert the company to the potential consequences of the declarations contained in that order, and indeed the company did act immediately to take it to a higher level of review to protect its interests. To me that kind of activity is inconsistent with some of the things that Mr. Hall was arguing to you this morning.

Your Honor, I think that is all the response that I have. If you have any questions, I will certainly be glad to answer them.

JUDGE MATUSCHAK: Thank you.

Mr. Hall?

MR. HALL: If Your Honor will permit me just a brief moment.

JUDGE MATUSCHAK: Mr. Hall, before you start, if the company were to present the same evidence here that it presented in the Limerick investigation, would you then not be asking us to overrule the Commission in its finding of imprudency?

MR. HALL: No, Your Honor, I don't believe so, because I don't believe the Commission has made a finding of imprudency.

The Supreme Court has reviewed the Commission's language and has said it is advisory criticism; it is mere criticism.

I think, obviously, as Your Honor reviews this case, Your Honor certainly will be cognizant of what the Commission stated in its order and will give it weight and effect, quite perhaps, but it is not preclusive.

JUDGE MATUSCHAK: Did the Commission say "having so found"? Wouldn't that imply a finding?

MR. HALL: The Commission also states that the ALJ

made imprudence findings. We presented to Your Honor a statement of the ALJ's conclusion, and that statement very clearly says that the ALJ made no finding. He says "may have been; appears to have been."

My position, Your Honor, is that that is all the Commission said and intended to say, and indeed they represented that fact to the Supreme Court in the argument which led the court to make the determination that it did. It clearly said, "We have not decided whether or not the company can recover these costs." If they have not decided whether or not the company can recover these costs, then they have not made an imprudency determination, because that is the issue of imprudence.

JUDGE MATUSCHAK: I don't know whether that is necessarily an issue of imprudence or not. As we view it, and we have so held in the Pennsylvania Power Company, that even if the action of the company were prudent, if there were such extraordinary circumstances that could not be anticipated, that there may be a balancing there of that risk that resulted as a result of those unforeseen circumstances.

MR. HALL: I'm sorry; I did not follow Your Honor.

JUDGE MATUSCHAK: We held there that even if the company's actions were prudent, if there were such extra-ordinary circumstances which arose that could not be anticipated by anybody, that all the risk may not fall on

the ratepayers, but it may be that the Commission may want to balance the risk as between the investors and the ratepayers.

MR. HALL: I'm afraid though if you reverse that, I have never seen a Commission determination that suggested, despite the presence of imprudence, ratepayers may be required to pay the costs of company decision-making.

JUDGE MATUSCHAK: I think we will have to agree with you there; that if it is imprudent, then we would anticipate that the Commission would rule that those costs are not recoverable, if a delay had any monetary effect.

MR. HALL: Yes. However, it seems to me that when the Commission says whether or not the costs should be recoverable -- the Commission said that -- that goes to the imprudency decision. It does not go to the question of whether or not there exists costs. That was dealt with by the Commission in a separate line of its statement to the Supreme Court.

I would like to emphasize and point out that the inclusion of this language that I am referring to by the Commission in the statement of the case to the Supreme Court is a matter of significance and supports the company's position and not the Trial Staff's.

The statement of the case sets forth non-argument, non-controverted matters. It sets forth what the party

accepts, what they perceive as being the statement of facts which are not controverted. I think by including a statement in their statement of the case to the Supreme Court representing to them that the Commission had not determined whether or not these costs should be recoverd or the magnitude of the costs or whether any costs existed, all of which were separately listed, the Commission clearly characterized and established its view of what it had said and the significance of what it had said in its 1982 order.

A couple of additional items, Your Honor. As I understand Mr. Delaney's argument, he agrees with me that the Allegheny Ludlum case did review the issue of what constitutes an adjudication. I believe if you look at that case, Your Honor, you will see that it is reviewed in the context of Pennsylvania law and particularly the Administrative Agency Law and that that provision is explicitly discussed.

The City of McKeesport case and also the PECo versus Pennsylvania PUC case which Mr. Delaney cites in his reply are clearly inapplicable. Those are cases where there was a final adjudication by the Commission, final and reviewable. We are not dealing with that here.

The UGI case is similarly inapplicable. These issues that we are discussing are highly fact based. In the UGI case, the court found based upon the facts presented that

UGI had the notice. I don't believe that you can do that here. The facts are different.

Mr. Delaney argued that Judge Klovekorn had made a finding which, in Mr. Delaney's view, was based on the credibility of the company's witnesses and suggested to Your Honor that Your Honor could not review that finding in this proceeding because, obviously, credibility is a matter in the hearing room.

However, Judge Klovekorn himself expressly stated that he was making no finding and the issue was to be resolved in this case. Thus, certainly Judge Klovekorn did not perceive the point advanced by Mr. Delaney as being a bar to consideration of the issue here.

Your Honor, that is all that I have.

JUDGE MATUSCHAK: Thank you.

We understand the importance of a ruling on this motion as early as possible, so that we are prepared to render an interim decision at this time.

Having reviewed the pleadings filed in connection with Trial Staff's Motion in Limine in this proceeding and having heard oral arguments today, we will rule now on the motion so that the parties, so desiring, may seek timely review by the Commission. Because of the importance of this matter, we will follow our ruling by a Memorandum Opinion more fully discussing the basis of our interim decision.

While some aspects relating to the motion may be of first impression, some overall precedent had been established in the CAPCO investigation at I-79070315 and I-79070317, in which we had presided, involving two jurisdictional electric utilities--together with certain Ohio electric utilities--Duquesne Light Company and Pennsylvania Power Company.

Trial Staff in its motion alleged that the Commission had considered the prudency of Philadelphia Electric Company's construction of the Limerick Station in: Re: Limerick Nuclear Generating Station, I-80100341, 56 Pa. P.U.C. 47. That proceeding was an investigation ordered on October 10, 1980, wherein the Commission had said it had concluded that an investigation should be opened "so that information can be gathered in an orderly and expeditious manner before PECo seeks to include Limerick in its rate base as used and useful property."

Further it said, "We concluded that an independent investigation of Limerick was appropriate so as to prevent the then pending rate investigation from becoming burdened with additional issues which would have had to be decided within the statutory period set forth in Section 1308 of the Public Utility Code.

We note that in that proceeding, 38 days of evidentiary hearings were held and that the matter was

concluded almost two years from its initiation on August 27, 1982.

Among the issues considered by the Commission there were the prudency, first, of the initial decision by PECo to begin construction of the Limerick nuclear generating station; two, of the 1974 delay in Limerick's construction schedule wherein PECo postponed the projected in-service dates by two years; third, of the 1976 decision by PECo wherein it further delayed construction and extended the in-service dates of Limerick Nos. 1 and 2 from 1981-'83 to 1983-'85, respectively; and, four, of the 1978 decision by PECo to further delay and reschedule the in-service dates of Limerick from 1983-'85 to 1985-'87, respectively.

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 issues.

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.

In its Motion in Limine, Trial Staff requests that we rule that the Commission's prior finding that Limerick 1976 and 1978 construction delays were unreasonable be conclusive on the parties to this proceeding. Trial Staff's reliance for such request on the basis of Section 316 of the Public Utility Code, however, is unfounded.

We will, however, grant Trial Staff's motion on the ground that the Comission's findings at I-80100341 of imprudence in the 1976 and 1978 Limerick construction delays should be incorporated into this rate proceeding in the nature of a bifurcation or as an ancillary or in-aid aspect of this rate case, and that all parties having had an opportunity to develop a record in a full and open hearing in said Limerick investigation, such findings by the Commission are conclusive on the parties in this proceeding.

Likewise, we hereby determine that the same treatment shall be afforded to the Commission's prior findings of fact that the PECo's initial decision to construct Limerick and its 1974 construction delays were prudent when made.

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.

We will take a ten-minute recess.

(Recess.)

APPENDIX E - PETITION OF PHILADELPHIA ELECTRIC COMPANY FOR COMMISSION REVIEW AND ANSWER TO A MATERIAL QUESTION (DECEMBER 26, 1985)

/ASHINGTON
EW YORK
OS ANGELES

MORGAN, LEWIS & BOCKIUS
COUNSELORS AT LAW
2000 ONE LOGAN SQUARE
PHILADELPHIA, PENNSYLVANIA 19103
TELEPHONE: (215) 963-5000
CABLE ADDRESS: MORLEBOCK
TELEX: 83-1315

MIAMI
HARRISBURG
LONDON

/ILLIAM E. ZEITER
AL DIRECT (215) 963-5367

December 26, 1985

Mr. Jerry Rich, Secretary
Pennsylvania Public Utility Commission
North Office Building
Commonwealth and North Streets
Harrisburg, PA 17120

Re: Pennsylvania Public Utility Commision v.
Philadelphia Electric Company
Docket No. R-850152

Dear Secretary Rich:

Enclosed for filing with the Commission please find the original and nine copies of Petition of Philadelhia Electric Company for Commission Review and Answer A Material Question in the above-captioned docket.

As shown on the attached Certificate of Service, I have today served copies of this document on all Active Parties.

Sincerely,

William E. Zeiter
Counsel for
Philadelphia Electric
Company

WEZ/gin

Enclosures

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA PUBLIC UTILITY COMMISSION :

v. :

PHILADELPHIA ELECTRIC COMPANY :

Docket No. R 850152

PETITION OF PHILADELPHIA ELECTRIC COMPANY FOR COMMISSION REVIEW AND ANSWER A MATERIAL QUESTION

WILLIAM E. ZEITER
Counsel for
PHILADELPHIA ELECTRIC COMPANY

OF COUNSEL
Edward G. Bauer, Jr., Esquire
Vice President & General Counsel
PHILADELPHIA ELECTRIC COMPANY
3201 Market Street
Philadelphia, PA 19101

J.H. Calvert, Jr.
Walter R Hall, II
Frederick H. Knight
David B. MacGregor
Robert H. Young
MORGAN, LEWIS & BOCKIUS
2000 One Logan Square
Philadelphia, PA 19103

December 26, 1985

NOW COMES Philadelphia Electric Company ("PECO"), pursuant to Section 5.302 of the Commission's Regulations (52 Pa. Code Section 5.302), and Petitions your Honorable Commission to grant interlocutory review and answer a material question. The material question for which this Petition seeks Commission review and answer has arisen as a result of an ALJ ruling granting a Motion in Limine filed by Trial Staff which would exclude certain as yet unspecified PECO testimony setting forth the prudent reasons for the 1976 and 1978 Limerick construction delays. The ruling is based on the novel view that the PUC discussion on the subject in the Limerick Investigation, 56 Pa. PUC 47 (1982) ("1980 Limerick Investigation"), must be conclusive upon the parties in this proceeding because the 1980 Limerick Investigation is a bifurcation or ancillary or in-aid aspect of this rate case.

The material question for which this Petition 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 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 action in the current proceeding, other than quantification of the consequences thereof.

Justice requires a negative answer to the material question. PECO raised this very 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. Extraordinary circumstances require that the PUC permit this interlocutory review because:

1. To make the PUC's imprudence "criticism" 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.

2. 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, 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.

Respectfully submitted,

/s/ William E. Zeiter

William E. Zeiter
Counsel for Philadelphia Electric Company

CERTIFICATE OF SERVICE

I hereby certify that I have caused copies of the Petition of Philadelphia Electric Company for Commission Review and Answer to a Material Question filed on December 26, 1985 to be served by first class mail, postage prepaid on all active parties in the Limerick No. I Rate Proceeding.

Mr. Jerry Rich, Secretary
Pennsylvania Public Utility Commission
New Filing Section
Secretary's Bureau, Room B-18
North Office Building
Commonwealth and North Streets
Harrisburg, PA 17120

John Hanger, Esquire
Community Legal Services, Energy Project
3638 North Broad Street
Philadelphia, PA 19140

David M. Kleppinger, Esquire
100 Pine Street
Harrisburg, PA 17120

Zori G. Ferkin, Esquire
Governor's Energy Council
P.O. Box 8010
300 N. 2nd Street
Harrisburg, PA 17105

Scott Rubin, Esquire
Office of Consumer Advocate
1425 Strawberry Square
Harrisburg, PA 17120

Mildred E. V. Pitts, Esquire
Information Resources & Utilities Division
General Services Administration
Room 4002
18th and F Streets, N.W.
Washington, DC 20405

Charles E. Rainey, Jr., Esquire
Municipal Services Building
Law Department, 15th Floor
Philadelphia, PA 19102

Edward S. Wardell, Esquire
Constance B. Foster, Esquire
Dilworth, Paxson, Kalish & Kaufman
2600 The Fidelity Building
Philadelphia, PA 19109-1094

Nancy Schuster, Esquire
1 Pond Street
Bristol, PA 19007

Patricia M. Gustin
Pennsylvania Public Utility Commission
Room G-33
North Office Building
Harrisburg, PA 17108

Earle H. O'Donnell, Esquire
Merrill L. Kramer, Esquire
Sutherland, Asbill & Brennan
1666 K Street, N.W.
Washington, D.C. 20006-2803

Mark P. Widoff, Esquire
Widoff, Reager, Selkowitz & Adler
129 State Street
Harrisburg, PA 17101

Michael Browne, Esquire
Reed, Smith, Shaw & McClay
1600 Avenue of the Arts Building
Broad and Chestnut Streets
Philadelphia, PA 19107

Honorable Joseph P. Matuschak
Pittsburgh State Office Building
300 Liberty Avenue
Pittsburgh, PA 15222

Wayne L. Emery, Esquire
Kenneth R. Pepperney, Esquire
Rafael Caminero, Esquire
600 Grant Street, Rm. 1580
Pittsburgh, PA 15230

Alan R. Squires, Esquire
Greenstein, Gorelick, Price,
Silverman & Laveson
900 Two Penn Center Plaza
Philadelphia, PA 19102

William E. Zeiter
Counsel for Philadelphia
Electric Company

APPENDIX F - PECO PETITION FOR STAY OF ALJ'S RULING

WASHINGTON
NEW YORK
LOS ANGELES

MORGAN, LEWIS & BOCKIUS
COUNSELORS AT LAW
ONE LOGAN SQUARE
PHILADELPHIA, PENNSYLVANIA 19103
TELEPHONE: (215) 963-5000
CABLE ADDRESS: MORLEBOCK
TELEX: 83-1315

MIAMI
HARRISBURG
LONDON

DAVID B. MACGREGOR
DIAL DIRECT (215) 963-5448

December 31, 1985

Honorable Joseph P. Matuschak
Administrative Law Judge
Pennsylvania Public Utility Commission
97 East Main Street
Uniontown, PA 15401

Re: Pennsylvania Public Utility Commission v. Philadelphia Electric Company, Docket No. R-850152

Dear Judge Matuschak:

Enclosed is an original and 2 copies of Philadelphia Electric Company's Petition for Stay of the December 20, 1985 Order granting the Pennsylvania Public Utility Commission Trial Staff's Motion in Limine and excluding from the record certain evidence dealing with the reasonableness of the 1976 and 1978 Limerick construction deferral decisions.

As indicated in the attached Certificate of Service, copies of the enclosed Petition have been served upon all parties of record.

Sincerely,

David B. MacGregor
Counsel for Philadelphia
Electric Company

DBM/b
Enclosure
cc: All parties of record

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA PUBLIC UTILITY COMMISSION	:	
v.	:	Docket No. R-850152
PHILADELPHIA ELECTRIC COMPANY	:	

PETITION FOR STAY

NOW COMES Philadelphia Electric Company ("PECO" or the "Company"), by its Counsel, and files this Petition with the Administrative Law Judge ("ALJ") for a stay of the December 20, 1985 Order granting the Pennsylvania Public Utility Commission Trial Staff's ("Trial Staff") Motion in Limine and excluding from the record certain evidence dealing with the reasonableness of the 1976 and 1978 Limerick construction deferral decisions. In support of this Petition, the Company represents as follows:

1. On November 20, 1985, the Trial Staff filed a Motion in Limine which would limit the evidence admitted and issues addressed in this proceeding to preclude consideration of the prudency of the 1976 and 1978 Limerick construction deferral decisions. As the sole basis for its Motion, the Trial Staff asserted that these decisions were found to be unreasonable by the Commission in Re Limerick Nuclear Generating Station, 56 Pa. P.U.C. 47 (1982), aff'd, 501 Pa. 153, 460 A.2d 734 (1983) (hereafter referred to as "1980 Limerick Investigation") and that, under Section 316 of the Public Utility Code (66 Pa.C.S. §316), such a finding is conclusive in the instant proceeding and precludes further litigation of this matter.

2. The Company filed an Answer to the Motion in Limine on December 5, 1985 and the Trial Staff filed a Reply to the Company's Answer on December 16, 1985. Oral argument on the merits of Trial Staff's Motion was held on December 20, 1985. On the basis of these submittals and oral argument, the ALJ granted the Trial Staff's Motion and ruled that (a) the 1980 Limerick Investigation record as it relates to the initial decisions to construct Limerick and the 1974, 1976 and 1978 construction deferral decisions is incorporated into the record in this proceeding; (b) the Commission's finding in the 1980 Investigation that the 1976 and 1978 deferral decisions were unreasonable is conclusive upon the parties to this proceeding; and (c) all evidence previously admitted in this proceeding which relates to the reasonableness of the initial decisions to construct Limerick and the decisions to delay construction are stricken from the record and any further evidence relating to these matters will not be admissible (Tr. 1374-1375).

3. Pursuant to 52 Pa. Code §5.302, the Company, on December 26, 1985, filed with the Commission a Petition for review of the ALJ's ruling and answer to the following material question:

> "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 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 action in the current

proceeding, other than quantification of the consequences thereof."

It is the Company's position that this question should be answered in the negative in view of the Pennsylvania Supreme Court's clear holding that a final and binding adjudication was not rendered by the Commission. Moreover, to accord conclusive effect to the Commission's discussion of this matter would cause undue prejudice to PECO, violate the Company's right to due process and substantially disrupt the orderly conduct of this rate proceeding.

4. Where interlocutory review and answer to a material question is sought in a proceeding, Section 331(e) of the Public Utility Code specifically authorizes the ALJ to grant a stay, where necessary, to protect the substantial rights of the parties involved, as follows (66 Pa.C.S. §331(e)):

> "Interlocutory appeals - A presiding officer may certify to the commission, or allow an interlocutory appeal to the commission on any material question arising during the course of a proceeding, where he finds that it is necessary to do so to prevent substantial prejudice to any party or to expedite the conduct of the proceeding. The presiding officer or the commission may thereafter stay the proceeding if necessary to protect the substantial rights of any of the parties therein." (emphasis added)

5. A stay of the ALJ's ruling pending final resolution by the Commission should be granted in order to protect the substantial rights of both the Company and other parties to this proceeding. If a stay is not granted, opposing parties will not develop and file testimony on this matter in accordance with the schedule previously established for litigation of this

proceeding, and in the event that the Commission answers the material question presented to it by the Company in the negative and reverses the ALJ's determination, unnecessary delay and substantial prejudice to the rights of all parties will result.

Specifically, under the current schedule, the testimony of opposing parties on Limerick issues is scheduled to be filed by January 14, or in less than two weeks, and cross-examination of opposing party witnesses supporting that testimony will occur during the first two weeks of February. Rebuttal testimony by the Company on Limerick issues must be filed by February 19, Limerick-related surrebuttal must be filed on February 28, and Limerick-related sur-surrebuttal must be filed on March 7. All rebuttal, surrebuttal and sur-surrebuttal testimony will be subject to cross-examination on March 12-14 and the record in this proceeding will be closed on March 14. During the next 2 months, briefs must be prepared and filed and the ALJ must issue a recommended decision, after which exceptions and replies to exceptions will be submitted. The 7-month suspension period in this proceeding ends June 27, 1986, and a final Commission Order must be issued prior to that time.

As shown above, an extremely demanding schedule has been established which must be met to permit the efficient development of a complete and accurate record if a final Commission Order is to be issued within the time constraints of this proceeding. If a stay is not granted and the ALJ's ruling is ultimately reversed by the Commission, this schedule will be substantially and unnecessarily delayed to the prejudice of all parties. The

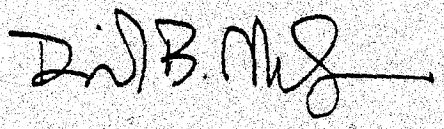
filing and development of rebuttal and surrebuttal testimony regarding the reasonableness of the construction deferral decisions as well as related cross-examination will be substantially delayed beyond the dates set forth above. As a result, all parties will be forced to accomplish these activities on an extremely compressed schedule in order to complete this proceeding within the statutory suspension period. Such delay and compression of the time needed for preparation of this testimony and cross-examination will substantially prejudice both the Company's and opposing parties' ability to fully and adequately develop the record on this important issue. Moreover, a delay in the submission of such significant evidence will disrupt the efficient and orderly conduct of this proceeding.

In contrast, if a stay is granted, then a full and complete record on the reasonableness of the deferral decisions can be developed in an orderly manner under the agreed upon schedule set forth above. Such a record is required if the Commission is to fully understand and resolve this issue in the event that the ALJ's ruling is reversed. However, even if the ALJ's ruling is ultimately upheld by the Commission, no party will have suffered because such a record has been developed. At most, additional evidence will have been prepared by all parties as was presumably contemplated in establishing the above schedule, which was established substantially before the Trial Staff's filing of the Motion in Limine and the ALJ's ruling. Clearly, the issuance of a stay will ensure that a complete and expeditious resolution to this matter is achieved, while denial

of a stay may result in substantial and avoidable prejudice and administrative burden.

WHEREFORE, for the reasons set forth above, the Company respectfully requests that its Petition for Stay be granted.

Respectfully submitted,



Walter R. Hall, II
David B. MacGregor
Jack E. Jerrett

Counsel for Philadelphia Electric Company

OF COUNSEL:

Edward G. Bauer, Jr., Esquire
Vice President and General Counsel
Philadelphia Electric Company
2301 Market Street
Philadelphia, PA 19101

Robert H. Young
William E. Zeiter
Jay H. Calvert, Jr.
MORGAN, LEWIS & BOCKIUS
2000 One Logan Square
Philadelphia, PA 19103

DATED: December 31, 1985

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon all parties of record in this proceeding in accordance with the requirements of 52 Pa. Code §1.54.

Dated this 31st day of December, 1985.

DAVID B. MACGREGOR

Counsel for Philadelphia
Electric Company

OF COUNSEL:

Edward G. Bauer, Jr., Esquire
Vice President and General Counsel
Philadelphia Electric Company
2301 Market Street
Philadelphia, PA 19101

MORGAN, LEWIS & BOCKIUS
2000 One Logan Square
Philadelphia, PA 19103
(215) 963-5700

APPENDIX G - TRIAL STAFF MAIN BRIEF BEFORE THE COMMISSION, pp. 1-11, 1980 LIMERICK INVESTIGATION

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION
BEFORE ADMINISTRATIVE LAW JUDGE JOSEPH J. KLOVEKORN

LIMERICK NUCLEAR STATION INVESTIGATION
DOCKET NO. I-80100341

BRIEF FOR COMMISSION TRIAL STAFF

Gregg C. Sayre
Assistant Counsel
For the Trial Staff of the Pennsylvania
Public Utility Commission

Room G-28
North Office Building
Harrisburg, PA 17120

(717) 783-2804

Dated: January 8, 1982

I. INTRODUCTION AND CONCLUSION

Trial Staff of the Pennsylvania Public Utility Commission is taking no position on many of the issues in this proceeding. Based on the testimony of Dr. James M. Giordano, Trial Staff submits that the completion of Limerick is more economical than its replacement by a medium sized coal unit plus interchange purchases. Apart from this conclusion, Trial Staff takes no position on the question of whether it is cheaper to complete, cancel or replace either unit of Limerick with some alternate program.

Trial Staff further suggests that unless the Commission finds the economics of the situation so compelling that PECO must be ordered to change its course, it does not make regulatory sense to order or approve any construction plan at this time.

Assuming the Commission does not order the cancellation of Limerick, it should do the following:

(1) Order PECO submit to the Commission its most recent estimates of costs and dates of commercial operation of Limerick 1 and 2 as used in this proceeding in PECO's analysis of the economics of various alternatives.

(2) Order PECO to notify the Commission immediately of any occurrence which will affect the critical path of construction and therefore the completion dates, and of any deviations from PECO's cost projections in excess of one million dollars. PECO should further be required to explain and justify any deviations in completion date or costs within two weeks of the notification to the Commission,

and in particular should be required to demonstrate why the delay or overrun was not within the control of PECO or its architect-constructor in the exercise of sound management. The Commission should be prepared to make future rate base disallowances of the cost of delays or cost overruns if they are not justified or are not reported promptly to the Commission.

(3) As a further monitoring of construction, order PECO to submit within 120 days a detailed schedule of specific construction and cost milestones to be reached in each subsequent two month period during the next two years, and require reports every two months specifying what milestones have been met.

(4) Order PECO to prepare a standby plan for possible future funding of construction through contributions in aid of construction, if and when customer support of construction becomes necessary to prevent further delays, and to request a letter ruling from the Internal Revenue Service that the customer contributions would not be taxable to PECO.

(5) Wait until Limerick is claimed in rate base to determine whether the cost of management ordered delays, particularly the 1976 and 1978 delays, should be disallowed.

II. SLIPPAGE OF COST AND COMPLETION DATE ESTIMATES

A. Historic Slippage

Limerick is being constructed for PECO by Bechtel Power Corp. on a cost-plus basis (the plus is a fixed fee for Bechtel; TR-1, 1, T.S. Exh. B). Bechtel has only remote motivations to get the plant completed on time and at the target costs; if it does a particularly bad job, it

might be subject to a breach of contract lawsuit and its reputation would suffer. Bechtel's project manager testified that he would not recommend any firm contract price for the plant to his employer (Tr. 53-54). With Bechtel unwilling to bear the risks of costs, overruns and delays, only PECO and its ratepayers are left to shoulder the risks. Even PECO will not guarantee a cost, nor will it state a probability percentage that the cost will exceed its official estimate (IR-1, Q. 6-55, 6-56, and 6-57, T.S. Exh. B).

The history of delays in completion date and increase in costs are shown in PECO's response to IR-1, 1-8 (Exhibit DLB-1A, Sched. 4). The slippages are shown graphically on Sched. 3 of Exhibit DLB-1A. We may confidently expect further slippages to occur (DLB-1, p. 5). Trial Staff commends PECO's frankness in providing two independent estimates of Limerick's cost, both of which were higher than PECO's official estimates. Dr. Perl's $4.752 billion, or $2,252 per kw (Tr. 2135) is still well above PECO's most recent estimates. There is no way to tell how much of the historic cost slippage and delays have been due to unanticipated changes in scope of the project (safety systems, e.g.), how much have been due to unanticipated changes in the level of inflation, how much have been due simply to bad forecasting, and how much if any have been due to the imprudence of management in failing to hold down costs.

B. The Costs of the 1976 and 1978 Delays

The cost of delays is easier to estimate than the cost of failure to manage construction effectively. Dr. Richard E. Nellis estimated the cost of the two-year delay announced in 1976 to be $506 million, and the cost of the 1978 delay to be $597 million (Exh. REN-1A, Sched. 2, p. 1). Although there was some testimony to the effect that the 1978 delay was not implemented until 1980 and that PECO spent the dollars necessary to keep on the 1983/85 schedule (State. 9, p. 12 and Tr. 495), PECO actually reduced its direct expenditures from 1978-1980 from the budgeted amount of $529 million down to $479 million (TR-1, 7, OCA Exh. 23). Given that increases in inflation and NRC requirements would have increased actual spending above budget figures, it is clear that PECO implemented the 1978 delay before 1980.

There was no substantial rebuttal of Dr. Nellis's calculations. Although Mr. Lawrence criticized Staff's AFDC calculations (State. 11-B, p. 6), his criticisms referred to calculations in Dr. Birx's and Mr. Muth's schedules (State. 11-B, Sched. 3 and Tr. 2580), which were corrected in Trial Staff Exhibit A. Little weight should be given to Mr. Boyer's calculations of the cost of the 1976 delay at $68.4 million (State. 1b, p. 7). All Mr. Boyer did was multiply the 1976 AFDC times the May, 1976 booked construction cost times 2 years. He ignored the increases in construction costs due

to inflation, the future increases in AFDC due to the inflationary construction cost increases, and the compounding of these increased AFDC costs (Tr. 1128-1132). Most of the cost of a delay appears at the end of construction, when the inflationary impact is highest and when there is more investment to be multiplied by higher AFDC rates. Mr. Boyer incorrectly assumed that all costs after 1976 which were postponed by two years would be unaffected by inflation and higher AFDC rates.

C. Justification of the 1976 and 1978 Delays

Much of the dispute between PECO and Trial Staff in this case revolves around whether the 1976 and 1978 delays were necessary. PECO's orginally stated reasons in 1976 were its reduced load forecast (State. DLB-1, pp. 3-4, referring to Mr. Paquette's testimony in R.I.D. 438). Reference was also made in a press release to financial constraints (State. 11-B, Appendix A). Both reduced load and financial reason were given for the 1978 delay (TR-1, 1-8, DLB-1A Sch. 4). Trial Staff submits that reduced load forecasts were not good reason to add $500 million to the cost of the plant by delaying it two years.

If reduced load were a sufficient reason for delay, PECO would still be delaying Limerick. The justification for the plant is that it will produce enormous savings in fuel and interchange expenses (compare Scenarios 1 and 4 in Exh. KGL-1, attached to PECO's State. 11). PECO, however,

did not recognize until shortly before this proceeding (one and one-half to two years before the cross examination of Mr. Kasum on March 25, 1981) that Limerick was needed for fuel savings regardless of PECO's need for Limerick's capacity (Tr. 233-235). PECO only recently began analyzing Limerick on the basis of fuel savings regardless of capacity (Tr. 235).

The point of dispute is therefore whether the billion dollar increase in costs from the 1976 and 1978 delays was unavoidable because of PECO's financial difficulties. Trial Staff submits that the postponements were not justified.

First of all, with respect to the 1978 delay, Mr. Paquette agreed that it was not required for financial reasons (Tr. 495-496). The only other reason given for postponement on IR-1, 1-8 (Exh. DLB-1A, Sched. 4) is reduced load forecast. Given that the plant is justified for energy reasons regardless of its effect upon capacity, the reduced forecast is not sufficient reason for the nearly $600 million (Exh. REN-1A, Sched. 2) of cost.

With respect to the 1976 delay, Trial Staff Witness Donald H. Muth examined whether PECO could have raised the additional $56, $44 and $76 million in 1976-1978 which Mr. Paquette testified was the change made by the Spring 1976 forecast in PECO's financing requirements (State. 9, Table C). Mr. Lawrence stated that the amounts necessary to be raised would have been greater (State. 11-D, pp. 2, 6), but PECO did not provide any revised figures to correct Mr. Paquettte's

Table C. In fact, Mr. Paquette, on cross-examination, agreed that Table C showed the amounts by which the 1976 postponement lowered 1976-1978 financing requirements (Tr. 508). Trial Staff submits that the Table C figures should be used for this proceeding.

Mr. Muth concluded that PECO would have been able to issue sufficient additional mortgage bonds in 1976-1978 to eliminate the postponement (State. DHM-2, pp. 2-3). Staff agrees with Mr. Lawrence that these debt issues would have increased rates by increasing the cost of debt (State. 11-D, pp. 2-3), but this is true whenever any debt is issued at greater than the embedded cost. R.I.D. 295 (order adopted February, 1977 and entered April, 1977) and R.I.D. 438 (Order adopted December 28, 1978 and entered February 5, 1979) would have been just in time for any such cost increases. Coverage would have been more than "well below 2.0 in 1979" (State. 11-D, p. 5) if the rate increases had been greater. It should also be noted that long term bond rates were lower in 1976-1978 than in 1974-1975 (Tr. 509).

Mr. Muth, however, recommended only using some debt mixed with equity issues to finance the additional capital investment. In 1977 and 1978 in particular, PECO passed up an unparalleled opportunity to issue more common stock at close to book value, in fact, closer to book value than the stock has attained since before 1974 (State. DHM-2, pp. 4-5 and Exh. DHM-2A, Sched. 8). In 1978, when the

proceeds/book ratio was 90.6% (Sched. 8), PECO did not even make a stock issue. The 1.9 million shares issued were only through the ongoing dividend reinvestment and employee stock ownership programs (Tr. 510). PECO should have been eager to issue common stock in 1978 after observing conditions in 1977, during which the average proceeds/book ratio was 101.5% (Exh. DHM-2A, Sched. 8). The increase in equity ratio would also have tended to increase rates in R.I.D. 438 and R-79060865, thus further improving PECO's interest coverage. Mr. Lawrence made no research or market analysis to determine whether additional common stock issues in 1976-1978 would have made a substantial impact on the market price of the stock. Mr. Lawrence candidly admitted that additional issues might have improved PECO's situation because of increased rates (Tr. 3407-3408). A mix of debt and equity would have avoided the extremes of Attachment II, State. 11-D, which assumes that the entire cost of eliminating the two year delay was financed by equity and that no additional rate increases would have been given in R.I.D. 295 and R.I.D. 438.

Instead of postponing in 1976 and 1978, PECO should either have cancelled in 1974 when its financial position was bleakest and when it received the construction permit, or it should have built the plant as quickly as possible. PECO had the courage of its convictions in 1974 -- the decision to continue assumed an improving economy and

promptly granted rate increases, neither of which occurred and both of which were outside PECO's control (State. 9, pp. 4-5; Tr. 505-507). PECO chose the worst possible path, not cancelling before the bulk of construction was begun (only $223 million had been expended at that time; State. 1b, p. 6), but not pressing forward to get the plant finished. PECO's economic forecasts in 1975 for 1976-1978 were optimistic (TR-1, 9, OCA Exh. 23). PECO should clearly have pushed ahead.

Mr. Paquette did not recall any analysis of the long term costs to customers of the 1976 delay (Tr. 502). In 1978, PECO computed that a one year postponement would reduce revenue requirements by $190 million for the first year, but increase bills by $47 million per year the second year and each year thereafter for the life of the plant (State. 9, p. 14). This does not appear to be a very good bargain for ratepayers, and Mr. Paquette did not recall even making a present value analysis (Tr. 502-503).

Even if it is assumed that all postponements were beyond the control of the company, PECO's management was nevertheless imprudent in getting PECO into a situation in which enormously costly postponements were required. PECO could, and probably should, have cancelled the plant in 1974, when economic conditions were at their worst, and the effects of the Arab oil embargo were starting to become apparent (State. DLB-1, p. 3). PECO has resisted an inves-

tigation of Limerick until this case, when the magnitude of the problem is so great that no good solution is possible. PECO put itself into grave financial risk when it decided to build such a large project itself, rather than jointly as with the nuclear stations partially owned by PECO. PECO did not begin to look for a grant owner until 1976-1978 (Tr. 493). The financing of Limerick has conflicted with the financing of Peach Bottom 2 and 3, Eddystone 3 and 4, and Salem 1 and 2, all of which PECO could have foreseen. PECO did not then, and apparently does not even now examine the possibility of controlling the peak through some kind of program when its capacity is projected to be deficient; its system planners only look at what additional generating capacity the company needs to meet the peak (Tr. 238-239). Trial Staff submits that the evidence shows that PECO went blindly ahead with Limerick regardless of the likely economic consequences.

PECO knew that Limerick was high risk undertaking when it chose a site at which a year-round supply of water, necessary for full operations, might be unavailable and admitted that fact at the time it applied for the construction permit (State. DLB-1, pp. 2-3). PECO's decision to go ahead in 1974 was based on giving the same kind of trust to economic conditions and to the regulatory authorities to smooth the way. PECO's claim for one-half billion dollars in its current rate case is symptomatic of the same expectation that the Commission will solve its problems for it.

Trial Staff submits that the evidence in this case establishes that PECO's management was imprudent in postponing Limerick in 1976 and 1978. For two reasons, however, Trial Staff recommends that the Commission defer decision on this subject:

(1) A prospective rate base adjustment is arguably not within the Commission's power when PECO has not yet claimed the plant (except $500 million of CWIP) in rate base.

(2) A prospective rate base or other adjustment such as a four year stoppage of AFDC would give the consumers no immediate benefits in terms of lower rates; such a decision at this time might well lead to a bond downrating or higher cost of debt or equity which would have a short range negative impact both on PECO and its ratepayers. Trial Staff suggests that this issue should therefore be considered again and more fully at the time PECO seeks to include Limerick in rate base.

D. The Cost of Future Delays

The potential cost of further delays is enormous. Bechtel's project manager estimated that a six month slippage would cost $50-100 million in direct costs, excluding the half-year of AFDC which would be accrued on the investment plus AFDC to date (Tr. 60-61). Dr. Nellis estimated a total cost of $344 million for a one year delay (Exh. REN-1A,

APPENDIX H - RECOMMENDED DECISION,
pp, 36-55, 1980 LIMERICK INVESTIGATION

BEFORE THE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

LIMERICK NUCLEAR GENERATING

STATION INVESTIGATION

I-80100341

INITIAL DECISION

OF

JOSEPH J. KLOVEKORN

Administrative Law Judge

March 26, 1982

over 10.8 million shares of common stock in 1975 at an average price of $12.31 per share. This increased the number of shares outstanding by 20% in just one year.

No party disputes that these events occurred. The OCA notes, however, that the company should have been aware then of the quagmire of direct construction cost escalations and in-service delays experienced by PECO at its other principal construction sites. (OCA M.B., p. V-11). The cost of this delay has been estimated at $36.6 million by the company. (PECO Statement 1B, pp. 6-7)[7/] and $372 million by the OCA.[8/]

Trial Staff argues that PECO should have either cancelled the units at this time or built the plant as quickly as possible. Instead, it criticizes the company for choosing the worst possible path-not cancelling before the bulk of construction was begun, but not pressing forward to get the plant finished in light of optimistic economic forecasts for 1976-1978. (OCA Ex. 23, Tr-1, 9; T.S. M.B. pp. 8-9).

1976 Extension

In 1976 PECO announced a further delay in the commercial operation of Limerick. Unit I was now to start in April 1983 and Unit II

7/ This is the additional carry-charge which would be experienced on the existing investment as the result of the deferral. It neglects, however, to reflect inflation in the costs of construction due to the delay.

8/ This is arrived at by comparing the July 1972 PECO estimates of total direct Limerick cost ($923 million) with the October 1974 estimate of $1.295 billion (OCA Ex. 1, IR 2, 1-3). This rough approximation cannot be relied on, since, of course, it reflects all post-July 1972 inflation, not just that portion related to the delay.

in April 1985. According to PECO, this rescheduling was made primarily to match growth in capacity additions with a new lower load forecast which was made in the spring of 1976. According to the company witness Paquette, the rescheduling was desirable from a financial standpoint. The company had not been able to improve its financial performance to a satisfactory level and, therefore, any lightening of the construction program enabled it to reduce the financing burden that it was facing.

During 1974 and 1975, PECO's return on common equity was in the range of 8.9% to 9.4%, its SEC interest coverage decreased further to 2.3-2.4 times and the price of its stock remained in the area of $10 to $15 per share, which was only 50% to 70% of book value. Also, in 1976, Standard & Poor's reduced its bond rating again, this time to A-.

In the summer of 1975 PECO's electric peak load was 5,530 megawatts, again below the 1973 record. This gave PECO further indications that energy conservation was having a significant effect and that it could expect a permanent adjustment in customers' usage of energy. Therefore, at that time the company changed its forecasted growth rate from its pre-1974 level of 7% per year down to 5%. The effect of this reduced growth rate was to lower its estimated 1980 peak load by almost 1,000 megawatts. This meant that it could reduce its capacity accordingly. Therefore, it delayed the Limerick units by two years, which lowered its projected capacity by 1,055 megawatts in the years 1981 to 1984 inclusive.

PECO had filed for another rate increase in November 1975 for a total of $95 million, or 10%. It requested $47 million to go into effect on January 19, 1976 on an interim basis, but the Commission allowed only $24 million of the increase, a 2.5% increase, to go into

effect in February 1976. Another $23 million increase became effective in August of that year on an interim basis.

In the spring of 1976, PECO lowered its five-year construction program by about $750 million. On average, PECO was able to reduce its outside financings in those years by about $60 million per year, or about 20%.

Mr. Paquette also testified that in evaluating the 1976 postponement, "it is also important to appreciate the context within which these decisions were being made". (PECO Statement No. 9, p. 10).

When growth forecasts began to level off and it became apparent that it would not need Limerick's capacity in 1981 and 1983, Mr. Paquette stated, it was entirely consistent with corporate and regulatory policy to slow down the construction of that plant in order to avoid bring it on line in advance of its need. This concern about excess capacity came to the surface in the company's 1975 and 1976 rate proceedings, when questions were raised by the Commonwealth of Pennsylvania concerning reserve margins and the possibility that the company then had "excess capacity" which should be eliminated from its rate base. Although the PUC rejected the Commonwealth's arguments in that case, it did indicate that the company would be required to justify its installed capacity in the next rate case. According to Mr. Paquette, in such an environment the company concluded that the public interest did not warrant a speedy completion of Limerick. Indeed, the company felt that there was some risk that if it brought on the Limerick units in 1981 and 1983, this Commission might exclude it from rate base with very dire financial consequences to the Company (PECO Statement No. 9, p. 11).

According to the testimony the company recognized that such a delay could result in a higher cost for Limerick, although the amount of this increase could not be accurately determined. PECO stated that balancing these factors, it was clear that rates would be greatly reduced in the short term from a postponement of Limerick since customers would not have to pickup the carrying costs for the plant in 1981 and 1983.

PECO believed, based on a review of Commission actions at that time, that the Commission's preference would be to have lower rates in the short term, even though that might result in some long term increases. During the proceeding, PECO estimated the cost of this delay at $68 million. (PECO Statement 1B, p. 7).

The OCA is highly critical of PECO's 1976 decision to slip Limerick's construction schedule, stating that it evidences a corporate attitude to react to load growth by building more and more capacity and not attempting to control such growth. (OCA M.B., p. V-15). It also criticized the company for failing to analyze what capacity would be needed if load growth continued to deescalate. It rejects the company's expressed concern about excess capacity. Under such circumstances, OCA maintains, the appropriate consideration, if not necessarily, would be whether it was reasonable, possible and responsible to stockholders and ratepayers to cancel one or both units. OCA notes that no analysis of this type was made. The only generation planning analysss during this period were plant-to-plant, coal versus nuclear, studies. Furthermore, OCA argues, PECO's load forecasts were fundamentally flawed in their methodological failure to capture the changing consumption patterns. In May of 1976, $284 million direct construction costs had been expended on Limerick. (OCA Ex. No. 6, IR-2, 8-12). The delay announced in 1976

added, according to the OCA, some $202 million to the direct cost of Limerick. (OCA Ex. No. 20, IR-2, 1-3).

Trial Staff was also highly critical of the 1976 delay. It estimated the cost of this postponement to be approximately $506 million (T.S. Ex. REN-1A, Sch. 2, p. 1). Trial Staff's witness Dr. Donald L. Birx, noted that PECO's originally stated reason for the delay was reduced load forecast. (T.S. Statement DLB-1, pp. 3-4). A press release issued at the time, however, also referred to financial constraints. (PECO Statement 11-B, App. A).

Trial Staff Witness Donald H. Muth testified, that according to the company, the 1976 delay reduced PECO's financing requirements by $56 million (1976), $44 million (1977) and $76 million (1978). (PECO Statement No. 9, Table C).

Mr. Muth concluded that PECO would have been able to issue sufficient additional mortgage bonds in 1976-1978 to eliminate the reason for this postponement. (T.S. Statement DHM-2, pp. 2-3). Although these debt issues would have increased rates by increasing the cost of debt, Trial Staff admits, this is true whenever any debt is issued at greater than the embedded cost. It should also be noted that long term bond rates were lower in 1976-1978 than in 1974-1975 (Tr. 509).

Mr. Muth, however, would have had the company using some debt mixed with equity issues to finance the additional capital investment. In 1977 and 1978, according to the witness, PECO passed up an unparalleled opportunity to issue more common stock at close to book value. In fact, he noted such an issuance would have been closer to book value than the stock has attained since 1974 (T.S. Statement DHM-2, pp. 4-5 and T.S. Ex. DHM-2A, Sched. 8). In 1978, when the proceeds/book ratio was 90.6%

(Sched. 8), PECO did not even make a stock issue. The 1.9 million shares issued during this time were only through the ongoing dividend reinvestment and employee stock ownership programs (Tr. 510). Trial Staff argues that PECO should have been eager to issue common stock in 1978 after observing conditions in 1977, during which the average proceeds/book ratio was 101.5% (T.S. Ex. DHM-2A, Sched. 8). The increase in equity ratio would also have tended to increase rates in R.I.D. 438 and R-79060865, thus further improving PECO's interest coverage. Trial Staff maintains that PECO could have financed the construction in a variety of ways. In 1976, PECO's mortgage coverage ratio was 2.5 times. If PECO had not reduced its 1976 construction expenditures by $56,000,000 and had financed these additions with first mortgage bonds, its mortgage coverage ratio would have only been reduced to 2.4 times. (T.S. Statement No. DHM-2, p. 4).

Trial Staff argues that PECO could also have financed the $56,000,000 of construction on an interim basis through short-term debt. PECO reduced its short-term debt by $100,728,000 during 1976 and there was only $7,226,000 of short-term debt outstanding on its balance sheet at December 31, 1976.

According to Trial Staff, PECO could also have issued additional common stock during 1976. Although its common stock was still selling below book value at an average price of $16.68 per share, this price was substantially higher than the 10,866,340 shares it issued in 1975 at $12.31 per share.

Trial Staff also argues that PECO could have financed the additional $44 million needed to maintain its construction schedule in 1977 through the issue of more common stock. However, this construction could also have been financed by first mortgage bonds or, on an interim

basis, with short-term debt. In 1977, PECO issued 5,317,952 shares of common stock at an average price of $19.54, or 101.5% of book value. If PECO had issued another 2,300,000 shares it would have had sufficient funds to cover the $44,000,000 of additional construction expenditures. Common stock issued in 1977 would have totaled 7,617,952 shares or substantially less than the 10,866,340 shares issued in 1975 (at $12.31 per share) or the 9,749,355 shares issued in 1980 (at $14.14 per share).

PECO's mortgage coverage ratio was 2.35 times in 1977. If PECO had issued an additional $44,000,000 of first mortgage bonds in 1977, its interest coverage would have been reduced to 2.28 times (assuming that the $56,000,000 of additional construction expenditures in 1976 had not been financed with mortgage bonds). The issuance of an additional $44,000,000 of first mortgage bonds in 1977 would therefore not have had a material effect on its interest coverage. Even if the 1976 and 1977 construction expenditures had both been financed with mortgage bonds, the mortgage coverage ratio would have only been reduced from 2.5 times to 2.2 times.

Trial Staff argues that PECO could also have financed the $44,000,000 of additional 1977 construction through short-term debt. PECO only increased its short-term debt by $7,649,000 in 1977, meaning there was only $14,875,000 of short-term debt outstanding on its balance sheet at December 31, 1977.

PECO could have financed its 1978 construction expenditures by issuing additional common stock. PECO had no public stock offering in 1978. The shares that it issued in 1978 were sold through its Dividend Reinvestment and Stock Purchase Plan, its Employee Stock Purchase Plan and its Tax Reduction Act Stock Ownership Plan. The stock issued through

these plans was sold at an average price of $17.46 or 90.6% of book value. If PECO had held a public sale of stock during the first quarter of 1978, its per share price would have been even greater than $17.46.

PECO's mortgage coverage ratio was 2.37 times in 1978. If PECO had issued an additional $76,000,000 of first mortgage bonds in 1978, its interest coverage would have been reduced to 2.26 times (assuming no additional mortgage bond issues in 1976 or 1977).

If the postponed 1976 and 1978 construction of $56,000,000 and $76,000,000, respectively, had been financed with mortgage bonds and the 1977 construction of $44,000,000 with common equity, the 1978 mortgage coverage ratio would have been 2.18 times.

Short-term debt outstanding at December 31, 1978, totaled only $16,129,000. This balance provided sufficient leeway for PECO to finance some or all of the $76,000,000 of 1978 postponed construction with short-term debt if it had chosen to do so.

PECO argues that Trial Staff's position is not supportable. First, it claims Trial Staff employs hindsight to construct a set of hypothetical financings allowed by circumstances about which the company could not have known when faced with the need to make its decision. Trial Staff is able to construct this hypothetical financing program because, as Trial Staff points out, long term bond rates were at a lower level between 1976 and 1978 than they were in 1976, because the rate of inflation decreased in the period 1976 through 1978, and because the value of PECO common stock increased between 1976 and 1978.

According to PECO, the second deficiency of Trial Staff's hypothetical financing program is that, even with the benefit of hindsight, it is impractical. Trial Staff insists that, while PECO common was still selling below book in 1976, the company could have sold $56 million of common to finance Limerick since the 1976 market price exceeded the 1975 market price. In addition, common stock sales of $44 million in 1977 and $76 million in 1978 were recommended. As an alternative, Trial Staff suggested that PECO could have issued $56 million in mortgage debt in 1976 because the company's coverage ratio was 2.5 times, that PECO could have issued $44 million in mortgage debt in 1977 with a coverage ratio of 2.35 times, or that PECO could have issued $76 million in 1978 because the company's mortgage ratio stood at 2.37 times. If sales of common stock or mortgage debt failed, Trial Staff suggests the use of short term debt "on an interim basis" to finance $56 million in 1976 and/or $44 million in 1977, and/or $76 million in 1978.

PECO maintains that Trial Staff's hypothetical financing program is not fiscally sound. If its suggestions were added to the amounts actually issued by the Company through the same period, PECO would have been left with an indenture coverage below 2.0 times in 1979, and further mortgage bond financing would have been precluded. (PECO Statement 11D, p. 5).

PECO claims that in the 1975 to 1979 period it could only have issued a total of about $30 to $40 million in additional mortgage bonds while maintaining a 2.0 times mortgage coverage ratio in 1979 (PECO Statement 11B, p. 6).

Trial Staff also hypothesized common stock offerings in 1976 ($56 million), 1977 ($44 million), and 1978 ($76 million), but PECO claims, ignored the cumulative effect of such offerings. If as Trial Staff suggested, PECO had issued an additional $176 million in common stock, the company would have been left with earnings of $1.70 per share in 1978, an amount insufficient to cover the company's common stock dividend. (PECO Statement 11D, p. 5).

Trial Staff's suggestion that PECO could have financed all or some of their 1976-78 requirements through short-term debt, PECO claims, ignores the fact that short term debt must be constantly refinanced. It also ignores the fact that use of large amounts of short term debt for immediate construction needs would sacrifice all of the financial flexibility inherent in short term debt reserves which are necessary to protect against capital market disruptions and unanticipated operating needs. (PECO Statement 11D, p. 5).

1978 Extension

In May 1978 PECO announced a decision to reschedule Units I and II from 1983-85 to 1985-87. PECO Witness Mr. Paquette testified that PECO did not in fact change the critical path of the construction schedule from 1978 through 1980, and that in those years PECO authorized and spent the additional dollars to maintain the 1983-85 service dates in the event that it became desirable to complete the units earlier than 1985-1987 (PECO Statement No. 9, p. 12; Tr. 495). The record shows, however, that PECO reduced its direct expenditures from 1978-1980 from the budgeted amount of $529 million to $479 million (OCA Exh. 23, Tr-1, 7). PECO explains, however, that it funded all major construction activities

required to maintain the earlier completion dates, but not activities of lesser importance (PECO R.B., p. 96, fn. 7).

The reasons for announcing a delay in 1978, according to PECO witness Paquette, were similar to those which were involved in the 1976 decision. In other words, by 1978 there were two more no-growth years. PECO's load forecasters lowered peak load estimates from 5% to 3% per year. In addition, PECO claims, the Commission permitted inadequate rate relief during this period. One important factor in this decision to postpone was apparently the recommendation of Administrative Law Judge Joseph Matuschak at R.I.D. 438 that an adjustment be made to PECO's rate base for "excess capacity." This was viewed as a message to the company not to optimize installed capacity but to minimize current costs and rates.

PECO, however, continued to preserve its options to maintain the earlier timetable due to the fact that escalating oil costs now made it appear that completion of Limerick at an early date might be advantageous to customers even if the capacity was not required, since the fuel cost savings resulting from Limerick's operations would more than offset the carrying costs of the plant (PECO Statement No. 9, p. 14).

Unlike the 1976 delay (Tr. 502), however, PECO this time performed an analysis to determine the level of short-term savings vs. long-term costs attributable to deferring completion of the plant. In 1978 PECO estimated that a one-year delay would reduce revenue requirements in the first year by $190 million. This would come about through a $350 million savings in base rates offset by higher operating expenses of about $160 million due to continued energy purchases. However, beginning in the second year and every year thereafter for the life of

the plant customers' bills would be approximately $47 million higher so that it would take approximately five years before the savings would be offset. No present value analysis was made (Tr. 502-503).

OCA points out, in response, that Judge Matuschak's decision in R.I.D. 438 came months after the decision to delay was announced. OCA also claims that the company failed to adequately analyze the economic and financial implications of the delay and the possible cancellation of at least one unit (OCA M.B., P. V-24-26).

Trial Staff estimates the cost of the 1978 delay to be $597 million (T.S. Ex. REV-1A, Sch. 2, P. 1).

1980 Schedule Extension

In 1980 PECO abandoned its option of maintaining the earlier 1983/1985 completion dates. This was made necessary when it became obvious that manpower availability and labor productivity in the installation of bulk commodities such as conduit and pipe were not meeting the target values. The manhours necessary to install the seismic design of pipe hangers and restraints turned out to be greater than estimated, and interferences introduced by these hangers to duct work and cable trays also required additional manhours to resolve. In addition, the NRC action items resulting from Three Mile Island were issued, adding additional manhours of job effort (PECO Statement 1B, P. 7).

Reasonableness of the Delays

Having discussed the various delays in the Limerick construction schedule, we now turn to the reasonableness of PECO management's various decisions to postpone the commercial operation dates of these units.

Initial consideration should be given to the standard of prudence against which these decisions should be measured. PECO argues (PECO M.B. pp. 296-299), that Trial Staff has actually ignored the legal standard establishing the requirements for a showing of management imprudence. PECO notes that the "prudent investment" theory is not new to the regulatory process. It was first articulated by Justice Brandeis nearly sixty years ago in Missouri ex. rel. Southwestern Bell Tel. Co. v. Missouri Public Service Commission, 262 U.S. 276, 67 L.Ed. 981 (1923). In defining the appropriate standard to be applied by regulatory agencies in their review of utility expenditures, Justice Brandeis stated as follows:

> The term prudent investment is not used in a critical sense. There should not be excluded from the finding of the base, investments which, under ordinary circumstances, would be deemed reasonable. The term is applied for the purpose of excluding what might be found to be dishonest or obviously wasteful or imprudent expenditures. Every investment may be assumed to have been made in the exercise of reasonable judgement, unless the contrary is shown. Southwestern Bell, supra (dissenting opinion), 262 U.S. at 289, n. 1. (Emphasis added).

An assessment of management's prudence is not properly premised upon hindsight. As stated by the Michigan Public Service Commission in Re Consumers Power Co., 14 P.U.R. 4th 1 (Mich. P.S.C. 1976):

> It has also become well established that in applying the prudent investment theory to particular management decisions, the commission must determine that there existed a reasonable need and basis for the utility to commit funds for the construction of utility plant in light of the circumstances which prevailed when the decisions were made and, further, that the expenditures were reasonably incurred. . . . [T]he Commission reviews these questions, not with hindsight, but based upon the circumstances that existed at the time those decisions were made. (At pp. 15-16). (Emphasis added.)

Accord, Wisconsin Telephone Co. v. Public Service Commission, 232 Wis. 274, 287 N.W. 122, 148 & 157 (1939).

According to PECO mere speculation as to potential cost savings will not support a finding of managerial imprudence. Re Consolidated Edison Co., 54 P.U.R. 3d 43, 103-114 (N.Y.P.S.C. 1964); Re Consolidated Edison Co., 96 P.U.R. NS 194 (N.Y.P.S.C. 1952). Nor will evidence that certain claimed expenditures are unusually high alone justify their disallowance. Boise Water Corp. v. Idaho Public Utility Commission, 578 P.2d 1089 (1978).

Further, it is not sufficient that such testimony simply question the wisdom of management's decision. As stated by the New York Public Service Commission in Re Consolidated Edison Company, 54 P.U.R. 3d 43, 112 (N.Y.P.S.C. 1964):

> A determination of prudence of imprudence calls for ... an inquiry into the reasonableness of management's judgment, i.e. whether there was a rational basis for it, but not an inquiry into its wisdom. In short, it is not for a commission to determine prudence by reference to what it would have done if it had been exercising the powers of management. (Emphasis added.)

Also, it is not sufficient that opponents to rate base inclusion of the claimed investment show that management could have made other decisions which would have had equal economic or other decisions which would have had equal economic or other benefit. As stated by the Supreme Judicial Court of Maine in Central Maine Power Company v. Public Utilities Commission, 405 A.2d 153, 178 (Me. 1979):

> Where, as here, the road chosen by management is arguably at least as economical as any alternative, and the benefit (i.e. cost) does not clearly appear to be 'excessive, or unwarranted, or incurred in bad faith,' management's judgment must be respected.

PECO argues that the Courts of this Commonwealth have applied these same principles as the legal standard which must be satisfied before a ratemaking disallowance may be justified on the basis of "management imprudence." Pennsylvania Power & Light Co. v. Public Service Commission, 128 Pa. Super. 195, 210, 216-17, 193 A. 427, 433-34 & 436-37 (1937); Pittsburgh v. Pa. P.U.C., 370 Pa. 305, 318 (1952); Pittsburgh v. Pa. P.U.C., 173 Pa. Super. 87, 92 (1953).

PECO concludes that an analysis of its various scheduling decisions relative to Limerick, demonstrates that, at the time and in the circumstances, its decisions were prudent. It claims that only by ignoring the circumstances surrounding each of its decisions and by using instead hindsight and strained comparision that one is able to argue otherwise.

The standard by which PECO seeks to have its actions measured appears to this administrative law judge to be inappropriate. In effect, the company is saying that as long as there is a rational basis for its action, any decision that it makes cannot be criticized. While that may have been the rule in the past, more recent decisions by regulatory agencies have held that:

> ...the company's conduct should be judged by asking whether the conduct was reasonable at the time, under all the circumstances, considering that the company had to solve its problems prospectively rather than in reliance on hindsight. In effect, our responsibility is to determine how reasonable people would have performed the tasks that confronted the company. Case 27123, Consolidated Edison Company of New York, Inc. (Opinion 79-1, issued January 16, 1979, pages 5-6). (N.Y.P.S.C.) See also, Case 27565, Niagara Mohawk Power Corp. (Opinion 80-25 issued June 24, 1980), Case 27869, Consolidated Edison Company of New York, Inc. (Opinion 82-2, issued January 21, 1982, pp. 11-14).

This standard of "reasonable care" rather than "rational basis" appears to be more appropriate here, primarily because it reflects the need to recognize the economic impact of delays in construction on the company's ratepayers. The rational basis standard might well be appropriate where one is dealing with a single routine item of plant which may cost several millions or the selection of one transmission line route over another. Certainly, this Commission should not take it upon itself to review every management decision. But where, as here, a company decision will have a substantial, if not overwhelming impact on rates for many years, this Commission must judge that action by some standard other than its rationality. PECO's conduct in delaying construction shall be judged on the basis of how reasonable people would have responded to the events of 1974-1978 and whether PECO's response was satisfactory in light of all those conditions and circumstances.

On this basis PECO's action in 1974 was reasonable by any standard. The oil embargo of late 1973 resulted in higher energy prices and recessionary economic conditions throughout the country. For the just time since World War II, energy sales and peak loads decreased. In addition the market for utility securities was poor due to the omission of Consolidated Edison's dividend. Under these circumstance, the company's decision to slip its construction schedule by two years was a reasonable response to an extraordinary series of events.

By 1976, however, the reduced load and financial constraints experienced by the company two years earlier continued. PECO's decision in the Spring of 1976 to delay Limerick for another two years might well have been reasonable, had it been based on a thorough evaluation of

economic consequences, not only to it but also to its ratepayers. The record, however, indicates that no such thorough evaluation was made.

As Trial Staff and OCA noted, PECO witness Paquette did not recall any analysis of the long-term economic costs to customers of this delay (Tr. 502). Although an exact determination of this increased cost could not be made, some sort of analysis should have been done. Similarly no analysis of alternatives to Limerick was made, neither did the company analyze its capacity requirements if load growth continued to decline.

In 1978 PECO did analyze the effect of its schedule extension on ratepayers and computed that a one-year postponement would reduce revenue requirements by $190 million for the first year, but would increase bills by $47 million per year the second year and each year thereafter for the life of the plant. Whether this was a good bargain for ratepayers is subject to discussion.

Although there can be no doubt that these postponements were caused in large part by financial factors, Mr. Paquette has offered another insight into management thinking when he testified (PECO Statement No. 9, pp. 10-13):

> In evaluating the 1976 postponement based on capacity and financial factors, it is also important to appreciate the context within which these decisions were being made. A public utility such as Philadelphia Electric has a duty to provide service and to build the facilities which are necessary to do so. Conversely, it has been historically recognized that no utility should build additional facilities which will not be useful within a least a reasonable time following their completion. Based on such an historic regulatory concept, it was clearly the view of the Company that Limerick should not be completed well in advance of the need for it. Accordingly, when our growth forecasts began to level off and it became apparent that we would not need Limerick's capacity in 1981 and 1983, it was entirely consistent with corporate and regulatory policy to slow down the construction of that plant in order to

avoid bringing it on line in advance of its need. This policy appeared to be confirmed when in the rate proceedings of 1975 and 1976 questions were raised by the Commonwealth of Pennsylvania concerning reserve margins and the possiblity that the Company then had "excess capacity" which should be eliminated from its rate base. Although the PUC rejected the Commonwealth's arguments in that case, it did indicate that the Company would be required to justify its installed capacity in the next rate case. In such an environment the Company concluded that the public interest did not warrant a speedy completion of Limerick. Indeed the questions concerning the Company's "excess capacity" indicated that there weas certainly some risk that if the Company brought on the Limerick plant in 1981 and 1983, the Public Utility Commission might exclude it from rate base with very dire financial consequences to the Company.

Offsetting all of these factors dictating a delay in the Limerick construction schedule, there was, of course, recognition by the Company of the possibility that such a delay could result in a higher ultimate cost for the Limerick station. The amount of this increased cost could, of course, not be accurately determined on any of the postponement dates. However, there was little question that additional AFUDC would be accrued as a result of the postponement, and it was also clear that the maintenance of the construction staff for a longer period at the site would increase overhead costs.

Balancing these factors, it was clear that the cost to the customers would be greatly reduced in the short term from a postponement of Limerick since they would not have to pick up the carrying costs for the plant in 1981 and 1983 but would have these costs postponed for at least two years. In other words, the delay decision involved clear short-term benefits to customers offset by possible long-term burdens, although the exact amount of those long-term burdens could not be precisely determined at the time.

In evaluating this question, the Company was of the view that the Pennsylvania Commission's preference would be to have lower rates in the short term even though that might result in some increases long term. Our judgment in this respect was based on a review of Commission actions and orders at that time. For examples, the Commission had refused the Company's request in include some CWIP in rate base and to normalize additional deferred taxes. Each of these PUC actions produced lower rates in the short

term, but higher rates in the long term and delay of Limerick seemed to fit in with this concept.

Because of continuing high inflation and low earnings, we requested another increase of $119 million in August 1977. We requested that approximately $50 million be allowed as interim rate belief to permit recovery of the carrying charges on Salem #1 which went into service on July 1977. However, the PUC granted an interim increase of only $11.8 million in March 1978. The final order for this case was not issued until March 1979, 19 months after we filed, and it granted an additional $67 million increase retroactive to July 4, 1978.

In the decision of the ALJ in connection with this rate increase, theres was a recommendation that the Commission adjust rate base for "excess capacity". We viewed this as another "message" from the public sector directing us not to optimize the installed capacity of our generating facilities, but to minimize current costs and rates. The regulatory philosophy for constructing additional capacity and the preference of short-term cost savings over long-term cost increases discussed in connection with the 1976 delay were all present in causing the delay announcement which was made in 1978.

It appears therefore that PECO's decision to postpone construction was influenced in part by the fear of an excess capacity adjustment by the Commission in a subsequent rate case. Rather than run the risk of such a revenue loss, the company chose to delay construction while at the same time continuing to accrue AFUDC on this plant-costs that will eventually be borne by the ratepayers.

In the past this Commission has held that there should be some sharing of the risk associated with bringing large plants on line and the resultant excess capacity which typically results. See Pa. P.U.C. v. Pennsylvania Power Co., R-77110521; Pa. P.U.C. v. Philadelphia Electric Co., R-79060865. This risk should not be effectively placed entirely on the ratepayer by permitting a utility delay the commercial operation of

a plant until the optimal time, while still allowing the company to earn a return, albeit non-cash, on its investment during this interregnum.

In summary, it appears that the company's action in postponing Limerick in 1976 and 1978 was made without careful analysis of the impact of such delay on its ratepayers.

In addition, the record shows that a factor in these decisions was the potential impact of Limerick on the company's capacity and reserve margins[9/] and the adverse effect this would have on the company's rate allowances. Consumers should not be expected to pay for delay which results form a conscious management decision to protect its own interests without adequate weight being given to its ratepayers' interest.

Trial Staff, although arguing that some adjustment is warranted as a result of PECO's decisions to postpone Limerick in 1976 and 1978, recommends that no final decision on this subject be made by the Commission at this time for the following reasons:

(1) A prospective rate base adjustment is arguably not within the Commission's power when PECO has not yet claimed the plant in rate base.

(2) A prospective rate base or other adjustment such as a four year stoppage of AFDC would give the consumers no immediate benefits in terms of lower rates; such a decision at this time might well lead to a bond downrating or higher cost of debt or equity which would have a

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9/ If Limerick were in service in 1981, PECO would have a summer reserve margin of 66% (PECO Statement No. 9, p. 18).

short range negative impact both on PECO and its ratepayers. Trial Staff suggests that this issue should therefore be considered again and more fully at the time PECO seeks to include Limerick in rate base. (T.S.M.B. p. 11).

I agree with Trial Staff that any decision now would be advisory only. This Commission cannot bind the future Commission that must decide PECO's claim for rate base treatment of these plants when they become commercially operable. Furthermore, this proceeding is a fact-gathering one. For purposes here, it is sufficient to note that the decisions to postpone Limerick were, in part, the result of management's discretion as well as financial circumstances. In a subsequent proceeding consideration can be given to the extent to which these delays were caused by financial and other external constraints and the extent to which management's fear of Commission sanctions entered into these decisions. Such a proceeding would also be an appropriate forum to quantify the effects of these delays. Such a record does not exist at the present time.

MANAGEMENT OF THE LIMERICK CONSTRUCTION PROJECT

Having followed the progress of Limerick up to the present it might be appropriate to discuss the management of the project as detailed on this record.

As noted earlier Bechtel Power Corporation was selected as the architect/engineer and constructor for Limerick, and General Electric was selected to provide the steam generator. Following the selection of these companies, PECO assigned responsibility for planning, scheduling

APPENDIX I - FINAL COMMISSION ORDER (AUGUST 27, 1982), pp. 11-17, 28-29, 1980 LIMERICK INVESTIGATION

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120

Public Meeting held May 7, 1982

Commissioners Present:

Susan M. Shanaman, Chairman
Michael Johnson
James H. Cawley (opinion and statement attached)
Linda C. Taliaferro, concurring in part and dissenting in part (opinion attached)
Clifford L. Jones

Limerick Nuclear Generating Station Investigation — I-80100341

OPINION AND ORDER

BY THE COMMISSION:

Before us for disposition is the Initial Decision of Administrative Law Judge (ALJ) Joseph J. Klovekorn in the above-captioned proceeding, wherein the ALJ makes several findings regarding, inter alia, the construction of the Limerick Nuclear Generating Station. For the reasons stated below, we disagree with several of these findings and shall modify the ALJ's Initial Decision.

Prior to the discussion of the positions advocated by the parties and our disposition of the issues presented, we note that this fact finding investigation and this Opinion and Order is the result of countless hours of preparation on the part of the parties and of the ALJ. We commend the parties and the ALJ on their fine efforts in dealing with the complex issues raised.

In rendering a decision in this investigation, we are aware that our options are limited. Unlike a traditional ratemaking case, in this proceeding, we are not presented with any claim which would affect current rates or rates for the immediate future. Rather, we have undertaken this investigation to ascertain the appropriateness of the decisions underlying the construction of the Limerick Nuclear Generating Station and the need to continue construction at this time, given the potential for load growth in PECO's service territory, alternative means of meeting that load growth, and the financial ability of PECO to continue construction of this station. In performing our analysis, we are cognizant of the fact that many of the calculations and figures presented in the context of this proceeding are somewhat speculative. Although no one can perfectly see the future, we are convinced that those estimates represent more than educated guesswork on the part of the witnesses.

The OCA and Staff, while not disputing the fact that the preceding events have occurred, both point to 1974 as the turning point in Limerick's construction. The OCA argues that the company should have been aware then of the quagmire of direct construction cost escalations and in-service delays experienced by PECO at its other principal construction sites (OCA Main Brief, p. V-11). The Trial Staff argues that PECO should have either cancelled the units at this time or built the plant as quickly as possible. Staff criticizes the Company for choosing the worst possible path--not cancelling before the bulk of construction was begun, but not pressing forward in completing the plant in light of the optimistic economic forecasts for 1976-1978 (OCA Ex. 23, N.T. 1, 9).

C. The 1976 Extension

In 1976, to match growth in capacity additions with a lower spring 1976 load forecast, PECO further delayed construction and revised the in-service dates for the Limerick Units Nos. 1 & 2 from April '81/ April '82 to April '83/April '85 respectively.

According to Mr. Paquette, the decision to further delay construction was based upon a continued deterioration of PECO's return on common equity, the price of its stock, and a further reduction in its bond rating to A-. Additionally, the wave of conservation continued to reduce PECO's peak load.[15/] At this time, PECO revised its forecast growth rate from its pre-1974 level of 7% per year downward to 5%, a revision which effectively lowered PECO's estimated peak load by almost 1,000 megawatts. As a further delay of the Limerick units would lower its projected capacity by 1,055 megawatts in the years 1981 to 1984 inclusive, construction was delayed.

Mr. Paquette stressed that in evaluating the 1976 postponement, "it is important to appreciate the context within which these decisions were being made." (PECO Stmt. No. 9, p. 10). He noted that concern about bringing a unit on line prior to its being necessary, creating excess capacity, was brought to the fore in the company's 1975 and 1976 rate proceedings. Although any excess capacity adjustment was rejected in that proceeding, we required PECO to justify its installed capacity in its next proceeding. According to Mr. Paquette, in such an environment the company concluded that the public interest did not warrant a speedy completion of Limerick. It appears that the company felt that there was some risk that if the Limerick units were brought on line in 1981 and 1982, the Commission might deem the plants to be unnecessary for the service of its customers and exclude any costs from rate base and prohibit recovery of any expenses associated with the operation of the units with dire financial consequences to the Company (PECO Stmt. No. 9, p. 11).

15/ PECO's peak load was 5,530 megawatts, again below the 1973 record.

The OCA raises two major objections to PECO's 1976 decision to delay Limerick's construction schedule, arguing that the slippage evidences a corporate attitude to react to load growth by building more and more capacity instead of attempting to control such growth (OCA Main Brief, p. V-15) and criticizes the company for failing to analyze what capacity would be needed if load growth continued to deescalate. The OCA contends that it would have been appropriate for PECO to consider cancellation of one or both units at this time. The OCA sets the cost of this delay at $202 million of direct costs (OCA Ex. No. 20, IR-2, 1-3).

Trial Staff criticizes the delay, contending, through testimony of Witness Donald Muth, that PECO's financial condition was such that it would have been able to issue sufficient additional mortgage bonds in 1976-1978 to eliminate the need for the postponement (T.S. Stmt. DHM-2, pp. 2-3). In addition, Mr. Muth concludes that the Company could have financed the construction in a variety of ways in 1976, i.e. the issuance of a combination of common stock, short term debt, and long term debt, rather than delaying construction. In addressing PECO's argument that construction was delayed because of a reduction in load, Trial Staff opines that if this were the case, construction at Limerick would still be delayed, as load has not grown significantly in recent years. If however, financial considerations were foremost, Staff suggests that instead of postponing constructing in 1976 and 1978, PECO should have either cancelled in 1974 when PECO's financial position was bleakest, or it should have built the plant as quickly as possible.

In rebuttal, PECO maintains that Trial Staff's hypothetical financing program is not fiscally sound. If its suggested financing proposals were added to the amounts actually issued by the Company through the same period, PECO would have been left with an indenture coverage below 2.0 times in 1979, precluding further mortgage bond financing (PECO Stmt. 11D, p. 5). PECO claims that in the 1975 to 1979 period, it could have issued only a total of about $30 to $40 million in additional mortgage bonds while maintaining a 2.0 times mortgage ratio in 1979. Finally, PECO argues that the issuance of common stock as suggested by Staff would merely have diluted earnings to a level insufficent to cover PECO's dividend. (PECO Stmt. 11D, p. 5).

D. 1978 Extension

In May 1978, PECO announced a decision to reschedule Units I and II from 1983-85 to 1985-87 respectively. Although PECO witness Paquette testified that from 1978 to 1980 the Company authorized and spent monies to maintain the 1983-85 service dates, the record indicates that direct expenditures during that period were reduced from the budgeted amount of $529 million to $479 million (OCA Exh. 23, N.T. 1, 7). According to the witness, the 1978 delay was caused by the same factors as the 1976 delays, i.e. no load growth, inadequate rate relief increasing financial constraints, and a concern about a possible excess capacity adjustment.

PECO, however, maintained its options with regard to its construction timetable due to the fact that escalating oil costs made it appear that completion of Limerick at an early date might be advantageous to customers, even if the capacity was not required, since the fuel cost savings resulting from Limerick's operations would more than offset the carrying costs of the plant (PECO Stmt. No. 9, p. 14).

Unlike the 1976 delay (N.T. 502), PECO performed an analysis to determine the level of short-term savings vs. long-term costs attributable to deferring completion of the plant.

The OCA points out, in response, that PECO's concern over an excess capacity adjustment should not have entered into PECO's planning picture, in that ALJ Matuschak's decision in R.I.D. 438 recommending an excess capacity adjustment, came months after the decision to delay was announced. OCA also claims that PECO failed to adequately analyze the economic and financial implications of the delay and the possible cancellation of at least one unit (OCA Brief p. V-24-26).

Trial Staff takes the same position with regard to this delay as the 1976 delay.

E. Discussion

We note at the outset of our discussion, that to adopt any proposed adjustments or calculations presented to us, at this time, would be inappropriate. The record presented is inadequate to accurately guage the costs of delay. Nor is the issue ripe for decision. Only when the plants are complete and the attendant cost claimed will the costs of delay be susceptible to accurate assessment. Accordingly, we shall not attempt to quantify the costs of the various delays at this time.

In order to judge the reasonableness of the actions taken by PECO's management in delaying the construction of the Limerick plants, we must initially establish a standard by which we can measure PECO's actions.

PECO would have us apply a standard of management imprudence arguing that so long as there exists a rational basis for the rendering of any of its decisions, those decisions may not be criticized. We are guided by Coplay Cement Manufacturing Company v. Public Service Commission, 271 Pa. 58, 114 A. 649 (1921) wherein the Pennsylvania Supreme Court stated:

> It was not intended by the legislature that the Commission should be a board of managers to conduct and control the affairs of public service companies, but it was meant that where certain of their powers and obligations had intimate relation to the public through fairness, accommodation or convenience, the commission should have an inquisitorial and corrective authority

> to regulate and control the utility in the field specifically brought within the commission's jurisdiction.

While it is not our duty to become PECO's Board of Directors, it is our duty to ascertain what the conduct of a prudent management would have been under a given set of circumstances and utilize that standard to determine whether actions taken by a particular utility, resulting in costs to be borne by ratepayers, are reasonable. Pennsylvania Power and Light Company v. Public Service Commission, 128 Pa. Superior Ct. 195, 216-217 (1937). Our process may be analogized to that of a court of law when it applies a reasonable man standard to proceedings before it. We find the opinion of the New York Public Service Commission is appropriate to utilize in determining whether management practices were reasonable. In Consolidated Edison Company of New York, Case 27123, Opinion 79-1 (January 16, 1979), the New York Public Service Commission stated:

> ...the company's conduct should be judged by asking whether the conduct was reasonable at the time, under all the circumstances, considering that the company had to solve its problems prospectively rather than in reliance on hindsight. In effect, our responsibility is to determine how reasonable people would have performed the tasks that confronted the company.

See also, Case 27565, Niagara Mohawk Power Corp. (Opinion 80-25 issued June 24, 1980), Case 27869, Consolidated Edison Company of New York, Inc. (Opinion 82-2, issued January 21, 1982). Thus, a standard of "reasonable care" rather than a "rational basis", as suggested by PECO, appears appropriate. Perhaps the ALJ summed up this approach best when he stated that "PECO's conduct in delaying construction shall be judged on the basis of how reasonable people would have responded to the events of 1974-1978 and whether PECO's response was satisfactory in light of all those conditions and circumstances". By utilizing such a standard we are attempting to balance the right of the ratepayers to be treated fairly and the inherent right of PECO to manage its own affairs.

With this standard in mind, the ALJ concluded that PECO's 1974 delay was reasonable and that the 1976 and 1978 delays may have been unreasonable. As previously noted, the ALJ did not find it appropriate to recommend any specific action regarding the 1976 and 1978 delays be taken at this time. However, he did conclude that the risk of large units should be shared by stockholders (R.D. at 54). He states: "Consumers 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 interests. To these findings PECO, the OCA, and the Keystone Alliance except.

In its exceptions, the OCA argues that if, in a future rate proceeding, the Commission determines that an adjustment is appropriate, "then in all fairness to ratepayers the effect on stockholders should be

assessed and compared to the approximate $200-300 million loss spread over ten years that would result from stockholders' absorption of one-half of the after-tax sunk cost of Limerick Unit No. 2."

Keystone Alliance excepts to that portion of the Initial Decision wherein the ALJ found PECO's pre-1974 actions to be prudent, arguing that PECO was committed to nuclear power plant construction rather than viewing nuclear generation with prudence. They also argue, that the ALJ erred in not finding that construction should have been halted in 1974.

PECO, in its exceptions, initially lends its support to the ALJ's conclusion that we lack authority to order prospective rate base adjustments and that such an adjustment, if adopted at this time, would interfere with PECO's ability to finance plant completion on the least cost Forecast 5 Schedule and would increase financial costs. However, PECO excepts to the ALJ's criticisms of its 1976 and 1978 scheduling decisions. Briefly, PECO argues that we should reject the ALJ's conclusions:

> because (1) the Initial Decision has erroneously summarized PECO's evidence as to the reasons for its scheduling decisions, (2) has failed entirely to discuss or describe a material and substantial part of PECO's evidence in support of those decisions and (3) has erroneously accepted unproven and erroneous cost-benefit assumptions presented by Trial Staff.

Initially, we disagree with Keystone's assertions that the 1974 construction extension decision was not prudently undertaken. As noted previously, at the time the construction permit was issued, PECO had no firm indication that demand would be reduced substantially. It is readily apparent that the decrease in demand was due primarily to the increased price of oil and rapid inflation, which in turn resulted in ever increasing rates. As there was no indication that this demand decrease would continue, we cannot conclude, as did Keystone, that construction should have been halted at this point in time. If anything, we would have concluded, as did Trial Staff, that in light of subsequent developments, the Limerick construction schedule should have been advanced. However, placing ourselves in the position of PECO's management with the facts and trends available to it at that time, we cannot conclude that management was imprudent and unreasonable in its decision in 1974 to delay construction.

With regard to the OCA's exception, we reiterate our position that as no claim has been made for inclusion or exclusion of costs associated with Limerick, we deem it inappropriate to allocate those costs. The issue of any allocation or sharing of costs is properly reserved for a future rate proceeding.

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.

III. Management Oversight of the Project

Following the selection of Bechtel Power Corporation as the architect/engineer and contractor for Limerick, and General Electric to provide the steam generator, PECO management assigned responsibility for planning, scheduling and cost control to its Engineering and Research (E & R) Department.

The management of this department holds weekly meetings with the heads of the six divisions comprising the department. Individual divisions have bi-weekly meetings to review Limerick activities. A departmental report is prepared and sent monthly to PECO's Chairman of the Board. The Vice President of PECO's E & R Department reports significant events to top management at weekly and bi-weekly meetings. In addition, a major project coordination meeting is held monthly, usually at the construction site and is attended by PECO and Bechtel personnel. Additional periodic meetings are held between General Electric, Bechtel and PECO management groups to review the overall project status (PECO Statement No. 1B, p. 2).

As noted above, PECO's E & R department is composed of 6 divisions. As described by PECO, the overall coordination and administration of the project rests in the Mechanical Engineering Division, and the designated Project Manager, Richard A. Mulford, is located in that division. This division also follows the mechanical design aspects of the plant, reviews and interacts with the piping and instrument system diagrams and plant layouts prepared by Bechtel, reviews and approves equipment specifications and drawings, and reviews bidders lists and equipment purchase recommendations. The division also performs a similar monitoring function for General Electric, the vendor of the nuclear steam supply system. Following the start of construction, a PECO Resident Project Manager was assigned to Bechtel in San Francisco; there are now three PECO employees situated there.

The Electrical Engineering Division follows the electrical aspects of the plant's design. Personnel in this division perform functions parallel to their counterparts in the Mechanical Engineering Division, working through an electrical project Engineer who coordinates his activities and reports through Mr. Mulford.

AFUDC on any additional investment in Unit 2 pending completion of Unit 1.

We are of the opinion that we would be remiss if we did not declare these conclusions in this Order. We believe that the public interest demands that we exercise our discretion and issue this declaratory order so that PECO can take appropriate action in response.

IV. Conservation

As was stated earlier, a portion of PECO's experienced decline in consumption and load growth has been due to a commendable effort on the part of PECO's customers to conserve electricity. Several parties to this proceeding, OCA, the City and CEPA, have set forth conservation and alternate energy source programs which they claim are feasible and lower cost alternatives to the completion of Limerick. However, the record developed on these programs is not sufficient for us to initiate specific programs at this time. There are still too many unanswered questions regarding the potential costs and benefits of the proposed conservation options and alternate energy sources, as well as unforeseen institutional barriers. We must be confident that these programs are the most desirable supply options available.

Throughout this proceeding, PECO has been criticized for failing to pursue an active conservation program (e.g. City M.B. pp. 21-26; OCA M.B. pp. IV 34-45; CEPA M.B., pp. 60-63; Keystone M.B., pp. 14-25), and unfavorable comparisons have been drawn between PECO's expenditures in this area and those of several other utilities. We did not intend to reach a conclusion as to the adequacy of PECO's past and current conservation programs. However, we strongly urge PECO to develop and implement aggressive conservation and alternate energy programs to offset future energy demands.

To these ends we will direct PECO to pursue an aggressive conservation program designed to substantially offset the suspension or cancellation of Limerick Unit 2. Further, we will direct the Secretary to open an investigation docket in order to develop a Commission policy, applicable to all electric utilities, whereby regulatory incentives would be afforded to any cost-effective conservation inducing investment designed to lower a utility's need to install additional capacity; THEREFORE,

IT IS ORDERED:

1. That the Philadelphia Electric Company inform us of its decision to suspend or cancel construction at Limerick Unit 2, in light of the conclusions of this Opinion and Order, within 120 days of the entry of this Opinion and Order and provide an explanation thereof.

2. That the Philadelphia Electric Company pursue an aggressive conservation program designed to substantially offset the suspension or cancellation of Limerick Unit 2 in consultation with our Bureau of Conservation, Economics and Energy Planning. The Company shall submit

an initial conservation program plan within 120 days of the entry of this Opinion and Order.

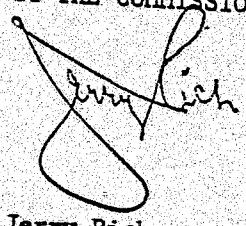
3. That the Secretary immediately open an investigation docket the purpose of which is to develop a Commission policy, applicable to all electric utilities, whereby regulatory incentives would be afforded to any cost-effective conservation inducing investment designed to lower a utility's need to install additional capacity.

4. That at a minimum the aforementioned investigation should address: conservation financing programs for residential and small commercial customers, joint customer/company financed alternate supply projects, rate induced or company controlled load management programs with corresponding investment programs, appropriate company informational activities required to support the company's programs, any necessary changes in existing service regulations in order to ensure efficient utilization of electricity, and any legislation which may be necessary to implement or enhance conservation or provide alternative supply opportunities.

5. That the Secretary invite all interested electric utilities or other parties to participate and direct the Commission's Bureau of Conservation, Economics and Energy Planning to actively participate in the investigation.

6. That the Initial Decision of Administrative Law Judge Joseph Klovekorn is adopted to the extent consistent with this Opinion and Order.

BY THE COMMISSION,



Jerry Rich
Secretary

(SEAL)

ORDER ADOPTED: May 7, 1982

ORDER ENTERED: August 27, 1982

APPENDIX J - PECO BRIEF BEFORE THE PENNSYLVANIA SUPREME COURT, pp. 67-74, Nos. 23 and 24 E.D. APPEAL DOCKET 1983

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

PENNSYLVANIA PUBLIC UTILITY COMMISSION, Appellant, v. PHILADELPHIA ELECTRIC COMPANY, Appellee, and OFFICE OF CONSUMER ADVOCATE, Intervenor.	No. 23 E.D. Appeal Docket 1983
WALTER W. COHEN, CONSUMER ADVOCATE, Appellant, v. PHILADELPHIA ELECTRIC COMPANY AND PENNSYLVANIA PUBLIC UTILITY COMMISSION, Appellees.	No. 24 E.D. Appeal Docket 1983

BRIEF FOR APPELLEE, PHILADELPHIA ELECTRIC COMPANY

Consolidated Appeals from the Order of the Commonwealth Court of Pennsylvania at No. 2365 Commonwealth Docket 1982, entered December 15, 1982, which reversed an Order of the Pennsylvania Public Utility Commission at I-80100341, entered August 27, 1982.

Robert H. Young
Walter R. Hall, II
Michael G. Nearing
Thomas G. Wilkinson, Jr.

2300 The Fidelity Building
123 South Broad Street
Philadelphia, PA 19109
(215) 875-5530

Counsel for Appellee
Philadelphia Electric Company

Of Counsel:
Edward G. Bauer, Jr., Esq.
Vice President & General Counsel
Irene A. McKenna, Esq.
Philadelphia Electric Company
2301 Market Street
Philadelphia, PA 19101

MORGAN, LEWIS & BOCKIUS
2100 The Fidelity Building
123 South Broad Street
Philadelphia, PA 19109

Date: April 18, 1983

does not imply authority to interfere with the construction of utility plant. Accordingly, the PUC is granted no authority to refuse registration of security certificates or to condition the use of proceeds from the sale of registered securities as a means of regulating utility plant construction.

D. THE PUC'S ADVISORY CRITICISM OF PECO'S 1976 AND 1978 LIMERICK DEFERRAL DECISIONS AND ITS DIRECTIVE THAT PECO FILE A CONSERVATION PROGRAM DO NOT PRESENT A REVIEWABLE ISSUE, BUT IF REVIEWED MUST BE REVERSED.

The August 27 Order states, as respects PECO decisions to defer completion of Limerick in 1976 and 1978, that: "PECO management did not exercise judgment sufficient to meet our reasonable man standard in delaying construction at Limerick . . . ." (R. 293a). The PUC, however, found it inappropriate to determine the extent to which such unreasonable management decision-making had affected, if at all, the reasonable costs of the Station:

> We note at the outset of our discussion, that to adopt any proposed adjustments or calculations presented to us, at this time, would be inappropriate. The record presented is inadequate to guage [sic] the costs of delay. Nor is the issue ripe for decision. Only when the plants are complete and the attendant cost claimed will the costs of delay be susceptible to accurate assessment. (R.289a) (emphasis added).

Similarly, the PUC directs that PECO should file with the PUC a "conservation program".

The Commonwealth Court found it unnecessary to review

these determinations in the proceeding below. It is PECO's position that this Honorable Court should likewise decline to review these determinations, because the PUC's statements and directive do not constitute a final adjudication and have no res judicata effect. PECO does request that this Court, unlike the Commonwealth Court, expressly hold in its Order that each of these determinations is at present not reviewable and without res judicata effect. An explicit statement to this effect is essential to avoid future pointless controversy over the meaning of these statements and directive and to reduce the financial uncertainty imposed by them upon PECO, which uncertainty increases capital attraction costs to the injury of both PECO and its ratepayers.

If this Court should conclude that these determinations are final adjudications or that they have res judicata effect, then such determinations must be reversed.

1. The Advisory Criticism Of PECO's 1976 And 1978 Limerick Deferral Decisions.

As noted above, while criticizing aspects of PECO's 1976 and 1978 decisions, the PUC held that the propriety of such decisions was not "ripe for decision" at this time.33/ Further,

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33/ The PUC further stated, in rejecting an OCA request that an imprudence finding be issued, that:

> With regard to the OCA's exception, we reiterate our position that as no claim has been made for inclusion or exclusion of costs associated with Limerick, we deem it inappropriate to allocate

(continued)

the PUC recognized that PECO's deferral decisions were "undertaken largely for financial reasons" and it stated: "We deem PECO's currently scheduled in-service date for Unit 1 of 1985 to be appropriate." (R.297a & 301a). The PUC on Brief further asserts that its determination is identical to that of the ALJ.34/ As expressed by the ALJ, this joint conclusion is as follows:

> This Commission cannot bind the future Commission that must decide PECO's claim for rate base treatment of these plants when they become commercially operable. Furthermore, this proceeding is a fact gathering one. For purposes here, it is sufficient to note that the decisions to postpone Limerick were, in part the result of management's discretion as well as financial circumstances. In a subsequent proceeding consideration can be given to the extent to which these delays were caused by financial and other external factors and the extent to which management's fear of Commission sanctions entered into these decisions. Such a proceeding would also be an appropriate forum to quantify the effects of these delays. Such a record does not exist at

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> those costs. The issue of any allocation or sharing of costs is properly reserved for a future rate proceeding. (R291a).

34/ PUC Brief, p. 76. As the PUC has further stated on Brief (pp. 11-12):

> The Commission further agreed with the ALJ that this proceeding was not appropriate for resolving the total amount of the increases in the construction costs brought on by the delays or for determining whether or not PECO could later recover those increases. . . . The Commission also reserved judgment on PECO's right to recover the costs of delay-induced increases until PECO actually seeks reimbursement in a subsequent proceeding.

the present time. (R.65a).

This Honorable Court has consistently held that a controversy is ripe for review only when it is the subject of "a final judgment or something in the nature of a final judgment." Commonwealth v. Ruth, 104 Pa. 294, 297 (1883); Marshall Estate, 403 Pa. 348, 168 A.2d 745 (1961). A final order is an order which ends litigation or disposes of a controversy. Pennsylvania Turnpike Commission v. Atlantic Richfield Co., 482 Pa. 615, 394 A.2d 491 (1978); City of Philadelphia v. Belmont Fund, Inc., 56 Pa. Cmwlth. 185, 424 A.2d 631 (1981). Where, however, there remain factual issues to be resolved, where the order specifically indicates that litigation of the controvery is not at an end or where the order does not dispose of the entire controversy, a final order has not been entered and it is not reviewable. Nothing must be left to conjecture, surmise or additional inquisition as to the administrative resolution of the controversy, if it is to be considered ripe for appellate review. Conway v. 20th Century Fox, 491 Pa. 189, 420 A.2d 405, 409 (1980); Pennsylvania Labor Relations Bd. v. Puritan Cleaners, 376 Pa. 617, 103 A.2d 904 (1954). This Court, in determining what constitutes the final and reviewable resolution of a controversy, looks "beyond the technical effect of the adjudication to its practical ramifications." T.C.R. Realty, Inc. v. Cox, 472 Pa. 331, 337, 372 A.2d 721, 724 (1977).

Clearly, the PUC's criticisms of PECO's 1976 and 1978

deferral decisions are not presently reviewable. The PUC has neither determined whether PECO should be penalized for its actions nor what the form or magnitude of any such penalty should be. Rather, it has explicitly held that the controversy is not ripe for its decision, much less that of this Court. The PUC has thus not rendered a final judgment as to any legally cognizable matter.

Moreover, if this controversy is not presently ripe for appellate review, then there can be no res judicata effect. Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955); Bearoff v. Bearoff Brothers, Inc., 458 Pa. 494, 327 A.2d 72 (1974); Gallery v. Municipal Authority of Blythe Township, 432 Pa. 307, 243 A.2d 385 (1968). For the reasons stated above, PECO requests that the Court expressly hold that the PUC's criticism of PECO's 1976 and 1978 deferral decisions is not a final adjudication and has no res judicata effect.

If, however, this Court concludes that the PUC's criticisms of PECO's 1976 and 1978 deferral decisions constitute a final adjudication of a legally cognizable controversy, binding on future Commissions and properly subject to appellate review, then those criticisms must be reversed for the following three reasons. First, the PUC admits that PECO's deferral decisions were "undertaken largely for financial reasons" and has itself proposed a similar deferral of Limerick 2 purportedly for financial reasons. Where the PUC admits that PECO's actions were

taken for the same reasons as its own action, PECO's actions cannot properly be subject to Commission criticism. Second, the PUC has offered no sensible explanation as to what it is that PECO did wrong or what other course of action should have been taken to exercise "reasonable management judgment". Rather, the PUC alternately reasons that PECO should have cancelled or accelerated Limerick construction. Obviously, PECO could not have chosen to concurrently pursue each of these diametrically opposed courses. Moreover, there is no evidence of any kind that cancellation was a proper course in 1976 or 1978.

Third, the Commission failed to apply its own articulated "reasonable man" standard in assessing the evidence. The PUC completely ignores the evidence presented by PECO that in 1976 and 1978 virtually all other utilities were eschewing the PUC's proposed cancellation/acceleration option in favor of the course followed by PECO. Clearly, this near unanimous industry action establishes the standard of what a reasonable man would do under the circumstances existing in 1976 and 1978.

Finally, the PUC and OCA argue (PUC Brief, pp. 77-86; OCA Brief, pp. 80-83) on Brief to this Court various selections from their testimony before the PUC in an effort to demonstrate that the PUC's conclusion is supported by substantial evidence. There are two reasons why their argument should be rejected. First, neither the PUC nor the ALJ accepted the testimony which

these parties currently advance as review of the Orders below demonstrates. In fact, as the PUC concluded that the deferral decisions were made largely for financial reasons, the bulk of this testimony, which argued that PECO should and could have built the plant more rapidly, was clearly rejected (R. 292a). Finally, much of the statistical and other data advanced by the PUC and OCA simply does not support the proposition for which it is asserted. This is apparent simply from comparison of the data to the asserted proposition.

2. The PUC's Directive That PECO File A Conservation Program.

In its August 27 Order, the PUC directs PECO to "submit an initial conservation program plan". (R. 305a). PECO initially interpreted this conservation directive to mandate the implementation of costly conservation and alternative energy source programs as a supply option to replace Limerick. It therefore opposed this unprecedented directive as beyond the PUC's authority and unsupported by the evidence.

The Commonwealth Court found it unnecessary to reach the conservation issue, and PECO submits that this Court should follow the same course. There is no present controversy or ripe issue respecting conservation before the Court at this time. As noted by the PUC in its Brief (p. 72):

> [T]he Commission's order appropriately leaves to the Company the initial design of the conservation plan. . . . There is simply no basis at this point

> for the Company's arguments that its conservation plan will be unduly expensive or unsuccessful since that plan does not yet exist.
>
> . . . [T]he Commission order in this matter only requires the company to file a conservation plan within 120 days. The Company is free to seek whatever guidance or time extension from the Commission it would deem necessary to meet this requirement.35/

PECO is presently preparing a conservation program and does not object to filing it in accordance with the Commission's wishes. As it is free to file any program which it views as appropriate and is further free to pursue any objections it may have to the Commission's treatment of that program, the PUC's directive is clearly not a final adjudication or ripe for review under the standards set forth above. To avoid uncertainty as to the PUC's intent in this matter, PECO requests that this Court explicitly state this conclusion in its Opinion.

35/ See OCA Brief, p. 64.

APPENDIX K - COMMISSION BRIEF BEFORE THE PENNSYLVANIA SUPREME COURT, pp. 4-14, 74-85, Nos. 23 and 24 E.D. APPEAL DOCKET 1983

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

PENNSYLVANIA PUBLIC UTILITY COMMISSION, Appellant v. PHILADELPHIA ELECTRIC COMPANY, Appellee and OFFICE OF CONSUMER ADVOCATE, Intervenor	No. 23 E.D. Appeal Docket 1983
WALTER W. COHEN, CONSUMER ADVOCATE, Appellant v. PHILADELPHIA ELECTRIC COMPANY AND PENNSYLVANIA PUBLIC UTILITY COMMISSION, Appellees	No. 24 E.D. Appeal Docket 1983

BRIEF FOR APPELLANT, PENNSYLVANIA PUBLIC UTILITY COMMISSION

Consolidated Appeals from the Order of the Commonwealth Court of Pennsylvania at No. 2365 Commonwealth Docket 1982, entered December 15, 1982, which reversed an Order of the Pennsylvania Public Utility Commission at I-80100341, entered August 27, 1982.

G-28 North Office Building
Harrisburg, PA 17120
(717) 787-5000

Charles F. Hoffman
Chief Counsel

Daniel P. Delaney
Deputy Chief Counsel

Louis G. Cocheres
Assistant Counsel

Counsel for the Pennsylvania
Public Utility Commission

STATEMENT OF THE CASE

A. Procedural History

In August 1980, the Office of Consumer Advocate filed a petition with the Pennsylvania Public Utility Commission (Commission) seeking to initiate a Commission investigation into the reasonableness of the construction of the Limerick Nuclear Generating Station (Limerick) by the Philadelphia Electric Company (PECO or Company). After an answer had been filed by the Company, the Commission adopted an order in October 1980, initiating an investigation into specified issues concerning Limerick's cost and construction at Commission docket I-80100341 (R. 2a). Additional issues concerning the need for and the economy of the Limerick plant were made part of the Investigation by the Commission in a subsequent amending order (R. 4a).

Thirty-eight days of evidentiary hearings and three non-evidentiary hearings were held in the period from March through November of 1981. The record in this matter consists of over 4,000 pages of testimony taken from over 30 witnesses. After the filing of briefs and reply briefs by the active participants in the proceeding, the presiding Administrative Law Judge issued an initial decision on March 26, 1982 (R. 6a). Exceptions to that decision were filed by all of the parties. These exceptions were resolved by the Commission in an order adopted May 7, 1982 and entered August 27, 1982 (R. 277a).

The Commission's conclusions are stated on page 4 of the August 27 order and provide in part as follows:

1. That based upon all of the facts presented in the proceedings before us, particularly the Commission's inability and unwillingness to provide the necessary revenues to complete both units at the Limerick Nuclear Generating Station as proposed, the completion of Limerick II by 1987 is not financially feasible. In order to ensure the continued maintenance of reliable and safe service to the public, this Commission finds that either the cancellation or suspension of construction at Limerick Unit II would be in the public interest.

2. That should the Company choose to cancel Limerick Unit II then the future treatment of any sunk costs associated therewith shall be determined at such time as the Company specifically requests recovery of such costs.

3. That should Philadelphia Electric Company choose not to suspend construction of Limerick II, then the Commission, pending completion of Unit I: (a) shall not approve any new securities issuances, the proceeds of which will be used, in whole or in part, for construction at Unit II, and (b) shall deny recovery of AFUDC (Allowance for Funds Used During Construction) on any additional investment in Unit II at such time as recovery is sought.

4. That Philadelphia Electric Company shall inform this Commission of its decision regarding the implementation of paragraph 1 above within 120 days of the entry of the final Opinion and Order in this proceeding.

5. That it would be in the public interest for the Company to pursue an aggressive conservation program designed to substantially offset the cancellation or suspension of Limerick II.

(R. 280a)

On September 23, 1982, the Company initiated the instant proceeding by filing a petition for review with Commonwealth Court of the Commission's August 27 order. On that date also, the Company sought a stay pending appeal from the Commission. The Commission denied the stay in an order adopted October 15, 1982 (R. 321a). On that date the Company filed an application with the Commonwealth Court for a stay or supersedes pending appeal pursuant to Appellate Rule 1781. On October 21, 1982, the Commission filed an answer in opposition to that application. A hearing was held before the Honorable James C. Crumlish, President Judge of the Court below on October 25, 1982. On October 26, Judge Crumlish filed a memorandum opinion and order granting the stay.

On October 27, 1982, the Commission and the Consumer Advocate filed appeals of Judge Crumlish's stay determination to the Pennsylvania Supreme Court. On November 8, this Court entered the following per curiam order:

> AND NOW, this 8th day of November, 1982, it being clear from the opinion accompanying the order of the Pennsylvania Public Utility Commission dated October 15, 1982, denying a stay of its order of August 27, 1982, that the order of August 27 does not prohibit construction at Limerick Unit 2, the stay entered by the Commonwealth Court on October 26, 1982, is vacated, the order entered by the Commission on October 15, 1982, denying a stay is reinstated, and the matter is remanded for expedited consideration.

Argument on the merits was made to the Commonwealth Court sitting en banc on December 14, 1982. On December 15, 1982 the Court issued a per curiam order

reversing the August 27 Commission Order and noting that an opinion would be filed at a later time. Two Petitions for Allowance of Appeal were filed in response to the per curiam order (which is set forth at length in the section of this brief entitled "Opinions and Orders Below"). The Commission filed its Petition for Allowance of Appeal on January 13, 1983. The petition was granted on March 2, 1983 by this Honorable Court. On February 28, 1983 the Commission filed its Application for Stay. Approximately one week later it forwarded its Memorandum of Law in support thereof. The application was granted by this Court on March 11, 1983.

This brief is submitted by the Commission in support of its appeal. Argument has been scheduled on the April 1983 argument list.

B. The Commission's Order.

The Commission's order in this case resulted from an investigation into PECO's decision to initiate construction of the Limerick Nuclear Generating Station (Limerick) and into its subsequent decisions to implement delays in that construction. The investigation focused inter alia on what alternatives PECO considered at the time it decided to build the plant, on the cost and reasonableness of construction delays which occurred, on the availability of other sources of energy which could replace Limerick at a lower cost to consumers and on the effects on PECO's ability to provide

safe and reliable service if construction of Units 1 and 2 at Limerick continued. (R. 2a, 278a, 279a).

In the late 1960's, PECO determined that, in order to meet projected increases in demand for electricity, it could most economically increase its generating capacity by constructing a nuclear power plant. (R. 281a, 282a). A site was chosen at Limerick which was approved by the Nuclear Regulatory Commission. (R. 282a). In 1969, PECO awarded the construction contract to Bechtel Corporation and construction commenced during the summer of 1974. (R. 283a, 285a). In October of that year, however, PECO announced that a two-year delay in the construction schedule would be implemented due to a deterioration in PECO's financial condition in the late 1960's and early 1970's. (R. 285a). The return which PECO paid to its shareholders had substantially decreased, its stock prices had dropped sharply and its credit rating had twice been lowered by Standard and Poor's. (R. 285a). The dramatic increases in oil prices in 1973 and a resulting reduction in electric consumption due to consumer conservation compounded those problems. (R. 286a). PECO decided to cut back on its immediate construction expenditures, and it therefore reduced its spending at Limerick. (R. 286a).

Two-year delays were also effected in 1976 and again in 1978. They were premised on considerations similar to those relied upon in 1974: continuing declines in both PECO's return to its shareholders and in its stock prices,

further downgrading of its credit rating and a lack of growth in electric demand. (R. 287a, 288a). In addition, PECO anticipated that if Limerick were completed on schedule, the Commission might view the plant as unnecessary for the service of customers in light of the continuing decline in power demand. It felt that the Commission might then exclude costs of constructing Limerick from consideration for rate-making purposes and thereby preclude PECO from recovering those expenses. (R. 287a).

The presiding Administrative Law Judge (ALJ) issued an initial decision and the Commission adopted the ALJ's recommendations in part and modified them in part. The ALJ concluded that PECO's decision to initiate construction of a nuclear power plant was not an abuse of its managerial discretion. (R. 40a) He found that the construction delay which was effected in 1974 was reasonable, but that those implemented in 1976 and 1978 were not. (R. 60a, 64a, 65a). The ALJ refused to quantify the cost increases resulting from those delays, and he also refused to determine whether PECO could recover those increases at a later date. (R. 64a, 65a). Finally, the ALJ held that at the present time, a nuclear generating plant presents a source of power which is more economical than any other alternative and that, in order to preserve those economic advantages, PECO should complete construction of both Units 1 and 2 as soon as possible. (R. 248a, 250a). (Unfortunately, as will be noted in section I-C, infra., some of the variables upon which this conclusion is based have already changed.)

The Commission's order first agreed with the ALJ that PECO's original decision to construct a nuclear generating plant at Limerick was reasonable and was a valid exercise of its managerial discretion. (R. 285a). The Commission found that at the time that the decision to build Limerick was made, PECO's financial condition was not as precarious as it would later become. (R. 284a). Furthermore, in the late 1960's many utilities were projecting that the demand for electricity which had consistently increased through the 1960's would continue to do so. (R. 283a). PECO concluded that a nuclear plant was the most economical method to provide the additional generating capacity which it reasonably expected it would need. In light of these factors, the Commission held that PECO had acted reasonably by initiating construction of Limerick.

The Commission then reviewed PECO's decisions implementing the construction delays to determine whether a reasonable person would have acted similarly under the circumstances faced by PECO. (R. 289a, 290a). The Commission held, as had the ALJ, that the 1974 delay was reasonable but that the delays in 1976 and 1978 were not. The Commission recognized that in 1974, PECO, based on earlier trends and industry projections, could still have reasonably expected an increase in future power demands which would require additional generating capacity. (R. 291a). The Commission concluded that, despite PECO's declining financial condition, the 1974 delay in construction was not imprudent. (R. 291a).

As for 1976 and 1978, however, the Commission found that delaying construction was not reasonable. Financial pressures on the company were increasing. Experience had shown that power demands would not significantly increase in the near future and that additional production capacity would not be needed. (R. 292a). The Limerick plant therefore was not necessary to meet future growth. PECO had argued that Limerick would replace more expensive fossil fuel plants. The older plants could be removed from service and the facilities at Limerick could then be considered in PECO's rate base. (R. 292a). The Commission Order noted that delaying construction had increased the ultimate costs of completion thereby defeating the economic advantages which Limerick enjoyed over other sources of power. (R. 292a). The Commission held that PECO's decisions to delay construction in 1976 and 1978 were unreasonable under the circumstances then existing. (R. 293a).

The Commission further agreed with the ALJ that this proceeding was not appropriate for resolving the total amount of the increases in the construction costs brought on by the delays or for determining whether or not PECO could later recover those increases. (R. 289a, 293a). The Commission held that the present record was inadequate to compute the additional costs attributable to the delays. Any attempt to quantify the amount at this time would be unduly speculative. The Commission also reserved judgment on PECO's right to

recover the costs of delay-induced increases until PECO actually seeks reimbursement in a subsequent proceeding. (R. 296a, 297a).

The Commission also concurred with the ALJ's conclusion that Limerick would produce economic benefits greater than any other proposed alternative. The Commission found that based on reasonable assumptions as to the final costs of Limerick, at what capacity it would operate and the likelihood of a growth in demand, operational savings over other sources of power could be expected. (R. 296a). (The cost of completion of Limerick is already rising to the upper limits of the Commission's assumptions. See section I-C, infra.)

The Commission, however, did not adopt the ALJ's recommendation that PECO complete construction of both Units 1 and 2 at Limerick as soon as possible. The Commission noted that completion of construction of both units would be seriously hampered by PECO's current financial condition. (R. 297a). The company's 1982 mortgage debt issue sold for 18.2%. (R. 297a). The new financing which would be necessary to go forward with construction of both units would also be at a high rate and consequently at great risk to investors. (R. 297a). This would cause a further reduction in PECO's already low credit rating and limit the number of possible investors. (R. 297a). In addition, such a reduction would affect the price of PECO's stock which in 1981 had sold for only 65% of the book value. (R. 298a). The company had

been authorized to pay a return to shareholders of 15.5% in 1981 but it actually had paid just 12%. (R. 298a). A further drop in the book value would have precluded PECO from issuing additional shares for fear of prohibitively diluting the value of existing shares. (R. 298a).

Furthermore the Commission found that PECO's financial problems stemmed in large measure from its extensive construction projects and that those problems would become even more serious if the projects continued unabated. (R. 298a). From 1975 to 1980, the percentage of cash that PECO used to meet construction costs fell from 26% to 5.2%. (R. 298a). Moreover, PECO had budgeted additional construction expenditures of $876 million and $870 million for 1982 and 1983. (R. 298a).

The Commission recognized that in its most recent rate case, PECO was denied rate relief which PECO had contended was necessary to maintain its construction programs. In Pennsylvania Public Utility Commission v. Philadelphia Electric Company, R-811626 (May 21, 1982), the Commission, in accordance with well settled law, refused to permit PECO to include the cost of Construction Work in Progress (CWIP) for Limerick in the determination of its rates. (R. 298a, 299a).

The Commission concluded that continued simultaneous construction of both Units 1 and 2 at Limerick would so adversely affect PECO's financial condition as to threaten its ability to provide safe and reliable service. (R. 301a). The Commission balanced the economic benefits of a nuclear

generating plant against the financial problems resulting from building both units simultaneously. (R. 301a). It concluded that construction of Units 1 and 2 concurrently would not be in the public interest. (R. 299a, 301a). The Commission ordered that it would not approve the issuance of any new securities to be used to finance continued construction of Unit 2 pending completion of Unit 1. (R. 301a). It also refused to permit recovery of Allowance for Funds Used During Construction (AFUDC) for any further investments in Unit 2 at this time. (R. 301a).

PECO filed a petition with the Commission on September 23, 1982 seeking a stay of its order. In its opinion of October 15, 1982 denying the stay, the Commission made clear that its prior order did not require PECO to cease construction of Unit 2. (R. 321a, 323a). The Commission noted that it had merely refused to approve the issuance of new securities to fund construction of that unit pending completion of Unit 1. (R. 323a). Moreover, the restriction on such securities is effective only until Unit 1 is completed. (R. 323a).

C. Related Rate Cases

The Limerick Investigation, which is the subject of these proceedings, began in August of 1980. Twenty-four months later the Commission entered its final order on August 27, 1982. The Limerick Investigation was not the only PECO case pending before the Commission during this

IV. THERE IS SUFFICIENT RECORD EVIDENCE TO SUPPORT THE COMMISSION'S FINDINGS THAT THE 1976 AND 1978 COMPANY DECISIONS TO DELAY LIMERICK CONSTRUCTION WERE UNREASONABLE.

Before presenting its position on this issue the Commission believes that it would be useful to identify those common areas of agreement which exist between the parties in this case. In its brief in the Commonwealth Court PECO specified its agreement that the Commission should evaluate management's conduct according to the "reasonable man" standard. That standard was set forth in the Commission's August 27 Order as follows:

> We find the opinion of the New York Public Service Commission is appropriate to utilize in determining whether management practices were reasonable. In Consolidated Edison Company of New York, Case 27123, Opinion 79-1 (January 16, 1979), the New York Public Service Commission stated:
>
> ". . .the company's conduct should be judged by asking whether the conduct was reasonable at the time, under all the circumstances, considering that the company had to solve its problems prospectively rather than in reliance on hindsight. In effect, our responsibility is to determine how reasonable people would have performed the tasks that confronted the company."

See also, Case 27565, Niagara Mohawk Power Corp. (Opinion 80-25 issued June 24, 1980), Case 27869, Consolidated Edison Company of New York, Inc. (Opinion 82-2, issued January 21, 1982). (R. 290a).

It is also obvious from PECO's description of the issue in its brief below that the Commission has found that PECO's 1976 and 1978 deferral decisions for Limerick failed to reflect reasonable management judgement.3/

Given these two areas of agreement, the Commission submits that the scope of this Honorable Court's review is limited to deciding whether or not there was sufficient evidence to support the Commission's finding. Administrative Agency Law, Act of April 28, 1978, P.L. 202, as amended, 2 Pa. C.S. §704. Contrary to PECO's assertions, the question is not whether or not PECO presented evidence to show that it acted rationally; nor is the question what would have been reasonable under the circumstances.

3/ The initial issue addressed by the Commission in its August 27 Order is PECO's alleged imprudence in adjusting the Limerick project's scheduled completion dates in 1974, 1976 and 1978 (August 27 Order, pp. 5-17). In adjudicating these allegations, the Commission purports to develop a "reasonable man" standard by which to judge PECO's actions (August 27 Order, p. 14).

* * *

As noted above, the PUC purports to employ a "reasonable man" standard as the basis of its evidentiary analysis. PECO agrees that the standard is appropriate, but would call the Court's attention to its specific terms. As noted by the PUC: "the Company's conduct should be judged by asking whether the conduct was reasonable at the time, under all the circumstances, considering the Company had to solve its problems prospectively rather than in reliance on hindsight." PECO Commonwealth Court Brief pp. 54-56. (Emphasis in the original).

With this in mind the Commission urges the Court to read that section of the August 27 Order which evaluated those deferral decisions. (R. 283a-293a). Note also that Paragraph 6 of the August 27 Order specifically incorporated the Administrative Law Judge's initial decision where it was not inconsistent with the Commission Order. (R. 305a). The Administrative Law Judge's initial decision is also set forth in the record, and one section was devoted to the 1976 and 1978 deferral decisions. (R. 45a-64a). The Commission submits that a fair reading of August 27 Order and the Administrative Law Judge's initial decision on this issue should lead the court to the conclusion that there were no inconsistencies. The Commission said:

> 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. (R. 293a).

Similarly the Administrative Law Judge said:

> In summary, it appears that the company's action in postponing Limerick in 1976 and 1978 was made without careful analysis of the impact of such delay on its ratepayers.
>
> In addition, the record shows that a factor in these decisions was the potential impact of Limerick on the company's capacity and reserve margins and the adverse effect this would have on the company's rate allowances. Consumers 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.

(R. 64a). (Footnote omitted).

As part of his conclusion he also stated:

> In addition PECO should also be placed on notice that the Commission will make future rate base allowances on only those capital expenditures that have been prudently incurred. (R. 256a).

Those portions of the initial decision, including the quoted material above, should be viewed as part of the August 27 Order.

The major witness presented by PECO to explain the basis for its decisions to delay the construction of Limerick in 1976 and 1978 was Mr. Paquette. During his direct examination Mr. Paquette testified that he was the Vice President in charge of the financial department of the Philadelphia Electric Co. (R. 333a-334a). The purpose of his testimony was to explain the delay decisions which the company made in 1974, 1976, and 1978. (R. 335a). He identified PECO's deteriorating financial condition as it related to a large construction program in 1974. (R. 335a-336a).

In 1976 the company decided to delay the completion of Unit 1 from April 1981 to April 1982 and to delay the completion of Unit 2 from April 1982 to April 1985. Mr. Paquette said that the company's primary reason was to bring the units on line at a time when the company's projected growth showed a need for the units. Thus, the delay was caused by PECO's awareness that the demand for electrical energy was not growing as rapidly as they had originally projected. He also explained that the company was experiencing financial difficulties generating sufficient cash to continue the

construction program. Finally, management believed that the Commission had a preference for allowing the consumer to experience lower short term energy costs which would be followed by higher long term rates when the units were added to the rate base at a higher cost at a later time. (R. 336a-339a).

In May 1978 the company again determined that it was necessary to delay the completion dates for the Limerick project. Unit 1 was rescheduled from April 1982 to 1985 and Unit 2 was rescheduled from April 1985 to 1987. Again the decision was premised on the company's desire to match the completion date with lower load growth expectation and the problems of financing such a large capital project. In addition Mr. Paquette indicated that there was some concern that the company might be penalized for having "excess capacity" (an unreasonably large generating capacity compared to the demand evidenced from the consumers). Management realized that the delay would mean a further cost escalation in terms of the completed project. However, they were also aware that AFUDC would continue to accumulate during the length of the construction project. There would be a further short term benefit to the ratepayers because their energy costs would remain relatively low until the units were completed. The company performed some analysis of the short and long term benefits of their decision. Finally, they also considered the prediction of low future inflation

rates which were forecasted at the time. (R. 337a-342a, 345a-346a). Mr. Paquette's testimony included the identification of certain Tables which were attached to his written testimony. (R. 347a-349a).

During cross-examination, Mr. Paquette had no memory of any effort by company management to analyze the effects of their 1976 delay decision beyond the criteria noted in his direct testimony. (R. 361a-362a). He also indicated that the company had not recognized a new trend in consumer demand or load growth. (R. 363a). Management gave no consideration to other alternatives such as: conservation, cancellation of one or both units, and/or procurement of energy from other sources. (R. 363a-364a). The company was still trying to finance the project all by itself and did not seek to enter into any kind of partnership (as it previously had with other projects) to finance the project until a period between 1976 and 1978. (R.357a, 363a-364a). With respect to the company decision in 1978, Mr. Paquette contradicted himself by subsequently specifying that financial problems were not the real cause for the management decision to delay the Limerick completion date. (R. 359a-360a).

As was noted in the initial decision of the Administrative Law Judge, two parties disputed the reasonableness of PECO's actions. Both the Commission Trial Staff and the Office of Consumer Advocate introduced evidence to supplement the record and to suggest the unreasonableness of PECO management's decisions. (R. 45a-56a). Dr. Birx,

currently Director of the Commission Bureau of Rates, testified that Limerick was a risky project from its inception because there was an inadequate supply of water to the site. Thus, PECO may not be able to use the site at full capacity. He also testified that PECO had failed to note the decline in their load growth, which was apparent in 1976. (R. 384a-386a). Thus, PECO had been too optimistic about the growth of future demand. Dr. Richard E. Nellis, another Trial Staff witness, estimated the cost of the 1976 delay decision to be approximately 506 million dollars. (R. 392a-393a, 395a). Mr. Muth, another Trial Staff witness, testified that PECO failed to consider alternate sources of financial support within their own company. (R. 429a-433a, 440a). Finally, with respect to the 1976 decision, the Trial Staff noted copies of press releases from PECO announcing the 1976 decision and attributing the delay to financial problems. (R. 424a-425a).

The Office of Consumer Advocate also criticized the 1976 delay decision by PECO management. The Consumer Advocate covered many of the same points in its evidentiary presentation that had been covered by the Trial Staff. In addition the Advocate produced evidence procured from PECO showing that no cost estimate or analysis of the 1976 delay decision was made by management. (R. 457a). PECO management also did not make any cost estimate or analysis of other construction projects in progress in 1976. (R. 378a-380a).

The Commission respectfully submits that the above noted material including Mr. Paquette's testimony, is sufficient to show that PECO management made the 1976 delay decision with little or no consideration for the future financial impact or the effects on its ratepayers. The Commission urges the Court to examine the following chart which was attached to the Direct Testimony of Mr. Paquette and marked Table A. (R. 351a). Even the most cursory of inspections reveals a trend of declining financial health starting in 1965 and continuing through 1976.[4/] Since there was evidence to show (1) PECO's failure to recognize this trend and the trend in declining demand for electrical energy, and (2) its failure to make any study of a situation which resulted in a 506 million dollar cost escalation, and (3) its failure to utilize other funding measures (other than bond issuance), the Commission's Finding that PECO's 1976 management decision to delay the completion dates for Limerick were unreasonable is legally supportable.

The Trial Staff was also critical of the 1978 delay decision. Dr. Nellis introduced evidence that this delay resulted in a 597 million dollar cost escalation. (R. 392a-393a, 395a). Dr. Birx introduced evidence, taken from PECO responses to interrogatories that PECO management recognized a financial problem would hinder the construction

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4/ Nor does the chart indicate that PECO's financial health seems to be much improved through 1978.

Philadelphia Electric Company Financial Results

1965 - 1980

	1965	1966	1967	1968	1969	1970	1971	1972
Earnings per Share	$ 1.92	2.08	$ 2.13	$ 2.13	$ 1.97	$ 1.84	$ 2.10	$ 2.08
Return on Common Equity	12.3%	12.7%	12.2%	11.9%	10.3%	9.4%	10.8%	10.3%
SEC Coverage Ratio								
Incl. AFUDC	5.1	5.1	4.4	3.6	3.2	2.6	2.9	2.8
Mortgage Coverage Ratio	5.8	5.3	4.5	3.8	3.5	2.3	2.4	2.5
Stock Price at Year End	$36.88	31.63	$29.63	$31.13	$24.00	$22.50	$23.88	$22.75

	1973	1974	1975	1976	1977	1978	1979	1980
Earnings per Share	$ 1.99	$ 1.81	$ 1.86	$ 1.91	$ 1.87	$ 1.87	$ 1.86	$ 2.00
Return on Common Equity	9.8%	8.9%	9.1%	9.9%	9.6%	9.7%	9.8%	10.6%
SEC Coverage Ratio								
Incl. AFUDC	2.7	2.3	2.4	2.5	2.4	2.4	2.1	2.1
Mortgage Coverage Ratio	2.4	2.1	2.5	2.5	2.3	2.4	2.1	2.3
Stock Price at Year End	$18.00	$10.88	$15.00	$17.88	$19.88	$15.50	$13.75	$12.50

TABLE 4

project and that demand growth was lagging (Unfortunately, PECO was still overestimating its future demand needs). (R. 390a). Mr. Muth again testified that the company failed to consider alternative financial plans which would have been available within the company. (R. 433a-434a, 440a). At a later time another PECO witness acknowledged that management had not sought any other form of internal financing beyond the sale of bonds. (R. 454a-455a).

The Office of Consumer Advocate was also critical of the 1978 delay decision. Contrary to some PECO testimony, the Consumer Advocate noted that PECO actually reduced its construction expenditures from its projected cost in 1978: in 1978 it projected 529 million dollars in construction costs, but spent only 479 million dollars. (R. 464a). Dr. Rosen, a witness for Consumer Advocate, criticized the analysis made by PECO in 1978 as inadequate. (R. 414a-422a). In addition the Consumer Advocate noted that any concern the company had about "excess capacity" was not related to the Recommended Decision of the Administrative Law Judge in a concurrent rate case. Pennsylvania Public Utility Commission v. Philadelphia Electric Company, R.I.D. 438, 52 PA PUC 772, 785, 31 PUR 4th 15, 27 (Order adopted December 28, 1978, and entered February 5, 1979). Since the rate case decision was made in December 1978, the company decision in May 1978 could not have been influenced by the Administrative Law Judge's comments.

Finally there was evidence which showed that PECO made no attempt to compare the cost savings of early completion

of Limerick in order to utilize theoretically "low cost" nuclear fuel to replace oil fired generators (which were experiencing rapidly rising oil prices at that time).5/ Analyses of these comparative cost savings were not made by PECO until shortly before its witnesses testified in the instant proceeding. (R. 328a-329a). Further, planners for PECO admitted that they were oriented toward analyzing their electrical supply problem by comparison of peak demand to generating capacity. (R. 330a-331a). Conservation was not considered.

In view of the evidence (1) that PECO's analysis of the financial impact of its 1978 decision was inadequate, (2) that it failed to explore alternate financing plans, (3) that it failed to recognize the decline in its load growth patterns, (4) that it was not financially stable, (5) that the significant warning for "excess capacity" problems came after the date of their decision to delay, and (6) that PECO actually reduced its construction expenditures from its projected costs thereafter, the Commission respectfully submits that its Findings that the PECO management acted unreasonably in its decision to delay construction of the Limerick project (at the ultimate cost of 597 million dollars) in 1978 is legally justifiable.

5/ Given the current world oil over supply and declining oil prices, this theoretical cost savings could disappear.

PECO's arguments that the Commission failed to consider all of the factors demonstrated by its evidence is of no avail in this situation. What PECO fails to acknowledge and must admit is the fact that the Commission, as the trier of fact, is free to evaluate the evidence presented and the credibility of the witnesses in any manner consistent with its findings. Carr v. State Board of Pharmacy, 48 Pa. Commonwealth Ct. 330, 334, 409 A.2d 941, 944 (1980) and Johnstown-Pittsburgh Express v. Public Utility Commission, 5 Pa. Commonwealth Ct. 521, 291 A.2d 545 (1972).

The Commission is not simply limited to the evidence presented by PECO. It can and has in this case utilized hard evidence supplied by PECO and other parties to reach its conclusion that management acted unreasonably. Metropolitan Edison Co. v. Pennsylvania Public Utility Commission, 62 Pa. Commonwealth Ct. 460, 468, 437 A.2d 76, 81 (1981). The Commission urges this Court to review the extensive record in this matter and to affirm its finding of unreasonable management action.

APPENDIX L - OCTOBER 10, 1980 COMMISSION ORDER INITIATING 1980 LIMERICK INVESTIGATION, AS AMENDED BY LETTER DATED NOVEMBER 12, 1980

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120

Public Meeting held October 9, 1980

Commissioners Present:

Susan M. Shanaman, Chairman
Michael Johnson
James H. Cawley
Linda C. Taliaferro

Limerick Nuclear Generating Station Investigation — I-80100341

ORDER

BY THE COMMISSION:

On August 8, 1980, the Office of Consumer Advocate (OCA) filed a petition, docketed at P-80080236, seeking (1) an Order to Show Cause why the continued construction of the Limerick Nuclear Generating Station (Limerick) of Philadelphia Electric Company (PECO) is in the public interest and (2) a Commission investigation into the need for and economy of Limerick. PECO has filed an answer, along with its own petition. It opposes issuance of the Rule to Show Cause and suggests that any investigation of Limerick be consolidated with the current PECO general rate increase proceeding at R-80061225. The OCA has filed an answer to PECO's petition. We conclude that an investigation of certain issues concerning Limerick should be opened.

We are opening this investigation proceeding so that information can be gathered in an orderly and expeditious manner, before PECO seeks to include Limerick in its rate base as used and useful property. This approach will enable us to proceed without the pressures of time associated with rate cases.

We realize, of course, that Limerick is under construction and that it represents a major, and controversial, undertaking by PECO. However, although we agree with the OCA that a Limerick proceeding should be opened, we do not agree that the Rule to Show Cause requested by the OCA is appropriate. We must first proceed to gather facts. We can then reach conclusions and enter whatever orders we deem to be appropriate.

Although the pending PECO rate case at R-80061225 will necessarily deal with Limerick to some degree, we conclude that we should not burden that proceeding with additional issues and that an independent investigation of Limerick should be opened; THEREFORE,

DOCKETED
OCT 15 1980

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FOLDER

IT IS ORDERED:

1. That the issue we incorporated into the rate proceeding at R-80061225 on August 28, 1980, concerning an estimate of the additional costs occasioned by deferrals of the Limerick construction schedule, be eliminated from that proceeding.

2. That an investigation be, and is hereby, undertaken to determine:

(a) The cost of construction delays at Limerick and whether those delays were reasonable;

(b) The escalation of cost estimates for Limerick and whether those costs for the plant are reasonable; and

(c) The eventual impact of Limerick on PECO's capacity and reserve margins and the reasonableness thereof.

3. That the petition filed by the OCA, and docketed at P-80080236, be denied, except to the extent that it is granted by the opening of this investigation.

4. That Commission staff, Philadelphia Electric Company and the Office of Consumer Advocate are hereby made parties to this investigation proceeding.

5. That copies of this order be served on all parties to the proceeding at R-80061225, Pennsylvania Public Utility Commission v. Philadelphia Electric Company.

6. That the Office of Administrative Law Judge assign this matter to an Administrative Law Judge for prompt hearing and initial decision.

BY THE COMMISSION,

William P. Thierfelder
Secretary

(SEAL)

ORDER ADOPTED: October 9, 1980

ORDER ENTERED: October 10, 1980

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

November 12, 1980

IN REPLY PLEASE
REFER TO OUR FILE
I-80100341

TO ALL PARTIES

Investigation into the Philadelphia Electric Company's Limerick Nuclear Generating Station - Philadelphia County

Dear Madam or Sir:

Chairman Shanaman moved that the Commission's Order entered October 10, 1980 in the above proceeding be amended to revise Ordering paragraph 2 as follows:

2. That an investigation be and is hereby undertaken to determine the need for an economy of the Limerick Nuclear Generating Station. The investigation shall address, but not be limited to, the following issues:

   (a) The cost of construction delays at Limerick and whether those delays were reasonable.

   (b) The escalation of cost estimates for Limerick and whether those costs for the plant are reasonable.

   (c) The eventual impact of Limerick on PECO'S capacity and reserve margins and the reasonableness thereof.

   (d) What alternatives PECO considered at the time the decision was made to build the plant and the projected cost of each alternative.

   (e) Could any currently available alternate sources of energy, conservation/load management activities, improvements in existing power plants' performance, etc. replace Limerick at a lower cost to the consumer assuming that:

      (1) expended costs are amortized over a reasonable period; or
      (2) expended costs are not amortized or collected from ratepayers; or
      (3) expended costs are shared among stockholders and ratepayers.

(f) The potential of large electric consumers directly buying the capacity and/or energy associated with Limerick;

Very truly yours,

William P. Thierfelder
Secretary

CKG:bjc

APPENDIX M - TRIAL STAFF'S MOTION TO STRIKE TESTIMONY RELATED TO THE REASONABLENESS OF THE 1976 AND 1978 DEFERRAL DECISIONS

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

January 3, 1986

IN REPLY PLEASE
REFER TO OUR FILE

Jerry Rich, Secretary
Pa. Public Utility Commission
New Filing Section
Harrisburg, PA 17120

In re: Pennsylvania Public Utility Commission

v.

Philadelphia Electric Company

R-850152

Dear Secretary Rich:

Enclosed for filing please find an original and three copies of Trial Staff's Motion to Strike for filing in the above captioned matter. Copies have been served upon the Administrative Law Judge and the other parties.

Very truly yours,

Daniel P. Delaney
Deputy Chief Counsel

Enclosure

cc: Honorable Joseph P. Matuschak
Service List

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

THE HONORABLE JOSEPH P. MATUSCHAK PRESIDING

PENNSYLVANIA PUBLIC UTILITY COMMISSION	:	
	:	Docket No.
v.	:	R-850152
PHILADELPHIA ELECTRIC COMPANY	:	

MOTION TO STRIKE

AND NOW, this 3rd day of January 1986, comes the Trial Staff of the Pennsylvania Public Utility Commission (Trial Staff) and moves to strike portions of the evidence sponsored by the Philadelphia Electric Company (PECO) in the above-captioned matter. In reliance on the Presiding Officer's ruling on the Trial Staff's Motion in Limine (Tr. p. 1370-5), the Trial Staff moves that the following evidence be striken:

1. PECO Statement No. 1: Direct testimony of Vincent S. Boyer.

    a. p. 16, lines 21-8
    b. p. 17, lines 5-50
    c. p. 18, all
    d. p. 21, all
    e. p. 22, all
    f. p. 23, lines 1-25
    g. Transcript page 1007, line 19 to line 17 of page 1008

2. PECO Statement No. 3: Direct testimony of Joseph F. Paquette, Jr.

    a. p. 31, line 21, years "1976 and 1978"
    b. p. 32, lines 2-4, 16-27

c. p. 33, all
d. p. 34, all
e. p. 35-47, all
f. p. 48, lines 1-4
g. Appendix A, Appendix B, Tables 8, 12, 14, 15, 16, 17

3. PECO Statement No. 8: Direct testimony of Love and Kononetz, Theodore Barry & Associates.

a. p. 31-45, all
b. p. 258-83, all
c. Transcript pages 1223 to 1256, line 8

4. PECO Statement No. 10: Direct testimony of William A. Abrams.

a. p. 5, lines 10-3
b. p. 20, lines 25-7
c. p. 21-29, all
d. p. 30, lines 1-10
e. Exhibits 5, 6, 7, 8, Schedules 8, 9, 10
f. Transcript pages 1418, line 16 on, all of pages 1420 to 1427, page 1428 to line 2

5. PECO Statement No. 11: Direct testimony of Dr. Lewis J. Perl.

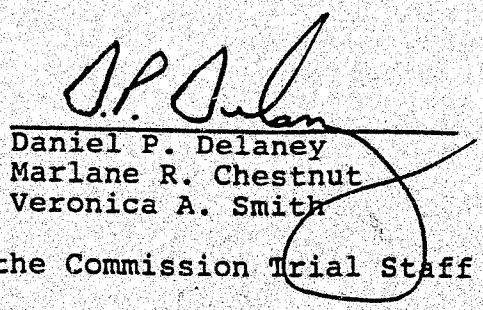
a. p. 3, lines 33-7
b. p. 5, lines 22-30
c. p. 9, lines 1-38
d. p. 23, lines 30 to 50
e. p. 24 to 28, all
f. p. 29, lines 1-5
g. Schedule 7, p. 1-4
h. Transcript pages 882-3 all, page 886 lines 4 to 25, pages 887-891, all

6. PECO Statement No. 15: Direct testimony of William H. Hieronymus.

a. p. 37, lines 19-24
b. p. 38, lines 1-6
c. p. 57, lines 18-22
d. p. 58-67, all
e. Exhibits WHH-4, WHH-5, WHH-6, WHH-7, WHH-8, WHH-9, WHH-10
f. Transcript pages 698, line 13 to the end of page 707

WHEREFORE, the Trial Staff respectfully requests the Presiding Officer to strike the above described portions of the evidence in this proceeding as required by the ruling on the Staff's Motion in Limine.

Respectfully submitted,



Daniel P. Delaney
Marlane R. Chestnut
Veronica A. Smith

For the Commission Trial Staff

G-28 North Office Building
Harrisburg, PA 17120
(717) 783-3190

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon parties of record in this proceeding in accordance with the requirement of 52 Pa. Code §1.54.

Dated this 3rd day of January, 1986

D. P. Delaney

Daniel P. Delaney

For Commission Trial Staff

RECEIVED

JAN6 1986

SECRETARY'S OFFICE
Public Utility Commission

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA PUBLIC UTILITY COMMISSION, et al.	:	
v.	:	Docket No. R-850152
PHILADELPHIA ELECTRIC COMPANY	:	

BRIEF OF PHILADELPHIA ELECTRIC COMPANY IN SUPPORT OF PETITION FOR COMMISSION REVIEW AND ANSWER TO A MATERIAL QUESTION

Robert H. Young
Jay H. Calvert, Jr.
Walter R. Hall, II
David B. MacGregor

Counsel for Philadelphia
Electric Company

OF COUNSEL:

Edward G. Bauer, Jr., Esquire
Vice President and General Counsel
Philadelphia Electric Company
2301 Market Street
Philadelphia, PA 19101

MORGAN, LEWIS & BOCKIUS
2000 One Logan Square
Philadelphia, PA 19103

DATED: January 6, 1986

DOCKETED
JAN 7 1986

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I. INTRODUCTION

On September 27, 1985, Philadelphia Electric Company ("PECO" or the "Company") filed the instant base rate proceeding with the Pennsylvania Public Utility Commission (the "Commission") seeking rate recognition of its Limerick Nuclear Generating Station Unit 1 ("Limerick 1"). In support of this filing, the Company presented extensive evidence demonstrating the need for Limerick 1 and the reasonableness of its cost. Included as part of this presentation was certain evidence which, among other purposes, demonstrates the reasonableness and prudence of the Company's decisions in 1976 and 1978 to announce delays in the completion of Limerick 1.

On November 20, 1985, the Commission's Trial Staff filed a Motion in Limine to preclude litigation in this proceeding of the reasonableness of the 1976 and 1978 Limerick construction deferral announcements on the ground that these actions were found to be unreasonable by the Commission in Re Limerick Nuclear Generating Station, 56 Pa. P.U.C. 47 (1982), aff'd, 501 Pa. 153, 460 A.2d 734 (1983), (the "1980 Limerick Investigation"), and that this finding is conclusive in this proceeding under Section 316 of the Public Utility Code, 66 Pa.C.S. §316 (Appendix A). After receiving the Company's Answer[1/] and a further Reply by the Trial Staff (Appendix C), as well as hearing oral argument by the parties, the Administrative Law Judge ("ALJ"), at the December 20, 1985 hearing, granted the Motion and ordered, inter alia, that certain yet to be identified testimony dealing with the prudence of the deferral announcements will be stricken from the record (Tr. 1306-1375; Appendix D). Specifically, the ALJ ruled that the Commission's prior criticism of the Company's 1976 and 1978 announcements of deferral of Limerick construction was a conclusive and binding adjudication upon the parties in the current proceeding, and will be "incorporated into this proceeding in the nature of a

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1/ The Company's Answer is attached as Appendix B to this Brief, and the arguments set forth therein are incorporated by reference into this Brief.

bifurcation or as an ancillary or in-aid aspect of this rate case" (Tr. 1373; Appendix D). On December 26, 1985, the Company filed a Petition seeking interlocutory review by the Commission of the ALJ's ruling and answer to the following material question:

> "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 the Company's 1976 and 1978 deferral announcements in the 1980 Limerick Investigation constitutes a final adjudication which precludes the submission of any evidence on the prudence of such action in the current proceeding, other than quantification of the consequences thereof."

For the reasons set forth in the Company's Petition (Appendix E), interlocutory review of the ALJ's ruling is required to prevent substantial prejudice and will expedite the conduct of this proceeding. The ALJ's decision, if upheld, would preclude the Company from adjudication in this proceeding of an issue of potentially central importance in determining the reasonableness of the cost of Limerick 1. An OCA witness has estimated that the deferral announcements increased the cost of Limerick 1 by $595.4 million (OCA St. 1, p. 29). The Company strongly disagrees with this testimony, but it clearly demonstrates the significance of this issue, the importance of the ALJ's ruling, and the need for interlocutory review.

For the reasons set forth below, the ALJ's ruling is in error and should be reversed. Specifically, the ALJ's conclusion that the Commission's criticism of the 1976 and 1978 deferral announcements is binding and conclusive on the Company is inconsistent with the Supreme Court's opinion in the 1980 Limerick Investigation and all relevant law, and if affirmed, would deny PECO due process of law. In addition, for the reasons set forth in its Petition for Stay filed on December 31, 1985 with the ALJ (Appendix F), the Company requests that the ALJ's ruling be stayed pending a Commission decision on this question.

II. ARGUMENT

A. CONTRARY TO THE ALJ'S RULING, THE COMMISSION DID NOT REACH A FINAL AND BINDING ADJUDICATION, FINDING, OR DETERMINATION OF THE REASONABLENESS OF THE 1976 AND 1978 DELAY ANNOUNCEMENTS IN THE 1980 LIMERICK INVESTIGATION.

The ALJ's decision to grant the Trial Staff's Motion is predicated on his conclusion that the reasonableness of the 1976 and 1978 deferral announcements was the subject of a final and binding adjudication, order, determination, or finding in the 1980 Limerick Investigation (Tr. 1374; Appendix D). This conclusion is simply wrong. The parties and the ALJ in that proceeding were clearly of the view that no binding determination on these issues would be made, and the Commission's final Order contains no reference whatsoever to the deferral announcements. Moreover, the Commission itself has stated, both in its Opinion in that proceeding and in its submittals upon appeal, that a final and conclusive determination was not made. Finally, and most importantly, the conclusiveness of the Commission's discussion of this issue was specifically raised by PECO on appeal, and the Pennsylvania Supreme Court held that the Commission's opinion was mere advisory criticism, did not constitute an adjudication, and therefore would not be reviewed on appeal. 460 A.2d at 739 n.7. The Company submits that these clear statements by the ALJ, the Commission, and the Supreme Court are determinative of the material question raised herein and require reversal of the ALJ's ruling.

The ALJ, after reviewing the facts presented by the parties, concluded that a determination of the reasonableness of the deferral announcements should be made in a later proceeding, as follows:

> "[T]his proceeding is a fact gathering one. For purposes here, it is sufficient to note that the decisions to postpone Limerick were, in part, the result of management's discretion as well as financial circumstances. In a subsequent proceeding, consideration can be given to the extent to which these delays were caused by financial and other external constraints and the extent to which management's fear of Commission sanctions entered into these decisions.

> Such a proceeding would also be an appropriate forum to quantify the effects of these delays. Such a record does not exist at the present time." (Appendix H; Recommended Decision, pp. 54-55) (emphasis added).

The Commission accepted the position of the parties and the ALJ and made no finding and reached no conclusion whatsoever regarding the reasonableness of the deferral announcements in its final Order in the 1980 Limerick Investigation (Order, p. 29; Appendix I). Indeed, the deferral announcements are not even mentioned in the Commission's Order. The Commission did discuss and criticize the Company's 1976 and 1978 deferral announcements in its accompanying Opinion, but concluded that the issue was not "ripe for decision." (p. 13, Appendix I).

Recognizing that a party might in the future attempt to ascribe conclusive effect to the Commission's criticism of the 1976 and 1978 deferral announcements, PECO specifically addressed this portion of the Commission's Opinion before the Pennsylvania Supreme Court. The Company explained the purpose for this appeal, as follows:

> "It is PECO's position that this Honorable Court should likewise decline to review these determinations, because the PUC's statements and directive do not constitute a final adjudication and have no res judicata effect. PECO does request that this Court, unlike the Commonwealth Court, expressly hold in its Order that each of these determinations is at present not reviewable and without res judicata effect. An explicit statement to this effect is essential to avoid future pointless controversy over the meaning of these statements....
>
> Clearly, the PUC's criticisms of PECO's 1976 and 1978 deferral decisions are not presently reviewable. The PUC has neither determined whether PECO should be penalized for its actions nor what the form or magnitude of any such penalty should be. Rather, it has explicitly held that the controversy is not ripe for its decision, much less that of this Court. The PUC has thus not rendered a final judgment as to any legally cognizable matter." (PECO Brief Before the Supreme Court, pp. 68-71; Appendix J) (emphasis added).

In response to the Company's argument (i.e., as first presented to the Commonwealth Court), the Commission expressly noted in its Brief before the Supreme Court that neither an adjudication nor any conclusive finding or determination had been made with respect to the 1976 and 1978 deferral decisions:

> "The Commission further agreed with the ALJ that, this proceeding was not appropriate for resolving the total amount of the increases in the construction costs brought on by the delays, or for determining whether or not PECO could later recover those increases.... The Commission also reserved judgment on PECO's right to recover the costs of delay-induced increase until PECO actually seeks reimbursement in a subsequent proceeding." (Commission Brief before the Supreme Court, pp. 11-12; Appendix K) (emphasis added).

Based in particular on the Commission's representations, which representations were set forth as certain and uncontroverted facts in the Commission Brief's Statement of the Case, the Supreme Court characterized this portion of the Commission's Opinion as follows:

> "[T]he opinion accompanying the PUC's order contained criticism, of an advisory nature, directed at PECO's decisions 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." Pa. P.U.C. v. Philadelphia Electric Co., 501 Pa. 153, 460 A.2d 734, 739 n.7 (1983).

Clearly, an Opinion which contains only "mere criticism . . . of an advisory nature," and where no mention of the subject matter is made in the Commission's Order, does not constitute an adjudication, determination, or finding as to which conclusive effect can be given. Thus, the Supreme Court expressly found that a final determination of the reasonableness of the 1976 and 1978 deferral announcements was not made. Indeed, the only final adjudication regarding those announcements was the Supreme Court's conclusion that the Commission's discussion of this issue was not a final order binding on PECO. The Supreme Court's decision is clearly the controlling law in this case and, for this reason, the ALJ's ruling must be reversed, and the Company must be given the

opportunity to develop a full and complete record so that a final determination of the reasonableness of these decisions may be rendered by the Commission.

In its attempt to circumvent the Supreme Court's clear holding, the Trial Staff, as the sole basis for its Motion, asserted that the Commission's prior discussion of the deferral announcements is conclusive in this proceeding under Section 316 of the Public Utility Code, which provides that a prior Commission "finding, determination or order ... shall remain ... conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review" (66 Pa.C.S. §316). As explained in the Company's Answer to the Motion, a determination or order of an administrative agency is generally defined as the equivalent of an adjudication, and an administrative finding generally refers to the formal resolution of a particular matter which supports an agency adjudication (Appendix B, pp. 4-5 and cases cited therein). In view of the Supreme Court's determination that an adjudication was not issued, the Commission clearly has not rendered a "finding, determination or order" within the meaning of Section 316. Moreover, Pennsylvania courts have repeatedly held that Section 316 can be applied to preclude collateral attack of a final, appealable Commission order only where a party has failed to properly exercise its right to appeal the matter at issue (Appendix B, pp. 5-6). Since the Company has exercised its right to appeal and the Supreme Court has held that the Commission's discussion was not ripe for review, these decisions are clearly distinguishable and Section 316 does not apply. Finally, a review of relevant precedent demonstrates that Section 316 was merely intended to codify the doctrines of res judicata and collateral estoppel and to reverse Pennsylvania case law which held that these doctrines did not apply to administrative proceedings (Appendix B, pp. 5-6 and cases cited therein). However, neither doctrine applies in this instance, and no party, including the Trial Staff or the ALJ, has argued to the contrary. For these reasons, the Trial Staff's reliance on Section 316 is incorrect and should be rejected.

The ALJ, nevertheless, concluded that the Commission's prior discussion of the 1976 and 1978 delay announcements is conclusive and binding because the 1980 Limerick Investigation was essentially a bifurcation of the Company's current Limerick 1 rate case. This argument, which was raised for the first time during oral argument, sua sponte by the ALJ, provides no basis for granting Trial Staff's Motion. Contrary to the ALJ's ruling, there was no bifurcation of the adjudication of the reasonableness of Limerick 1 cost. Bifurcation refers to the division of a proceeding into two parts for adjudication, traditionally with each part producing a final and binding determination (i.e., an adjudication). Such a bifurcation simply did not occur in this case and no language can be read in the Commission's Order initiating the 1980 Investigation as providing notice that such bifurcation was intended.[2/] The Commission's Order makes no finding whatsoever as to the reasonableness of the deferral announcements, and the Supreme Court held that there was no determination or adjudication of this issue. The ALJ's characterization of the 1980 Limerick Investigation and the Limerick 1 rate proceeding as bifurcated proceedings simply assumes that conclusion.

During oral argument, the ALJ appeared concerned that, if PECO's position were adopted, the 1980 Limerick Investigation would be rendered meaningless and a waste of time (Tr. 1332-1335; Appendix D). Again, there is no basis for this view. The 1980 Limerick Investigation was conducted principally to determine whether the Limerick Station should be completed, and based upon the record developed in that

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2/ That bifurcation was, in fact, not intended is clear from the Commission's Order initiating the Investigation. Although that Order lists a number of issues as to which the Commission states that the Investigation will serve to gather facts, it does not define issues to be conclusively resolved in the Investigation or to be saved for the rate proceeding, nor does it set up procedures for the implementation of such an issue bifurcation. Clearly, the Commission cannot, consistent with constitutionally mandated due process of law, decide, after the hearing and argument process is closed, that certain selected issues will be "conclusively" determined while others are left open for further attack by the utility's opponents. However, this is what the ALJ has held that the Commission sought to do in its 1982 Order concluding the Limerick Investigation. Were this the case, the Commission's actions would quite obviously have been fundamentally unfair and a violation of due process of law.

proceeding the Commission made an adjudication that Limerick 1 should be completed and that Limerick 2 construction should at least be temporarily suspended. This final adjudication was appealed to the Pennsylvania Supreme Court, and the Commission's decision was affirmed. A clearly lesser function of the 1980 Limerick Investigation was to begin gathering facts in preparation for the Limerick 1 base rate proceeding. These efforts defined the deferral issues and focused the parties presentations in the instant case. However, as set forth below in Section II(B), this process was merely a preliminary fact gathering function before final adjudication in a full rate proceeding.

Finally, the ALJ/Trial Staff's reliance on the CAPCO and Beaver Valley proceedings is misplaced. The CAPCO Investigation at Docket Nos. I-79070315 and I-79070317 was an investigation with many of the same purposes, but also significant differences, to the 1980 Limerick Investigation. As expressed in the Commission's Order instituting that investigation on July 12, 1979, its purpose was "to determine the impact of the CAPCO construction delays upon the rates charged and the service provided by Duquesne Light Company."[3/] During the course of that lengthy investigation, Duquesne also claimed amortization in various rate cases of the costs of certain cancelled construction projects. In those rate cases, apparently with the concurrence of Duquesne and other parties, the Commission deferred ruling on Duquesne's rate case expense claim pending completion of its 1979 Investigation docket. At the conclusion of that docket, the Commission, consistent with PECO and the Supreme Court's understanding of its action in the 1980 Limerick Investigation, specifically did not make any final adjudication or determination respecting the reasonableness of the CAPCO deferral decisions (Opinion and Order on Reconsideration, p. 7). If the Commission did not make a final determination in the CAPCO Investigation whose principal purpose was to

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3/ This differs from the 1980 Limerick Investigation where the principal focus of the Investigation as stated by the Commission was "to determine the need for and economy of the Limerick Nuclear Generation Station." (PUC Secretarial Letter dated November 12, 1980; Appendix L).

investigate that issue, then clearly the 1980 Limerick Investigation, whose principal purpose was directed at investigating other issues, does not constitute a final adjudication or determination of such issues. Indeed, the CAPCO precedent supports the PECO position. While the Commission did conclude that Duquesne's claimed amortization allowance should be approved, it did so through joint examination in the Investigation and a concurrent rate case docket, a procedure with which the parties all concurred. It should be noted that the Investigation and rate case docket were being litigated concurrently and not over four years apart as is the case with the current rate case and the 1980 Limerick Investigation, were initially decided by Commission Orders entered within two weeks of each other and the issue of amortization of such costs was actually resolved in an Order issued jointly in both the Investigation and rate case dockets. Clearly, the CAPCO procedural record provides no support for the ALJ's bifurcation theory.

The Beaver Valley cases to which Trial Staff referred in oral argument (Tr. 1363; Appendix D), involved an investigation into outages at the Beaver Valley 1 nuclear generating station at Docket No. I-79070314, 50 PUR4th 272, and a concurrent rate proceeding at Docket No. R-8011069. The Beaver Valley outages raised two very different sets of issues: (1) whether Beaver Valley, in light of the several outages, was used and useful and thus should be included in base rates and 2) whether replacement power costs were imprudently incurred and thus should be disallowed from ECR recovery, not a base rate case issue. Hearings were held separately in the rate case and investigation dockets, but a joint order was issued in both dockets resolving all issues. See Pa. P.U.C. v. Duquesne Light Co., 54 Pa. P.U.C. 695, 43 PUR4th 27 (1981). Subsequently, in response to a Duquesne Petition for Rehearing, the Commission determined that further hearings were needed on specific issues at the Investigation docket because of uncertainty in the record as to the outage period for which Duquesne should be held responsible and as to the calculation of replacement power costs. See Re

Beaver Valley Generating Station Unit No. 1, 50 PUR4th 272, 274 (1982). Clearly, there is no "bifurcation" or "in-aid" procedure present in this case. Rather, the appropriate issues were decided in the appropriate proceeding (i.e. rate case issues litigated and decided in the rate case and ECR issues litigated and decided in the ECR investigation case) after proper notice had been given. The ALJ's "in-aid" or "bifurcation" theory is entirely novel to proceedings before the Commission, finds no support in the October 1980 Order initiating the Limerick Investigation, and its application to that proceeding years after the fact clearly violates due process of law.

B. PRECLUDING EVIDENCE ON THE PRUDENCY OF THE 1976 AND 1978 DEFERRAL ANNOUNCEMENTS WOULD BE A CLEAR VIOLATION OF DUE PROCESS OF LAW.

Application of the Commission's "criticism" of the deferral announcements as a final and binding determination of this issue in the current proceeding would be a flagrant denial of due process of law. Under Pennsylvania law, due process requires notice that a specific issue will be finally resolved in a proceeding. In Smith v. Pa. P.U.C., 192 Pa. Super. 424, 432, 162 A.2d 80, 84 (1960), the Court explained this fundamental due process right:

> "Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

See 2 Pa.C.S. §§101, 504; Allegheny Ludlum Steel Corp. v. Pa. P.U.C., 501 Pa. 71, 459 A.2d 978 (1983); Schanz v. Bureau of Corrections, 52 Pa. Cmwlth. 300, 415 A.2d 978, 982 (1980).

First, in its October 10, 1980 Order initiating the Limerick Investigation, as amended by letter dated November 12, 1980, the Commission stated that the primary purpose of the Investigation was to "determine the need for and economy of the Limerick Nuclear Generating Station," and was only secondarily to gather information in order to facilitate a future determination of the reasonableness of Limerick costs when claimed in a future rate proceeding:

"We are opening this investigation proceeding so that information can be gathered in an orderly and expeditious manner, before PECO seeks to include Limerick in its rate base as used and useful property. This approach will enable us to proceed without the pressures of time associated with rate cases.

We realize, of course, that Limerick is under construction and that it represents a major, and controversial, undertaking by PECO. However, although we agree with the OCA that a Limerick proceeding should be opened, we do not agree that the Rule to Show Cause requested by the OCA is appropriate. We must first proceed to gather facts. We can then reach conclusions and enter whatever orders we deem to be appropriate" (Order, p. 1; Appendix L) (emphasis added)

Thus, the Commission's notice to the parties of the scope of the Investigation expressly limited the proceeding as to the deferral announcements to a fact gathering function. There should, therefore, be no question that the proceeding and any discussion of the deferrals therein were intended to be merely preliminary to a later due process adjudication of the deferral issue, and it is clear that the Company had no adequate notice otherwise.

Second, as demonstrated above, there was never any notice, at any time during the proceeding, that the prudency of the deferral announcements would be finally litigated in the 1980 Limerick Investigation. The ALJ's Recommended Decision, the Commission's position on appeal, and the Supreme Court's decision demonstrate beyond any doubt that the Commission was merely gathering facts and that only in a future proceeding would both the prudency and the quantification of the delays be determined. Indeed, the concept that the 1980 Limerick Investigation might be viewed as the first phase of a bifurcated proceeding was raised for the first time by the ALJ in his ruling on Trial Staff's Motion. Clearly, under these circumstances, the Company did not have adequate notice that the 1980 Limerick Investigation would be declared to have reached a final adjudication on this issue.

Third, as discussed above, the 1980 Limerick Investigation was intended to determine the need for and economy of the Limerick Nuclear Generating Station, in

order to reach a conclusion whether continued construction of both units was in the public interest. Only as a lesser purpose did the Commission begin gathering facts as to the Company's decisions in 1976 and 1978 to announce delays in the completion of the two units. As a result, the Company and the other parties did not attempt to present a full and complete analysis of these issues in the 1980 Limerick Investigation.4/

In essence, the ALJ's bifurcation theory attempts to transform a preliminary fact-gathering investigation into a final determination or adjudication. This is a clear violation of due process. As demonstrated above, the purpose of the 1980 Limerick Investigation as to the deferral announcements was simply to begin gathering information on this issue, and the Supreme Court recognized this in holding that the Commission's criticism was only advisory, was not a final determination, and therefore was not ripe for appellate review.

Other courts have also recognized the clear distinction between a fact-gathering investigation and an adjudication. In Atchison, Topeka & Santa Fe Railway Co. v. Kansas Commission on Civil Rights, 215 Kan. 911, 529 P.2d 666, 673 (1974), the Kansas Supreme Court explained:

4/ The fact that the deferral announcements were a minor issue in the prior proceeding is obvious from the mere volume of the record and arguments developed in the case on the deferral announcements versus other issues. Out of the total 1,451 pages of testimony submitted by all parties, only 72 or 5% were devoted to the deferral announcements. Similarly, out of 4,559 transcript pages, only 137 or 3.0% involved cross examination on the issue. Finally, although there were 1,504 pages of brief argument, only 77 or 5.1% addressed this issue. Indeed, a review of the 1980 Limerick Investigation record demonstrates that the Company merely presented its own employees to report upon the facts to the Commission, consistent with the understood fact gathering purpose of the Investigation. No testimony was presented by representatives of the financial community or independent management review of the reasonableness and prudence of the Company's decision. Such evidence has been presented only for the first time, as appropriate under the terms of the Commission's various orders, in this rate proceeding. As compared to the direct testimony of 72 pages presented at the 1980 Limerick Investigation, the evidence which it is the purpose of Trial Staff's Motion in Limine to deny the Commission on this critical issue consists of portions of six Statements and over 160 pages. (See Staff Motion to Strike; Appendix M).

> "It is important to distinguish between an 'investigation' and a 'hearing' or 'adjudication.' The term 'hearing' is appropriate to quasi-judicial proceedings while 'investigation' is appropriately used with regard to nonjudicial functions of an administrative agency and the seeking of information for future use rather than proceedings in which action is taken against someone. An 'investigation' is nonadversary and contemplates a procedure much less formal and more flexible than applies even to an administrative hearing." (citations omitted).

Thus, the fundamental distinction between a fact-finding investigation, such as the 1980 Limerick Investigation, and an adjudication is that the former by its very nature does not provide full due process litigation of a particular issue, which must await later adjudication.

The U.S. Supreme Court also clarified this distinction in Hannah v. Larche, 363 U.S. 420, 442, 4 L.Ed. 1307, 1321, 80 S.Ct. 1502, 1515 (1960):

> "Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used."

See also Bowles v. Baer, 142 F.2d 787, 788-789 (7th Cir. 1944)("Investigations are informal proceedings held to obtain information to govern future action and are not proceedings in which action is taken against anyone.... On the other hand, in a hearing there are parties and issues of law and of fact to be tried, and at the conclusion of the hearing action is taken which may materially affect the rights of the parties.").

Thus, it is fundamentally unfair and a denial of due process to apply criticisms from a fact-finding investigation which was never intended or structured to provide full due process notice and hearing to preclude later adjudication of an issue. The Supreme Court has expressly stated that PECO had no adjudication on the prudency of its deferral decisions. Due process clearly requires that the Company have its constitutional right to a full adjudication now. See Norwood v. Pennsylvania State Horse Racing Commission, 16 Pa. Cmwlth. 219, 328 A.2d 198, 204 (1974).

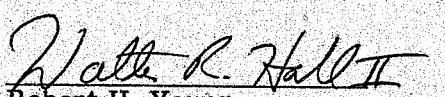
The above denial of due process resulting from the ALJ's ruling would result in extreme and clear prejudice to the Company. Had the Company been advised that a final adjudication was to be made on the 1976 and 1978 deferral decisions in the 1980 Limerick Investigation, the Company and the other parties would not have treated it as a subsidiary issue and preliminary fact gathering process, and would have litigated the issue fully and completely. Specifically, the Company would have presented the additional evidence it has submitted in the current rate case as described in footnote 4. Second, had the Company known that a binding determination had been made in the 1980 Limerick Investigation, its evidentiary presentation in the Limerick 1 rate proceeding would have been entirely different and would have focused more fully upon a quantification of the effect, if any, of the deferral decisions on completion of the plant rather than proving that its decisions to defer were prudent and reasonable.

Third, the bifurcation of an imprudency determination and separate quantification of the cost of that imprudency are unworkable. It will simply lead to extensive and pointless arguments over what the Commission did or did not decide was imprudent and on what grounds in the 1980 Limerick Investigation. Clearly, opposing parties will likely argue that the costs quantified as imprudent must be established based upon the Commission's alleged imprudency determination. This approach, if accepted, will render as a sham any contention that the Commission's alleged imprudence determination and the quantification of imprudency costs can be viewed as independent conclusions capable of bifurcation. That this is so can already be seen in the arguments presently on going before the ALJ as to what portion of PECO's evidentiary presentation should be struck and for what reasons. Under the ALJ's approach, the Commission will be required to attempt to interpret the 1982 Order against the complex factual background of Limerick's construction. Under these circumstances, it will be impossible for the parties to present cogent positions and focused factual presentations to the

Commission or for the Commission to reach meaningful conclusions. Any position presented by the parties would be subject to acceptance or rejection based simply on conflicting interpretations of the 1982 Order and not that position's substantive or factual merit. A hearing process attempted under such uncertainty is hardly fair and is itself a denial of due process.

At a minimum, and in light of the complexity of this matter and its possible significance to the current and future financial integrity of PECO, the Commission should not precepitously resolve this issue. Rather, and in light of the fact that PECO's testimony has already been presented and cross-examined and opposing party testimony was already substantially prepared at the time of the ALJ's ruling and is now due within one week's time, the Commission should reverse the ALJ and reserve to its final adjudication what significance if any should be given to the 1982 Order's criticisms.

Respectfully submitted,



Robert H. Young
Jay H. Calvert, Jr.
Walter R. Hall, II
David B. MacGregor

Counsel for Philadelphia
Electric Company

Dated: January 6, 1986

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing document upon the Administrative Law Judge and all parties of record in this proceeding in accordance with the requirements of 52 Pa. Code §1.54.

Dated this 6th day of January, 1986.

Walter R. Hall, II
Counsel for Philadelphia
Electric Company

OF COUNSEL:

Edward G. Bauer, Jr., Esquire
Vice President and General Counsel
Philadelphia Electric Company
2301 Market Street
Philadelphia, PA 19101

MORGAN, LEWIS & BOCKIUS
2000 One Logan Square
Philadelphia, PA 19103

COMMONWEALTH OF PENNSYLVANIA

ORIGINAL

OFFICE OF CONSUMER ADVOCATE
1425 Strawberry Square
Harrisburg, Pennsylvania 17120

DAVID M. BARASCH
Consumer Advocate

(717) 783-5048

January 6, 1986

DOCUMENT FOLDER

RECEIVED
JAN 6 1986
SECRETARY'S OFFICE
Public Utility Commission

Jerry Rich, Secretary
Pennsylvania Public Utility Commission
Room G-18, North Office Building
Harrisburg, PA 17120

Re: Pennsylvania Public Utility Commission v. Philadelphia Electric Company, Docket No. R-850152

Dear Secretary Rich:

Enclosed please find an original and nine (9) copies of the Brief of the Consumer Advocate in Opposition to the Petition for Interlocutory Review of Philadelphia Electric Company in the above-captioned case. As per attached certificate of service, copies of this document have been served on the parties.

Sincerely,

Susan Perkins Weston

Susan Perkins Weston
Assistant Consumer Advocate

2527P
Enclosures

CERTIFICATE OF SERVICE

Re: Pennsylvania Public Utility Commission
v.
Philadelphia Electric Company
Docket No. R-850152

I hereby certify that I am this 6th day of January, 1986, serving either in person or by first class mail the foregoing document, Brief of the Office of Consumer Advocate in Opposition to Petition for Interlocutory Review of Philadelphia Electric, in the above-captioned proceeding.

William E. Zeiter, Esq.
Morgan, Lewis & Bockius
2000 One Logan Square
Philadelphia, PA 19103

Raymond Williams
Philadelphia Electric Company
Electric Division
2301 Market Street
Philadelphia, PA 19101

Edward G. Bauer, Jr.
Vice President
Philadelphia Electric Company
2301 Market Street
Philadelphia, PA 19101

Marlane R. Chestnut
Veronica A. Smith
Daniel Delaney
Assistant Counsels
PA Public Utility Commission

David M. Kleppinger, Esq.
Edward J. Riehl, Esq.
McNees, Wallace & Nurick
P.O. Box 1166
Harrisburg, PA 17108-1166

Janet Parrish
John Hanger
Community Legal Services
Energy Project
3638 North Board Street
Philadelphia, PA 19140

Zori G. Ferkin
Governor's Energy Council
P.O. Box 8010
300 N. 2nd Street
Harrisburg, PA 17105

Hon. Joseph P. Matuschak
Administrative Law Judge
PA Public Utility Commission
97 E. Main Street
Uniontown, PA 15401

Allie B. Latimer
Charles V. Curcio
Mildred E. V. Pitts
General Service Administration
18th & F Streets, N.W.
Washington, DC 20405

Larry Selkowitz, Esq.
Widoff, Reager, Selkowitz, Adler
129 State Street
Harrisburg, PA 17102

Charles E. Rainey, Jr., Esq.
Assistant City Solicitor
City of Philadelphia
Law Department
15th Floor, Municipal Svces. Bldg.
Philadelphia, PA 19102

Hon. Clarence D. Bell
Senate of Pennsylvania
Senate Post Office
Harrisburg, PA 17120

Franklin L. Kury, Esq.
Reed, Smith, Shaw & McClay
1300 North Second Street
P. O. Box 11844
Harrisburg, PA 17108

Alan R. Squires, Esq.
Greenstein, Gorelick, Price,
Silverman & Laveson
900 Two Penn Center Plaza
Philadelphia, PA 19102

Robert A. DiFilippo
555 East Lancaster Avenue
St. Davids, PA 19087

Michael L. Browne, Esq.
J. Tomlinson Fort, Esq.
J. Thomas Morris, Esq.
Reed, Smith, Shaw & McClay
1600 Avenue of the Arts Building
Broad & Chestnut
Philadelphia, PA 19107

Martha W. Bush
237 S. Melville Street
Philadelphia, PA 19139

Scott C. Penwell, Esq.
Duane, Morris & Heckscher
203 Pine Street
P.O. Box 1003
Harrisburg, PA 17108-1003

Susan Perkins Weston
Susan Perkins Weston
Assistant Consumer Advocate

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Public Utility Commission

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA PUBLIC UTILITY COMMISSION	:	
v.	:	Docket No. R-850152
PHILADELPHIA ELECTRIC COMPANY	:	

BRIEF OF THE OFFICE OF CONSUMER ADVOCATE IN OPPOSITION TO PETITION FOR INTERLOCUTORY REVIEW OF PHILADELPHIA ELECTRIC COMPANY

Susan Perkins Weston
Assistant Consumer Advocate

Irwin A. Popowsky
Assistant Consumer Advocate

David Wersan
Assistant Consumer Advocate

Office of Consumer Advocate
1425 Strawberry Square
Harrisburg, PA 17120
(717) 783-5048

DOCUMENT FOLDER

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COUNTERSTATEMENT OF THE QUESTION

Was Administrative Law Judge Matuschak correct in granting a motion in limine filed by the Commission Trial Staff to bar relitigation of this Commission's findings from the investigation at I-80100341 determining that certain delays in construction of the Limerick Nuclear Station were unreasonable?

STATEMENT OF FACTS

On October 9, 1980, the Pennsylvania Public Utility Commission ("PUC" or "Commission") ordered an investigation into a number of Limerick Nuclear Generating Station construction issues. In stating the purpose of the investigation, the Commission noted:

> We are opening this investigation proceeding so that information can be gathered in an orderly and expeditious manner, before PECO seeks to include Limerick in its rate base as used and useful property. This approach will enable us to proceed without the pressures of time associated with rate cases.

Order entered October 10, 1980, at 1 (emphasis in original). That Order specified that the investigation was undertaken to determine, among other matters, "The cost of construction delays at Limerick and whether those delays were reasonable." Order entered October 10, 1980, at 2.

After hearing extensive litigation of the case, which was docketed at I-80100341, Administrative Law Judge Klovekorn issued a recommended decision on March 26, 1982, in which he concluded, inter alia, that two specific delays in construction, in 1976 and 1978, had been unreasonable, R.D. at 53-55. He recommended, however, that the Commission not attempt to quantify the rate treatment to reflect that finding of unreasonableness until the Company sought to include Limerick in rates.

On August 27, 1982, this Commission entered its Opinion and Order in the case at I-80100341. Concerning the 1976 and 1978 delays, this Commission ruled that:

> [W]e are of the opinion that PECO management did not exercise sufficient judgment sufficient to meet our reasonable man standard in delaying construction at Limerick in 1976 and 1978.

Order entered August 27, 1982, at 17. The Commision deferred quantification of the costs of delay until such time as the Company presented a rate claim for the plant, saying:

> [W]e are requested by Staff and the OCA to quantify the costs 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.

Id.

The Company appealed to the Commonwealth Court, which reversed the Commission's Order. Subsequently, the Commonwealth Court's decision was appealed by the Commission and the OCA to the Supreme Court of Pennsylvania. The determination that the two construction delays were unreasonable was among the issues presented to the Supreme Court on appeal. The Supreme Court Opinion addressed the delay issue in a footnote, which stated in part:

> ...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.

Pa. PUC v. Philadelphia Electric, 501 Pa. 153, 161 (1983).

In the present case, the Company has filed direct testimony addressing the reasonableness of the 1976 and 1978 delays. On November 20, 1985, The Commission Trial Staff filed a motion in limine asking that the Commission's findings on the reasonableness of the 1976 and 1978 delays be held conclusive on parties to the present case. The Company filed a response containing New Matter on December 5, 1985, and the Trial Staff responded to the New Matter on December 16, 1985. On December 20, 1985, oral argument was held before ALJ Matuschak, with argument presented by the Trial Staff, the Office of Consumer Advocate, and the Company. Following oral argument, the ALJ made an oral ruling on the record, indicating that the ruling would be followed by a written decision. In his ruling, Judge Matuschak said in part that:

> We will, however, grant Trial Staff's motion on the ground that the Commission's findings at I-80100341 of imprudence in the 1976 and 1978 Limerick construction delays should be incorporated into this rate proceeding in the nature of a bifurcation or as an ancillary or in-aid aspect of this rate case, and that all parties having had an opprtunity to develop a record in a full and open hearing in said Limerick investigation, such findings by the Commission are conclusive on the parties in this proceeding.

Tr. 1373. The ALJ also ruled, sua sponte, that the Commission's findings in favor of the Company regarding initial construction and the 1974 delay were also binding on the parties. On December 26, 1985, the Company petitioned this Commission for interlocutory review of that order.

SUMMARY OF ARGUMENT

The OCA submits that ALJ Matuschak's ruling barring relitigation of the reasonableness of PECO's decisions to delay Limerick construction

in 1976 and 1978 is both logical and lawful. The Commission conducted its investigation at I-80100341 with the explicit purpose of resolving those issues without rate case time pressures and before PECO sought to include Limerick in rate base. Furthermore, the facts surrounding the 1976 and 1978 delays obviously have not changed since the Commission's Order in 1982. PECO's testimony presents only new after-the-fact rationalizations for the decisions which the PUC has already found unreasonable.

The ALJ's decision, like the Commission decision which it implements, accords the Company full due process. The company had notice and thorough hearing at I-80100341, and it will be able to appeal all the findings which ultimately form the basis for the rate order in the present case.

Finally, such an approach to these issues is consistent with the Pennsylvania Supreme Court's decision in Pa. PUC v. Philadelphia Electric Company, 501 Pa. 153, 460 A.2d 734 (1983). While that Supreme Court decision determined that the Commission's finding of unreasonableness in the 1976 and 1978 Limerick construction delays were not appealable at the time of the Supreme Court decision, the Supreme Court did not hold that the Commission's findings were invalidly made or lacked substantial basis in the evidence. Accordingly, it is consistent with the Supreme Court's ruling to conclude that the I-80100341 findings remain conclusive determinations of fact. OCA agrees that the decision in this case will be the first final adjudication of PECO's rights and the first decision of the rate treatment which will reflect the judgment that the 1976 and 1978 delays were unreasonable, and as such it will be fully appealable. The decision in this case will thus differ from the decision of facts

without a determination of rights which the Supreme Court considered when reviewing I-80100341. ALJ Matuschak's ruling, treating the factual findings made by this Commission at I-80100341 as conclusive regarding the reasonableness of the 1976 and 1978 delays, while acknowledging that I-80100341 did not set any consequence to the company's rights as a result of those rulngs, is therefore compatible with the Supreme Court's rulings.

ARGUMENT

I. THE ALJ'S ORDER IS CONSISTENT WITH THE COMMISSION'S DECISION AND ORDERS IN THE LIMERICK INVESTIGATION AT I-80100341.

The OCA submits that Administrative Law Judge Matuschak's ruling is the sound, necessary implementation of this Commission's own Orders at I-80100341. In his ruling, Judge Matuschak summarized that investigation's purpose:

> 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 Philadelphia Electric would seek to include Limerick in rate base, as a pragmatic procedure, directed that these 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.

Tr. 1372. Review of the Orders in that case reveals the accuracy of this summary of Commission intent.

In the initiating Order, the Commission clearly stated that the investigation's purpose was to gather information in "an orderly and expeditious manner" without the time constraints of rate case litigation. Order entered October 10, 1980, at 1. Specifically, the intent was to assess those issues "before PECO seeks to include Limerick in its rate base as used and useful property." Id. (emphasis in original).

Carrying out this Commission purpose, the investigation and resulting decision determined the reasonableness of the 1976 and 1978 delays in construction. The Commission decided that the Company had not met the "reasonable man" standard for prudence in those delays. Order entered August 27, 1982, at 17. Moreover, in the sentence immediately after determining that the delays failed the reasonable man decision, that judgment was clearly labelled as a finding, when the Commission stated that:

> Having so found, we are requested by Staff and the OCA to quantify the costs of the dalay to ratepayers. We are of the opinion that to do so at this time is inappropriate.

Id. (emphasis added).

Thus, the Commission decided the reasonableness issue in the 1980 investigation, while leaving the quantification until the costs of those delays became clear. The findings had no immediate effect on the parties because Limerick 1 was not yet being claimed in rates, and accordingly the finding did not represent an appealable adjudication at that time.

By ordering an investigation into Limerick construction issues before Limerick costs were claimed in a rate case, the Commission set up a bifurcated procedure for determining the rate treatment of those Limerick costs. Under this approach, some issues about which all facts could be known in 1980 would be decided then. Other issues, which could not yet be resolved, would be postponed until the Company sought to include Limerick in rate base. However, the benefit of the investigation would be that, when the rate case was filed and rate case time constraints would apply, some issues would already have been resolved, allowing the limited schedule for rate case litigation to deal more adequately with the issues that remained.

The OCA submits that such a bifurcated approach is fully within this Commission's authority, as Judge Matuschak correctly ruled. Section 331(a) of the Public Utility Code, 66 Pa.C.S. §331(a), provides:

> (a) General rule.-- The commission may, on its own motion and whenever it may be necessary in the performance of its duties, investigate and examine the condition and management of any public utility or any other person or corporation subject to this part. In conducting the investigations the commission may proceed either with or without a hearing, as it may deem best, but it shall make no order without affording the parties affected thereby a hearing....

The investigation at I-80100341 was within this investigatory authority and fully provided the hearing required before reaching an order.

This Commission has in the past dealt with other issues in a similar, bifurcated fashion. In the Duquesne rate case at R-821945, Duquesne's rates were adjusted to include the amortization of cancelled plant costs which were found prudent in the Commission's CAPCO investigation at I-79070315 and I-790979317, Order at R-821945, entered January 28, 1983, at 23-4. Indeed, in the previous Duquesne base rate case, the Commission had explicitly deferred decision of the CAPCO issues in order to resolve those issues in the separate investigation at I-79070315, Order at R-80011069, entered February 2, 1981, at 57.

Similarly, in the Beaver Valley Opinion and Order entered February 20, 1981, in the investigation docketed at I-79070314 and consolidated with the Duquesne rate case at R-80011069, the Commission ruled that the Company had not proven that its actions leading up to the 1979 Beaver Valley shutdown were prudent. The Commission subsequently remanded the case to an ALJ for additional hearings and entered another Opinion and Order at I-79070314 on June 16, 1983, determining that specific replacement power costs should be refunded to ratepayers. The

Beaver Valley orders are now part of a consolidated appeal by Duquesne before the Commonwealth Court.

The Trial Staff argued that the motion in limine should be granted based on the authority of §316 of the Public Utility Code, 66 Pa.C.S. §316. The OCA submits that while §331 is a fully adequate basis for the motion, §316 also applies. That section reads in part:

> §316. Effect of commission action
>
> 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....

In the I-80100341 proceeding, this Commission made findings subject to this section. Accordingly, those findings are final, with the single exception that judicial review may overturn them. Under §316, those findings may not be relitigated before the Commission.

II. RELITIGATION OF THE REASONABLENESS OF THE 1976 and 1978 DELAYS COULD NOT INTRODUCE ANY FACTS NOT KNOWN DURING THE I-80100341 INVESTIGATION, AND SO WOULD BE REDUNDANT.

The decision in I-80100341 regarding the 1976 and 1978 delays dealt with events already passed and facts which could already be known, and it did so in a time closer to their occurrence. No development between 1982 and the present could change the facts relevant to PECO's decisions made in 1976 and 1978. Relitigation would provide only an opportunity to present additional rationalizations developed after the fact, which would be irrelevant to the reasonableness of the decision as it was actually made. That the facts regarding the decision were fully litigated at I-80100341 and would only be repeated here is made clear by the testimony filed by PECO witness Paquette, which relied, in part, upon his testimony from I-80100341, stating as follows:

Q. I would like now to direct your attention to the announced delays in Limerick completion which occurred in 1974, 1976 and 1978. First in the Fall of 1974, why did the Company announce a change in the Limerick completion schedule so as to schedule the first unit for commerical operation in April 1981 instead of July 1979?

A. I responded to that question in the first Limerick Investigation Docket at I-80100341. Instead of repeating my answer here, I have attached the pertinent portion of my testimony in that proceeding as Appendix B. Also included in Appendix B is that portion of my I-80100341 testimony which pertains to the 1976 and 1978 announcements that I will discuss later.

* * *

Q. Please explain why the company made the April 1976 announcement.

A. As I indicated in the first Limerick Investigation Docket at I-80100341, the 1976 delay was caused by....

PECO St. 3 at 31-32 (emphasis added). Since the issues litigated at I-80100341 were ripe for decision then, the Commission proceeded to decide them. A rehashing of the issues in the current case is uncalled for.

In addition, litigation of these issues in the current case would be burdensome in light of the many other issues to be considered and the statutory time constraints on rate litigation. The Commission decided to bifurcate the issues and hold the investigation at I-80100341 because it knew that Limerick issues would require protracted and complex litigation. This Commission therefore chose to investigate those issues which were ripe for decision "before PECO seeks to include Limerick in its rate base as used and useful property." Order Entered October 10, 1980, at 1, (emphasis in original), in order to allow full and efficient consideration of these issues without "the pressures of time associated with rate cases." Id. The Company seeks to reopen issues on which this

Commission has already made its findings, in the case in which it is making its claim for inclusion of Limerick in rate base, and while parties and this Commission are indeed under rate case time pressures. In short, PECO seeks exactly what this Commission intended to avoid through its orders in the 1980 investigation.

III. THE COMMISSION'S DECISION AND ORDERS AT I-80100341 AND THE ALJ'S ORDER UNDER REVIEW HERE ACCORD PHILADELPHIA ELECTRIC FULL DUE PROCESS.

Judge Matuschak's order, in carrying out this Commission's intent regarding the 1980 investigation, provides the Company with full due process. PECO's rights to notice, hearing, and judicial review have been fully preserved. The Company's allegations in its petition for interlocutory review regarding denial of due process are incorrect.

The Commission order instituting I-80100341 gave the Company notice of the issues to be decided therein. The Order clearly stated that the delays were to be investigated and their reasonableness determined. Moreover, this Commission explicitly declared its intention to consider issues relevant to a future rate case before that rate case was filed, thereby giving the company notice that rate-related issues would be decided in the investigation. That the Company had full notice is also indicated by the Company's conduct. During the investigation, the company presented detailed testimony on the reasons for the delays in question. In its reply brief in that proceeding, PECO argued, in defending the delay decisions, that:

> PECO urges the Commission to reject Trial Staff's various arguments in its Order concluding this proceeding. As noted in the Commission's Order of October 10, 1980, a principal purpose of this investigation has been to examine "the cost of

> construction delays at Limerick and whether those delays were reasonable". Trial Staff and all other parties to this investigation, including PECO, have had a full opportunity to develop the record upon this issue.

PECO Reply Brief, I-80100341, at 116 (emphasis added).

Likewise, the I-80100341 investigation gave the Company the full due process hearing to which it was entitled. During the investigation, the Company was able to present its case and to question the case made by opposing parties. The Company was accorded full opportunity for discovery, testimony, cross examination, rebuttal, briefing, and exceptions. Indeed, the hearing rights it exercised were identical to those it would have in this rate case, so that relitigation would provide no additional procedural protection denied in the investigation.

It is of course true that the Company has not yet had an opportunity to appeal the delay findings at issue here. However, that inability is temporary. The Company cannot yet appeal because the investigation's delay findings will not culminate in a rate order until this case is decided. A decision in this case will be a final adjudication. After that decision, the Company can appeal the findings upon which such a decision is based, including the findings made at I-80100341, if it chooses to do so. While the hearing of issues related to rate treatment of Limerick have been bifurcated at the Commission level, the appellate consideration will deal with all the issues relevant to the final adjudication of rates in a single proceeding.

Thus, contrary to the Company's argument, the bifurcated approach taken by this Commission to the resolution of Limerick construction issues accords Philadelphia Electric full due process. Clear notice and a full hearing were given at I-80100341, and judicial review will be available, if desired, at the end of this case.

IV. THE ALJ'S DECISION IS CONSISTENT WITH THE RULING OF THE SUPREME COURT IN Pa. PUC v. Philadelphia Electric Company, 501 Pa. 153, 460 A.2d 734 (1983), IN WHICH PHILADELPHIA ELECTRIC APPEALED PORTIONS OF THE COMMISSION'S RULING AT I-80100341.

Judge Matuschak's ruling under review here is fully compatible with the Supreme Court's decision on appeal from some aspects of the I-80100341 order. The Supreme Court observed in a footnote that:

> ...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."

Pa. PUC v. Philadelphia Electric, 501 Pa. 153, 161 (1983).

The Supreme Court's determination that the rulings dealing with the 1976 and 1978 delays, standing alone, were not final adjudications does not mean that those rulings were not definitive Commission findings on the issues addressed. The Court did not rule that the findings themselves were improperly made or without authority as factual determinations. Instead, it merely stated that they were without effect as rights determinations, and so unappealable. Such a ruling was sound, in light of the fact that at the time of the Order appealed from, Limerick could have been cancelled, its power could have been sold, or a variety of other intervening events could have changed the appropriate treatment of Limerick if and when the Company sought to include it in rate base. The Commission therefore had entered no rate treatment order, and had made no adjudication settling PECO's rights which could be appealed. What the Commission had done was make factual findings to resolve certain Limerick related issues in a separate proceeding and prior to the litigation of Limerick's inclusion in rates. Standing alone, these factual findings were unappealable as the Supreme Court

ruled. But the Supreme Court did not rule, and in no way suggested, that those factual findings were improper or invalid.

In this case, the Commission will issue a final adjudication, a decision which sets rates reflecting Limerick. In a manner yet to be determined, that decision should reflect the Commission's findings at I-80100341 that the 1976 and 1978 delays were unreasonable. Treating those findings as conclusive, in keeping with the Commission's stated purpose in making them, is fully consistent with the Supreme Court's determination that they were not appealable adjudications in 1982 when no rate treatment had resulted from them.

V. CONCLUSION

The OCA submits that the ruling under review, in granting a motion in limine to prevent relitigation of the reasonableness of the 1976 and 1978 delays in Limerick construction, implemented this Commission's stated purpose in the I-80100341 investigation of those issues. This Commission instituted that investigation, inter alia, to resolve Limerick related issues then ripe for decision before Philadelphia Electric sought to include Limerick in rate base and without the time pressures such a rate case would involve. It was fully within the Commission's authority to do so. To allow the Company to relitigate those issues now would completely frustrate the purpose of the original proceeding.

The Company has argued that the Supreme Court footnote dealing with these findings undermined their binding authority. OCA submits that, on the contrary, the Supreme Court addressed only the ripeness of those findings for judicial review, and accordingly has no bearing on whether those findings are conclusive in the present proceeding.

The OCA submits that the Company had full notice and hearing before these findings were made at I-80100341, and will be entitled to judicial review once an adjudication is made of the Company's right to include costs related to those unreasonable delays in rates. Accordingly, the Company's due process argument is without merit.

THEREFORE, the Office of Consumer Advocate respectfully urges that the petition for interlocutory review be denied and the ruling of Administrative Law Judge Matuschak granting the motion in limine be upheld.

Respectfully submitted,

Susan Perkins Weston

Susan Perkins Weston
Irwin A. Popowsky
David Wersan
Assistant Consumer Advocates

David M. Barasch
Consumer Advocate

DATED: January 6, 1986

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

January 6, 1986

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SECRETARY'S OFFICE
Public Utility Commission

Jerry Rich, Secretary
Pa. Public Utility Commission
New Filing Section
Harrisburg, PA 17120

In re: Pennsylvania Public Utility Commission

v.

Philadelphia Electric Company

Docket No. R-850152

Dear Secretary Rich:

Enclosed for filing please find an original and nine copies of the Trial Staff's Brief Opposing the Petition of the Philadelphia Electric Company for Commission Review and Answer to a Material Question in the above captioned matter. Copies have been served upon the Administrative Law Judge and the other parties.

Very truly yours,

D. P. Delaney

Daniel P. Delaney
Deputy Chief Counsel

[DOCU... FOLDE...]

DPD:cew

Enc.

cc: Honorable Joseph P. Matuschak
Service List

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA PUBLIC UTILITY COMMISSION	:	
	:	Docket No.
v.	:	R-850152
PHILADELPHIA ELECTRIC COMPANY	:	

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Public Utility Commission

FOLDER

BRIEF OF TRIAL STAFF OPPOSING THE PETITION OF THE PHILADELPHIA ELECTRIC COMPANY FOR COMMISSION REVIEW AND ANSWER TO A MATERIAL QUESTION

Brief In Opposition To A Petition For Interlocutory Review Pursuant To Section 5.302 Of The Commission's Rules Of Procedure, 52 Pa. Code §5.302.

DOCKETED
JAN 7 1986

Daniel P. Delaney
Marlane R. Chesnut
Veronica A. Smith

Counsel for Commission Trial Staff

Pennsylvania Public
Utility Commission
P.O. Box 3265
Harrisburg, PA 17120
(717) 783-3190

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EXHIBITS

1. Trial Staff's Motion in Limine, filed November 20, 1985.

2. Trial Staff's Reply to New Matter, filed December 16, 1985.

3. The Honorable Joseph P. Matuschak's Bench Decision on Trial Staff's Motion, decided December 20, 1985.

4. Commission Order of October 10, 1980 initiating the Limerick Investigation At I-80100341.

5. Petition for Review filed by Philadelphia Electric Company on September 23, 1982, docketed at 2365 C.D. 1982.

STATEMENT OF THE CASE

This interlocutory appeal is before the Commission in response to a Petition Of the Philadelphia Electric Company (PECO) For Commission Review And Answer To A Material Question. The Petition was filed by PECO on December 26, 1985 in accordance with the Commission Rules of Administrative Practice and Procedure, Section 5.302, 52 Pa. Code §5.302. Essentially, the Commission has been asked to review a decision by Administrative Law Judge Matuschak which granted a Motion in Limine filed by Trial Staff in the instant proceeding.

The Motion in Limine was centered on one major issue: "the proposed inclusion in rates of the capital and operating costs of the Limerick Nuclear Generating Station Unit I and 100% of Common Plant." Motion, p. 1. Since the Commission had previously conducted a lengthy investigation into the prudency of PECO'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), Staff requested that the Commission's prior finding of unreasonableness or imprudency in PECO's decisions to delay construction of the Limerick units in 1976 and 1978 be considered prima facie evidence of the facts found and conclusive upon the parties to the present proceeding pursuant to Section 316 of the Public Utility Code. Staff argued that the liability issue had been severed from the question of damages and that the parties should only be able

to submit evidence in the instant proceeding on the issue of the quantification of those increased expenses due to the imprudency of delaying Limerick construction in 1976 and 1978. The basis for the Staff's motion was Section 316 of the Public Utility Code. 66 Pa. C.S. §316. While the Motion was pending, several hearings were held. Staff moved repeatedly during those hearings to strike any testimony offered by PECO which addressed the prudency of the 1976 and 1978 Limerick construction delays.

The Motion in Limine was filed on November 20, 1985. A copy of the Motion is attached as Exhibit 1. PECO filed its Answer to Motion in Limine and New Matter on December 5, 1985. Trial Staff filed its Reply to New Matter on December 16, 1985. A copy of the Reply is attached as Exhibit 2. ALJ Matuschak held oral argument on the Staff's Motion on December 20, 1985 (N.T. 1306-1370). He then issued a bench decision immediately after argument. (N.T. 1370-1375). A copy of the Presiding Officer's decision is attached as Exhibit 3. He indicated that he would also file a Memorandum Opinion to more fully discuss his reasoning. (N.T. 1370). This brief is being submitted in opposition to PECO's Petition for Commission Review and Answer To A Material Question.

COUNTER STATEMENT OF THE QUESTION PRESENTED

Did the Presiding Officer correctly rule that the Commission's prior finding in the first Limerick Investigation, Docket No. I-80100341, 56 Pa. PUC 47, 61 (1982), that PECO had been unreasonable in its 1976 and 1978 Limerick construction delay decisions, was conclusive on all the parties to the instant proceeding?

ANSWER: The Presiding Administrative Law Judge's decision is in accordance with the Public Utility Code, and PECO's request for interlocutory relief should be denied.

ARGUMENT

I. The Commission's Prior Finding Of Imprudence By PECO Is Binding On All Parties To The Instant Proceeding And Should Not Be Relitigated.

Before setting forth its arguments, Staff submits that a brief review of the historical facts is appropriate. The Commission Order, dated October 10, 1980, initiating its 1980 Limerick Investigation at Docket No. I-80100341 addressed the scope of the proceedings with the following language:

> We are opening this investigation proceeding so that information can be gathered in an orderly and expeditious manner, before PECO seeks to include Limerick in its rate base as used and useful property. This approach will enable us to proceed without the pressures of time associated with rate cases.
>
> We realize, of course, that Limerick is under construction and that it represents a major, and controversial, undertaking by PECO. However, although we agree with the OCA that a Limerick proceeding should be opened, we do not agree that the Rule to Show Cause requested by the OCA is appropriate. We must first proceed to gather facts. We can then reach conclusions and enter whatever orders we deem to be appropriate.

Order, p. 1, which is attached and marked Exhibit 4. A fair reading of the quote above and the remainder of the Order gave clear notice to all parties that the investigation held the potential that adverse findings could be made which would have an impact on PECO's rates. Indeed, as will be set forth more fully below, that is exactly what happened.

During the course of the 1980 investigation the parties fully litigated the issue of the prudency of PECO's mangerial decisions in 1976 and 1978 to delay the construction of the Limerick Nuclear Generating Station. PECO quite candidly explained to the Commission the opportunity which all parties had to litigate the issue in its Reply Brief:

> PECO urges the Commission to reject Trial Staff's various arguments [that PECO was imprudent in 1976 and 1978] in its Order concluding this proceeding. As noted in the Commission's Order of October 10, 1980, a principal purpose of this investigation has been to examine "the cost of construction delays at Limerick and whether those delays were reasonable". Trial Staff and all other parties to this investigation, including PECO, have had a full opportunity to develop the record upon this issue.

Appendix 1, p. 116, Staff Reply to New Matter (Exhibit 2).

After making a careful review of the evidence presented on the prudency of the 1976 and 1978 construction dalays, this Commission entered a final Order on August 27, 1982 in which it stated:

> Considering the foregoing, we are of the opinion that PECO management did not exercise judgement 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.

56 Pa. P.U.C. at 61. (Emphasis added).

Clearly the Commission's language indicates that a finding of unreasonable management was made.

In reaction to this finding and the other Commission conclusions and directives in the August 27 Order, PECO filed a Petition for Review in the Commonwealth Court on September 23, 1982. (A copy is attached and marked Exhibit 5). The Petition is replete with references to the findings of imprudency for 1976 and 1978. See Exhibit 5, Paragraphs 8(f), 10(b) and 11(c). PECO sought and received review of this Commission's entire final Order (including the 1976 and 1978 findings of imprudency), and the Commonwealth Court reversed the Commission Order. Philadelphia Electric Company v. Pennsylvania Public Utility Commission, 71 Pa. Commonwealth Ct. 424, 455 A.2d 1244 (1983). The Commonwealth Court made no reference to the imprudency finding in its opinion.

The Commission then appealed to the Supreme Court. In due course the Court upheld the Commission Order and reversed the Commonwealth Court decision. Pennsylvania Public Utility Commission v. Philadelphia Electric Company, 501 Pa. 153, 460 A.2d 734 (1983). While the majority of the Court's opinion dealt with other issues, the Court addressed the issue of PECO's managerial imprudence in footnote 7.

> 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.

Thus, the Court specified that the finding was not an adjudication and did not review it. Nor did the Court disturb the finding.

The instant rate case is the first time PECO has requested inclusion of Limerick Unit I and the associated Common Plant in its rate base. In this context Staff submitted its Motion in Limine which requested that Administrative Law Judge Matuschak declare that the Commission's prior finding of the unreasonable nature of the 1976 and 1978 Limerick construction delays conclusive upon the parties. Staff based its Motion on Section 316 of the Public Utility Code which states in pertinent part:

> 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.

66 Pa. C.S. §316.

Judge Matuschak granted Staff's Motion on December 20, 1985, but rejected Section 316 as a basis for his ruling.

PECO made three unsuccessful, related arguments in opposing the Motion. See PECO Answer to Motion in Limine and New Matter. The first was that the Commission in its

prior order had not made an adjudication which was binding on the parties. The second was that Section 316 was inapplicable because it was merely a codification of the doctrines of res judicata and collateral estoppel. And third, PECO argued that to grant the Motion would result in a denial of due process. Each of the arguments is flawed as will be demonstrated below.

The difficulty with PECO's argument that the Commission had not made a prior adjucation is evident in its framing of the "material question". PECO refuses to acknowledge the difference between a finding and an adjudication. Findings resolve issues. Adjudications resolve cases. In a case the size of the first Limerick Investigation the Commission made many findings resolving many issues, but simply because not all of the findings are needed to support the portion of the adjudication on appeal does not make those additional findings subject to collateral attack in this proceeding. The Commission's finding of imprudency for PECO's 1976 and 1978 delay decisions may not have been an adjudication. Nonetheless, it is binding upon the parties pursuant to Section 316 because the finding was not set aside, annulled or modified on judicial review.

Staff disagrees with PECO's argument that Section 316 merely codifies the doctrine of res judicata and collateral estoppel. Staff will not repeat the criteria for res judicata and collateral estoppel. See Safeguard Mutual

Life Insurance Co. v. Williams, 463 Pa. 567, 574, 345 A.2d 664, 668 (1975) (elements of res judicata and collateral estoppel). Instead, Trial Staff notes that Section 316 requires only two conditions be met: First, there must be a prior finding made by the Commission. And second, the finding shall not have been disturbed upon appellate review. With respect to PECO's liability for its imprudent managerial decisions in 1976 and 1978 both conditions have been met, and Section 316 must be applied.[1]

PECO's attempt to equate res judicata or collateral estoppel with Section 316 is another effort to equate a finding with an adjudication. The case most analogous to the current controversy demonstrates the difference in operation between them. In Philadelphia Electric Company v. Pennsylvania Public Utility Commission, 61 Pa. Commonwealth Ct. 325, 433 A.2d 620 (1981), the Commission excluded $9.7 million from PECO's rate base as being the amount attributable to PECO for the mismanagement of the construction of the Salem Nuclear Generating Unit I. In a prior rate case PECO had litigated the prudency of its management responsibility, and the Commission had disallowed $10.5 million in rate base. PECO appealed the prior rate

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[1] Staff's position also serves as the basis for its limited disagreement with Judge Matuschak. While Staff agrees with Judge Matuschak's ultimate conclusion, it submits that the Judge would have been better advised to premise his ruling on Section 316 because both conditions precedent have been fulfilled.

case including the $10.5 million adjustment. PECO attempted subsequently to relitigate the prudency of the Salem I management decisions in the second rate case. The Administrative Law Judge struck the proffered evidence on the basis of res judicata and certified the question to the Commission. The Commission upheld the Administrative Law Judge and eventually made a $9.7 million adjustment in its final order. The Commonwealth Court upheld the decision to exclude the evidence based on res judicata as valid when decided. However, since during the interim the Court had reversed the prior rate case ($10.5 million), it was required to reverse the Commission on the $9.7 million issue also. Id. at 331-337, 433 A.2d at 624-626.

The similarity between the Commonwealth Court decision and the instant case is striking. In the instant case PECO is once again attempting to litigate the prudency of its prior management decisions. The Commission has in a prior case (I-80100341) ruled that the decisions in question were imprudent, and PECO appealed. In the PECO case, cited above, the prior Commission Order, which determined liability and quantified damages, was entitled to res judicata effect. Only the reversal of the prior quantification finding in the first rate case prevented the Court from upholding the subsequent Commission Order which had adopted the prior finding. In the instant case the failure of the appellate courts to set aside, annul or modify the finding of managerial imprudence at I-80100341

leads to the same conclusion (preclusion of relitigation of the issue) by operation of Section 316 and not by res judicata.

The existing Commission record also undermines PECO's "lack of due process" argument. The above quoted portion of the Commission Order of October 10, 1980 initiating the Limerick Investigation gives notice of the potential for an adverse impact on PECO's rate base. The admission in PECO's Reply Brief, also quoted above, demonstrates that PECO availed itself of the opportunity to litigate the issue. The Commission then based its finding of imprudency upon the evidence introduced by the parties, particularly PECO's Mr. Paquette. Thus, PECO has already received all of the due process to which it is entitled on the issue of liability for imprudence.[2] See Cohen v. Pennsylvania Public Utility Commission, 78 Pa. Commonwealth Ct. 545, 554-556, 468 A.2d 1143, 1148-1149 (1983); aff'd. ___Pa. ___, 493 A.2d 653 (1985).

Staff admits that the instant proceeding is the first time the parties will face the issue of the inclusion in rate base of the costs associated with Limerick I and Common Plant. Further, Trial Staff admits that PECO is entitled to all reasonable due process rights with respect

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[2]For a succinct statement of due process requirements see Smith v. Pennsylvania Public Utility Commission, 192 Pa. Superior Ct. 424, 429, 162 A.2d 80, 83 (1960).

to that issue. However, as indicated above, Trial Staff denies that this case should present any opportunity to PECO to relitigate the reasonableness of the 1976 and 1978 deferral decisions. The issue of the reasonableness of the deferral decisions was litigated in the 1980 Limerick Investigation wherein PECO received all due process rights to which it was entitled. That issue was resolved adversely to PECO and that finding has not been disturbed upon appeal. Relitigation is now foreclosed by the operation of Section 316 of the Public Utility Code. There is no reason to burden the record in this proceeding with any evidence beyond the finding of imprudence set forth by the Commission Order at I-80100341, entered August 27, 1982. To do otherwise would be contrary to the plain language of Section 316.

The "extraordinary circumstances" offered by PECO to justify interlocutory review are neither extraordinary nor persuasive. As shown in its Petition for Review, PECO could and did appeal the imprudency finding to Commonwealth Court. However, even if it is true that the Pennsylvania Supreme Court held that this Commission's finding of managerial imprudence in PECO's 1976 and 1978 deferral decisions was not a reviewable adjudication, that holding is not determinative on the conclusiveness of this Commission's finding. The importance of the Supreme Court's action is that it affirmed the Commission's final order and that it

did not set aside, annul or modify the finding. 66 Pa. C.S. §316.

The reliance PECO places on the Supreme Court decision and prior Commission statements is either misplaced or based on a misunderstanding. At the risk of being repetitious, Staff reinterates its position that the fact that the Supreme Court declared the finding not to be a adjudication is not determinative. As for reliance on prior Commission statements, Staff notes that PECO made a similar argument in the New Matter it filed before the ALJ. The response to those arguments is contained in Staff's Reply to New Matter and will not be repeated. See Exhibit 2. If PECO supplements its arguments, Staff requests that the Commission use two questions for evaluating any new example which the company may try to raise: First, has PECO distinguished between a position taken by Staff during the 1980 Limerick Investigation and a position taken by the Commission in an Order or during the appellate review of the Limerick Investigation Order? (The former, of course, would not be the "Commission's" prior statement.) And second, has the alleged example been taken out of context or artfully edited? Any misconception PECO may have had in its case preparation for this proceeding is not binding on this Commission or the parties.

PECO's concern about an incomplete record in the event the evidence is excluded is without merit. During the cross-examination of Mr. Paquette on December 20, 1985 in

the instant case, Staff placed on the record his prior inconsistent statements which were the basis upon which the finding of imprudence was made. (N.T. 1491-1492, 1502, Staff Ex. Nos. 14 and 15.) In addition Judge Matuschak directed that the relevant portions of the record from the 1980 Investigation be incorporated into the record of this proceeding. (N.T. 1374-1375) Thus, in the event of an appeal there will be sufficient evidence of record to uphold the Commission's prior finding. There is no danger that the record is incomplete.

Section 5.302(b) suggests that the parties address the need for a stay in their briefs to the Commission. 52 Pa. Code §5.302(b). Staff notes that PECO has not requested a stay in its Petition For Review And Answer To A Material Question. In the event a question of a stay is raised, Staff submits that PECO has not alleged or met the requirements necessary to establish entitlement to the remedy. See Pennsylvania Public Utility Commission v. Process Gas Consumer Group, 502 Pa. 545, 467 A.2d 805 (1983).

CONCLUSION

Staff submits that the issue of whether the prior Commission finding of imprudency by PECO in 1976 and 1978 was an adjudication is irrelevant to this proceeding. By operation of Section 316 of the Public Utility Code that finding, which was not disturbed upon appeal, is conclusive upon all parties. PECO had sufficient notice of the issue and fully litigated the question in the prior Investigation. The fact that the Commission chose to bifurcate the issue of liability from its determination of damages has not deprived PECO of its due process rights on the liability issue. There are no "extraordinary" reasons to grant interlocutory relief. There is no danger of an incomplete record upon appeal. The relief requested in the instant Petition should be denied, and the granting of the Motion in Limine should be affirmed, based on Section 316 of the Public Utility Code.

Respectfully submitted,



Daniel P. Delaney
Marlane R. Chestnut
Veronica A. Smith

For the Commission Trial Staff

G-28 North Office Building
Harrisburg, PA 17120
(717) 783-3190

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon parties of record in this proceeding in accordance with the requirement of 52 Pa. Code §1.54.

Dated this 6th day of January, 1986.

Daniel P. Delaney

For Commission Trial Staff

EXHIBITS

1. Trial Staff's Motion in Limine, filed November 20, 1985.
2. Trial Staff's Reply to New Matter, filed December 16, 1985.
3. The Honorable Joseph P. Matuschak's Bench Decision on Trial Staff's Motion, decided December 20, 1985.
4. Commission Order of October 10, 1980 initiating the Limerick Investigation At I-80100341.
5. Petition for Review filed by Philadelphia Electric Company on September 23, 1982, docketed at 2365 C.D. 1982.

BEFORE THE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

THE HONORABLE JOSEPH P. MATUSCHAK PRESIDING

PENNSYLVANIA PUBLIC UTILITY COMMISSION	:	
v.	:	R-850152
PHILADELPHIA ELECTRIC COMPANY	:	

MOTION IN LIMINE

AND NOW, this 20th day of November 1985, comes the Trial Staff of the Pennsylvania Public Utility Commission (Trial Staff) and moves the Presiding Officer to make a preliminary determination of the nature of the evidence that may be admitted into the record in the above captioned matter. In support of its motion, the Trial Staff respectfully represents the following:

1. This proceeding was initiated on September 27, 1985 with the filing by the Philadelphia Electric Company (PECO) of Supplement No. 15 to its Tariff Electric - Pa. P.U.C. No. 26. Supplement No. 15 is designed to produce an increase in the Company's annual electric revenues of approximately $670.7 million based on budgeted sales for a future test year ending June 30, 1986. A major issue in this case is the proposed inclusion in rates of the capital and operating costs of the Limerick Nuclear Generating Station Unit I and 100% of Common Plant.

2. The Commission has previously considered the prudency 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). Among the issues considered there by the Commission was the prudency of the Company's decision to delay construction of the Limerick Station in 1976 and 1978. After reviewing the presiding Administrative Law Judge's conclusion that the 1976 and 1978 delays were unreasonable and the partys' exceptions to that conclusion, the Commission stated the following:

> [W]e are of the opinion that PECO management did not exercise judgement sufficient to meet our reasonable man standard in delaying construction at Limerick in 1976 and 1978.

56 Pa. P.U.C. at 61.

The Commission then 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 of the costs associated with the construction of the plants.

3. Section 316 of the Public Utility Code, 66 Pa. C.S. §316, provides in pertinent part:

> 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.

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. The Court described the Commission's delay 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.

5. The Trial Staff respectfully submits that the Commission's prior finding of the unreasonable nature of the 1976 and 1978 Limerick construction delays meets the requirements of Section 316 and therefore is prima facie evidence of the facts found and conclusive upon the parties to the present proceeding.

6. No party should be permitted to relitigate this issue in the current proceeding. All of the parties in the Commission's prior Limerick Investigation received a full and fair opportunity to present evidence concerning the prudency of the Company's decision to delay Limerick construction in 1976 and 1978. No useful purpose would be served by relitigating this issue in the present case. Moreover it would be a misuse

of the Commission's limited administrative resources to reconsider this already resolved issue in the present case. The Trial Staff submits that the only part of this issue that should be examined in the instant proceeding is the quantification of the effects of the unreasonable construction delays upon the Company's Limerick rate base claim.

WHEREFORE, the Trial Staff respectfully requests the Presiding Officer to rule that the Commission's prior finding that Limerick 1976 and 1978 construction delays were unreasonable is prima facie evidence of that finding and conclusive on the parties to this proceeding.

Respectfully submitted,

Marlane R. Chestnut

G-28 North Office Building
Harrisburg, PA 17120
(717) 783-2804

Marlane R. Chestnut

Veronica A. Smith

Daniel P. Delaney

For the Commission Trial Staff

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon parties of record in this proceeding in accordance with the requirement of 52 Pa. Code §1.54.

Dated this 20th day of November, 1985

D. P. Delaney

Daniel P. Delaney

For Commission Trial Staff

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

THE HONORABLE JOSEPH P. MATUSCHAK PRESIDING

PENNSYLVANIA PUBLIC UTILITY COMMISSION	:	
	:	Docket No.
v.	:	R-850152
PHILADELPHIA ELECTRIC COMPANY	:	

REPLY TO NEW MATTER

AND NOW, this 16th day of December 1985, comes the Trial Staff of the Pennsylvania Public Utility Commission (Trial Staff) and Replies to the New Matter of the Philadelphia Electric Company (PECO) contained in PECO's Answer to Motion in Limine and respectfully represents as follows:

7. Admitted in part and denied in part. The allegations in the first unnumbered paragraph are admitted. The allegations in the second unnumbered paragraph are denied as legal conclusions to which no responsive pleading is required. By way of further response, the Trial Staff notes that with respect to subparagraph 1) the Commission Order at I-80100341, entered August 27, 1982, states as follows:

> Considering the foregoing, we are of the opinion that PECO management did not exercise judgement 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.

56 Pa. P.U.C. at 61. (Emphasis added.)

Clearly the Commission's language indicates that a finding of unreasonable management action was made.

With respect to subparagraph 2) Trial Staff asserts that the Pennsylvania Supreme Court did not rule on the issue other than to generally affirm the Commission Order.

With respect to subparagraph 3) Trial Staff admits that this is the first case in which PECO has claimed rate base inclusion of the costs of Limerick. However, Trial Staff denies that this is the first opportunity PECO has had to litigate the propriety of its management actions. Indeed, PECO in defending its decision to delay Limerick construction argued to this Commission as follows:

> PECO urges the Commission to reject Trial Staff's various arguments in its Order concluding this proceeding. As noted in the Commission's Order of October 10, 1980, a principal purpose of this investigation has been to examine "the cost of construction delays at Limerick and whether those delays were reasonable". Trial Staff and all other parties to this investigation, including PECO, have had a full opportunity to develop the record upon this issue.

PECO Reply Brief, I-80100341, p. 116. (Emphasis added.) (Copies of pp. 116-117 have been attached as Appendix 1 to permit the Administrative Law Judge to understand the context of PECO's admission.)

ceeding with a claim for recovery of any of the costs associated with the construction of the plants. Consequently, we can

In essence PECO has had the opportunity to exercise its statutory and constitutional right to present evidence and argument on the issue of its prudency in delaying Limerick construction. The Commission finding, quoted above, simply bifurcated the issues of prudency and the appropriate remedy. The issue of the Company's prudency has been resolved adversely to PECO in the Investigation at Docket No. I-80100341. The only remaining issue for the instant proceeding is the quantification of the appropriate remedy.

8. Admitted in part and denied in part. The vast majority of the legal arguments contained in paragraph 8 are denied as set forth more specifically below. Those few allegations which are admitted will be so noted.

The crucial premise upon which PECO's arguments rest is its unsuccessful attempt to equate a "finding" with an "adjudication" or with a final "order" or with a "determination". Trial Staff disagrees with this premise. Even if it is true that the Pennsylvania Supreme Court held that this Commission's finding of managerial imprudence in PECO's 1976 and 1978 deferral decisions was not a reviewable adjudication, that holding is not determinative on the conclusiveness of this Commission's finding. The importance of the Supreme Court's action is that it affirmed the Commission's final order and that it did not set aside, annul or modify the finding. 66 Pa. C.S. §316. Trial Staff submits that the distinction PECO refuses to recognize is that, even if the finding was not an adjudication and was not viewed as an adjudication by the Supreme Court, the plain language of the statute makes

the finding binding on the Company and the parties to this proceeding because it was reviewed by the Court and was not set aside, annulled or modified.

Trial Staff agrees that a finding resolves a particular issue. Further, it agrees that an adjudication must be supported by the appropriate findings. Indeed those factors highlight the difference between an adjudication and a finding: Findings resolve issues. Adjudications resolve cases. In a case the size of the first Limerick Investigation the Commission made many findings resolving many issues, but simply because not all of the findings are needed to support the portion of the adjudication on appeal does not make those additional findings subject to subsequent attack in this proceeding.

PECO argues (p. 5) that the only use for Section 316 is to preclude a collateral attack on a Commission order where a party has failed to appeal the same order in an appropriate fashion. Trial Staff disagrees and submits that it would be more accurate to say that the reported cases deal only with collateral attacks on Commission orders. However, the language of the statute is far more encompassing than including only Commission orders. Section 316 is stated in the disjunctive and also includes rules, regulations, findings and determinations. The fact that no reported case has interpreted the remaining language does not limit the application of the section.

Trial Staff also disagrees with PECO's suggestion (p. 6) that Section 316 merely codifies the doctrine of

res judicata and collateral estoppel. Trial Staff will not repeat the criteria for res judicata and collateral estoppel. See Safeguard Mutual Life Insurance Co. v. Williams, 463 Pa. 567, 574, 345 A.2d 664, 668 (1975) (elements of res judicata and collateral estoppel). Instead, Trial Staff notes that Section 316 requires only two conditions be met: First, there must be a prior finding made by the Commission. And second, the finding shall not have been disturbed upon appellate review. With respect to PECO's liability for its imprudent managerial decisions in 1976 and 1978 both conditions have been met, and the statute should be applied.

PECO's attempt to equate res judicata or collateral estoppel with Section 316 is another effort to equate a finding with an adjudication. The case most analogous to the current controversy demonstrates the difference in operation between them. In Philadelphia Electric Company v. Pennsylvania Public Utility Commission, 61 Pa. Commonwealth Ct. 325, 433 A.2d 620 (1981), the Commission excluded $9.7 million from PECO's rate base as being the amount attributable to the mismanagement of the construction of the Salem Nuclear Generating Unit I. In a prior rate case PECO had litigated the prudency of its management responsibility, and the Commission had disallowed $10.5 million in rate base. PECO appealed the prior rate case including the $10.5 million adjustment. PECO attempted to relitigate the prudency of the Salem I management decisions in the second rate case. The Administrative Law Judge struck the proffered evidence on the basis of res judicata and

certified the question to the Commission. The Commission upheld the Administrative Law Judge and eventually made a $9.7 million adjustment in its final order. The Commonwealth Court upheld the decision to exclude the evidence based on res judicata as valid when decided. However, since during the interim the Court had reversed the prior rate case ($10.5 million), it was required to reverse the Commission on the $9.7 million issue also. Id. at 331-337, 433 A.2d at 624-626. The similarity between the Commonwealth Court decision and the instant case is striking. In the instant case PECO is once again attempting to litigate the prudency of its prior management decisions. The Commission has in a prior case (I-80100341) ruled that the decisions in question were imprudent. PECO had appealed the prior case. In the PECO case, cited above, the prior Commission Order which determined liability and quantified damages, was entitled to res judicata effect. Only the reversal of the prior quantification finding prevented the Court from upholding the subsequent Commission Order which had adopted the prior finding. In the instant case the failure of the appellate courts to set aside, annul or modify the finding of managerial imprudence at I-80100341 leads to the same conclusion (preclusion of relitigation of the issue) by operation of Section 316 and not by res judicata.

9. Denied. The allegations and arguments contained in paragraph 9 are denied as more specifically set forth below. If there are any allegations which can be admitted, they will be so noted.

Trial Staff does not dispute that the time has come to determine the costs of Limerick Unit I and Common Plant which will be included in PECO's rate base. However, PECO refuses to recognize that by virtue of the Commission's prior finding it can only recover, at most, total costs less any amount attributable to the cost of its imprudent managerial decisions to defer construction in 1976 and 1978. The portion of the Commission Order quoted (p. 7) by PECO, read in context, gives the Company the appropriate notice that the findings made in the Investigation could well impact PECO's rate base.

That portion of the Trial Staff's Main Brief quoted by PECO (p. 7) should be read in context as prefaced by the following:

> Trial Staff further suggests that unless the Commission finds the economics of the situation so compelling that PECO must be ordered to change its course, it does not make regulatory sense to order or approve any construction plan at this time.

Trial Staff Main Brief, p. 1. See Appendix A to PECO Answer (Emphasis added.)

In fact the Commission did find the situation compelling and gave PECO the option of discontinuing construction of Unit 2 or losing Commission approval of funding sources. 56 Pa. PUC at 67-71. The second quote (p. 8) from the Trial Staff Main Brief should also be read in context. It was introduced with the following:

> Trial Staff submits that the evidence in this case establishes that PECO's management was imprudent in postponing Limerick in 1976 and 1978. For two reasons, however, Trial Staff recommends that the Commission defer decision on this subject:

Trial Staff Main Brief, p. 11. See Appendix A to PECO Answer. (Emphasis added.)

Obviously Trial Staff recognized that there was sufficient evidence to support the finding of imprudence, and the Commission chose to make the finding and to order PECO to change its course. Thus, neither of the passages quoted by PECO from the Trial Staff Main Brief should be construed as wholehearted endorsements of PECO's position.

It may be true that Administrative Law Judge Klovekorn adopted the Trial Staff position. However, it should be emphasized that he too believed PECO had not given careful consideration to the ratepayers' interests.

> In summary, it appears that the company's action in postponing Limerick in 1976 and 1978 was made without careful analysis of the impact of such delay on its ratepayers.
>
> In addition, the record shows that a factor in these decisions was the potential impact of Limerick on the company's capacity and reserve margins and the adverse effect this would have on the company's rate allowances. Consumers 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.

Initial Decision, p. 54. See Appendix A to PECO Answer. (Footnote deleted.)

Again ALJ Klovekorn hardly endorsed the Company's actions. More importantly, the Commission chose to continue where the

Administrative Law Judge stopped and made the finding of imprudency quoted previously. (See ¶ 7 above.) 56 Pa. PUC at 61.

PECO's careful editing of the quote (p. 9) from the Commission Order, entered August 27, 1982, omits the crucial last sentence of the paragraph.

> Accordingly, we shall not attempt to quantify the costs of the various delays at this time.

56 Pa. PUC at 58 (emphasis added). See also Appendix C to PECO Answer.

Thus, the Commission specified, as conceded by Trial Staff, that the quantification of damages was not resolved. Again, it is the issue of quantification that remains to be litigated in the instant proceeding.

PECO's discussion of its alleged challenge in the Supreme Court to the Commission's finding of imprudence evidences a fundamental misunderstanding of the appellate review applied to the Limerick Investigation. PECO did not, as it represents (p. 9), appeal to the Supreme Court; the Commission did. Examination of Appendix D to its Answer, the source of its quote (pp. 9-10), reveals that PECO has quoted its brief as an appellee before the Supreme Court. Nor could the quote taken from the Commission-Appellant's brief have been written in response to the Company's argument (p. 10). Obviously, as the appellant, the Commission brief was filed first. In addition, the quoted portion is taken from the Commission's Statement of the Case which was not argumentative in nature.