

PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17120

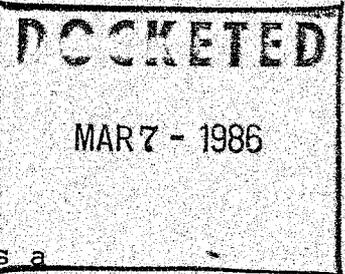
Public Meeting held March 6, 1986

Commissioners Present:

Linda C. Taliaferro, Chairman  
Frank Fischl  
Bill Shane

Pennsylvania Public Utility Commission  
v.  
Philadelphia Electric Company

R-850152



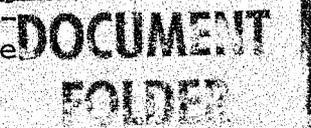
OPINION AND ORDER

BY THE COMMISSION:

Before the Commission for consideration is a Petition for Interlocutory Review and Answer of a Material Question ("Petition") filed on February 7, 1986, by the Consumers Education and Protective Association, et al. ("CEPA"),<sup>1/</sup> pursuant to the provisions of 52 Pa. Code §5.302.

The material question concerning which CEPA seeks Commission review and answer is:<sup>2/</sup>

May an intervenor to a Commission proceeding compel the production of a Commission employee and certain documents when said employee is not a member of the Commission Trial Staff participating in the proceeding and the subpoenaed documents and the testimony to be elicited concern the performance



<sup>1/</sup>Including Association of Community Organizations for Reform Now, Action Alliance of Senior Citizens, Philadelphia Citizens in Action, and Mr. Bradshaw.

<sup>2/</sup>We have adopted Trial Staff's restatement of the material question which we find more precisely frames the question before us.

of the Commission employee in his capacity as advisor to the Commission?

Brief History of Proceeding

On September 27, 1985, Philadelphia Electric Company ("PECO") filed with the Commission Supplement No. 15 to its Tariff-Electric Pa. P.U.C. No. 26, containing rates designed to produce an increase in annual electric revenues of approximately \$949 million, based on estimated sales for a future test year ending June 30, 1986.

During hearings in these rate proceedings, on January 23, 1986, CEPA filed an Application, pursuant to Section 5.421 of the Commission's regulations, 52 Pa. Code §5.421, for a subpoena of Mr. Joseph Farrell, Director of the Commission's Bureau of Consumer Services, or his designee, to attend, with the following requested documents, the rebuttal phase of the hearings in these proceedings:

1. A summary of all citations for violation of 52 Pa. Code Chapter 56 issued to PECO for the last two years or other evidence of PECO's violation of 52 Pa. Code Chapter 56 during the last two years;
2. Any memoranda or other documents regarding PECO's compliance with 52 Pa. Code Chapter 56 or with programs benefiting ratepayers with incomes at or below 150% of the Office of Management and Budget poverty line;
3. Any memoranda or documents concerning the effectiveness of PECO's programs in eliminating or ameliorating the ability-to-pay problem of PECO ratepayers at or below 150% of the poverty line;
4. Any evidence, memoranda, or documents evaluating PECO's implementation of 52 Pa. Code Chapter 56.

On January 30, 1986, Administrative Law Judge ("ALJ") Joseph P. Matuschak denied CEPA's request for the subpoena of Mr. Farrell or his designee.

CEPA contends that the material question should be answered affirmatively if the record is to be full and complete, and that extraordinary circumstances require our review of the material question because:

1. PECO witness, Mr. Raymond Williams, testified that certain programs protect low-income ratepayers from ability to pay problems and justify not adopting an essential need rate or other rate structure modification to assist low-income ratepayers.
2. Without the issuance of a subpoena for Mr. Farrell or his designee, CEPA, et al. will be seriously prejudiced, since Mr. Farrell or his designee, by virtue of their positions, have unique and essential knowledge about the effectiveness of PECO's programs to assist low-income ratepayers.
3. The Presiding Officer's ruling raises the critical policy question of whether intervenors may compel the production of witnesses, employed by the Commission, who have exclusive control of evidence material to a case.

CEPA advocates the adoption of a cost-based essential needs rate as essential if electric service is to remain accessible to low-income families served by PECO.

On January 30, 1986, Charles D. Shields, Jr., Assistant Counsel in the Commission's Law Bureau<sup>3/</sup> appeared,

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<sup>3/</sup> Counsel Shields is not a member of the Commission Trial Staff participating in these proceedings.

on behalf of Mr. Farrell at the hearing in these proceedings before the ALJ. Counsel Shields filed a Brief in opposition to CEPA's Petition, arguing that ALJ Matuschak's denial of the subject subpoena was consistent with provisions of the Public Utility Code and the Commission's Rules of Practice and Procedure since, inter alia, the documents prepared by the Commission's Bureau of Consumer Services in the course of its role as advisor to the Commission are not subject to discovery under Section 5.321 of the Commission's Rules and Regulations, 52 Pa. Code §5.321.

### Discussion

The Commission's Rules and Regulations regarding Interlocutory Review are set forth at 52 Pa. Code §5.301 et seq. which provide, in pertinent part:

§5.301. Interlocutory review generally.

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

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

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

(a) During the course of a proceeding, a participant may submit a timely petition to the Secretary requesting the Commission's review and answer to a material question which has arisen or is likely to arise. The petition shall be in writing with copies served on all participants and the presiding officer and shall state, in not more than one

page, the question to be answered and the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding. (Emphasis added).

\* \* \*

§5.304. Interlocutory review of discovery matters.

(a) Unless otherwise ordered by the Commission in exceptional situations, rulings of presiding officers on discovery are not subject to interlocutory review absent certification by the presiding officer that the ruling involves an important question of law or policy that should be resolved immediately by the Commission, except that an order of a presiding officer regarding the deposing of a Commissioner or Commission employe will be subject to interlocutory appeal to the Commission as provided in §§5.301 - 5.303 (relating to interlocutory review generally, petition for Commission review and answer to a material question. Commission action on petition for review and answer). (Emphasis added).

Section 5.304, supra, does provide that an order of a presiding officer regarding the deposing of a Commission employe will be subject to interlocutory appeal; hence, CEPA's Petition is properly before us as an interlocutory appeal since the denial by ALJ Matuschak of the requested subpoena is quite similar to a denial by a presiding officer of the deposing of a Commission employe.

However, the paramount criteria for our interlocutory review of rulings of presiding officers made during the course of proceedings is the existence of extraordinary circumstances (Sec. 5.301(a)), and the presence of compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceedings (Sec. 5.302(a)).

The information which CEPA seeks to secure from Mr. Farrell is clearly obtainable from PECO, a party to the proceedings. We therefore find no extraordinary circumstances which would warrant the issuance of a subpoena for the appearance of Mr. Farrell, a non-party to the proceedings and a person employed as an advisor to the Commission.

CEPA's argument that Mr. Farrell possesses unique and irreplaceable information is merely a statement, not supported by any factual allegations, and certainly would not support a decision on our part to direct an advisory employe of this Commission to testify at the request of one of the parties to the proceeding.

Furthermore, Section 333 of the Public Utility Code, 66 Pa. C.S. §333, here pertinent, states, in part:

(f) Subpoena duces tecum.--A party to a proceeding may obtain in accordance with commission rules a subpoena duces tecum requiring the production of or the making available for inspection, copying or photographing of relevant necessary designated documents at a prehearing conference or other specific time and place.

\* \* \*

(j) Other subpoenas.--The presiding officer shall have the power in accordance with commission rules to issue subpoenas ad testificandum and duces tecum at any time during the course of the proceeding.

(Emphasis added).

Both Sections 333(f) and 333(j) provide for the issuance of subpoenas, in accordance with Commission rules; however, Section 5.349 of the Commission's Rules of Practice and Procedure, 52 Pa. Code §5.349, regarding requests for

documents etc., specifies that the section shall not be applicable to materials which are in control of, inter alia, Commission advisory staff, such as Mr. Farrell.

Section 5.349 provides specifically:

§5.349. Requests for documents, entry for inspection and other proposes.

\* \* \*

(e) This section shall not apply to official files of the Commission, or materials which are the product of or within the control of Commission advisory or adjudicatory staff, but shall apply only only materials within the control of staff as may be participating in the action as a participant. Access to official files of the Commission shall be as prescribed in §§1.71 - 1.77 (relating to public access to Commission records). (Emphasis added)

Section 333(f) (6) of the Public Utility Code, 66 Pa. C.S. §333(f) (6) provides:

The deposing of a commission employee shall only be allowed upon an order of the presiding officer based on a specific finding that the party applying to take the deposition is seeking significant, unprivileged information not discoverable by alternative means. (Emphasis added).

The information which CEPA seeks from Mr. Farrell is privileged information which is available for the information of this Commission; and, as previously discussed, this information is discoverable by alternative means, i.e., it is obtainable from PECO.

CEPA cites Section 308(f) of the Public Utility Code, 66 Pa. C.S. §308(f), as compelling the appearance of Mr. Farrell. Section 308(f) provides: "Staff Testimony. -

Members of the Staff of the Commission shall appear and present testimony in any proceeding before the Commission when called by the Commission or any of the parties to the proceeding."

We concur with the argument of Counsel Shields that the language in Section 308(f) twice refers to particular proceedings, and the logical definition of "staff", given the context of the entire language of 66 Pa. C.S. §308(f), would be a reference to members of the Commission staff actually participating in a prosecutorial or party capacity in the particular proceeding involved. This interpretation would be consistent with the intent of the previously discussed Commission procedural rules to exempt advisory staff and documents from the discovery process. (Brief of Joseph Farrell).

#### Conclusion

In order that this Commission may carry out its duties and obligations imposed under the Public Utility Code, it is essential that our advisory Staff not be required to present testimony in a proceeding before this Commission which would result in the disclosure of information obtained by the advisory Staff in the performance of official advisory duties for this Commission. The information which CEPA seeks is confidential and privileged in nature, and should not be disclosed nor discoverable except under the most compelling circumstances, not here present. This is particularly true when the requested information is discoverable by alternative means.

In accordance with the foregoing discussion, we conclude that the material question concerning which CEPA seeks review and answer should be answered in the negative,

i.e., that Mr. Joseph Farrell should not be compelled to testify in these proceedings, thus upholding the ruling of ALJ Matuschak; THEREFORE,

IT IS ORDERED:

1. That the Petition for Interlocutory Review and Answer of a Material Question filed by the Consumers Education and Protective Association, et al. on February 7, 1986, is granted.

2. That the material question is answered in the negative.

BY THE COMMISSION,



Jerry Rich  
Secretary

(SEAL)

ORDER ADOPTED: March 6, 1986

ORDER ENTERED: March 6, 1986