



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

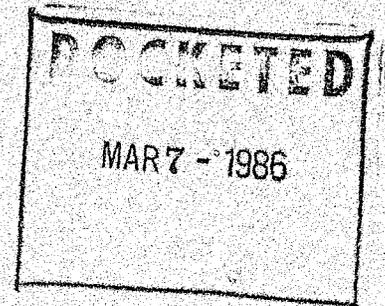
March 6, 1986

IN REPLY PLEASE
REFER TO OUR FILE

R-850152

All Parties

Pennsylvania Public Utility Commission
v.
Philadelphia Electric Company



To Whom It May Concern:

This is to advise you that two Opinions and Orders have been adopted by the Commission in public meeting held March 6, 1986 in the above entitled proceeding.

Copies of these two orders are enclosed for your records.

Very truly yours,

Jerry Rich, Secretary

EMD
Certified Mail



PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120

Public Meeting held March 6, 1986

Commissioners Present:

Linda C. Taliaferro, Chairman
Frank Fischl
Bill Shane

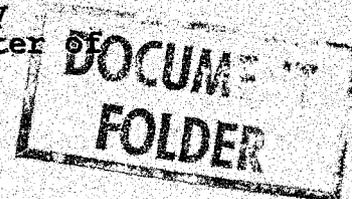
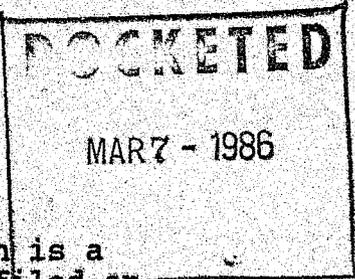
Pennsylvania Public Utility Commission
v.
Philadelphia Electric Company

R-850152, et al.

OPINION AND ORDER

BY THE COMMISSION:

Before the Commission for consideration is a Motion for Certification of Interlocutory Order filed on January 31, 1986, by Philadelphia Electric Company ("PECO" or the "Company"), pursuant to 52 Pa. Code §5.633, which requests that the Commission amend its Opinion and Order entered January 21, 1986, to state expressly that the Opinion and Order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate determination of the subject matter of the Opinion and Order.



Brief History of Proceeding

On September 27, 1985, 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. A major issue in this proceeding is the proposed inclusion in rates of the capital and operating costs of the Limerick Nuclear Generating Station Unit No. 1.

In a Motion in Limine filed on November 20, 1985, Trial Staff requested Administrative Law Judge ("ALJ") Matuschak to make a preliminary determination of the nature of the evidence that may be admitted into the record regarding the 1976 and 1978 delays in the construction of the subject generating unit. The ALJ granted Trial Staff's Motion in Limine which thereby excluded certain PECO testimony regarding the 1976 and 1978 construction delays.

Pursuant to the Commission's Opinion and Order entered on January 21, 1986, we affirmed the ALJ's grant of Trial Staff's Motion in Limine, stating:

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

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

Section 316, however, provides that the Commission's findings or determinations shall be prima facie

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

PECO states that its Motion was filed to prepare the way for the filing of a "protective" petition for permission to appeal in the Commonwealth Court pursuant to 42 Pa.C.S. §702(b) and Pa. R.A.P. 1311, or alternatively, if the Commission fails or refuses to amend its Order as herein requested, the filing of a protective petition for review in the Commonwealth Court under 42 Pa.C.S. §702(b) and Pa. R.A.P. Ch. 15.

The Company further states that it has concluded that it is essential to take a timely present appeal from the January 21, 1986 Order because:

1. Exclusion of major evidence on the prudence of the 1976 and 1978 Limerick deferral announcements will prejudice PECO by creating an incomplete record.
2. To make the Commission's imprudence "criticism" in the Limerick Investigation, 56 Pa. PUC 47 (1982), a binding finding of fact in this case in the face of the Supreme Court's decision in Pa. P.U.C. v. Philadelphia Electric Company, 501 Pa. 153, 460 A.2d 734 (1983) causes substantial prejudice to PECO whose due process rights are violated by (a) ruling that a

"criticism" it could not appeal is final and binding, and (b) excluding evidence which forms the basis for a critical PECO position in this proceeding developed in reliance upon the Commission's prior statements and the Supreme Court decision.

3. The Commission's Order relies, inter alia, on the doctrines of res judicata, citing Philadelphia Electric Company v. Pa. P.U.C., 61 Pa. Commw. 325, 433 A.2d 620 (1981), and collateral estoppel, citing Fincher v. Township of Middlesex, 64 Pa. Commw. 355, 439 A.2d 1353 (1982), doctrines which are generally applied to forever bar relitigation of previously decided claims or issues.
4. The applicable law is not clear as to whether the Company's present right to seek interlocutory review of the Order involves a compulsory or permissive appeal (compare Pa. R.A.P. 311(d)).

Trial Staff filed an Answer to the Company's Motion for Certification which opposes the Company's request for the following reasons:

1. Section 702(b) of the Judicial Code, infra, requires a statement that an immediate appeal would materially advance the ultimate termination of the matter, and an appeal of the prior Opinion and Order at this time will do nothing to advance this case, whose litigation at this point is approximately half completed, and that the prosecution of an appeal at this time raises a substantial issue of the Commission's jurisdiction to complete the case while the matter is before the Commonwealth Court.
2. The legal issues advanced in its motion by the Company have all been addressed and rejected by both the

Presiding Officer and the Commission in the course of ruling on the Trial Staff's Motion in Limine.

3. Rule of Appellate Procedure 1701 limits the Commission's jurisdiction to continue proceedings in a matter when an appeal has been taken. The Company's prosecution of an appeal of a Commission order at this docket at this time raises a significant issue of the Commission's jurisdiction to continue proceedings while that matter is before the Commonwealth Court. In the opinion of Trial Staff, the Company's prosecution of an appeal at this time, whether certified or not, could legitimately be considered by the Commission as a waiver by the Company of the statutory suspension provisions of Section 1308 of the Public Utility Code, 66 Pa. C.S. §1308.

Discussion

52 Pa. Code §5.633 provides:

(a) When the Commission has made an order which is not a final order, a participant may by motion request that the Commission find, and include the findings in the order by amendment, that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal to Commonwealth Court from the order may materially advance the ultimate termination of the matter. The motion shall be filed within 10 days after service of the order, and shall be subject to §5.103 (relating to hearing motions). Unless the Commission acts within 30 days after the filing of the motion, the motion shall be deemed denied.

Pertinent to the matter before us is Section 702(b) of the Judicial Code, 42 Pa.C.S. §702(b) which provides:

When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order. (Emphasis added)

PECO seeks an amendment to the January 21, 1986 Opinion and Order which would add language that the Opinion and Order "[I]nvolves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the Opinion and Order may materially advance the ultimate termination of the subject matter of the Opinion and Order." We must decline PECO's request that we so amend said Opinion and Order for the following reasons:

1. The legal issues advanced by the Company, i.e., that exclusion of evidence regarding the prudence of the 1976 and 1978 Limerick construction deferrals will prejudice PECO; that our reliance upon the doctrines of res judicata and collateral estoppel are doctrines which are generally applied to forever bar relitigation of previously decided claims or issues; and that to make the Commission's imprudence "criticism" in the Limerick Investigation, at 56 Pa. P.U.C. 47 (1982) a binding finding of fact in the instant proceeding causes substantial prejudice to PECO, are quite simply insufficient reasons for so amending our January 21, 1986 Opinion and Order. These issues were advanced by PECO previously, and we are not persuaded that our legal conclusions in the January 21, 1986 Opinion and Order were in error.

2. We agree with Trial Staff that an appeal of the prior Opinion and Order will do nothing to advance this case particularly when hearings are approximately half completed. In fact, such an appeal could very likely prolong the ultimate conclusion of the instant proceedings.
3. Our conclusion in the January 21, 1986 Opinion and Order that our ultimate determination in the prior Limerick investigation that PECO was imprudent in deciding to delay construction of the generating unit in 1976 and 1978 precludes litigation of PECO's prudence in the instant rate proceeding is clearly a conclusion and an issue which may be appealed in the normal course upon the issuance of a final Opinion and Order in the instant rate proceedings.
4. Notwithstanding PECO's arguments to the contrary, we do not see a substantial ground for a difference of opinion regarding our conclusion that litigation of PECO's prudence in delaying construction, in 1976 and 1978, of Limerick Unit No. 1 is precluded in the instant rate proceeding.

52 Pa. Code §5.633 provides that unless the Commission acts within thirty days after the filing of PECO's Motion for Certification, the Motion shall be deemed denied. The Motion for Certification was filed by PECO on January 31, 1986; therefore the thirty day period expired on March 3, 1986. However, for the purpose of providing clarification of the appropriate application of the provisions of 52 Pa. Code §5.633, and for the additional reason that we desire to express our reasons for denying the Motion for Certification, we will waive the thirty day limitation nunc pro tunc.

Conclusion

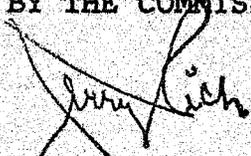
In accordance with the foregoing discussion, we conclude that PECO's Motion for Certification of Interlocutory Order should be denied; THEREFORE,

IT IS ORDERED:

1. That the Motion for Certification of Interlocutory Order filed by Philadelphia Electric Company at Docket No. R-850152, is denied.

2. That the thirty day limitation, set forth at 52 Pa. Code §5.633, is waived.

BY THE COMMISSION,


Jerry Rich
Secretary

(SEAL)

ORDER ADOPTED: March 6, 1986

ORDER ENTERED: March 6, 1986