COMMONWEALTH OF PENNSYLVANIA
March 10, 1986

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

RECEIVED

MAR 11 1986

Office of A. L. J.
Public Utility Commission

TO: William H. Smith, Chief
Administrative Law Judge

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

Enclosed please find an original and a copy of:

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

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

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

A copy of each Ruling and/or Opinion has been sent to the following parties of record:

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

Daniel P. Delaney, Esquire
Marlane R. Chestnut, Esquire
Veronica A. Smith, Esquire
Pennsylvania Public Utility Commission
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

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

Irwin A. Popowsky, Esquire
David Wersan, Esquire
Scott J. Rubin, Esquire
Office of Consumer Advocate
1425 Strawberry Square
Harrisburg, PA 17120

John Hanger, Esquire
Janet Parrish, Esquire
Community Legal Services
3638 North Broad Street
Philadelphia, PA 19140

Mildred E. W. Pitts, Senior Trial Attorney
General Services Administration
18th & F Streets, N.W. - Room 4002
Washington, D.C. 20405

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

Charles Rainey, Jr., Esquire
Kathryn Lewis, Esquire
City of Philadelphia, Law Department
15th Floor, Municipal Services Bldg.
Philadelphia, PA 19102-1692

Mark P. Widoff, Esquire
Larry B. Selkowitz, Esquire
Widoff, Reager, Selkowitz & Alder, PC
129 State Street
Harrisburg, PA 17101

Nancy Schuster, Esquire
1 Pond Street
Bristol, PA 19007

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

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

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

Stephen Bosch, Esquire
Temple University
450 Carnell Hall
Broad Street and Montgomery Avenue
Philadelphia, PA 19122

William T. Hawke, Esquire
Joseph J. Malatesta, Esquire
Malatesta, Hawke, McKeon & Morris
212 Locust Street
P. O. Box 12110
Harrisburg, PA 17108

Martha W. Bush, Esquire
Pa. Energy Ratepayers Coalition
237 S. Melville Street
Philadelphia, PA 19139

Bernard A. Ryan, Jr., Esquire
Dechert, Price & Rhoads
800 North Third Street
Harrisburg, PA 17102

Scott C. Penwell, Esquire
Duane, Morris & Heckscher
203 Pine Street
P. O. Box 1003
Harrisburg, PA 17108-1003

James A. Corrodi, Esquire
Scott Paper Company
Scott Plaza
Philadelphia, PA 19113

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

Robert A. DiFilippo, Esquire
555 East Lancaster Avenue
St. Davids, PA 19087

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

William F. Barrett
Office of Administrative Law Judge
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17120

If you have any questions, please call this office.

bjm

Enclosures (6)

BEFORE THE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

MEMORANDUM OPINION ON
MOTION TO STRIKE OF
PHILADELPHIA ELECTRIC COMPANY

Background

On January 22, 1986, Philadelphia Electric Company (PECO or Company) filed its Motion in Limine to Strike portions of the Office of Consumer Advocate (OCA) Statement No. 2 (Testimony and Exhibits of Dr. Stephen H. Hanauer) and portions of OCA Statement No. 1 (Testimony and Exhibits of James J. O'Brien) from the record of this proceeding.

Answer to the motion was submitted by the OCA, in which it urges that the motion be denied.

Oral arguments were held on February 13, 1986.

Following oral arguments, we entered a bench order denying the motion, and indicated that subsequently we would file a Memorandum Opinion further discussing the basis of our order.

The instant proceeding was initiated with the filing by PECO of Supplement No. 15 of its Tariff Electric-Pa. P.U.C. No. 26 on September 27, 1985. Supplement No. 15 is designed to produce an increase in the

Company's annual electric revenue of approximately $670.7 million, based on budgeted sales for a future test year ending June 30, 1986. The principal reason given by PECO for its rate filing is to reflect the increased capital and operating costs and decreased energy production costs associated with the Limerick Generating Station Unit 1 and 100% of common plant (Limerick 1).

A central issue in the proceeding is the reasonableness of the cost of Limerick 1. Limerick 1 is a 1055 mw boiling water reactor with a General Electric (GE) Mark II Pressure Suppression Containment. 1/ The OCA had filed testimony in this proceeding alleging that GE was negligent and imprudent with respect to the design and the testing of the Mark II containment; that these errors substantially increased the cost of Limerick 1; and that PECO should bear the costs associated with GE's alleged imprudence.

In this connection, the OCA submitted the testimony of Dr. Stephen H. Hanauer (OCA Statement No. 2; Appendix A) alleging such GE errors, and the testimony of James A. O'Brien (OCA Statement No. 1; Appendix B) which quantifies the alleged impact of Limerick 1 costs of the alleged errors in the plant's containment design. Mr. O'Brien proposes a downward adjustment of $160.7 million to the costs of Limerick 1 construction.

1/ The containment structure in a nuclear power reactor provides an enclosure around the reactor to prevent releases of radioactivity into the containment. Its purpose is to isolate radioactivity within the reactor core and primary reactor fluids from outside the reactor area in the event of any incident or accident.

PECO moves to strike the aforementioned testimony on the ground that in Pa. P.U.C. v. Pennsylvania Power and Light Company, (PP&L) R-822169, 55 PUR 4th 185 (1983) the identical issue of GE's prudence with respect to the design and testing of the Mark II containment structure was raised and fully litigated by the OCA; and that this Commission entered a final order finding that there was no showing of GE imprudence in the design and testing of the Mark II containment and rejecting the OCA's proposed rate base adjustment.

PECO contends that relitigation of the issue of GE's imprudence with respect to the Mark II containment design in the instant proceeding is, therefore, barred by the doctrine of collateral estoppel, and that the evidence on the issue presented by OCA should be excluded from this proceeding.

The OCA's answer raises five points in opposition to the Company's motion:

1. That the OCA was not a party to both proceedings, or was a party in a different capacity in the two proceedings;

2. That the issue is not the same in this case because of changes in the legal context or the applicable law;

3. That the issue was not fully litigated in the PP&L case;

4. That the Company's reliance on collateral estoppel is misplaced where first PP&L, and now PECO, have the burden of proof; and

5. That the Company's motion was not timely filed.

Discussion

Under Pennsylvania law, a plea of collateral estoppel is valid if the issue decided in the prior adjudication was identical with the one presented in the later action; there was a judgment on the merits; the party against whom the plea is asserted was a party or in privity with a party in the prior adjudication, and the party against whom it is asserted has had a full and fair opportunity to litigate the issue in question in a prior action. This rule applies even if the causes of action are not identical. Davis v. U.S. Steel Supply, Division of U.S. Steel Corporation, 688 F 2d 166; Schubach v. Silver, 461 Pa. 366, 336, A.2d 328 (1975); Keystone Building Corp. v. Lincoln Savings & Loan Association, 468 Pa. 85, 92 n.7, 360 A.2d 191, 195, n.7 (1976); Davis v. O'Brien, 230 Pa. Super. 449, 326 A.2d 511 (1974).

The Commission and the Commonwealth Court have held that collateral estoppel is applicable to proceedings before the Commission and bars relitigation of the same issue in later cases. See Pa. P.U.C. v. Keystone Water Company - White Deer District, 55 Pa. P.U.C. 774, 752-755 (1982). The applicability of collateral estoppel in rate proceedings was recently affirmed and further clarified by the Commonwealth Court in Keystone Water Company - White Deer District v. Pa. P.U.C., 81 Pa Cmwlth Ct. 312, 474 A.2d 368 (1984). In Keystone, the Court held that although res judicata does not apply to rate proceedings because each rate case is a separate cause of action, collateral estoppel does apply and bars the same party from relitigating the same issue in a subsequent rate proceeding (474 A.2d at 373). In addition, the Court further defined the "identity of issues"

element of collateral estoppel, stating: "Collateral estoppel is designed to prevent relitigation of issues which have remained substantially static, factually and legally. (474 A.2d at 373).

The Company argues that the issue of GE's imprudence which the OCA seeks to relitigate in this case is the same issue fully litigated and decided in the 1983 PP&L rate case, and that the facts relevant to relitigate this issue are historic and not subject to change.

The thrust of the Company's position here is that, through the use of collateral estoppel, the OCA can be precluded from litigating an issue on behalf of one utility's ratepayers because the OCA previously failed to win that issue on behalf of another utility's (PP&L's) ratepayers. In other words, the Company contends that even though PECO ratepayers have not previously litigated the issue, they would be forced to bear all the costs related to litigation of that issue because the OCA, as representative of PP&L ratepayers, lost that issue in a prior case.

The precise issue in this motion to strike, to our knowledge, has not previously raised in proceedings before this Commission, and counsel have cited no precedents.

However, in Walter W. Cohen, Consumer Advocate v. West Penn Power Company, C-823151, in our Ruling on Preliminary Objections of West Penn at pages 11-12 (December 7, 1982), relating to standing, we discussed the nature of OCA representation thus:

> The Consumer Advocate has been authorized by the Legislature to represent the consumers of public utilities in protecting their interests before this Commission. The Office of the Consumer Advocate was created with the full realization that the consumers, especially

individual residential consumers, cannot adequately represent themselves in utility matters before this Commission, and that the functions of the Commission can best be performed in an adverse proceeding by counsel at least as skilled as counsel for public utility companies, and who possess resources sufficient to conduct in-depth investigations and to enlist in-depth expert evidence. See Citizens of Florida v. Mayo, 333 So. 2d 1 (1976). The resources of the Consumer Advocate, however, are not unlimited, so the Legislature left it to the Consumer Advocate's discretion as to the consumer interests in which he will become involved before this Commission.

If the public utility consumers have standing to intervene in, or to institute proceedings within this Commission's jurisdiction, the Consumer Advocate has standing to represent such consumer interests, if he so elects. If consumers, either individually or as a group, have standing, the Consumer Advocate has standing to represent such interests.

If, on the other hand, West Penn would agree that consumers, individually or as a group, have standing, but not through representation by the Consumer Advocate, then its objection would not be against standing, as such, but only against effective standing, a position that would certainly be contrary to the intent and will of the Legislature.
[Emphasis in original]

Reference is made to the following colloquy at the oral argument:

JUDGE MATUSCHAK: Mr. MacGregor, what is the position of the company as to whether PECO customers would be estopped from raising the issue of GE imprudence in the design of the Mark II?

MR. MacGREGOR: they would not be barred, Your Honor. (Tr. 3199)

* * *

JUDGE MATUSCHAK: . . . Aren't you in effect stating that PECO customers in this case have standing, and they have a right to not be barred by collateral estoppel? If they engage counsel of their own choosing at their own expense, and experts at their own expense, they are not barred, but if they make use of the Office of Consumer

> Advocate at public expense, then they are barred. Does that sound right?
>
> MR. MacGREGOR: Yes, Your Honor, I think that is the right result . . . the OCA has to be treated as a state agency like any other state agency, and the law holds that collateral estoppel applies against state agencies.
> (Tr. pp. 3203, 3204)

While it may be true that "state agencies" may be barred by collateral estoppel, in such cases such agencies represent the public as a given, or all members of the public of the Commonwealth. The Consumer Advocate occupies a unique position. In these rate cases he does not represent PECO customers in a PP&L rate case. He is in a position different from a "state agency" that represents all the public in a general sense. The Office of Consumer Advocate has been established by the Legislature to represent particular customers in a particular proceeding. The OCA was specially established by the Legislature, in the nature of special counsel to ratepayers in specific public utilities cases, designated as "Public Counsel" or "Peoples Counsel" in other jurisdictions.

The General Assembly has authorized the Consumer Advocate "to represent the interest of consumers as a party, or otherwise participate for the purpose of representing an interest of consumers, before the Commission." 71 Pa. Stat. Ann. §309-4(a) (Purdons 1985 Supp.). The OCA's enabling legislation states that: "Any action brought by the Consumer Advocate before a court or an agency of this Commonwealth shall be brought in the name of the Consumer Advocate". Id at §309-4(d).

Here, the OCA appears on behalf of the ratepayers of the particular utility involved. His status in filing a complaint here is derived from his statutory authority to represent PECO ratepayers.

Of course the Commission's decision in the PP&L Susquehanna cases carry precedential weight, but such does not preclude PECO ratepayers, through their statutorily established representative, from even raising viable defenses to the Company's multi-million dollar claims.

As we said at oral argument. (Tr. 3206)

> Every policy has a purpose, and while the doctrine of collateral estoppel has a purpose to bring some finality to litigation, we question whether it should be so rigidly applied as to create an injustice or a failure to provide adequate representation for the PECO customers in this case.

We believe that fundamental fairness is involved. Since each utility is a separate entity, no utility can be collaterally estopped from litigating a particular rate claim simply because the Commission ruled against another utility on the same issue. Each utility would have a right to relitigate a losing issue, even where the factual and legal elements are the same.

Under the Company's view of collateral estoppel, ratepayers would not have the same right if they are represented by the OCA. Because the Legislature has seen fit to create a single office to represent the interests of all Pennsylvania ratepayers, the Company contends that a "defeat" for the ratepayers of one utility legally precludes the ratepayers of all other utilities from even raising the same argument to the extent that they wish to raise that issue through their statutorily created representative, the OCA.

It is unfair and inconceivable that the Legislature, by creating a single Office of Consumer Advocate to defend ratepayers, intended to

create a double standard where each utility has a due process constitutional right to litigate every claim on its own behalf (to litigate every claim on its own behalf at ratepayer expense, since ratepayers are paying the Company's rate case expense), and at the same time prohibit the PECO ratepayers from utilizing the services of the OCA, which has been provided for ratepayers at considerable public expense. In effect, while PECO would not have PECO ratepayers barred by collateral estoppel in the premises, it would bar PECO ratepayers from effective representation by OCA on this issue, because of what happened to PP&L ratepayers in a prior case.

In our opinion two issues of public policy are involved. First, there is the public policy of collateral estoppel to realize some finality to the decisions on the issue by the Commission in prior cases. Secondly, there is also a public policy to ensure any party a fair adversary proceeding in which to present its case. Whether or not to apply the doctrine of collateral estoppel in a particular case is not just an issue of administrative expediency; it is also an issue of fairness and due process to the parties involved. Here, the need for relitigation outweighs any benefits that occur from administrative expediency. PECO ratepayers should, for the first time, have the opportunity to defend themselves against an alleged $200 million rate base claim alleged to have been imprudently incurred. The public policy relating to collateral estoppel must be balanced against the public policy of providing an opportunity to all parties to fully and fairly litigate their position. The public policy of collateral estoppel should not be so rigidly applied so as to prevent the fundamental fairness and justice in this proceeding.

Having determined that the doctrine of collateral estoppel does not apply against PECO ratepayers on the issue GE imprudency through representative by the OCA, we see no need to address the other contentions raised by the OCA against PECO's motion to strike.

We believe that our order in denying PECO's motion to strike, in the circumstances, was proper.

March 10, 1986

JOSEPH P. MATUSCHAK
Administrative Law Judge