

ORIGINAL

2

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BEFORE

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

In re: A-110550, F-055 Letter of notification of Philadelphia Electric Company relative to reconstructing and rebuilding of the existing 138 KV Line to operate as a Woodbourne-Heaton 230 KV Line in Montgomery and Bucks Counties.

Philadelphia, Pennsylvania
July 11, 1991

RECEIVED
AUG 22 1991

Pages 1 to 39, inclusive

AGENT
FOLDER

RECEIVED
AUG 19 1991
SECRETARYS
Public Utility Comm.

HOLBERT ASSOCIATES
KATHY J. OWENS
Suite 203, Cranberry Court
212 North Third Street
Harrisburg, Pennsylvania 17101

NVL

CERTIFIED ORIGINAL

BEFORE
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

In re: A-110550, F-055 Letter of notification of
Philadelphia Electric Company relative to
reconstructing and rebuilding of the existing 138
KV Line to operate as a Woodbourne-Heaton 230 KV
Line in Montgomery and Bucks Counties.

Stenographic report of hearing held
in Hearing Room 4, State Office Building,
Philadelphia, Pennsylvania,

Thursday,
July 11, 1991
at 2:00 p.m.

BEFORE
HERBERT SMOLEN, ADMINISTRATIVE LAW JUDGE

APPEARANCES:

PATRICIA KRISE BURKET, ESQUIRE
Public Utility Commission
G-28, North Office Building
P.O. Box 3265
Harrisburg, Pennsylvania 17120
Appearing on behalf of Prosecutory Staff

ROBERT J. SUGARMAN, ESQUIRE
SUGARMAN & ASSOCIATES
16th Floor, City
101 North Broad Street
Philadelphia, Pennsylvania 19107
Appearing on behalf of Robert Small

1 APPEARANCES: (Continued)

2 PAUL R. BONNEY, ESQUIRE
2301 Market Street
3 Philadelphia, Pennsylvania 19101
4 Appearing on behalf of Philadelphia Electric
Company

5 WARD L. SMITH, ESQUIRE
Care of Crowell & Moring
6 1001 Pennsylvania Avenue, Northwest
Washington, D.C. 20004
7 Appearing on behalf of Philadelphia Electric
8 Company

9 TANYA J. MCCLOSKEY, ESQUIRE
1425 Strawberry Square
10 Harrisburg, Pennsylvania 17120
11 Appearing on behalf of the Office of Consumer
Advocate

12 TINKU KHANWALKAR, ESQUIRE
Two North Ninth Street
Allentown, Pennsylvania 19101
13 Appearing on behalf of Pennsylvania Power &
14 Light

15
16
17
18 - - - - -
19

20
21
22
23 HOLBERT ASSOCIATES
24 KATHY J. OWENS
Suite 203, Cranberry Court
25 212 North Third Street
Harrisburg, Pennsylvania 17101

1 JUDGE SMOLEN: This is a prehearing conference in
2 Docket A-110550, Folder 055. Now, this is a telephonic
3 prehearing conference and, therefore, I will ask each of the
4 attorneys on the telephone to state their full name and who
5 they represent. Now, let's start off with Mr. Sugarman.

6 MR. SUGARMAN: Your Honor, my name is Robert
7 Sugarman. I represent Robert Small and 70 other intervenor
8 protestants, and I'm in Greensboro, North Carolina and have
9 been in South Carolina -- North Carolina all week and have
10 had no opportunity to get anything together for this
11 conference.

12 JUDGE SMOLEN: Okay. Next. Someone pick it up. Mr.
13 Bonney?

14 MR. BONNEY: This is Paul Bonney representing
15 Philadelphia Electric Company.

16 MS. MCCLOSKEY: Your Honor, this is Tanya McCloskey
17 and I have with me Barrett Sheridan from the Office of
18 Consumer Advocate.

19 JUDGE SMOLEN: Do you want to spell the last name?

20 MS. MCCLOSKEY: McCloskey, M-c-c-l-o-s-k-e-y, and
21 Sheridan, S-h-e-r-i-d-a-n.

22 JUDGE SMOLEN: All right. Next.

23 MS. BURKET: This is Patricia Burket from the
24 Commission Prosecutory Staff.

25 JUDGE SMOLEN: Spell your name for the reporter.

1 MS. BURKET: B-u-r-k-e-t. And with me is Tod Prowell
2 from the Commission's Bureau of CEEP.

3 MR. SUGARMAN: Bureau of what?

4 MS. BURKET: Ceep, C-e-e-p.

5 JUDGE SMOLEN: And what does it stand for?

6 MR. PROWELL: Conservation, Economics, and Energy
7 Planning.

8 JUDGE SMOLEN: Next.

9 MS. KHANWALKAR: This is Tinku Khanwalkar of PP&L.

10 JUDGE SMOLEN: That, you'll have to spell for the
11 reporter, and I may say at this particular time, I received
12 a Fax -- by Fax, a petition to intervene filed by
13 Pennsylvania Power and Light Company by Miss Khanwalkar.
14 Now, spell your name, please.

15 MS. KHANWALKAR: That's spelled K-h-a-n-w-a-l-k-a-r.
16 And with me is Dave Dulick, who is not an attorney of record
17 in this proceeding, but is here with me.

18 JUDGE SMOLEN: Now, I know Mr. Sugarman has not
19 received your petition for leave to intervene.

20 MS. KHANWALKAR: I Fax'd his office, but I told him
21 he is not -- he would not have received this.

22 JUDGE SMOLEN: I might say that there was just handed
23 to me a facsimile transmission from Attorney McCloskey
24 containing a -- it's a prehearing memorandum from the OCA.
25 All right. I now have that. All right, who's next? Anyone

1 else?

2 MR. SMITH: Ward Smith.

3 JUDGE SMOLEN: What is it?

4 MR. SMITH: Pardon me.

5 JUDGE SMOLEN: Would you please repeat your name for
6 the reporter.

7 MR. SMITH: Ward Smith, W-a-r-d. Representing
8 Philadelphia Electric Company. Also with me is Tom Watson,
9 representing Philadelphia Electric Company.

10 MR. RONNEY: Your Honor, we also have here in
11 Philadelphia -- Philadelphia Electronic Company, Cathy
12 Dodd.

13 MR. SUGARMAN: Is everybody participating in this
14 call by telephone?

15 JUDGE SMOLEN: Everybody by phone.

16 MR. SUGARMAN: All right. Now, as I say, I've
17 received a prehearing memorandum from Mr. -- from PECO and
18 from OCA --

19 MR. SUGARMAN: I'm -- Your Honor, I -- this is Bob
20 Sugarman. I had asked my office yesterday to file with Your
21 Honor a request for continuance of this prehearing based on
22 the fact that it was scheduled after I got down here and
23 there was no way I could begin to put together a prehearing
24 memorandum for it or even to review the prehearing
25 memorandum which I understood sometime late yesterday PECO

1 wanted to file. So --

2 JUDGE SMOLEN: Yes, I received that telephone call
3 from your office and I said since everyone -- let's have
4 this preliminary prehearing conference, let's just see where
5 the parties are and that if necessary, we could have another
6 prehearing conference and of course no one would be
7 prejudiced by this telephone prehearing and everyone will
8 have an opportunity to say and to file whatever they want to
9 file.

10 MR. SUGARMAN: Very good. I had not received that
11 information back because I've been in nonstop depositions.

12 JUDGE SMOLEN: Mr. Bonney, do you want to take the
13 ball at this particular point since really the prehearing
14 was called at your instance, initially?

15 MR. RONNEY: Sure. Just to make it clear, Your
16 Honor, that I think it's -- all the parties agreed that a
17 prehearing conference was in order.

18 JUDGE SMOLEN: Right.

19 MR. BONNEY: But as you noted, I have filed today
20 copies of a prehearing conference memo and served copies on
21 Your Honor and all parties by hand delivery or telecopy and
22 mailed copies as well.

23 And the -- in the prehearing conference memorandum,
24 we request that you issue an order on several points,
25 specifically regarding the issues in scope of the hearing,

1 burden of proof, and scheduling that is the submission of
2 testimony and the scheduling of this hearing.

3 JUDGE SMOLEN: Let me interrupt. In connection with
4 the later -- the hearing scheduling, many of the dates which
5 you have proposed are taken on my calendar by other
6 hearings.

7 I know you didn't know what my calendar was, but just
8 so that's clear that --

9 MR. BONNEY: Yes, sir. I didn't feel comfortable in
10 getting that in advance either.

11 JUDGE SMOLEN: That's okay. I'm sorry for
12 interrupting you. Continue. I know you've discussed burden
13 of proof and the scheduling, and again, I haven't had a
14 chance to study this. I had a hearing this morning.

15 So please continue with what you were stating.

16 MR. BONNEY: I could run through the points that I
17 raised. John, if people have not had an opportunity to
18 review it, then it may not make sense to do that until they
19 have had such a chance. Because I imagine people will just
20 say they don't want to respond yet until they've had a
21 chance to review it, but I could run through the --

22 JUDGE SMOLEN: Why don't you touch on your issues and
23 the burden of proof. The list of witnesses and proposed
24 schedule we can pass at this particular point.

25 MR. BONNEY: Okay. As far as the issues to point out

1 in the memorandum that it's clear from the Commonwealth
2 Court's order as well as the Commission's subsequent order
3 scheduling this hearing that the sole question in this
4 hearing is whether the petitioners will be adversely
5 affected by the transmission line.

6 In our view, that's a threshold question in essence
7 as to whether the petitioner has standing in that regard.
8 The determination of whether they're adversely affected does
9 not involve questions about the need for or propriety of the
10 location or design of the line.

11 JUDGE SMOLEN: And you set that forth in your memo?

12 MR. BONNEY: Yes.

13 JUDGE SMOLEN: Okay. Go ahead.

14 MR. BONNEY: Also to point out on the memo that under
15 the Commission's tape order, the petitioners are precluding
16 evidence regarding property values. Those issues are
17 outside the jurisdiction of the Commission. The Commission
18 does not have the authority to address them.

19 That's an order from you clarifying the scope of the
20 proceeding. We do point out that our view that questions
21 regarding EMS Associates with the line are properly within
22 the scope of these hearings.

23 JUDGE SMOLEN: All right. Miss McCloskey, I haven't
24 had a chance to look over your prehearing memorandum. Do
25 you want to briefly summarize it?

1 MS. MCCLOSKEY: Yes, Your Honor. Briefly, we address
2 as well, the issues that we see being presented in this
3 proceeding. And of course, the major issue being considered
4 would be the -- whether or not the petitioners are adversely
5 affected by the trans -- proposed transmission line.

6 We've also raised as an issue the engineering design
7 of the transmission line since design in direct response to
8 Commissioner Rhodes' public statement on this subject in
9 this proceeding looking at the design aspects and the
10 possibility of mitigating the effects of the EMS both within
11 and beyond the right-of-way by the use of the engineering
12 design -- the OCA would also like to state that additional
13 use may arrive as discovery, and the testimony swept and the
14 question of the adverse effect of the petitioners is being
15 examined in this proceeding and we would reserve the right
16 to address those issues if presented in the proceeding.

17 We have also briefly addressed in our prehearing
18 memorandum the idea of burden of proof and the possibilities
19 for scheduling and we've also raised a discovery issue as to
20 the timing of discovery and a possible modification to the
21 Commission discovery rules depending on the expedited nature
22 of this schedule in this proceeding.

23 JUDGE SMOLEN: Do you want to go into that discovery
24 situation?

25 MS. MCCLOSKEY: Sure. Under the Commission's Rules

1 of Practice and Procedure, specifically 52 PA Code, Section
2 5.32-D, the time for answering interrogatories is set at 20
3 days, since this is a nonrate case proceeding.

4 And if an expedited schedule is established, it seems
5 as if the 20 days may impede the preparation of any type of
6 written testimony and we would request an order from the ALJ
7 reducing the time for serving answers to interrogatories
8 from 20 days to 108 days, if an expedited schedule is
9 adopted; and that would also mean any change in the time for
10 filing objections to interrogatories which we would propose
11 written objections to be served within 35 days instead of
12 the 10 days now provided in the rule and that all objections
13 be communicated orally to the party serving the
14 interrogatory within three days.

15 JUDGE SMOLEN: And is that all set forth in your
16 memorandum?

17 MS. MCCLOSKEY: Yes, it is, Your Honor.

18 JUDGE SMOLEN: What about the issue of the burden of
19 proof? I'm just glancing through these pages. Do you want
20 to address that?

21 MS. MCCLOSKEY: Yes, Your Honor. The OCA position
22 that the burden of proof and the burden of going forward in
23 this proceeding --

24 JUDGE SMOLEN: Let me interrupt you -- finish your
25 sentence, I'm sorry?

1 MS. MCCLOSKEY: -- remains with the company.

2 JUDGE SMOLEN: Burden of proving what?

3 MS. MCCLOSKEY: The -- the burden I think -- let me
4 turn to my memo briefly here, or back up briefly. The
5 Commission order and the Commonwealth Court order specified
6 that this is a re-opening of the proceeding, of the letter
7 of notification proceeding in PECO -- in which the
8 petitioners have not yet been afforded their opportunity to
9 be heard.

10 It's the OCA's position that this is the hearing that
11 would have occurred under the letter of notification
12 proceeding, had the petitioner been given that opportunity
13 at that time.

14 We would argue that --

15 JUDGE SMOLEN: Let me interrupt.

16 MS. MCCLOSKEY: Sure.

17 JUDGE SMOLEN: Assume that there was an original
18 hearing ordered in this, what would the company -- that is
19 PECO's burden be?

20 MS. MCCLOSKEY: Okay. As to PECO's burden under an
21 original hearing which would be to meet the requirements
22 that are set forth in the Commission's regulations and among
23 those requirements would be as to the health and safety of
24 the line as well as the technical aspect such as the
25 transmission line design in which it is proposing.

1 JUDGE SMOLEN: Does -- go ahead.

2 MS. MCCLOSKEY: And we would submit that the company
3 has the burden of proof in this proceeding as to its
4 consideration of the health and safety of the public when it
5 undertook to construct this line and the actions it took and
6 the considerations that it was given in meeting that health
7 and safety requirement in the regulation.

8 JUDGE SMOLEN: Does your position -- all right. Go
9 ahead. Continue.

10 MS. MCCLOSKEY: Consistent with that, it would have
11 the burden of proof then demonstrating that the line is safe
12 and can provide adequate and reliable service.

13 JUDGE SMOLEN: Does your position -- that is OCA's
14 position, in your view, fly in the face of the Commonwealth
15 Court's remand order or the Commission's orders scheduling
16 the hearings in this proceeding?

17 MS. MCCLOSKEY: No, Your Honor. We don't believe
18 that it does. We do believe that only information that can
19 be provided by the petitioners can establish the type of
20 adverse affect that the petitioners see this line having on
21 their health and on their property.

22 But as related to that, the overriding concern in the
23 regulations as to the safety of the line.

24 JUDGE SMOLEN: I'm not sure I understand that
25 answer. You're saying petitioners -- let me ask you what

1 you are saying. What would be the petitioner's burden, if
2 any?

3 MS. MCCLOSKEY: The petitioners, Your Honor, would
4 have the burden of -- of proving their particular
5 circumstances as to their adverse effects.

6 JUDGE SMOLEN: As opposed to the --

7 MS. MCCLOSKEY: As opposed to --

8 JUDGE SMOLEN: -- Utility's burden of what?

9 MS. MCCLOSKEY: As to the Utility's burden of proving
10 and demonstrating that it is complied with the Commission's
11 regulations and it has met the requirement set forth in the
12 Commission's regulations.

13 MR. BONNEY: Your Honor, may I respond?

14 JUDGE SMOLEN: And who is this?

15 MR. BONNEY: Paul Bonney.

16 JUDGE SMOLEN: Yes. Go ahead.

17 MR. BONNEY: Several points. First, it's clear from
18 the Commonwealth Court, Judge Paladino's order and the
19 subsequent Commission's orders that this case is not about
20 whether we have met the requirements of the PUC's
21 regulations.

22 In other words, contrary to what Miss McCloskey was
23 saying, this is not the hearing that the petitioners would
24 have had if they had challenged the Company's filing in the
25 first instance.

1 The Commission, in particular, makes clear in four
2 places and in the most recent decision that this hearing is
3 limited to the sole question of whether petitioners will be
4 adversely affected.

5 There's no mention of whether PECO has to prove
6 that. It's method of requirements of the PUC regulation as
7 I pointed out in the prehearing conference memorandum, the
8 petitioners asked for the hearing and if that request had
9 been granted, it would be incumbent for them to come forward
10 and prove their case and consequently they have the burden
11 of both coming forward and the burden of proof in the --
12 wherever the practical matter -- it's difficult to imagine
13 how you can expect the company or other parties to prove all
14 the ways in which the petitioners will not be affected.

15 In other words, to prove the negative without having
16 their testimony about how they believe they are adversely
17 affected.

18 We don't know where to start -- to put on a witness
19 who said they are not adversely affected and go from there.
20 Finally, in our view, the petitioners are the proponents of
21 a rule or order that will be adversely affected by the
22 reconducting of the lines.

23 And the result of that, they have the burden of proof
24 under the express provisions of Section 3, 32-A of the --

25 JUDGE SMOLEN: Have you concluded?

1 MR. BONNEY: I'd just like to say and reiterate that
2 nowhere in the Commission's decision do they say that the
3 health and safety affect of the line or the line design were
4 to be a subject of this proceeding, or that considerations
5 other than the effect on the petitioners, themselves, was to
6 be considered.

7 In our view, it's -- if the petitioners do -- if it
8 is determined at the conclusion of this proceeding that the
9 petitioner do -- or will be adversely affected, and some of
10 the issues that Miss McCoiskey touched on and addressed in a
11 subsequent proceeding --

12 JUDGE SMOLEN: Miss Burket, does the Commission --
13 the Law Bureau have any position?

14 MS. BURKET: Yes, it's the prosecutory staff's
15 position that the petitioners do have the burden of proof in
16 this case. The remand order from Judge Paladino clearly
17 said that there should be a hearing held so that they would
18 have a chance to show how they would be adversely affected
19 by the recent change of this line.

20 The Commission order also made that clear. The order
21 in paragraph -- said that the record would be -- hereby
22 reopened for a hearing in determination of the sole issue of
23 whether the petitioners would be adversely affected by the
24 reconducting of this line.

25 It's clear to me from these two orders that the

1 burden of proof is on the petitioner and that there's only
2 one issue to be decided here. If I could address this
3 discovery issue.

4 JUDGE SMOLEN: Let me interrupt you before you go
5 into discovery. Do you intend submitting a memorandum on
6 the points which you have just made?

7 MS. BURKET: I hadn't intended to, Your Honor, but if
8 you would like me to, I will.

9 JUDGE SMOLEN: Yes, I would appreciate everyone
10 receiving one from you. All right. Now, you said something
11 about discovery.

12 MS. BURKET: Yes, on the point about discovery, I
13 agree with OCA that it is to be an expedited hearing.
14 Something has to be done to tighten up the time period
15 between interrogatory answer period and objections and I
16 find Miss McCloskey's suggestion to be well worth taken.

17 JUDGE SMOLEN: Mr. Sugarman, are you there?

18 MR. SUGARMAN: Yes, I am.

19 JUDGE SMOLEN: Do you have -- let's address
20 discovery. Do you have any problem with tightening up the
21 discovery schedule?

22 MR. SUGARMAN: No, but I have outstanding discovery
23 that's long overdue from the Commission itself and I'm
24 wondering if that could be subjected to even more
25 expedition.

1 JUDGE SMOLEN: Well, let's hear what Miss Burket
2 says.

3 MS. BURKET: I haven't -- Mr. Sugarman submitted
4 interrogatories to the Commission on this -- on this case
5 before the prosecutory staff entered its appearance in this
6 matter. And at the time, it wasn't appropriate to serve
7 interrogatories on the Commission's staff.

8 JUDGE SMOLEN: You don't want anyone to serve it
9 again, do you?

10 MS. BURKET: Pardon? That's not necessary. I can
11 take it as of this time period that he would like that
12 discovery.

13 MR. SUGARMAN: I don't think that's fair. It's been
14 outstanding for six weeks and it's not a complex discovery.

15 MS. BURKET: It's burdensome discovery though, Mr.
16 Sugarman.

17 PRESIDING OFFICER: Have objections -- wait a minute
18 now, let's not argue.

19 MS. BURKET: We can't talk merely about the
20 individual interrogatories.

21 JUDGE SMOLEN: Have objections -- I assume no
22 objections have been filed.

23 MS. BURKET: I will be filing an answer to the
24 interrogatories -- let's see what my schedule is -- by the
25 end of next week. And if there's any objections to be

1 lodged, I will call you at your office in Philadelphia on
2 Monday?

3 JUDGE SMOLEN: Are you talking to Mr. Sugarman?

4 MS. BURKET: Yes.

5 MR. SUGARMAN: Well, I feel that that's -- that
6 that's tidy, but --

7 MS. BURKET: But that may be, but as I explained to
8 you, we did not enter this proceeding.

9 MR. SUGARMAN: I don't need -- you were involved in
10 it because you -- you were in opposition to the Commonwealth
11 Court's decision and you entered your appearance at that
12 time --

13 PRESIDING OFFICER: Wait. We don't have to argue
14 here. You folks --

15 MR. SUGARMAN: That's a relatively minor thing. I
16 would be glad to cooperate in an expedited discovery
17 proceeding, Your Honor.

18 PRESIDING OFFICER: That's fine then. I will leave
19 it up to Counsel to communicate with -- between and among
20 each other to expedite discovery and in -- I will enter some
21 kind of an order reflecting an expedited discovery
22 procedure.

23 MR. SUGARMAN: The only thing I would request -- this
24 is Bob Sugarman, again. In that regard, I have this long
25 scheduled discovery program that is going to consume four

1 days -- four out of the five business days next week and
2 kept me out of town and I'll respond as promptly as I can,
3 but I just wanted to tell Your Honor, whatever is on the
4 schedule -- I know Your Honor has discussion and I'll try to
5 set up a substitute person in my office to -- to respond to
6 discovery as necessary; but it will be -- it will be
7 difficult for me for the next week or so.

8 JUDGE SMOLEN: You --

9 MR. SUGARMAN: I'll do the best I can.

10 JUDGE SMOLEN: Do you want to also file a
11 memorandum?

12 MR. SUGARMAN: Yes, I do want to file a memorandum.

13 JUDGE SMOLEN: I mean in connection with the issues
14 which were raised today over the phone?

15 MR. SUGARMAN: Yes, I do. And I'm -- if you like, I
16 could -- I could tell you what my position is on those
17 issues.

18 JUDGE SMOLEN: You should. Go ahead.

19 MR. SUGARMAN: The best I can, not having the
20 material in front of me.

21 MR. BONNEY: If I might interrupt a moment -- this is
22 Paul Bonney. I'm just curious when you would expect that
23 memorandum to be filed.

24 MR. SUGARMAN: I don't know. That's another
25 question --

1 JUDGE SMOLEN: We'll set a time for that.

2 MR. BONNEY: I think it's critical because as you see
3 from my schedule request, the first date for the submission
4 of testimony is about two weeks from today.

5 MR. SUGARMAN: I haven't seen your scheduling request
6 and moreover I didn't know until -- if you are requesting
7 something, I don't think you're entitled to. Is that all --
8 if you are requesting that testimony be ordered to be in
9 writing, I don't -- I don't expect to be able to do that and
10 I do not expect to -- to want to do that.

11 And I hope you're not asking that that be ordered to
12 be done because there's nothing in the rules that allows
13 that.

14 MR. BONNEY: If I may address that point, Your Honor.

15 JUDGE SMOLEN: Go ahead.

16 MR. BONNEY: This is the point raised -- this is Paul
17 Bonney. I believe Mr. Sugarman is mistaken. The PUC
18 regulations in fact --

19 MR. SUGARMAN: Encourage.

20 MR. BONNEY: -- encourage --

21 MR. SUGARMAN: They don't allow it to be ordered.

22 MR. BONNEY: -- expert testimony and obviously the
23 Administrative Law Judge has the authority to order that the
24 file --

25 MR. SUGARMAN: You say it's obvious. Can you point

1 to a single incidence where that's ever been done in the
2 history of the PUC?

3 JUDGE SMOLEN: You're going to have an opportunity to
4 submit a memorandum. Mr. Bonney, apparently, is making that
5 request and you're opposing that request.

6 MR. SUGARMAN: Since I don't have his memorandum, I
7 would like to know has such a request ever been -- such an
8 order ever been entered by the Pennsylvania Utility
9 Commission ordering that all testimony must be submitted in
10 writing?

11 MR. BONNEY: I'm not sure to whom -- if you're
12 directing that question to me or Judge Smolen.

13 JUDGE SMOLEN: Clearly Judge Smolen does not know
14 whether the Commission ever did that.

15 MR. SUGARMAN: Right.

16 JUDGE SMOLEN: I don't think anybody knows whether
17 the Commission ever did that. However, you will have an
18 opportunity to file your memorandum opposing Mr. Bonney's
19 request.

20 MR. SUGARMAN: Yeah.

21 JUDGE SMOLEN: Whether the Commission ever did it in
22 the past is really not material now. Because if the ALJ or
23 the Commission has the authority to do so under the rules,
24 you people can argue about it in your memorandum.

25 MR. SUGARMAN: Your Honor, I just want to make sure I

1 heard you. You didn't say you think the Commission has the
2 authority. You're saying that question can be argued?

3 JUDGE SMOLEN: That question can be argued. Okay.

4 MR. SUGARMAN: I'll address it in my memorandum. I'd
5 like to go on because the issue of filing a memorandum in
6 the future has already been raised with respect to the
7 Commission staff and I presume it will be ready with respect
8 to other people on this call.

9 But I don't want to get sidetracked into a date at
10 this moment because I did want to respond to the position on
11 --

12 JUDGE SMOLEN: All right. Respond to the position.
13 We'll talk about dates later.

14 MR. SUGARMAN: Right. The -- my interpretation of
15 the Commonwealth Court order is very different from both of
16 our -- the company and this staff, both of which opposed the
17 Commission -- the Commonwealth Court's order and both of
18 which did not succeed in persuading the Commonwealth Court.

19 The Commonwealth Court overturned the Commission's
20 order which it had no authority to do. Had the Commission's
21 previous order been satisfactory under the law, the
22 Commonwealth Court had no authority to really overturn the
23 Commission's orders.

24 There is something wrong with the Commission order.
25 What the Commonwealth Court found wrong with the Commission

1 order was that my clients have never been given notice of
2 the Commission's proceedings and, therefore, have never been
3 given an opportunity to be heard.

4 Therefore, the proceeding was defective in that there
5 was inappropriate prosecution of this. Had there been an
6 initial proceeding, if it had been proper -- had my clients
7 been given notice and an opportunity to participate, they
8 could have listened to Pinko's testimony.

9 They -- first of all they could have filed protests
10 based on -- on the issues that concern them which were all
11 of the issues need, impact on the community, and EMF and
12 Pinko would have had notice that those were the issues in
13 the witnesses that they presented and their burden as the
14 applicant could have been cross-examined on those issues.

15 Had Pinko not proved those issues, having had notice
16 of them, the application would have been denied. Had they
17 presented proof on those issues, my clients could have, A,
18 cross examined as I said; B, my clients could have presented
19 rebuttal or responsive testimony and the burden of proof
20 would have been that the applicant had the burden of proof
21 at the end of the day.

22 Now, given that the defect in the original proceeding
23 was that my clients were not notified and did not have an
24 opportunity -- there's no basis in law or otherwise for
25 prejudicing them at this time by virtue of the defect in the

1 proceeding, nor did the Commonwealth Court so indicate.

2 Miss Burket used the word, the Commonwealth Court
3 said that my client should have the opportunity to show that
4 they've been injured. I don't remember that language in the
5 Commonwealth Court opinion whatsoever.

6 I may be mistaken. I don't have it in front of me
7 down here in North Carolina, but my recollection is that the
8 Commonwealth Court's opinion was more towards the direction -
9 that those issues should be addressed.

10 It did not either imply or state that anything would
11 change on the burden of proof from what should have happened
12 in the first place, and therefore, the company -- this
13 proceeding has to go forward and it's my client's petition
14 for rehearing in the PUC with the statements of what they
15 intended to have heard at the time was, in effect, their
16 protest.

17 And, therefore, we have hearings just as if there had
18 been a letter notice to my clients and a protest and we go
19 forward from there. Otherwise my clients are prejudiced by
20 virtue of the defect, which was not their problem in the
21 first place.

22 That's my position on that, on the burden of proof,
23 and I think it's implicit in that as to the issues. The
24 Commonwealth Court did not -- it's true the Commonwealth
25 Court referred to the fact that my client's concerns need to

1 be addressed; but the Commonwealth Court did not say that
2 that's all that should be done.

3 The Commonwealth Court said that the initial
4 proceedings were defective. The obvious implication of that
5 is that the -- we should go back to where we left to the --
6 where the defect occurred and start from there and have the
7 proceeding the way we would normally have a proceeding.

8 There's been no -- to me that's the only logical
9 interpretation of what the Commonwealth Court said.

10 MR. BONNEY: Your Honor, this is Paul Bonney. May I
11 respond?

12 JUDGE SMOLEN: Yes.

13 MR. BONNEY: I would just like to point out that -- I
14 think I understand Mr. Sugarman's position, but
15 unfortunately the -- nowhere in the Commonwealth Court's
16 order does it say that you go back to square one at these --

17 MR. SUGARMAN: I didn't say square one. I said go
18 back to where the defect occurred.

19 MR. BONNEY: Unfortunately, for him it doesn't say
20 that. It says the petitioners can have the hearing on
21 whether they're adversely affected and the Commission's
22 subsequent order makes it even clearer that that is the sole
23 question to be addressed. Not questions of need or impact
24 on the community, et cetera.

25 MR. SUGARMAN: But you do agree with me on the burden

1 of proof then?

2 MR. BONNEY: No, of course not. I stated my position
3 earlier with respect to whether they're prejudiced or not to
4 present evidence. We've indicated on those other issues --
5 we've indicated earlier that if they are successful in
6 proving in this proceeding that they will be adversely
7 affected by the line, then they can move onto those other
8 issues.

9 So in our view, they are not prejudiced. They're
10 only prejudiced -- they won't be prejudiced -- there's no
11 need to address those issues unless we first resolve the
12 threshold question of whether they will be adversely
13 affected.

14 Then they have no standing to argue that there's no
15 need for the line, or there's an adverse impact on the
16 community or any other issues that might have been addressed
17 at an initial proceeding on the letters of notification.

18 JUDGE SMOLEN: Miss Khanwalkar is on part of this
19 conference call. Now, on behalf of PP & L, which filed a
20 petition for leave to intervene, does any -- do any of the
21 parties have any objection to this petition to intervene?

22 MR. SUGARMAN: Your Honor, this is Bob Sugarman. I
23 do.

24 JUDGE SMOLEN: All right, you do. All right. So
25 you'll have an opportunity to file whatever document or

1 whatever pleading you want to file in opposition to that.

2 MR. SUGARMAN: Okay. Thank you.

3 PRESIDING OFFICER: Therefore PP & L, although a
4 party to the prehearing conference, is not yet a party to
5 the case and you're able to hear what's going on, but I will
6 not afford you an opportunity to participate at the
7 prehearing conference unless and until your petition for
8 leave to intervene is granted.

9 MS. KHANWALKAR: Your Honor, may I ask Mr. Sugarman
10 what his basis is for the objection?

11 MR. SUGARMAN: Who is that speaking?

12 MS. KHANWALKAR: This is Tinku Khanwalkar for PP & L.

13 MR. SUGARMAN: I didn't see your petition. I was
14 going to add that it's conceivable that when I see your
15 petition I'll change my position, but I haven't seen your
16 petition, so I don't know what you think your standing is.

17 And standing is an issue that has been, as you could
18 hear in the last 20 minutes or half hour repeatedly, raised
19 in this proceeding and I don't -- I'll read your petition.
20 I'll consider the question and if I change my position, I
21 will certainly let everybody know.

22 MS. KHANWALKAR: Well, Mr. Sugarman, I can tell you
23 right now in about three sentences what our petition said.
24 It's very brief. There's nothing much to it. Basically,
25 our position is that the proceeding may raise issues that

1 could adversely impact PP & L and, therefore, if you wish to
2 be a part of this proceeding in case that should happen --

3 MR. SUGARMAN: I don't know that that satisfies the
4 burden of standing that my clients have held and other
5 people have in the past. In fact, I would say that if I had
6 set that as a standing, I wouldn't have gotten anywhere.

7 JUDGE SMOLEN: Well, you'll have an opportunity to
8 respond in any way you deem fit and advisable on behalf of
9 your clients that is addressed to Mr. Sugarman.

10 MR. SUGARMAN: Thank you, Your Honor.

11 MS. KHANWALKAR: Your Honor, I would like to reserve
12 a right to respond to Mr. Sugarman's motion to --

13 JUDGE SMOLEN: Go ahead. Finish your sentence.

14 MS. KHANWALKAR: I am requesting the right to reserve
15 -- requesting to reserve the right to respond to Mr.
16 Sugarman's motion.

17 JUDGE SMOLEN: I'm not sure that you need that
18 authority from me. You have a petition for leave to
19 intervene and an answer will be filed, or an answer won't be
20 filed. And whatever the rules and regulations permit with
21 respect to further pleadings on that point, you're entitled
22 to.

23 But I'm not going to vary the rulings and regulations
24 of the Commission.

25 MS. KHANWALKAR: That's fine, Your Honor.

1 JUDGE SMOLEN: All right. Now, let's go back now to
2 the date for filing of these prehearing memoranda. I think
3 we're going -- we're supposed to get one from the Law Bureau
4 and from Mr. Sugarman.

5 MS. KHANWALKAR: Yes.

6 JUDGE SMOLEN: How about the end of next week, or is
7 that too long a period of time?

8 MR. SUGARMAN: I could make it the end of next week,
9 Your Honor.

10 MS. KHANWALKAR: The end of next week would be fine,
11 Your Honor.

12 JUDGE SMOLEN: Any comments, Mr. Bonney?

13 MR. BONNEY: Yes, Your Honor. Just to point out
14 again that we have suggested that pretrial testimony be
15 filed by the petitioner's expert testimony. This is not the
16 testimony by the residence -- I want to make that clear, but
17 to be filed this month and I take it that you're not going
18 to rule on some of these preliminary questions which ruling
19 is necessary for determination of the schedule until after
20 you received and have some opportunity to review the
21 memoranda there that are going to be filed by Mr. Sugarman
22 and the Commission and possibly a response by the company
23 and the Offices of Consumer Advocate.

24 JUDGE SMOLEN: Well, I can't rule on anything that I
25 don't have in my hands.

1 MR. BONNEY: Right. I just want to point out, Your
2 Honor, that timing of the memorandum -- that first of all
3 it's common practice to submit to prehearing conference
4 memoranda at the prehearing conference.

5 MR. SUGARMAN: Then you shouldn't have scheduled
6 this --

7 JUDGE SMOLEN: We understand that the short notice is
8 extenuating circumstances here. This was on the schedule
9 the day before yesterday.

10 MR. SUGARMAN: Right.

11 MR. BONNEY: Correct, Your Honor, and we have worked
12 long hours to --

13 MR. SUGARMAN: You didn't pick last week when you
14 were on vacation. You picked this week when --

15 JUDGE SMOLEN: We don't have to spar with words here.

16 MR. BONNEY: I was not on vacation.

17 MR. SUGARMAN: Wherever you were. You picked a time
18 deliberately when you knew I was out of state. I told you
19 last week I was going to be out of state all week.

20 MR. BONNEY: Your Honor, I take exception to his
21 remark.

22 JUDGE SMOLEN: We're just sparring with words here
23 which are meaningless to the merits of the case either
24 procedurally or substantively, so let's go ahead.

25 MR. BONNEY: Secondly, I would just like to point out

1 that the petitioners have requested an expedited hearing.

2 MR. SUGARMAN: I'm not petitioners at this point and
3 I would like to clarify the terminology as to what our
4 status is with protestants.

5 MR. BONNEY: Mr. Sugarman has requested an expedited
6 hearing and in fact a filing made with the Commission
7 immediately following Judge Paladino's order he requested
8 within 30 days.

9 MR. SUGARMAN: That's correct. Did you not request
10 that you set up a prehearing conference when I would be out
11 of town?

12 MR. BONNEY: Your Honor, I would like to be able to
13 finish my point.

14 JUDGE SMOLEN: Let him finish, and Mr. Sugarman,
15 you'll be able to respond.

16 MR. BONNEY: I'd also like to say that as far as the
17 questions of burden of proof and scope of the proceedings, I
18 worded Mr. Sugarman when I talked with him to raise those
19 questions at the prehearing conference and in fact those
20 very issues that we're discussing today are one of the major
21 issues we needed the prehearing conference in the first
22 place.

23 So I don't see where he has room to complain that he
24 has not had time to prepare for this or address these
25 questions seeing as how he's the one who wants to have an

1 expedited hearing and seeing as how he knew these issues.

2 MR. SUGARMAN: Your Honor, I'll file -- I agree I
3 want a hearing as quickly as possible and I don't know --
4 Mr. Bonney did not tell me last week that he was going to
5 propose the idea.

6 JUDGE SMOLEN: When do you want to file your present
7 hearing?

8 MR. SUGARMAN: That's the first I ever heard of that
9 concept, but -- and -- but I will file a prehearing
10 memorandum by Monday, if the Trial Staff would like me to do
11 so.

12 JUDGE SMOLEN: Monday of this week.

13 MR. SUGARMAN: I would say Monday. By Monday in
14 other words, it may be after hours, but --

15 JUDGE SMOLEN: Let's say have it in my hands by
16 Tuesday morning.

17 MR. SUGARMAN: Yeah.

18 JUDGE SMOLEN: Wait a minute. I was just going to
19 ask Miss Burket --

20 MS. BURKET: Excuse me?

21 JUDGE SMOLEN: Excuse me.

22 MS. BURKET: It was semantics here.

23 MR. SUGARMAN: I'm I'm glad to have that
24 communication.

25 MS. BURKET: But I can surely get a prehearing

1 conference into your hands, Your Honor, by Tuesday morning,
2 if that's what you would like.

3 JUDGE SMOLEN: Then it's settled. What's Tuesday's
4 date? I don't have a calendar.

5 MR. BONNEY: July 16th.

6 JUDGE SMOLEN: All right. July 16th is directed to
7 be the date for the filing of prehearing memoranda by the
8 PUC Prosecutory Staff and by Mr. Sugarman, and you'll
9 address all the issues that you want to address in them,
10 including a proposed schedule.

11 MR. SUGARMAN: Yes, and on a schedule issue that I
12 would hope we would have the hearings as quickly as possible
13 and the one way to have them as quickly as possible is not
14 to stop for the preparation of written testimony. That will
15 slow things down.

16 JUDGE SMOLEN: You --

17 MR. SUGARMAN: I'll address that in my memoranda.

18 JUDGE SMOLEN: Is there anything else that we have
19 to --

20 MS. MCCLOSKEY: Your Honor, this is Miss McCloskey
21 from the OCA. A point that might help to clarify some of
22 this, OCA has also requested the opportunity to file written
23 testimony of the expert witnesses who will be addressing
24 matters of a biological and engineering nature.

25 And I would just suggest to the parties, there may be

1 a way to somewhat separate those people which I believe Mr.
2 Bonney referred to as the resident petitioners and those
3 witnesses who will be addressing biological or technical
4 engineering matters versus the written testimony and those
5 that would be presenting their testimony orally.

6 JUDGE SMOLEN: Do you have a suggestion on that?

7 MR. SUGARMAN: If I may -- this is Bob Sugarman. If
8 I may, it's those people that I was addressing. I didn't
9 understand that anybody was proposing that the residents be
10 required to submit written testimony that would be even more
11 novel.

12 But as to the experts, those are the ones I was
13 talking about when I said -- if I'm going to go first. Now,
14 if somebody else is going to go first, as I believe is going
15 to happen, it's no problem that I could do written
16 submissions.

17 But if to go first and I don't know depending on how
18 his Honor rules on that, then it would slow things up if I
19 -- I'm only thing thinking of how much time I need to do
20 that because I have no intention of doing it in writing, but
21 rather to expert -- orally, which is what I've always done.

22 JUDGE SMOLRN: Any --

23 MR. SUGARMAN: It's experts we're talking about.

24 MS. MCCLOSKEY: But the OCA has made the request to
25 submit their expert testimony in written form.

1 MR. SUGARMAN: I don't have any objection to anybody
2 doing it that way.

3 JUDGE SMOLEN: All right.

4 MR. BONNEY: Your Honor, this is Paul Bonney. I just
5 note of the written expert testimony that it is decided that
6 written expert testimony is not required, you're going to
7 request extensive time to conduct discovery including
8 depositions to be able to prepare ourselves for cross
9 examination, or in the alternative as for a separation of
10 the day of the direct oral testimony and the cross
11 examination on that testimony and also note with respect to
12 discovery that we have outstanding discovery for the Office
13 of Consumer Advocate and the protestants that answers and
14 responses are due on Monday the 15th.

15 JUDGE SMOLEN: And we have --

16 MR. BONNEY: On Wednesday --

17 JUDGE SMOLEN: Let me interject here. Mr. Bonney,
18 you're put on notice now that Mr. Sugarman does not intend
19 to submit written testimony of his experts, therefore, I do
20 not believe you should delay if you have discovery or you
21 want to take the depositions -- do it yesterday. Don't
22 delay waiting for a ruling from me.

23 MR. BONNEY: Your Honor --

24 JUDGE SMOLEN: He's expressed his opinion.

25 MR. BONNEY: And he has not done so yet.

1 MR. SUGARMAN: It's not done yet. We can't take a
2 deposition until we know whom your witnesses are.

3 JUDGE SMOLEN: It is in your prehearing memo, is it
4 not, Mr. Sugarman?

5 MR. SUGARMAN: What the names of the experts --

6 MR. BONNEY: Your Honor, I'd ask -- have the other
7 parties provided names of experts in their memoranda?

8 JUDGE SMOLEN: Mr. Sugarman?

9 MR. BONNEY: No, we have not yet retained experts
10 until our prehearing memoranda -- we do note now who we
11 should call because he does know what allegations the
12 protestants will make with respect to how they will be
13 adversely affected.

14 MR. SUGARMAN: That is one of the most incredible
15 things I ever heard. Look at the briefs you filed in the
16 Commonwealth Court with our allegations. You must have
17 known then.

18 JUDGE SMOLEN: Well, we're not -- we don't really
19 have an argument here today. We're -- this is a prehearing
20 conference. Let me get the prehearing memo -- memoranda
21 from OCA -- excuse me, from the prosecutory staff and from
22 Mr. Sugarman.

23 I will then have all the documents in front of me and
24 then I can issue an appropriate order and I'm looking
25 forward to receiving some kind of a response to the petition

1 for leave to intervene from Mr. Sugarman and the other
2 parties if they desire to file.

3 MS. KHANWALKAR: Your Honor, if I may, just to
4 interject --

5 JUDGE SMOLEN: Who is it?

6 MS. KHANWALKAR: That response from Mr. Sugarman to
7 intervene, will that be included in the July 16th memo?

8 MR. SUGARMAN: That would be a separate pleading.

9 MS. KHANWALKAR: This is Tinku Khanwalkar from
10 PP & L. If we delay too long in getting that resolved on an
11 expedited basis, we end up waiting a long time before we
12 have this --

13 MR. SUGARMAN: I'll expedite my response as much as I
14 can.

15 MS. KHANWALKAR: Would you be able to --

16 MR. SUGARMAN: This hits me as a very sudden event,
17 so I may -- I'll do it as quickly as I can and certainly
18 within the time allowed by rules --

19 JUDGE SMOLEN: I might say this to Mr. -- to Miss
20 Khanwalkar, you've had ample opportunities to file a
21 petition to intervene this proceeding a long time ago and
22 this just comes today on the day of the prehearing
23 conference, so we can't put extra pressure on Mr. Sugarman
24 to respond any more than the rules require and he's
25 indicated that he will expedite his answer as much as

1 possible, his response to your petition.

2 MS. KHANWALKAR: That's fine, Your Honor. We are not
3 aware of the conference being held today, that's why we
4 hurried up and got the intervention.

5 JUDGE SMOLEN: But you knew of the August 15 hearing,
6 did you not, from the Commission's order?

7 MS. KHANWALKAR: Yes, we were aware that we had about
8 another month and a half or so, but we were not aware that
9 the prehearing conference was held today.

10 JUDGE SMOLEN: All right. Anything else that we have
11 to discuss today? Let me go through the list. Mr.
12 Sugarman, anything else you have to discuss?

13 MR. SUGARMAN: No, Your Honor. Thank you very much.

14 JUDGE SMOLEN: Mr. Bonney?

15 MR. BONNEY: No, Your Honor.

16 JUDGE SMOLEN: Miss McCloskey?

17 MS. MCCLOSKEY: If I could just have a point of
18 clarification, Your Honor. The prehearing memorandum, are
19 they going to be memorandums of law concerning the burden of
20 proof issue, or in light of a prehearing memorandum? I was
21 a little unclear.

22 JUDGE SMOLEN: I believe it should cover the burden
23 of proof because these others do.

24 MS. MCCLOSKEY: Okay. Thank you, Your Honor.

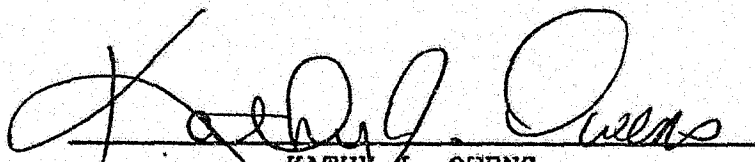
25 JUDGE SMOLEN: Anyone else want to add anything

1 before we conclude the prehearing conference? And I might
2 say, if necessary, I will feel free to call another
3 prehearing conference if I deem it necessary. Anything else
4 to be discussed this morning or this afternoon?

5 Hearing no response, then we're going to adjourn
6 today's prehearing conference and I look forward to
7 receiving the memoranda which are due. Thank you very
8 much.

9 (Whereupon, at 3:00 p.m., the hearing was adjourned.)

10 I hereby certify that the proceedings and evidence
11 are contained fully and accurately in the notes taken by me
12 during the hearing of the within cause, and that this is a
13 true and correct transcript of the same.

14
15
16 
17 KATHY J. OWENS
Court Reporter

18
19 The foregoing certification does not apply to any
20 reproduction of the same by any means unless under the
21 direct control and/or supervision of the certifying
22 reporter.

23 HOLBERT ASSOCIATES
24 KATHY J. OWENS
Suite 203, Cranberry Court
212 North Third Street
Harrisburg, Pennsylvania 17101

25