

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17120

PETITION OF SMALL, ET AL.
FOR STAY PENDING APPEAL

PUBLIC MEETING - MAY 2, 1991
MAY-91-L-715*
DOCKET NO. A-110550F055

STATEMENT OF COMMISSIONER DAVID W. ROLKA

Because the Commission majority voted to deny the Emergency Petition of Non-Noticed Property Owners to re-open the record to hear evidence on the potential safety risks of electromagnetic fields, I dissented. I believe that the Petitioners raised a new or novel issue which was not considered when the Commission initially approved Philadelphia Electric Company's (PECO) Application to construct the transmission line at issue. At that time, however, I was not disposed to granting Petitioners' request to halt construction. I would have preferred that hearings be held to create an evidentiary record sufficient to enable the Commission to evaluate the EMF risk issue.

This proposed Order states that the EMF issue has been raised in prior cases. Therefore, it is argued, the Petitioners failed to meet the new or novel issue standard for reopening the record under Section 703(g) of the Public Utility Code. Bootstrapping this argument, it is stated that the Commission did consider EMF risks when it initially approved PECO's Application. This contention is incorrect. The only pleading before the Commission when it initially approved construction was PECO's Application. PECO's Application and the Commission's February, 1990 Order contained no reference to EMF issues. Even if the Order had, new evidence concerning EMF has come to light since February of 1990 when the Commission initially approved PECO's Application. This new evidence qualifies as "newly discovered evidence unavailable at the initial determination," another standard for reopening the record. Commission consideration of EMF issues in prior cases does not translate into purported consideration of EMF in this case.

The Petitioners are now pursuing their appellate remedies. The appeal will take time. Meanwhile PECO continues construction on the power line. To avoid the potential consequence of an appeal victory on paper only, Petitioners now again urge that construction of the power line be halted. The Commission's denial of a hearing on the merits makes Petitioners' request that more compelling.

I would support a partial grant of the stay, insofar that PECO should be required to seek prior PUC approval before energizing the power line. PECO can exercise its discretion in deciding whether to proceed with construction. In this way,

Petitioners would still have some protection against pursuing a successful appeal and having no underlying recourse. I recognize that the Commission's appellate counsel would have to request the appellate court for the Commission to retain jurisdiction over this issue. Alternatively, if this course of action does not prevail before the Commission, this relief could be pursued before Commonwealth Court.

May 2, 1981
DATED

David W. Rolka
DAVID W. ROLKA, COMMISSIONER

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
HARRISBURG, PA. 17120

Petition of Small, et al.,
for Stay pending Appeal

Public Meeting
May 2, 1991
Docket No. A-110550F.055
MAY-91-L-715*

STATEMENT OF COMMISSIONER JOSEPH RHODES, JR.

I have reviewed the proposed Order that denies petitioners a stay pending appeal and find that I can agree with virtually none of its reasoning. I, therefore, will vote no on this report, and I would grant petitioners a stay of that part of the March 8, 1991 Order that denied them a hearing.

May 2, 1991
Date

J. Rhodes, Jr.
Joseph Rhodes, Jr.
Commissioner



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

May 3, 1991

IN REPLY PLEASE
REFER TO OUR FILE
A-110550F055

Donald Blanken, Assistant General Counsel
Philadelphia Electric Company
2301 Market Street -
P.O. Box 8699
Philadelphia, PA 19101

Petition of Small et al. for Stay Pending Appeal

Dear Sir:

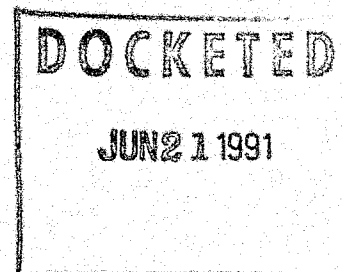
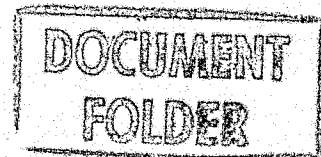
This is to advise you that the Commission at Public Meeting held May 2, 1991 adopted an Order in connection with the above entitled proceeding.

A copy of the Order is enclosed for your records.

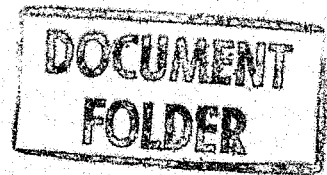
Very truly yours,

Jerry Rich, Secretary

JZ
Encls.
Certified Mail
Receipt Requested
Copy of Order to: See list attached



NYE 7

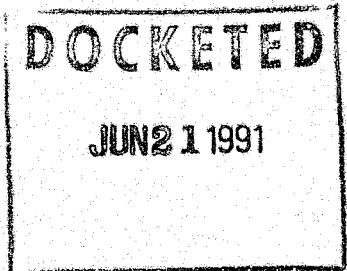


PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120

Public Meeting held May 2, 1991

Commissioners Present:

William H. Smith, Chairman
Joseph Rhodes, Jr., Vice-Chairman, dissenting
Frank Fischl, Commissioner
Wendell F. Holland, Commissioner
David W. Rolka, Commissioner, dissenting



Petition of Small et al.
for Stay Pending Appeal

No. A-110550F055

O R D E R

BY THE COMMISSION:

On February 9, 1990, at Docket No. A-110550F.055, the Commission approved a Letter of Notification filed by Philadelphia Electric Company (PECO) to reconstruct a 138 kV transmission line, previously owned by Conrail, as the Woodbourne-Heaton 230 line in Bucks and Montgomery Counties. On September 14, 1990, Petitioners Small, et al.,^{1/} filed an Emergency Petition of Non-Noticed Property Owners to Intervene for Reopening and to Suspend Approval. On March 8, 1991, the Commission entered an order denying this petition. On April 2, 1991, the Petitioners filed a petition for review of the Commission's March 8 order in Commonwealth Court. On April 8, 1991, the Petitioners filed the instant petition requesting a stay of construction of the PECO 230 kV line pending the Commonwealth Court appeal. On April 15, 1991, PECO filed its reply.

In support of their petition for stay, the Petitioners allege that the Commission denied their petition to reopen the proceeding on PECO's Letter of Notification in a three to two vote although the Petitioners had no prior notice of the original proceedings, and sought reopening to address several issues including "loss of value and health effects, arising from the construction of the line." Petition, p. 1. The Petitioners also allege that in their Emergency Petition, they had "pointed out the changes in the facility [PECO's transmission line] which would have disqualified it from the letter of notification approach." Id. The

^{1/} The Petitioners are members of a Pennsylvania Non-profit corporation, Parents Against An Unsafe Environment (PAUSE).

Petitioners state that in denying their Emergency Petition, the Commission majority gave no reason why temporary suspension of construction would have any significant adverse effect and they further state that no such reason has been presented to the Commission. Id. Petitioners also state that the suspension of construction of the line during consideration of the Petitioners' appeal by the Commonwealth Court will avoid the potential for significant loss to the ratepayers or the shareholders of the utility should the Petitioners ultimately prevail on appeal. Petition, p. 2. The Petitioners assert that they have a substantial chance of prevailing in the Commonwealth Court, as indicated by the dissenting opinions of two Commissioners. Id.

In its reply to the instant petition, PECO states that under the Commission's electric transmission line siting regulations at 52 Pa. Code §§57.71, et al, it sought Commission approval to locate and construct a 230 kV transmission line on an abandoned railroad electric transmission line, using the in-place catenary structures located along the active double-track railroad operated by Consolidated Rail Corporation. PECO explains that since the transmission line was to be constructed almost entirely on the railroad right-of-way, PECO followed the Letter of Notification procedure under Section 57.72(d) of the siting regulations. PECO also explains that Petitioners were not served with a notice of the filing because the transmission line siting regulations at 52 Pa. Code §57.72(c)(4) do not require that they be served with such notice.

In answer to the Petitioners' allegation about no significant adverse effect resulting from temporary suspension of the construction of this line, PECO replies that its Letter of Notification set forth the need for this transmission line and that it specifically reiterates those allegations of need by incorporation. Moreover, PECO asserts that suspension of construction during consideration of Petitioners' appeal to the Commonwealth Court is not necessary to avoid any loss to the ratepayers because the ratepayers are not charged for the cost of constructing a line before it is placed into service.

In conclusion, PECO argues that the Petitioners do not have a substantial chance of prevailing before the Commonwealth Court because there is no merit to the Petitioners' contentions. PECO avers that it followed all appropriate regulations in notifying parties and presenting the facts necessary for the Commission to issue its order approving the location and construction of this line.

DISCUSSION

In Pa. PUC v. Process Gas Consumers Group, 502 Pa. 545, 467 A2d 805 (1983), the Supreme Court of Pennsylvania held that the standards that must be satisfied for a stay to be granted are those set forth in Virginia Petroleum Jobbers Association v. Federal Power Commission, 104 U.S. App. D.C. 106, 259 F.2d 921 (1958), as refined in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Circuit 1977). Under the Virginia Jobbers criteria (as refined) the grant of a stay is warranted if:

1. The petitioner makes a strong showing that he is likely to prevail on the merits;
2. The petitioner has shown that without the requested relief, he will suffer irreparable injury;
3. The issuance of a stay will not harm other interested parties in the proceeding; and
4. The issuance of a stay will not adversely affect the public interest.

All of the above criteria must be satisfied, if a stay is to be granted.

Regarding the initial Virginia Jobber criterion, the reopening of a proceeding under 66 Pa. C.S. §703(g) following a final Commission order is discretionary and the refusal of the Commission to reopen the PECO Letter of Notification proceeding upon the Petitioners' earlier request only may be challenged when it is clear that the Commission has clearly abused its discretion. W.J. Dillner Transfer Co. v. Pa. PUC, 175 Pa. Super. 472, 107 A.2d 164 (1954), app. den. 349 U.S. 903, 75 Ct. 580, 99 L.Ed. 1240 (1955).

[M]ere disagreement with a commission decision is insufficient reason to grant reconsideration; rather, factors such as a change in circumstances or newly discovered evidence unavailable at the initial determination may be relevant in determining whether to grant the petition for reconsideration and the commission may also consider whether the petition addresses new and novel arguments previously overlooked.

Kea v. Peoples Natural Gas Company, 60 Pa. PUC 215, 216 (1985).

In the instant case, PECO correctly followed the letter of notification procedure; adhered to all appropriate regulations in notifying affected parties; and presented the facts necessary for the Commission to make a decision approving the location and construction of this line. In their Emergency Petition, the Petitioners did not present any evidence which was not available at the time of the proceeding on PECO's Letter of

Notification, nor did they present any new or novel arguments^{2/} which would have warranted reopening of this proceeding. Therefore, it is unlikely that they will prevail on appeal.

However, in support of their alleged satisfaction of the first criterion, the Petitioners aver that they have a substantial chance of prevailing in the Commonwealth Court as indicated by the dissenting opinions of two Commissioners. As much as the opinions of dissenting Commissioners who vote in the minority on any order are respected by those Commissioners voting in the majority, we do not believe that the mere reference by the Petitioners to the two dissenting opinions expressed in the instant case constitutes a substantial showing under the Virginia Jobbers criteria that Petitioners will prevail on this matter before the Commonwealth Court.

Continuing with the Virginia Jobber's criteria for granting a stay, the Petitioners do not present any reasons in their petition in support of the second criterion that without the requested relief, they will suffer irreparable harm. Because a petition should be a self-contained document, and the Petitioners are not proceeding pro se, we decline to search through their previous filings for support for this prong of the test.

As to the third and fourth criteria, Petitioners appear to argue that the burden is on the Commission or PECO to show that suspension of the construction of this line would have any significant adverse effect on PECO or the public interest. This argument clearly lacks merit as this burden under Virginia Jobber remains with the Petitioners.

^{2/} The issues which the Petitioners would have raised had their petition for reopening would have been granted--the need for the line, public health and safety aspects of the line, and aesthetics--are issues which the Commission has already considered in their decision approving PECO's Letter of Notification. Order entered March 8, 1991, pp. 10-11. As to the specific issue of electromagnetic fields or EMF, this issue was considered by this Commission previously in Re Pennsylvania Electric Company, 56 Pa. PUC 130 (1982); Application of West Penn Power Company for Authorization to Locate and Construct the Warfordsburg Loop 138 kV Transmission Line, Order entered May 27, 1988 at A-111250F010; and the Application of West Penn Power Co. for a finding that...the construction, operation and maintenance of an electric transmission line...across land of...Galiachatos...is necessary or proper for the service, accommodation, convenience or safety of the public, Order entered October 3, 1990 at A-111250F013.

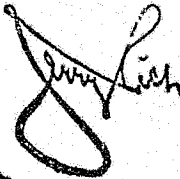
Nonetheless, the Petitioners assert that if the stay of this construction is not granted, PECO ratepayers and stockholders will suffer a financial loss if the Petitioners prevail in Commonwealth Court. This negative, contingent assertion of future harm cannot be extrapolated in any way to provide proof that PECO, or the public interest will not be harmed if the requested stay is granted.

On the other hand, the Commission found public need for the reconstruction of the old Conrail electric line as the Woodbourne-Heaton 230 kV line when it approved PECO's Letter of Notification. It is, therefore, inconceivable that halting construction of this line even temporarily would not adversely affect PECO or the public interest. Because the Petitioners have not satisfied any of the four criteria in the Virginia Jobbers test, we must deny this petition for stay pending appeal;

THEREFORE,

IT IS ORDERED that the Petition of Small, et al., For Stay Pending Appeal is denied.

BY THE COMMISSION,

A handwritten signature in black ink, appearing to read "Jerry Rich", written over a large, stylized, looped flourish.

Jerry Rich
Secretary

(SEAL)

ORDER ADOPTED: May 2, 1991

ORDER ENTERED: MAY 8 1991

B-913347
PKB

ROBERT SMALL, FRANK ENGLISH, :
and DIANE P.S. KOERPER, et al. :
Petitioners :

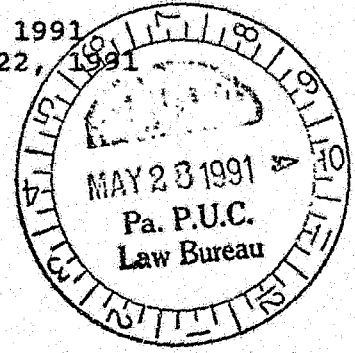
IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

v.

FILE IN A-110550 F55

PENNSYLVANIA PUBLIC UTILITY
COMMISSION,
Respondent,

No. 761 C.D. 1991
Argued: May 22, 1991



HONORABLE MADALINE PALLADINO, Judge

MEMORANDUM OPINION AND ORDER

BEFORE
DOCKETED
AUG 20 1991

AND NOW, this 24th day of May 1991, because counsel for
Petitioner, during argument on his motion, expressly requested a
remand rather than a stay of the construction of the high tension
electrical line in question and, additionally requested a hearing
before the Public Utility Commission (PUC), this court will
consider Petitioner's petition to stay as a petition to remand.

It is clear to the court that the letter notification
process of 52 Pa. Code §57.72(d), under which Philadelphia
Electric Company proceeded before the PUC, did not contemplate the
fact matrix before this court in which an existing right-of-way,
previously utilized for rail service, is put to a new use. The
notice to entities owning property within the proposed right-of-
way provided in 52 Pa. Code §57.72(d) is insufficient, where as
here, it is clear that Petitioners, as neighboring property
owners, will be affected by the new use of the right of way.¹
Notice to municipalities given pursuant to 52 Pa. Code

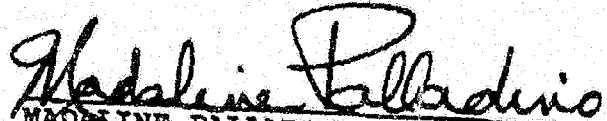
¹This court renders no opinion as to whether the landowners will
be adversely affected by the reconductoring of the high tension
electrical line.

**DOCUMENT
FOLDER**

DOCKE
MAY 29 1991
DER

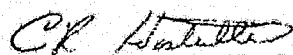
NVL

§57.72(c)(11) does not provide the notice and opportunity to be heard to which Petitioners are entitled. This court concludes that Petitioners are entitled to a hearing on the question of whether they will be adversely affected by the reconductoring of the high tension electrical line at issue in this case. Consequently, this court orders this case remanded to the PUC to hold a hearing on this issue within 90 days from the date of this order.


MADLENE PALLADINO, Judge

CERTIFIED FROM THE RECORD
AND ORDER EXIT

MAY 24 1991


Deputy Prothonotary - Chief Clerk

SUGARMAN & ASSOCIATES

ATTORNEYS AT LAW

16TH FLOOR, CITY PLACE

101 NORTH BROAD STREET

PHILADELPHIA, PENNSYLVANIA 19107

215-751-9733

FAX 215-751-9891

ROBERT J. SUGARMAN

ALAN M. KAPLAN

MARCIA E. BERRY

DAVID A. ROBERTS

LEGAL ASSISTANT

May 30, 1991

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



RECEIVED

JUN 3 1991

SECRETARY'S OFFICE
Public Utility Commission

In re: Letter of Notification
of Philadelphia Electric Company
Under 52 Pa. Code §57.72(d)
Re: Proposed 230 KV Woodbourne
To Heaton Transmission Line

A110580753

Dear Secretary Rich:

Kindly file the enclosed Petition for Hearing and return a date stamped copy for my file. A return envelope is enclosed for your convenience. Thank you.

Sincerely,

Robert J. Sugarman

RJS:er
Enclosures

cc: Donald Blanken, Esq.
Tanya McCloskey, Esq.
Patricia Krise Burket, Esq.
John F. Povilaitis, Esq.
Honorable William H. Smith
Honorable David W. Rolka
Honorable Joseph Rhodes, Jr.
Honorable Wendell F. Holland

pldngs91\peco.001

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

DOCUMENT
FOLDER

IN RE: LETTER OF NOTIFICATION :
OF PHILADELPHIA ELECTRIC COMPANY :
UNDER 52 PA CODE §57.72(d) :
RE: PROPOSED 230 KV WOODBOURNE :
TO HEWITSON TRANSMISSION LINE :

DOCKET NO. A-110550F055

PETITION FOR HEARING

RECEIVED

JUN 3 1991

SECRETARYS OFFICE
Public Utility Commission

Pursuant to the Commonwealth Court's Order of May 24, 1990, intervenors request that the Commission ALJ Staff immediately schedule the hearing herein as directed by the Commonwealth Court, and aver as the basis thereof the following:

1. Since PECO is proceeding apace to complete construction of the transmission line at issue, delay will only incur to the legitimate detriment of both sides, and any benefit which PECO might gain from rushing construction would be illegitimate and should not be countenanced by the Commission.

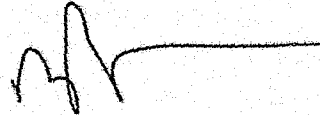
2. While intervenors are making discovery requests, these requests are minimal and involve information which should be readily available, since most of it is the foundation of the notification letter (although updated), and hearings can be held without delay.

3. Since the Commonwealth Court has vacated the Commission's previous decision, the legal status of the present activity by PECO is in doubt.

4. Intervenors request three days of hearings.

DOCKETED
JUN 07 1991

WHEREFORE, intervenors pray that the Commission schedule this matter for hearing within 30 days.



ROBERT J. SUGARMAN
Counsel for Intervenors

Date: _____

5/20/91

OF COUNSEL:

SUGARMAN & ASSOCIATES
16TH FLOOR, CITY PLACE
101 N. BROAD STREET
PHILADELPHIA, PA 19107
(215) 751-9733
pldngs91\peco.001

CERTIFICATE OF SERVICE

I, certify that I have caused a copy of the foregoing Petition for Hearing to be served on the following by first class mail, postage pre-paid, this date:

Donald Blanken, Esquire
Philadelphia Electric Company
2301 Market Street
P. O. 8699
Philadelphia, PA 19101

Tanya McCloskey, Esquire
Office of the Consumer Advocate
1425 Strawberry Square
Harrisburg, PA 17120


Pennsylvania Public Utility Commission
Patricia Krise Burket, Esquire
John F. Povilaitis, Esquire
G-28 North Office Building
Harrisburg, PA 17120

Honorable William H. Smith
Public Utility Commission
Commonwealth of Pennsylvania
Harrisburg, PA 17120

Honorable David W. Rolka
Public Utility Commission
Commonwealth of Pennsylvania
Harrisburg, PA 17120

Honorable Joseph Rhodes, Jr.
Public Utility Commission
Commonwealth of Pennsylvania
Harrisburg, PA 17120

Honorable Wendell F. Holland
Public Utility Commission
Commonwealth of Pennsylvania
Harrisburg, PA 17120



ROBERT J. SUGARMAN, ESQ.

Date: 5/30/91