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Re: Proposed Amendments of The Pennsylvania Public  
Utility Commission's Rules of Practice and  
Procedure at 52 Pa. Code 3.1 through 3.12

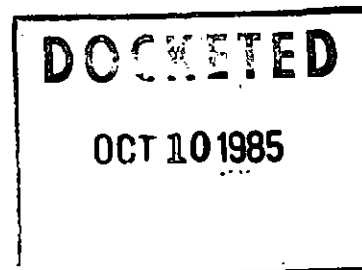
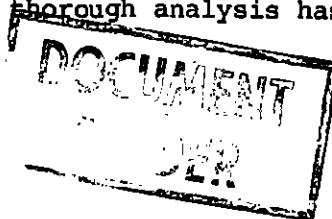
**RECEIVED**  
OCT 9 1985  
**SECRETARY'S OFFICE**  
**Public Utility Commission**

Dear Mr. Woodside:

On September 19, 1985, the Pennsylvania Public Utility Commission (PUC) adopted Proposed Amendments to its Rules of Practice and Procedure at 52 Pa. Code §§3.1 through 3.12. The Amendments seek to establish a procedure whereby parties may obtain preliminary injunctive relief from the Pennsylvania Public Utility Commission pending the resolution of a dispute at the Commission. The proposed regulations were adopted in response to a Motion of Commissioner Frank Fischl passed at a Public Meeting held on April 4, 1985. A copy of Commissioner Fischl's Motion is attached hereto.

We will be filing on behalf of Carnegie Natural Gas Company and Apollo Gas Company comments to the proposed rulemaking with the Commission when it has been published in the Pennsylvania Bulletin. However, because the proposed regulations raise serious legal issues, Carnegie and Apollo offer these preliminary comments to the Office of Attorney General and the Independent Regulatory Review Commission and the appropriate standing House and Senate Committees.

Carnegie Natural Gas Company (Carnegie) and Apollo Gas Company (Apollo) recognize the Commission's concern for establishing procedures to handle requests for preliminary injunctive relief. As was noted in Commissioner Fischl's Motion, over the past year numerous requests for injunctive relief have been filed with the Commission by natural gas utilities operating in western Pennsylvania. However, Carnegie and Apollo wish to stress that any regulations establishing a procedure for granting injunctive relief should only be adopted after a thorough analysis has been given as to whether or



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not: (1) the Commission has the statutory power to issue injunctive relief; (2) if it does, can such powers be lawfully delegated to an Administrative Law Judge; and (3) if it does, should such powers correlate with the concurrent powers of a Court of Common Pleas.

Carnegie and Apollo take the position that the Pennsylvania Public Utility Code does not envision the Commission having injunctive powers over cases pending before it on the merits. Even assuming arguendo that the Commission possesses such powers, the proposed regulations are defective in that they permit an Administrative Law Judge to issue an injunction without the right of a party to appeal that ruling to the full Commission. Additionally, the regulations do not require the posting of an injunction bond. While Commissioner Fischl's April 4, 1985 Motion directed that the Law Bureau, in proposing regulations, consider the requirement of an injunction bond, such a bond is not discussed in the Commission's Order approving the proposed regulations, nor is it discussed in the regulations themselves.

On the specifics of the proposed regulations, the following comments are made:

52 Pa. Code §3.7 The Commission's proposed regulation at §3.7 lists the findings which an Administrative Law Judge or Presiding Officer must make in order to issue an interim emergency order. The section requires that an ALJ find: (1) that petitioner's right to relief is clear; (2) that the need for relief is immediate; and (3) that the injury would be irreparable if relief is not granted. The proposed regulations include most of the elements normally required by a court of general jurisdiction before issuing an injunction. However, the proposed regulations fail to include a crucial, additional element before an injunction will issue in a court of general jurisdiction. Alder v. Township of Bristol, 83 Pa. Commonwealth Ct. 72, 47S A.2d 1361 (1984). That element is the requirement that any irreparable harm not be compensable in money damages.

While it is basic public utility law that the Commission cannot award money damages, Feingold v. Bell of Pennsylvania, 477 Pa. 1, 383 A.2d 791 (1977), that does not negate the proper requirement in any injunction proceeding that preliminary relief not issue unless money damages are not fully compensable. As long as an injured party can obtain monetary damages in some court, then it is irrelevant that that remedy cannot be obtained at the Commission. Therefore, it is Carnegie's and Apollo's position that a

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fourth element should be added to Section 3.7 before an interim emergency order will issue. That element is that the injury alleged is not capable of being satisfied with monetary damages.

52 Pa. Code §3.10 - Section 3.10 of the proposed regulations states that an interim emergency order or an order denying injunctive relief may be reviewed by the Commission upon petition. Carnegie and Apollo strenuously object to §3.10. The section as written denies an injured party a statutory appeal as of right to the full Commission.

The section states that any petition to the Commission challenging an ALJ's ruling on an interim emergency order request shall follow the interlocutory review procedures of the Commission at 52 Pa. Code §§5.301 to 5.303. The difficulty with the interlocutory review provisions is that they do not guarantee that the interim emergency order of an ALJ will reach the Commission for full review.

An interlocutory appeal is only permitted upon a timely petition under §§5.301 - 5.303 alleging extraordinary circumstances and requesting that the Commission review and answer a material question. The Commission may decline to answer the question or fail to act upon the petition under its regulations. That does not constitute an appeal as of right. In the meantime, the Interim Emergency Order of the Administrative Law Judge or Presiding Officer is in effect. Under the proposed regulations this would be the only situation where an order of an Administrative Law Judge or Presiding Officer would become effective without recourse to the Commission.

It is Carnegie's and Apollo's position that even assuming that the Commission has the power to issue preliminary injunctions, such power is not vested in an ALJ without a statutory right of the parties to full Commission review. In other words, even if the Commission has the authority to issue preliminary injunctions, such a power can only be exercised by the full Commission and cannot be delegated solely to an Administrative Law Judge.

Carnegie's position is twofold. The first basis for Carnegie's conclusion that only the full Commission has the power to issue an injunction and not an ALJ is based on a reading of the entire Public Utility Code. The Public Utility Code evidences a strong intent on the part of its drafters to allow parties the right to full Commission review from any "tentative,

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initial or recommended decision". An ALJ does not have the power under the statutory framework to issue a binding tentative, initial or recommended decision without the right of the parties to appeal from the ALJ's ruling to the Commission. 66 Pa. C.S. §§331(b) and 332(h). That right must exist as of right. The interlocutory appeal mechanism does not guarantee the right under the statute to full Commission review.

The second reason for Carnegie's and Apollo's conclusion that even assuming that the Commission does have the power to issue injunctions, that power cannot be vested in an ALJ without the right of a party to full Commission review of that decision, is based on the theory that if the Commission and a Court of Common Pleas have concurrent jurisdiction to rule on injunction requests, then the rights of the parties should be the same in both forums. The elements necessary to satisfy the prerequisites for an injunction should be the same, and the appellate rights should be the same. Following that analysis to its logical conclusion, just as a party to an injunction action in a Court of Common Pleas has an appeal as of right to a higher court under Rule 311 of the Pennsylvania Rules of Appellate Procedure, so too should parties to a preliminary injunction proceeding at the Commission have a similar appeal as of right from an ALJ's preliminary injunction ruling to the full Commission.

The issues presented by these regulations are at first blush harmless. Care must be taken that the underlying legality of the regulations be fully explored.

I hope our preliminary comments have been helpful. If you wish to discuss this further, please do not hesitate to contact me.

Sincerely,

McNEES, WALLACE & NURICK

By *Barbara S. Kahoe*  
Barbara S. Kahoe

Counsel for Carnegie Natural Gas Company  
and Apollo Gas Company

cc: Senator Clarence Bell  
Representative Charles Laughlin  
Mr. Irwin G. Zimmerman  
Mr. Jerry Rich  
Mr. Daniel Delaney