

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	
	:	
v.	:	R-2016-2569975
	:	
PPL Electric Utilities Corporation	:	
	:	
National Railroad Passenger Corporation	:	
	:	C-2016-2580526
v.	:	
	:	
PPL Electric Utilities Corporation	:	

SECOND ORDER ON MOTION TO COMPEL

On October 5, 2016, PPL Electric Utilities Corporation (PPL) filed Supplement No. 213 to Tariff Electric Pa. P.U.C. No. 201 (Supplement 213), to become effective January 1, 2017. Supplement 213 proposes an annual increase of approximately \$2.320 million in the distribution revenues received from rate schedule Power Service to Electric Propulsion (LPEP). PPL states that the National Passenger Railroad Corporation, (Amtrak) is its sole customer under rate schedule LPEP.

On December 19, 2016, Amtrak filed a complaint with new matter that the Commission docketed at Docket No. C-2016-2580526. The complaint alleges that if the Commission grants PPL's requested increase in distribution revenues, it would increase the LPEP monthly customer charge to \$319,671.00 in order to recover costs associated with upgrades to the Conestoga Substation. This is an increase from the current \$126,323.59 LPEP monthly customer charge placed in effect January 1, 2016, pursuant to the settlement in the case at R-2015-2469275.

The complaint further asserts that Amtrak will own or have supplied more than 70% of the transformer capacity for the Conestoga Substation. According to the complaint, Amtrak already owns 3 of the 7 transformers at the Conestoga Substation. Amtrak plans to deliver 2 or more transformers to replace the older transformers owned by PPL. Therefore, the proposed rate increase is unjust and unreasonable.

The new matter asserts that, pursuant to the settlement in the case at R-2015-2469275, on September 1, 2017, the LPEP monthly customer charge reverted to the rate of \$37,100.00 per month in effect prior to January 1, 2016. Amtrak also states in new matter that it should receive a refund of the payments for the period from January 1, 2016 to August 31, 2016.

On December 22, 2016, the Commission suspended PPL's filings, pursuant to 66 Pa. C.S. §1308(b), from January 1, 2017 until June 1, 2017. Subsequently, the Commission issued an errata notice indicating that PPL's filings were suspended until July 1, 2017.

On December 22, 2016 PPL filed an answer and new matter to Amtrak's complaint. The answer admits that PPL's filing proposes to increase the LPEP monthly customer charge from the current \$126,323.59 to \$319,671.00.

The answer denies that Amtrak will own or has supplied more than 70% of the transformer capacity for the Conestoga Substation. The answer asserts that PPL owns four of the transformers as well as the control building, control equipment and circuit breakers at the Conestoga Substation. In addition, PPL owns all of the land for the Conestoga Substation.

The answer contends that Amtrak's new matter in its complaint is procedurally improper. The answer denies that on September 1, 2016, the LPEP monthly customer charge reverted to the rate of \$37,100.00 per month in effect prior to January 1, 2016. Rather, the answer contends the rate of \$126,323.59 per month was effective January 1, 2016 and remains in effect unless and until the Commission approves a new rate. The answer denies that Amtrak is entitled to receive a refund for payments for the period from January 1, 2016 to August 31, 2016.

The new matter states that Amtrak has agreed that upgrades to the Conestoga Substation are required to provide continuous reliable and safe service to Amtrak. Amtrak has also agreed that, as the only customer served by the Conestoga Substation, it is responsible for the reasonable and prudent costs to upgrade the Conestoga Substation.

The new matter contends that the \$126,323.59 per month customer charge was set forth in the settlement in the case at R-2015-2469275, that the PPL Industrial Customer Alliance (PPLICA) joined the settlement on behalf of Amtrak, that the Commission approved the \$126,323.59 customer charge and that the charge is set forth in PPL's currently effective tariff. The new matter argues that Amtrak's request for a refund is barred as a matter of law.

The new matter alleges that the upgrades to the Conestoga Substation were due to be completed and in service by December 31, 2016. However, Amtrak and PPL agreed that PPL would temporarily discontinue work on the Conestoga Substation.

The new matter states that nothing in the settlement in the case at R-2015-2469275 provides that the LPEP customer charge would revert back to \$37,100.00 if Amtrak and PPL were unable to resolve the issues surrounding the upgrade of the Conestoga Substation. The new matter contends that Amtrak's request for a refund is a violation of the settlement in the case at R-2015-2469275. The answer with new matter requests that the Commission deny Amtrak's complaint.

Also on December 22, 2016, PPL filed preliminary objections to Amtrak's complaint. The preliminary objections reiterate the assertions in PPL's answer with new matter.

The preliminary objections request that Amtrak's request for refunds be denied for failure to state a claim upon which relief may be granted because the request is barred as a matter of law, barred by the settlement in the case at R-2015-2469275 and barred by the express terms of the agreement between PPL and Amtrak.

The preliminary objections also contend that the new matter in Amtrak's complaint does not comply with the Commission's regulations. Nothing in the Commission's regulations authorize new matter to be included in a complaint. The preliminary objections request that the Commission dismiss Amtrak's request for a refund of the LPEP charges and/or strike the new matter.

On December 27, 2016, the Commission's Bureau of Investigation and Enforcement (I&E) filed a notice of appearance.

By notice dated December 28, 2016, the Commission scheduled a prehearing conference for this matter on January 6, 2017 at 10:00 a.m. in Hearing Room 2, Commonwealth Keystone Building in Harrisburg and assigned the matter to me. I issued a prehearing order, dated December 29, 2016, addressing, inter alia, requests for continuance, subpoena procedures, attorney representation and the Commission's policy encouraging settlements.

On January 3, 2017, Amtrak filed an answer to PPL's preliminary objections. The answer reiterates the assertions in Amtrak's complaint with new matter. The answer denies that Amtrak's request for a refund is barred as a matter of law, barred by the settlement in the case at R-2015-2469275, barred by the express terms of the agreement between PPL and Amtrak or because the complaint fails to conform with the Commission's regulations. The answer requests that PPL's preliminary objections be denied.

Also on January 3, 2017 Amtrak filed a petition requesting that the Commission suspend PPL's filing indefinitely. In support of its petition Amtrak alleges that it plans to purchase the Conestoga Substation. If it cannot purchase the Conestoga Substation, Amtrak alleges it will take the Conestoga Substation through its eminent domain authority.

Once Amtrak acquires the Conestoga Substation, the petition asserts that PPL will not own any distribution service property serving Amtrak or provide distribution service to Amtrak. If PPL does not own any distribution service property serving Amtrak or provide distribution service to Amtrak, there is no basis to charge Amtrak for distribution services under

the LPEP customer charge. Once it acquires the Conestoga Substation, Amtrak will no longer be a customer of PPL and PPL's filing will be moot.

The petition requests that the Commission suspend PPL's filing indefinitely. Alternatively, the petition requests that the Commission suspend PPL's proceedings for the full nine months authorized by 66 Pa.C.S. § 1308(b), until October 1, 2017.

On January 5, 2017, PPL filed an answer to Amtrak's petition. The answer opposes suspending PPL's filing indefinitely. However, the answer agrees that the Commission should suspend PPL's filing for nine months. The answer requests that the Commission deny the request to suspend PPL's filing indefinitely but grant the request to suspend the filing for nine months.

I conducted a prehearing conference in this case on January 6, 2017. Present were counsel for PPL, Amtrak and I&E. As a result of the prehearing conference, I issued Prehearing Order #2, dated January 6, 2017, which established a litigation and briefing schedule based on the Commission's December 22, 2016 order and subsequent errata notice suspending PPL's filings until July 1, 2017.

In anticipation that the Commission would address Amtrak's petition at its January 19, 2017 public meeting, the parties requested a further prehearing conference. N.T. 6-7. By notice dated January 9, 2017, the Commission scheduled a further prehearing conference for this matter on January 20, 2017 at 10:00 a.m. in Hearing Room 2, Commonwealth Keystone Building in Harrisburg.

On January 11, 2017, Amtrak filed an answer to PPL's new matter. The answer generally denies the assertions in PPL's new matter.

On January 17, 2017, Amtrak filed objections to PPL's interrogatories. Generally, the objections contend that PPL's interrogatories request information that is

irrelevant, beyond the scope of this proceeding and concern matters over which the Commission has no jurisdiction.

By order dated January 18, 2017, I sustained PPL's preliminary objections, in part. I struck the new matter portion of Amtrak's complaint without prejudice because the new matter was a complaint against PPL's existing LPEP rate, not its proposed LPEP rate.

By opinion and order dated January 19, 2017, the Commission modified its December 22, 2016 order and suspended PPL's filings until October 1, 2017. I conducted a further prehearing conference on January 20, 2017 in order to revise the litigation and briefing schedule in light of the Commission's January 19, 2017 opinion and order. As a result of the further prehearing conference, I issued Prehearing Order #3, dated January 23, 2017, which modified the litigation and briefing schedule.

On January 20, 2017, PPL filed a motion to compel responses to discovery propounded on Amtrak, pursuant to 52 Pa.Code §§ 5.342(g) and 5.350(e). According to the motion to compel, the Respondent served interrogatories and requests for documents on the Complainant on January 11, 2017. Attached to the motion to compel is a copy of the interrogatories and requests for documents, marked as Appendix A.

The motion to compel asserts that on January 17, 2017 Amtrak filed objections to interrogatories. Attached to the motion to compel is a copy of Amtrak's objections, marked as Appendix B.

The motion to compel asserts that counsel for PPL and Amtrak attempted to informally resolve the discovery dispute but were unable to resolve Amtrak's objections.

On January 24, 2017, Amtrak filed an answer to PPL's motion to compel. The answer contends that PPL's interrogatories request information that is irrelevant, beyond the scope of this proceeding and concern matters over which the Commission has no jurisdiction.

By order dated January 27, 2017, I granted PPL's motion to compel, in part.

On February 2, 2017 Amtrak provided responses to PPL's discovery requests.

On February 7, 2017, PPL filed a second motion to compel responses to discovery propounded on Amtrak, pursuant to 52 Pa.Code §§ 5.342(a)(4), g and Prehearing Order #2, dated January 6, 2017. According to the second motion to compel, Amtrak provided responses to interrogatories and document requests PPL to Amtrak Set I, Nos. 19, 21, 22, and 23.

The second motion alleges that Amtrak's responses did not fully and completely answer the interrogatories and document requests. Attached to the second motion to compel is a copy of Amtrak's responses, marked as Appendix A.

The second motion to compel asserts that counsel for PPL and Amtrak attempted to informally resolve the discovery dispute but were unable to resolve the dispute.

On February 10, 2017, Amtrak filed an answer to PPL's second motion to compel. The answer contends that Amtrak's responses are complete based on the status of the decisions made by Amtrak concerning purchase of the Conestoga Substation. The answer also asserts that some of the information sought is privileged, consistent with the Federal Rules of Civil Procedure and Pennsylvania Rules of Civil Procedure. The answer states that Amtrak will supplement its responses as soon as the information becomes available to Amtrak. The answer requests that the Commission deny PPL's second motion to compel.

The regulations at 52 Pa.Code §§ 5.321-5.373 contain the Commission's formal discovery rules. A party may use discovery to obtain information regarding any matter, not privileged, which is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party. It is not grounds for objection that the information sought will be inadmissible at a hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. 52 Pa.Code § 5.321(c).

Information is relevant if it tends to establish a material fact, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact. Smith v. Morrison, 47 A.3d 131 (Pa.Super. 2012), app. denied, 57 A.3d 71 (Pa. 2012). Relevancy in discovery is broader than the standard used for admission of evidence at a hearing. Com. v. TAP Pharmaceutical Products, Inc., 904 A.2d 986 (Pa.Cmwlt. 2006). The party objecting to discovery has the burden to establish that the requested information is not relevant or discoverable. Koken v. One Beacon Insurance Co., 911 A.2d 1021 (Pa.Cmwlt. 2006). Any doubts regarding relevancy should be resolved in favor of discovery.

Turning to PPL's second motion to compel, the second motion to compel requests that I grant the motion and direct Amtrak to answer PPL's Amtrak Set I, No. 19 and Nos. 21-23.

PPL to Amtrak Set I, No. 19 states:

See Complaint, ¶ 38. Please explain in detail whether Amtrak intends to acquire:

- (a) All of the equipment and facilities at the Conestoga Substation;
- (b) All of the land upon which the Conestoga Substation is situated;
- (c) The four PPL Electric-owned transmission lines between the Conestoga Substation and the Pennsylvania-Maryland border; and
- (d) All of the PPL Electric-owned transmission line right-of-way between the Conestoga Substation and the Pennsylvania-Maryland border.

In its February 2, 2017 response to this interrogatory, Amtrak stated that it was unable to respond to this request because it has not made a final decision concerning purchase of the Conestoga Substation and no offer to purchase had been made to PPL. The response indicated that when Amtrak determined the scope of the facilities that it needed to acquire, it would inform PPL and offer to purchase those facilities.

PPL contends that this answer is nonresponsive. In addition, PPL notes that Amtrak's response has raised a new objection that was not the basis for Amtrak's initial objections.

In response, Amtrak contends that it cannot further respond to this request at this time because no final decision has been made about the exact property and equipment that will be included in the forthcoming offer to purchase the Conestoga Substation. Amtrak contends that it should be permitted to supplement any initial responses later once the facts are determined.

Amtrak points out that it has provided PPL with responses to PPL to Amtrak Set I, No. 19 (c) and (d) in its response to PPL to Amtrak Set I, No. 24 by indicating that it does not intend to acquire, operate or maintain the four transmission lines or right of way between the Conestoga Substation and the Pennsylvania-Maryland border. Amtrak contends it can provide this information because a final decision has been made to exclude the transmission lines and transmission right of way from its offer to purchase. However, Amtrak has not made a final decision concerning the equipment, facilities and land of the Conestoga Substation.

I previously ruled that the information sought by PPL is relevant or is reasonably calculated to lead to the discovery of admissible evidence. PPL is seeking an increase in annual distribution revenues of approximately \$2.320 million received from rate schedule LPEP. The requested increase in revenues is necessary in order to recover costs associated with upgrades to the Conestoga Substation.

To the extent that Amtrak intends to acquire portions of the Conestoga Substation, it will have an effect on the amount of revenues PPL will need to upgrade the Conestoga Substation. PPL is entitled to know how much of the Conestoga Substation Amtrak plans to acquire so that it may adjust the amount of its revenue request in the event that Amtrak acquires a portion of the Conestoga Substation.

Since Amtrak has not yet determined what portions of the Conestoga Substation it plans to acquire, if any, I cannot order it to provide information it does not yet possess. However, if Amtrak fails to provide this information in a timely manner so as to allow PPL to prepare evidence in response, I will prohibit Amtrak from producing this information at the hearings to be held in this matter. I will deny this portion of PPL's second motion to compel, noting that Amtrak has a continuing duty to supplement its response, pursuant to 52 Pa.Code § 5.332.

PPL to Amtrak Set I, No. 21 provides:

See Petition of the National Passenger Railroad Corporation for Amendment of the December 22, 2016 Order to Suspend these Proceedings, ¶ 19. Please provide following:

- (a) The name, address, and phone number of Amtrak's real property appraiser that visited the Conestoga Substation on December 30, 2016;
- (b) A copy of all documents, notes, photographs, and other materials used or relied upon by Amtrak's real property appraiser and its employees or agents during the visit to the Conestoga Substation on December 30, 2016; and
- (c) A copy of all analyses, recommendations, memoranda, studies, proposals, and other documents used or otherwise prepared by Amtrak's real property appraiser and its employees or agents regarding the Conestoga Substation.

PPL to Amtrak Set I, No. 22 provides:

See Petition of the National Passenger Railroad Corporation for Amendment of the December 22, 2016 Order to Suspend these Proceedings, ¶ 19. Please explain the following in detail:

- (a) The method used, or to be used, by Amtrak to determine the value of the facilities at the Conestoga Substation; and

(b) The method used, or to be used, by Amtrak to determine the value of the land underlying the Conestoga Substation.

PPL to Amtrak Set I, No. 23 provides:

See Supplement No. 213, Statement of Reasons, p. 6 and Exhibit 2. In the event that Amtrak acquires the Conestoga Substation, either by sale or condemnation, please explain whether Amtrak intends to pay, reimburse, compensate, or otherwise include in the purchase price/condemnation value the actual project costs already incurred by PPL Electric. Explain your response and reasoning in detail.

In its February 2, 2017 response to 21, 22 and 23, Amtrak stated that while it has engaged appraisers to assess the value the Conestoga Substation, no final appraisal reports have been prepared to date and Amtrak has taken no action in reliance upon any appraisal report. In addition, Amtrak has not yet exercised its federal eminent domain authority. If and when it does exercise that authority, Amtrak claims that provisions and the Federal Rules of Civil Procedure will govern disclosure concerning expert testimony. According to Amtrak, information regarding the advice or communications with other consultants is subject to work product privilege. Amtrak concludes it cannot respond to this request.

PPL contends that this answer is nonresponsive. In addition, PPL notes that Amtrak's response has raised a new objection that was not the basis for Amtrak's initial objections. PPL argues that Amtrak did not raise the issue of privilege when it first objected to these interrogatories and should not be allowed to do so now.

Alternatively, PPL argues that the attorney-client privilege and the work-product privilege do not apply to the information sought in 21, 22 and 23. The information does not concern communications between an attorney and client, does not concern the mental impressions, conclusions, memoranda, notes, summaries or legal research of an attorney.

In response, Amtrak contends that it cannot further respond to this request at this time because it has not finalized the scope of its offer and cannot finalize the compensation it

will include in that offer. Amtrak indicates that it expects to finalize and make an offer within the next two weeks. Amtrak therefore lacks the information to respond to 22 and 23. Amtrak asserts that once it makes an offer to PPL, it will supplement its response to PPL's requests.

Amtrak also contends that pursuant to the Federal Rules of Civil Procedure a non-testifying expert is not subject to discovery. Amtrak has not identified an appraiser as a witness to testify in a possible condemnation proceeding. Amtrak has not determined whether it will call an appraiser as an expert in a possible condemnation proceeding. Amtrak concludes that the appraisers are at this time non-testifying experts and are immune from discovery under the Federal and Pennsylvania Rules of Civil Procedure. In addition, Amtrak asserts that communications between Amtrak's counsel and the appraisers are subject to privilege.

I previously ruled that the information sought by PPL is relevant or is reasonably calculated to lead to the discovery of admissible evidence. PPL is seeking an increase in annual distribution revenues of approximately \$2.320 million received from rate schedule LPEP. The requested increase in revenues is necessary in order to recover costs associated with upgrades to the Conestoga Substation.

To the extent that Amtrak intends to acquire portions of the Conestoga Substation, it will have an effect on the amount of revenues PPL will need to upgrade the Conestoga Substation. PPL is entitled to know the identity of Amtrak's appraiser and the methods used by the appraiser to arrive at a value of the Conestoga Substation Amtrak plans to acquire so that PPL may adjust the amount of its revenue request.

Amtrak contends that it has not determined whether it will call an appraiser in a possible condemnation case. Amtrak did not list an appraiser in the list of witnesses set forth in its prehearing memorandum but reserved the right to amend its list of witnesses. Therefore, pursuant to Pa. R.C.P. 4003.5, its appraiser is not subject to discovery because the appraiser is at this time a non-testifying expert.

The Commission's regulation at 52 Pa.Code § 5.324, governing discovery of expert testimony, states that, consistent with Pa.R.C.P. 4003.5, discovery of facts known and opinions held by an expert may be obtained. The regulation at 52 Pa.Code § 5.324 requires the parties to disclose each person whom the party expects to call as an expert. The identified experts are then subject to discovery. The language of 52 Pa.Code § 5.324 closely mirrors the language in Pa.R.C.P. 4003.5. Since the language of 52 Pa.Code § 5.324 is nearly identical to the language in Pa.R.C.P. 4003.5 and indicates that it is consistent with Pa.R.C.P. 4003.5, I will look to the explanatory comments to Pa.R.C.P. 4003.5 for guidance.

The explanatory comments to Pa.R.C.P. 4003.5 indicate that the rule distinguishes between an expert expected to be called as a witness and an expert not expected to be called. The comments indicate that a witness expected to be called as a witness is subject to discovery.

However, if an expert is not expected to be called as a witness at trial, the explanatory comments to Pa.R.C.P. 4003.5 indicate that no discovery of such a witness is permitted unless there is an order of court. A party may obtain such an order of court only in exceptional circumstances. Thus it appears that the Commission's rule at 52 Pa.Code § 5.324 should be interpreted to prohibit discovery of a non-witness expert.

Since Amtrak has not yet determined whether it will call an appraiser as a witness and did not list an appraiser as a witness in its prehearing memorandum, that appraiser is not subject to discovery at this time. However, if Amtrak determines that it will present the appraiser as a witness and fails to disclose that witness in a timely manner, so as to allow PPL to prepare a response, I will prohibit the expert from testifying, pursuant to 52 Pa.Code § 5.324(b).

Concerning 23, since Amtrak has not yet determined what portions of the Conestoga Substation it plans to acquire, if any, it cannot determine what portion of any of the project costs incurred by PPL it will reimburse. I cannot order Amtrak to provide information it does not yet possess. However, if Amtrak fails to provide this information in a timely manner so as to allow PPL to prepare evidence in response, I will prohibit Amtrak from producing this information at the hearings to be held in this matter. I will deny this portion of PPL's second

motion to compel, noting that Amtrak has a continuing duty to supplement its response, pursuant to 52 Pa.Code § 5.332.

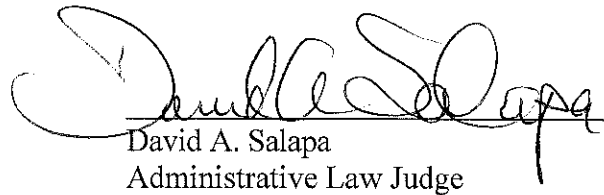
ORDER

THEREFORE,

IT IS ORDERED:

1. That the motion to compel, filed February 7, 2017, by PPL Electric Utilities Corporation is denied, pursuant to 52 Pa.Code § 5.342(g).

Date: February 17, 2017


David A. Salapa
Administrative Law Judge

R-2016-2569975 - PPL ELECTRIC FILED SUPP NO 213 TO PA PUC NO 201; EFF:
1/1/17, PROPOSING AN INCREASE TO RATE SCHEDULE LPEP.

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C-2016-2580526
(For National Railroad Passenger Corporation)