

1 reliability criterion employed by other generating systems,
2 to your knowledge?

3 A Yes, it is.

4 Q Referring you to Page 9, Mr. Weiss, would
5 you explain to me how the required reserve margin level
6 would vary dependent upon the various items that you have
7 mentioned on Lines 5 to 10?

8 Let me focus that question on a somewhat
9 particular item.

10 The adequacy of the transmission and switching
11 system through which the generating systems are attached,
12 how would that affect that required reserve reliability?

13 A Well, for example, let's take a look at a
14 transmission grid which would basically be composed of a
15 shape more appropriately described as a square, and in that
16 square, at the upper lefthand corner and the lower righthand
17 corner, you would have two generation facilities within the
18 confines of that square.

19 The peak load days demanding at any given
20 instant or at the peak, would be, let's assume, two megawatts.

21 Let's also assume that each generating plant
22 the one in the upper lefthand corner and the one in the
23 lower righthand corner, are each capable of switching or
24 each capable of generating the two megawatts required at the
25 time of the system peak.

1 standard. Do you know, Doctor, is that a planning standard
2 or is this a standard for economic transactions?

3 A I'm flattered by the title. That is a
4 standard indicated in the Mid-Atlantic Area Council plans
5 which were issued in April of 1977. It is a suggested
6 standard indicated on some of their exhibits.

7 Q Is it your understanding that that is a
8 standard by which utilities are suggesting to plan their
9 systems for reliability purposes or is it a standard related
10 to economic capacity transactions within the Mid-Atlantic
11 Council?

12 A The Mid-Atlantic Council is the planning
13 arm, therefore, the recommended or suggested criteria of
14 22 percent is a planning criteria, yes.

15 Q Now, also on page 9, you mentioned the Energy
16 Systems Research Group. Another witness of the Consumer
17 Advocate or another group representing the Consumer Advocate
18 in this proceeding who have indicated the reserve margin of
19 14 to 22 percent to insure a loss of load probability
20 of one day in ten years. That's the statement in your
21 testimony.

22 Is it your understanding that the loss of load
23 probability which is employed by that group in reaching their
24 reserve margin of recommendation is the same as that employed
25 by the company?

1
2 MR. HALL: Your Honor and Mr. Burgraff, I have
3 one copy of the form 12. I would like to discuss it with the
4 witness and approach him to do that.

5 MR. BURGRAFF: Fine.

6 BY MR. HALL:

7 Q Now, Mr. Weiss, is it not correct that the
8 megawatt number which you show at page 7 of your testimony
9 of 7926, which you have used in your computation of the
10 49 percent reserve margin is drawn from column 4 of page 4-A
11 of the FERC form 12?

12 A Essentially, yes. It is the same as the number
13 which appears at the FERC form 12, page 5, column 9, which is
14 headed installed capacity connected to load at the time of
15 system peak.

16 Q But you would agree that the numbers are the
17 same and indeed the concept of the plants that are being
18 included in that number is the same?

19 A Yes.

20 Q And is not the number that you have used from
21 page 5 in the column you indicated, does that not represent
22 the manufacturer's maximum nameplate rating for the generating
23 units included?

24 A Yes.

25 Q Referring you to column 10 of page 5 of FERC

1 form 1, that column indicates a net plant capability of
2 7214, of 7,214 for the company's system, and it is indicated
3 in the instructions that that capacity is equal to the
4 capacity of the plant at the end of 1978, which was available
5 for use or which could have been used at the time of the
6 summer peak, is that not correct?

7 A That was capacity which was connected to
8 load at the time of the summer peak. The available capacity
9 connected to load. That was not the nameplate rating that
10 was connected to load.

11 Q Do you know why there's a difference between
12 those two numbers, Mr. Weiss?

13 A Certainly the reason for the difference revolves
14 around the fact that some of the plant may not have been
15 available due to, for example, being down for maintenance or
16 forced outage, perhaps.

17 Q Would a difference be, perhaps, this generating
18 plant can produce, say, a given generating plant can generate,
19 plant A, it can produce more electricity/the winter than it
20 can in the summer? Is that not correct?

21 A I wouldn't agree with that. Not necessarily,
22 no.

23 Q And would that not be true - - you can disagree
24 with me if you wish - - because in the summer, the cooling
25

1 capacity is reduced for the need for cooling is greater
2 which thereby reduces the plant's ability to produce because of
3 the ambient temperature?

4 A That's conceivable, yes.

5 Q And is there not an additional factor which is
6 the need to use electricity produced within the confines of
7 the plant, is that not correct?

8 A That's correct.

9 Q The number which you have given in your
10 testimony is the nameplate rating which is the maximum which
11 can be produced but some of that energy must be used in the
12 plant, itself, is that not correct?

13 A That's correct.

14 Q So therefore, it is not available to meet the
15 company's load, is that not correct?

16 A That's correct.

17 Q Now, you also cite a peak load for 1978 of
18 5,318.

19 A That's correct.

20 Q And does that not also appear in FERC form 12
21 or did you obtain it from that source?

22 A That's correct.

23 Q What page did you obtain it from?

24 A That was obtained from page 5, column 11.

25 Q And would you agree that that same number is

1224a

1 shown on page 24 of FERC form 12?

2 A That's correct. At line 1.

3 Q And could you state for me what that number
4 represents that's shown on those pages?

5 A Combined net demand on the generating plant at
6 the time of system peak.

7 Q Does page 24 indicate that in fact the load on
8 the company's system, the actual demand for energy of its
9 customers was in excess of 5,318 at the time of its peak
10 demand?

11 A That's correct.

12 Q How much was that excess?

13 A 562 megawatts.

14 Q Thank you. Now, referring to your statement 6,
15 Mr. Weiss, the first adjustment to the company's claims
16 which you explain in that statement is an adjustment to the
17 company's claimed level of revenues. Is that not correct?

18 A That's right.

19 Q And that is, itself, an adjustment to the company's
20 revenue growth adjustment?

21 A That's right.

22 Q Would you explain to me the difference between
23 your adjustment and that of the company?

24 A Well, as noted in my exhibit THW-4, my adjustment
25 relates to the linear growth average between the beginning of

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PHILADELPHIA ELECTRIC COMPANY
R.I.D. No. 865

Testimony of Michael L. Arndt
on behalf of
Office of Consumer Advocate

November 1979

1. Q. Please state your name and address.

2.

3. A. My name is Michael L. Arndt. I am employed as a public
4. utility rate analyst by the firm of Hess & Lim, Inc. Our
5. business address is 5809 Annapolis Road, Hyattsville,
6. Maryland 20784.

7.

8. Q. Please describe your educational background and experi-
9. ence in the public utility field.

10.

11. A. I received a Bachelor of Arts degree in Business Adminis-
12. tration from Northwestern College in May 1974 and a
13. Master of Business Administration degree from Drake
14. University in December 1978. I am also completing
15. additional studies in accounting at the University of
16. Maryland.

17.

18. Following graduation in 1974, I accepted employment
19. with the Utilities Division of the Iowa State Commerce
20. Commission in Des Moines, Iowa. During my employment as

1226a

1. September 15, and December 15 of the current calendar
2. year, and March 15 and June 15 of the following year.
3. While it is recognized that experienced payment lags can
4. be longer than 90 days by exercising various options
5. available to defer Federal income tax payments, 90 days
6. is considered to be reasonable for ratemaking purposes.
- 7.
8. Q. Please explain your calculations of expense lags
9. associated with the costs of long term debt and preferred
10. stock.
- 11.
12. A. Long term debt interest and preferred stock dividends are
13. paid in semi-annual and quarterly installments,
14. respectively. The Company, therefore, experiences
15. payment lags of 90 days with long term debt interest and
16. 45 days with preferred stock costs.
- 17.
18. Q. Does the fact that long term debt interest and preferred
19. stock dividends are capital costs have any effect on
20. whether the accompanying lags should be considered for
21. working capital purposes?
- 22.
23. A. No. The lags in payment of these costs have the same
24. effect on the Company's cash requirements as the lags in
25. payment of other components of its cost of service.

1. A utility's revenue requirement includes an
2. allowance for the costs of long term debt and preferred
3. stock which are eventually paid at a later date. The
4. cost or return associated with long term debt and
5. preferred stock properly reflect an increment required by
6. bondholders and preferred stockholders to compensate
7. them for the lag or delay in payment of the interest or
8. preferred dividend. If interest and preferred dividends
9. were to be paid at an earlier date, the bondholders and
10. preferred stockholders undoubtedly would have been
11. willing to accept a lower return on their investment
12. considering the time value of money. Since the costs of
13. long term debt and preferred stock reflected in a revenue
14. requirement determination include the increment required
15. as compensation for the delay in payment, it is necessary
16. to reflect this delay in the cash working capital
17. determination in order to achieve a proper matching of
18. costs. Failure to reflect this delay in the cash working
19. capital computation would require customers to pay for
20. this cost twice--once in the form of higher embedded
21. costs of long term debt and preferred stock, and again in
22. the form of return on working capital requirement already
23. supplied by the customers. Since the level of interest
24. and preferred dividend is stipulated at the time of
25. issuance, the funds resulting from the double charge
26. would unjustly benefit the residual investor who is the
27. common stockholder.

1228a

1. Q. Why didn't you consider the lag associated with the
2. payment of common stock dividends in the working capital
3. analysis?

4.

5. A. Costs associated with common stock are substantially
6. different in nature from capital costs associated with
7. long term debt and preferred stock. When bondholders and
8. preferred stockholders purchase securities, they have
9. accepted, for practical purposes, a stipulated level of
10. interest or dividend payment and an established schedule
11. of payment. The common stockholder is neither guaranteed
12. nor limited to a predetermined level of return. The risk
13. and uncertainty associated with common stock is reflected
14. in the opportunity to earn a return higher than the
15. return allowed on bonds or preferred stock. Since the
16. return on common stock is not contractual or
17. predetermined, the resulting cash flow has not been
18. considered for cash working capital purposes.

19.

20. Q. Please explain the revenue lag of 45 days used in your
21. computation.

22.

23. A. As stated earlier the Company calculated a revenue lag of
24. 57 days which included a customer payment lag of 38 days
25. derived from 13 month-ending account receivable
26. balances. As indicated by the accrued tax balances,
27. month-end amounts can be misleading for cash working

PHILADELPHIA ELECTRIC COMPANY
 Cash Working Capital Requirement
 Estimated 12 Months Ended March 31, 1980

(A)	Pro Forma Amount \$(000) (B)	Pro Forma Expense Per Day (C)	Expense Lag (Days) (D)	Net Lag (Days) (E)	Cash Requirement (F)
Operation and maintenance expense					
1. Coal	\$ 29,598	\$ 81,090	35	10	\$ 810,900
2. Coal freight	11,004	30,148	4	41	1,236,068
3. Oil	195,405	535,356	30	15	8,030,340
4. Net interchange and purchased energy	162,334	444,751	35	10	4,447,510
5. Labor	140,481	384,879	11	34	13,085,886
6. Other operation and maintenance expense	225,914	618,942	15	30	18,568,260
7. Amortized nuclear fuel	7,256	19,879			
8. Subtotal	<u>771,992</u>	<u>2,115,045</u>			<u>46,178,964</u>
9. Ad Valorem taxes	23,055	63,164	(5)	50	3,158,200
10. Other taxes	67,749	185,614	(5)	50	9,280,700
11. State income taxes	15,998	43,830	(34)	79	3,462,570
12. Federal income taxes payable	98,119	268,819	90	(45)	(12,096,863)
13. Interest on long term debt	104,255	285,630	90	(45)	(12,853,356)
14. Preferred stock dividends	24,022	65,814	45	0	
15. Subtotal	<u>\$1,105,190</u>	<u>\$3,027,916</u>			<u>\$ 37,130,215</u>
16. Other prepayments					<u>2,100,000</u>
17. Totals					<u>\$ 39,230,215</u>

Sources:

- Column B: Lines 1-6—Company's Schedule C-25a
- B: Line 7—Company's Exhibit DRS-2, B-21
- B: Lines 9-10—Company's Exhibit DRS-2, Schedules B-11, D-1 and A-4
- B: Lines 11-12—Company's Exhibit DRS-2, Schedule A-1
- B: Lines 13-14—Exhibit (THM-1) and Dr. Marcus' embedded costs
- C: Column B divided by 365
- D: Lines 1-6—Company's Schedule C-25a
- D: Line 9—Exhibit (MLA-1), page 2
- D: Line 10—Gross receipts tax (82.5%) are accrued in calendar basis with estimated portion paid on April 15th of current year and balance paid on April 15th of following year
- D: Line 11—Exhibit (MLA-1), page 4
- E: Column D less 45 days per Staff Witness Mr. Markovci
- F: Column C times Column E
- F: Line 18—Company's Exhibit DRS-2, Schedule C-25

PHILADELPHIA ELECTRIC COMPANY
Ad Valorem Taxes
Expense Lag Calculations

<u>(A)</u>	<u>Accrual Period (B)</u>	<u>Mid-Point of Accrual Period (C)</u>	<u>Date of Payment (D)</u>	<u>Expense Lag (Days) (E)</u>	<u>Percent of Total (F)</u>	<u>Weighted Expense Lag (Days) (G)</u>
1. Capital Stock-Pennsylvania	Prior Year	7/1/19A	4/15/19B	288	14.01%	40.35
2.	Current Year	7/1/19B	4/15/19B	(77)	49.66	(38.24)
3. Public Utility Realty- Pennsylvania	Current Year	7/1/19B	6/1/19B	(30)	34.74	(10.42)
4. Net Worth-New Jersey	Current Year	7/1/19B	4/15/19C	288	1.05	3.02
5. Personal Property- New Jersey	Current Year	7/1/19B	9/15/19B	76	0.27	.21
6.	Current Year	7/1/19B	2/15/19C	229	0.27	.21
7. Totals					<u>100.00%</u>	<u>(4.87)</u>

Sources:

Columns (B), (C), and (D): Company's Response IR-2, RB-3 Adjusted
(E): Days From Column (C) to Column (D)
(F): Company's Exhibit DPS-2, B-14
(G): Column (E) Times Column (F)

PHILADELPHIA ELECTRIC COMPANY
State Income Taxes
Expense Lag Calculation

(A)	Accrual Period (B)	Mid-Point of Accrual Period (C)	Date of Payment (D)	Expense Lag (Days) (E)	Percent of Total (F)	Weighted Expense Lag (Days) (G)
1. Corporate income tax- Pennsylvania	Current year	7/1/19A	4/15/19A	(77)	81.36%	(62.65)
2.		7/1/19A	9/15/19A	76	4.28	3.25
3.		7/1/19A	4/15/19B	288	9.52	27.42
4. Net income-Maryland	Current year	7/1/19A	4/15/19A	(77)	0.10	(0.08)
5.		7/1/19A	6/15/19A	(16)	0.13	(0.02)
6.		7/1/19A	9/15/19A	76	0.10	0.08
7.		7/1/19A	12/15/19A	167	0.10	0.17
8. Net income-New Jersey	Current year	7/1/19A	4/15/19A	(77)	3.81	(2.93)
9.		7/1/19A	6/15/19A	(16)	0.60	(0.96)
10. Totals					100.00%	35.72

Sources:

Company's Response IR-2, RB 4

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PHILADELPHIA ELECTRIC COMPANY
BEFORE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

INFORMATION SUBMITTED PURSUANT TO
SECTION 53.51 et seq OF THE COMMISSION'S REGULATIONS

VOLUME I - VALUATION

SUPPLEMENT NO. 6
TO
TARIFF ELECTRIC - PA. P.U.C. NO. 25

ISSUED JULY 27, 1979

EFFECTIVE SEPTEMBER 25, 1979

- Q.2. Provide a schedule of respondent's generating capability showing: net dependable capacity in kW by unit, megawatt hours generated by unit, plant capacity factor by unit, the total station fuel consumption and maintenance and operating expenses for the test year. Also, provide the same information for the twelve-month period prior to the test year and estimates for one year subsequent to the test year.
- A.2. Attachment I-B-2 pages 1 through 3 provide the net generation, capacity factor and fuel burn by station for the fiscal years ended 3/31/78 through estimated 3/31/80. Similar data for the period ended 3/31/81 is unavailable, however, page 4 of the same attachment provides the requested data on an estimated basis for the calendar year ended 12/31/80.

Attachment I-B-2 pages 5 through 10 provide the operating and maintenance expenses by station for the fiscal years ended 3/31/78 through estimated 3/31/80. Similar data for the period ending 3/31/81 is unavailable, however, pages 11 through 16 of this same attachment provide the station operating and maintenance expenses on an estimated basis for the calendar year ended 12/31/80.

STATION
UNIT

STATION - UNIT

STEAM

BARB 3+4
CHESTER 5+6
CONEMAYAN 1+2
CRUMBY 1
CRUMBY 2
DELAWARE 7
DELAWARE 8
EDDYSTONE 1
EDDYSTONE 2
EDDYSTONE 3
EDDYSTONE 4
KEYSTONE 1+2
RICHMOND 9
" 12
SCHUYLKILL 1
" 3+9
SOUTHWARK 1+2

NUCLEAR

PENNS BOTTOM 2
" 3
SALEM 1

INTERNAL COMB

CRAYDON CT
ALL OTHER RE. CT + DKS
SALEM CT.

STATION - UNIT	APRIL 1, 1977		THRU MAR 31, 1978		FUEL - BURN		% CAP FUE
	NET GENERATION MW CAP	MWH	CONV. FACT.	COND. TONS	OIL BLS	GENS MCF	
BARB 3+4	130	46,566	4.1		109,938		
CHESTER 5+6	124	272,446	25.1		662,664		
CONEMAYAN 1+2	352	1,523,097	49.4	653,609	24,254		
CRUMBY 1	150	678,081	51.6	266,144	1,466,793		50.1
CRUMBY 2	201	863,253	49.0				
DELAWARE 7	126	709,168	64.3		2,353,758		63.3
DELAWARE 8	124	677,508	62.4				
EDDYSTONE 1	301	1,301,614	49.4				
EDDYSTONE 2	334	863,950	29.5	822,258	3,404,928		31.6
EDDYSTONE 3	380	922,697	27.7				
EDDYSTONE 4	380	767,232	23.1				
KEYSTONE 1+2	353	1,832,377	59.3	768,893	17,016		
RICHMOND 9	166	188,415	13.0		540,657		9.5
" 12	108	38,849	4.1				
SCHUYLKILL 1	166	747,716	51.4		1,494,773		46.4
" 3+9	83	264,022	36.3				
SOUTHWARK 1+2	256	444,611	14.3		1,016,238		
<u>NUCLEAR</u>							
PENNS BOTTOM 2	447	1,710,657	43.7				59.0
" 3	439	2,869,614	74.6				
SALEM 1	460	1,495,252	49.4				
<u>INTERNAL COMB</u>							
CRAYDON CT	432	549,943	11.5		11,023,368		
ALL OTHER RE. CT + DKS	1173	348,333	3.4		846,995	2,301	
SALEM CT.	16	6,417	4.6		17,172		

STATION - UNIT

STEAM

BARB 3+4
 CHESTER 5+6
 CONEMAUGH 1+2
 CRUMBY 1
 CRUMBY 2
 DELAWARE 7
 DELAWARE 8
 EDDYSTONE 1
 EDDYSTONE 2
 EDDYSTONE 3
 EDDYSTONE 4
 KEYSTONE 1+2
 RICHMOND 9
 " 12
 SCHUYLER 1
 " 3+4
 SOUTHWARK 1+2

NUCLEAR

PEACH BOTTOM 2
 " 3
 SALCM 1

INTERNAL COMB

CRAYDON CT
 ALL OTHER RE. CT+DIES
 SALEM CT

APRIL 1, 1978 thru MAR 31, 1979		NET GENERATION		FUEL BURN			% CAP
MW CAP	MWH	FACT	COAL TONS	OIL BLS	GAS MCF	FACT	
0	0						
124	169,282	15.6		445,057			
352	1,561,606	50.6	658,058	17,905			
150	838,336	63.8	322,498	176,312		61.8	
201	1,062,663	60.4					
126	618,377	56.0		209,130		55.2	
124	590,055	54.3					
301	1,242,658	47.1	1,004,199				
334	1,367,543	46.7		276,141		31.8	
380	563,785	16.9					
380	712,240	21.4					
353	1,798,730	58.2	756,027	19,082			
166	235,832	16.3		551,289			
0	0						
166	708,473	48.7		1,399,062		45.9	
70	241,397	39.4					
356	401,662	12.9		948,202			
447	3,099,207	79.1				76.7	
439	2,850,551	74.1					
460	2,154,586	53.5					
392	314,598	9.2		643,033			
993	207,849	2.4		484,348	1,473		
16	500	0.4		1,765			

STATION _____

SUBJECT _____

STATION	UNIT	NET CAPY	GENERATION	APRIL 1, 1979 thru MARCH 31, 1980		FUEL BURN				CANY FACT.	
				CAPIY FACT.	%	COAL Tons	OIL BBL'S	GAS MCF	%		
		MW	MWH								
STEAM											
BARBADOS	3#1	0	0								
CHESTER	5#6	124	122 000	11.2			223 700				
CONEMAUGH	1#2	352	1785 000	57.7	767 000		75 540				
CROMBY 1		150	560 000	72.9	369 300		1344 540			57.3	
CROMBY 2		291	908 000	45.8							
DELAWARE 7		126	821 000	74.2			2620 460			71.8	
DELAWARE 8		124	755 000	69.3							
EDDYSTONE 1		301	1751 000	67.7	1482 300						
EDDYSTONE 2		334	2258 000	77.0				3691 670			47.6
EDDYSTONE 3		380	229 000	27.8							
EDDYSTONE 4		380	858 000	25.7							
KEYSTONE	1#2	353	1880 000	60.6	841 300		36 740				
RICHMOND 9		166	164 000	11.2			343 830				
RICHMOND 12		0	0								
SCHUYLKILL 1		166	126 000	49.8			1489 760			54.5	
SCHUYLKILL 3#9		70	341 000	55.5							
SOUTHWARK	1#2	356	242 000	7.7			492 640				
NUCLEAR											
PEACH BOTTOM 2		447	3077 000	78.9						76.2	
PEACH BOTTOM 3		435	2853 000	74.0							
SALEM 1		460	2488 000	61.6							
INTERNAL COMBUSTION											
CROYDON CT		392	497 100	14.4			1106 620				
SALEM CT		16	0	0			0				
ALL OTHER PE CT & DIE		953	205 650	2.4			475 070		760		

1236a

STATION

SUBJECT

STATION - UNIT	NET CAPY	GENERATION	YEAR 1950		FUEL BURN		CAPY FACT.		
			MW	MWH	%	COAL TONS		OIL BBL'S	GAS MCF
STEAM									
BARBARCES 3A	0	0							
CHESTER 3C	124	157 000	14.4		350	300			
CONEMAUGH 1A	352	1669 000	54.0	717	700	71	010		
CROMBY 1	150	940 000	71.3	356	300	1483	460	55.5	
CROMBY 2	201	893 000	50.4						
DELAWARE 7	126	818 000	78.5			2473	290	67.8	
DELAWARE 8	124	670 000	61.5						
EDDYSTONE 1	301	1775 000	67.1	1531	400	3891	830	46.6	
EDDYSTONE 2	334	2076 000	69.1						
EDDYSTONE 3	320	240 000	25.2						
EDDYSTONE 4	380	1075 000	32.2						
KEYSTONE 1A	353	1874 000	60.4	838	500	36	220		
RICHMOND 9	166	182 000	13.5			374	980		
RICHMOND 12	0	0							
SCHUYLKILL 1	166	797 000	54.7			1619	680	55.1	
SCHUYLKILL 3A	70	345 000	36.1						
SOUTHWATER 1A	356	297 000	9.5			552	940		
NUCLEAR									
PEACH BOTTOM 2	447	2464 000	67.8					73.4	
PEACH BOTTOM 3	429	3251 000	84.3						
SALEM 1	460	2738 000	67.8						
INTERNAL COMBUSTION									
CROYDON CT	392	485 990	14.2			1084	290		
SALEM CT	10	240	0.2				580		
ALL OTHER PE CT&DIE.	993	248 180	2.8			569	710	760	

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PREPARED	
CHECKED	TBE
TYPED	s/ehs
COMPALED AND FOOTED	

Phila. Electric Co. - Electric
 Steam Power Generation
 Operating and Maintenance Expenses
 \$1,000

Attachment I-B-2
 5 of 16

Design	4-1-77 to 3-31-78	4-1-78 to 3-31-79	4-1-79 to 3-31-80
1 Schuylkill Station			
Operating (Excluding Fuel)	9,304	3,003	4,604
Fuel	20,650	21,509	23,911
Maintenance	2,457	2,813	2,362
Total	26,411	27,324	30,877
6 Eddystone Station			
Oper.	4,867	5,413	5,717
Fuel	72,308	73,170	112,945
Maint.	15,402	14,990	14,255
Total	92,574	93,573	132,917
7 Crommy Station			
Oper.	1,662	1,769	1,990
Fuel	29,946	38,714	35,803
Maint.	3,522	2,485	4,169
Total	35,130	42,888	41,962
8 Chester Station			
Oper.	1,825	1,820	2,297
Fuel	9,073	6,467	4,252
Maint.	1,050	1,089	1,452
Total	12,008	9,376	7,981
9 Delaware Station			
Oper.	1,839	1,994	2,278
Fuel	32,515	30,310	41,650
Maint.	1,626	2,756	2,745
Total	35,980	35,060	46,673
10 Richmond Station			
Oper.	1,456	1,733	1,823
Fuel	7,385	7,907	5,514
Maint.	2,330	1,132	1,286
Total	11,171	10,772	8,623
11 Barbours Station			
Oper.	756	598	480
Fuel	1,675	7	0
Maint.	357	277	165
Total	2,788	882	645

Phila. Electric Co. - Electric

Steam Power Generation

Operating and Maintenance Expense

\$1,000

PREPARED	
CHECKED	TSP
TYPED	3/8/73
COMPARED AND FOOTED	

Desig.		4-1-77	4-1-78	4-1-79
		¹⁰ 3-31-78	¹⁰ 3-31-79	¹⁰ 3-31-80
12	Southwark station			
	Operating (excluding Fuel)	2,328	2,500	2,815
	Fuel	14,179	13,911	7,879
	Maintenance	1,321	2,006	1,788
	Total	17,828	18,417	12,482

1240a

Phila. Electric Co. - Electric

Attachment I-B-2

7 of 16

PREPARED
 CHECKED TBP
 TYPED 5/8/79
 COMPARED AND FOOTED

Mine Mouth
 Operating and Maintenance Expense
 \$11,000

Design		4-1-77 to 3-31-78	4-1-78 to 3-31-79	4-1-79 to 3-31-80
15	Conemaugh Station			
	Operating (Excluding Fuel)	1 899	1 360	1 204
	Fuel	21 793	22 990	29 817
	Maint.	4 511	5 283	3 362
	Total	27 403	29 633	34 383
17	Keystone Station			
	Oper.	971	1 106	1 152
	Fuel	18 052	20 036	24 259
	Maint.	4 279	4 196	3 852
	Total	23 302	25 338	29 263

Phila. Electric Co. - Electric
Nuclear -
Operating and Maintenance Expense
\$1,800

PREPARED	
CHECKED	TBP
TYPED	SIB/MS
COMPARED AND FOOTED	

Desig.		4-1-77	4-1-78	4-1-79
		to 3-31-78	to 3-31-79	to 3-31-80
14	Peacn Bottom 2+3			
	Operating (Excluding Fuel)	7,178	7,996	8,726
	Fuel	14,892	20,589	20,401
	Maint.	8,928	8,885	8,046
	Total	30,998	37,470	37,173
16	Salem Station			
	Operating (Excluding Fuel)	4,486	7,369	9,522
	Fuel	4,733	6,089	12,966
	Maint.	3,880	5,226	8,397
	Total	13,099	18,684	30,885

1242a

PREPARED	
CHECKED	TBP
TYPED	5/2/79
COMPARED AND FOOTED	

Phila. Electric Co. - Electric
Gas Turbines

Operating and Maintenance Expense

\$1,000

Desig.	4-1-77 + 3-31-78	4-1-78 + 3-31-79	4-1-79 + 3-31-80
Simple Cycle CT's			
Operating (Excluding fuel)	3 477	3 412	3 484
Fuel	13 296	8 045	8 444
Maint.	1 412	2 557	3 147
Total	18 185	14 014	15 075
129 Croydon Station			
Oper.	266	441	443
Fuel	17 570	10 443	19 526
Maint.	1 663	1 596	1 862
Total	19 499	12 480	21 771
126 Salem CT			
Oper.	8	9	18
Fuel	263	28	0
Maint.	27	11	18
Total	298	48	36

1246a

PREPARED

CHECKED

TYPED

APPROVED
FOOTER

Palla Electric Co. - Electric

-Attachment I-B-2

13 of 16

Mine Month

Operating and Maintenance Expense

44,600

Design

1-1-80

to

12-31-80

15	Communion Station
	Operating (Excluding Fuel)
	Fuel
	Maint.

1,274

29,535

4,147

Total

34,956

17	Keystone Station
	Oper.
	Fuel
	Maint.
	Total

1,213

25,616

5,258

Total

32,093

Ohio Electric Co. - electric

Nuclear

Operating and Maintenance Expenses

\$1,000

PREPARED _____
 CHECKED TBP _____
 TYPED SJB/MS _____
 APPROVED _____

1-1-80
to
12-31-80

Desig.

Desig.	Description	Amount	Notes
14	Peach Bottom 2-3		
	Operating (Excluding Fuel)	9,000	
	Fuel	21,517	
	Maint.	9,479	
	Total	39,996	
16	Salem Station		
	Operating (Excluding Fuel)	11,033	} INCLUDES SALEM UNIT #2
	Fuel	17,464	
	Maint.	9,788	
	Total	38,285	

1248a

PREPARED

CHECKED

TYPED

INDEXED
FOOTED

Phila. Electric Co. - Electric

Hydro

Operating and Maintenance Expense

\$1,000

Attachment I-B-2

15 of 16

Design

19

Mudby Run Station
Operating (excluding fuel)
Fuel
Maint.

Total

1-1-80
to
12-31-80

1207

0

1305

3112

PREPARED _____
 CHECKED TBP _____
 TYPED 5/2/79 _____
 PHASED _____
 FOLDED _____

Phila. Electric Co. - Electric
 Gas Turbines
 Operating and Maintenance Expense
 \$11,000

Desia		1-1-80 to 12-31-80							
Simple Cycle CT's									
	Operating (Excluding fuel)		3506						
	Fuel		10691						
	Maint.		3137						
	Total		17334						
129 Croydon Station									
	oper.		461						
	Fuel		20091						
	Maint.		1886						
	Total		22438						
126 Salera CT									
	Oper.		12						
	Fuel		11						
	Maint.		12						
	Total		35						

1250a

PHILADELPHIA ELECTRIC COMPANY
BEFORE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

INFORMATION SUBMITTED PURSUANT TO
SEC. 53.51 et seq OF THE COMMISSION'S REGULATIONS

VOLUME II - RATE OF RETURN

SUPPLEMENT NO. 6
TO
TARIFF ELECTRIC - PA. P.U.C. NO. 25

ISSUED JULY 27, 1979

EFFECTIVE SEPTEMBER 25, 1979

Philadelphia Electric Company
BANK NOTE AND CREDIT LINE DATA

	(a)	(b)	Amount Outstanding on any one day During Test Year	
	<u>Line of Credit</u>	<u>Average Daily Balance of Notes Payable</u>	<u>Minimum</u>	<u>Maximum</u>
American Bank & Trust Co. of Pa.	\$4,000,000	-	0	0
Central Penn National Bank	6,000,000	-	0	0
Chase Manhattan Bank	6,000,000	-	0	0
Chemical Bank	6,000,000	-	0	0
Continental Bank	5,000,000	-	0	0
Fidelity Bank	14,000,000	-	0	0
First National Bank of South Jersey	5,000,000	-	0	0
First Pennsylvania Bank	35,000,000	-	0	0
Frankford Trust Company	700,000	-	0	0
Girard Bank	18,000,000	-	0	0
Industrial Valley Bank	5,000,000	-	0	0
Irving Trust Company	15,000,000	-	0	0
Lincoln Bank	900,000	-	0	0
Mellon National Bank	2,000,000	-	0	0
National State Bank	2,000,000	-	0	0
Philadelphia National Bank	19,000,000	-	0	0
Provident National Bank	10,000,000	-	0	0
Southeast National Bank	2,500,000	-	0	0
Wilmington Trust Company	3,000,000	-	0	0
<u>FEE LINE OF CREDIT</u>				
Chase Manhattan Bank	25,000,000	-	0	0
Irving Trust Company	<u>25,000,000</u>	-	0	0
TOTAL	\$209,100,000	-		

1252a

EXHIBIT DPS-2

PHILADELPHIA ELECTRIC COMPANY
ELECTRIC OPERATIONS

REVENUE, EXPENSES, INCOME & MEASURES OF VALUE

TWELVE MONTHS ENDING
MARCH 31, 1980

JULY 27, 1979

Philadelphia Electric Company - Combined Operations

DEVELOPMENT OF FACTORS FOR ALLOCATING COMMON
TO ELECTRIC, GAS, & STEAM OPERATIONS (a)

	<u>Plant in Service</u> (1)	<u>By Total Revenue</u> (2)	<u>By Total Customers</u> (3)	<u>Average</u> <u>(4)=(1)+(2)+(3)</u> 3
<u>Basic Data</u>	<u>(Thousand \$)</u>	<u>(Thousand \$)</u>	<u>(Number)</u>	
Electric	\$3,462,887	\$1,229,729	1,264,553	
Gas	292,037	194,996	270,884	
Steam	<u>52,447</u>	<u>41,318</u>	<u>659</u>	
Subtotal	\$3,807,371	\$1,466,043	1,536,096	
Common	<u>117,035</u>	<u>-</u>	<u>-</u>	
Total	\$3,924,406	\$1,466,043	1,536,096	
<u>Allocation Factors</u>			P E R C E N T	
Electric	90.952	83.881	82.322	85.718
Gas	7.670	13.301	17.635	12.869
Steam	<u>1.378</u>	<u>2.818</u>	<u>0.043</u>	<u>1.413</u>
Total	100.000	100.000	100.000	100.000

(a) The allocation factors shown represent plant, revenue and customers at March 31, 1979 (ref. B-17 of Exhibit DPS-1)

1254a

Philadelphia Electric Company - Electric Operations

CASH WORKING CAPITAL

March 31, 1980

(Thousand \$)

Operating & Maintenance Expense

Proforma operating and maintenance expense(a)	\$771,721
Average lag in days between receipt of revenues and payment of operating expenses (b)	34
Average daily O&M \$771,721 ÷ 365	\$2,114
Requirement \$2,114 x 34 days	\$71,876

Taxes and Prepayments

The 3/31/80 balances for taxes accrued, collections payable, taxes prepaid and other prepayments are estimated to be 6% greater than the corresponding actual balances as of 3/31/79. Therefore, the 13-month average balances for those accounts will be 6% greater than the corresponding amounts shown on page C-25 of Exhibit DPS-1.

Thirteen Month Average Balances

	Taxes Accrued (1)	Collections Payable (2)	Taxes Prepaid (3)	Other Prepayments (4)	Net (5)=(1)+(2)-(3)-(4)
Total Company					
3/31/79 (c)	\$44,900	\$5,300	\$19,700	\$2,300	\$28,200
3/31/80 (d)	\$47,600	\$5,600	\$20,900	\$2,400	\$29,900

Allocation to Electric Operations

% (e)	100.1	85.718	96.7	85.718	-
\$	\$47,600	\$4,800	\$20,200	\$2,100	\$30,100

Bank Balances

The thirteen month average bank balances for the period ending March 31, 1980 are not estimated to be increased over the \$12,300 average for the thirteen months ended March 31, 1979. Electric Operations portion of that total is 85.718% of \$12,300 or \$10,500.

Total Cash Working Capital

\$71,876 - \$30,100 + \$10,500 = \$52,276

(a) Test year Oper. & Maintenance Expense	\$765,385
Proforma Expense Adjustments (D-3, D-5, D-11, D-12, D-13, D-17)	6,336
Proforma Oper. & Maintenance Expense	\$771,721
(b) Ref. Page C-25a of Exhibit DPS-1	
(c) Ref. Page C-25 of Exhibit DPS-1	
(d) Balances for 3/31/79 increased approximately 6%	
(e) Ref. Page C-25 of Exhibit DPS-1	

1 never ultimately required approval for termination because
2 there were other arrangements made, is that correct?

3 A That's correct.

4 THE ADMINISTRATIVE LAW JUDGE: If there's
5 nothing further, the witness is excused. And the other
6 witness is excused, also.

7 We have one housekeeping detail on my part.
8 That is there are four motions to strike that Mr. Hall had
9 made at various parts of the transcript. At page 2854 of the
10 transcript, Mr. Hall moved to strike a portion of Consumer
11 Advocate witness Stutz' testimony with regard to the com-
12 mercial forecasts in the A. D. Little document.

13 It is my opinion that the argument goes more
14 to the weight to be accorded these figures and not whether
15 they are immaterial or irrelevant and therefore, I will
16 deny the motion.

17 At page 2968, Mr. Hall moved to strike part
18 of Consumer Witness Shakow's testimony. I will deny the motion
19 on these same grounds.

20 At page 3017, Mr. Hall moved to strike Consumer
21 Advocate Witness Weiss' testimony, or a portion thereof, on
22 the basis of what might be called for lack of another phrase,
23 the Doctrine of Res Judicata. I have examined the Commission's
24 decision in RID 438 and I conclude the Commission did not address
25 itself there to the precise issue raised by Mr. Weiss. Therefore,

Sayre

B-80062683

MORGAN, LEWIS & BOCKIUS

COUNSELORS AT LAW

123 SOUTH BROAD STREET

PHILADELPHIA, PENNSYLVANIA 19109

TELEPHONE: (215) 875-5000

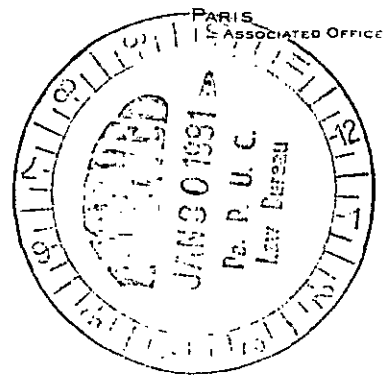
WASHINGTON
NEW YORK
HARRISBURG

LOS ANGELES
MIAMI

PARIS
ASSOCIATED OFFICE

THOMAS P. GADSDEN
DIAL DIRECT (215) 875-5234

January 29, 1981



Francis C. Barbush, Chief Clerk
Commonwealth Court of Pennsylvania
620 South Office Building
Harrisburg, PA 17120

Re: Philadelphia Electric Company v. Pennsylvania
Public Utility Commission, No. 1415 C.D. 1980

Dear Mr. Barbush:

It has been brought to my attention that pages 3-5 of Exhibit THW-6 were inadvertently omitted in the preparation of the Reproduced Record recently filed in the above-captioned proceeding. Accordingly, I have enclosed 27 copies of the missing pages, designated page numbers 1217(b)-1217(d) and request that they be inserted in the copies of the Reproduced Record currently on file.

I sincerely regret this oversight and hope that it has not caused you or the Court any undue inconvenience.

Sincerely,

Thomas P. Gadsden

Thomas P. Gadsden

tjk

Enclosures

cc: All Parties of Record

DOCUMENT
FOLDER

DOCKETED
FEB - 3 1981
96

1. (2) The Company's claim for an estimated
 2. average balance of nuclear fuel in the reactor of
 3. Salem Unit No. 1 for the twelve months ending
 4. March 31, 1980, is overstated because it fails to
 5. properly reflect the scheduled period of reload.

6.
 7. (3) The Company's claim for fossil fuel
 8. inventory based on 45-day supply at the mine mouth
 9. stations and a 60-day supply in the Philadelphia
 10. area stations is inflated due to the Company's
 11. unsupported claim for a "desired" base inventory
 12. level.

13.
 14. (4) The Company has failed to reflect the
 15. effects of the Commission's decision in R.I.D. 438
 16. as it relates to the Theodore Barry & Associates
 17. audit report (May, 1977) of the Salem Unit No. 1.

18.
 19. (5) The Company has overstated its working
 20. capital claim. The analysis of the Company's
 21. working capital claim and recommended changes
 22. to it are addressed by Mr. Arndt.

23.
 24. Q. With regard to the issue of excess generating capacity,
 25. would you please state the Company's generating capacity
 26. reserve for 1978?

27.
 28. A. Based on a peak load of 5,667 megawatts at the time of
 29. system peak in 1978 and the total installed capacity

C

1. connected to load of 7,926 megawatts at the time of
2. system peak load, the Company had an installed reserve
3. capacity of 40 percent of system peak demand. At the C
4. time of the peak, however, for various reasons, only
5. 7,215 megawatts were available to supply the demand which
6. results in a net reserve generation capability of
7. 27 percent. It must be noted that the figures just C
8. quoted are actual statistics for the year ended
9. December 31, 1978, and are in no way modified to reflect
10. an adjustment for normal weather conditions.

11.

12. Q. Does the Company's projected installed reserve capacity
13. for 1979 differ from that experienced in 1978?

14.

15. A. Yes, it does. For 1979, according to Company witness
16. Boyer, the Company projects an installed reserve capacity
17. of 36 percent of projected system peak demand.

18.

19. Q. Is a reserve generating capacity in the 1978 range of 27 C
20. to 40 percent necessary to insure the provision of C
21. adequate and reliable electric service?

22.

23. A. No. As a matter of fact, maintaining such a large
24. reserve generating capacity can be a severely detrimental
25. position for a company to be in from the standpoint of
26. providing electrical service at the lowest possible cost.

27. In the case of Philadelphia Electric Company, a

1. substantial portion of its generating capacity is
2. represented by oil-fired plants which have
3. characteristically high heat rates which, in turn, mean
4. relatively high fuel costs and a susceptibility to
5. unstable fuel prices which have existed since 1973, the
6. beginning of our first hard-hitting experience with the use of
7. oil as an economic weapon in the world market.

8.

9. Q. Is there a generally accepted standard for reserve
10. margins employed throughout the electric utility
11. industry?

12.

13. A. No, there is no generally accepted industry-wide
14. standard. But, in my experience, I am aware of
15. recommended or contractually-agreed-to reserve margins
16. in the range from approximately 15 percent to 25 percent
17. of estimated peak demand for a given system. As an
18. example, the Staff of the Federal Energy Regulatory
19. Commission in a Staff Report entitled "Projected 1977
20. 1978 Winter Electric Load-Supply Situation, Contiguous
21. United States", dated December 1, 1977, has noted that
22. electric utilities generally plan for an installed
23. reserve margin of between 15 percent and 25 percent of
24. peak demand. This range of reserve margins is comparable
25. to the 40 percent installed reserve margin carried by C
26. Philadelphia Electric Company in 1978.

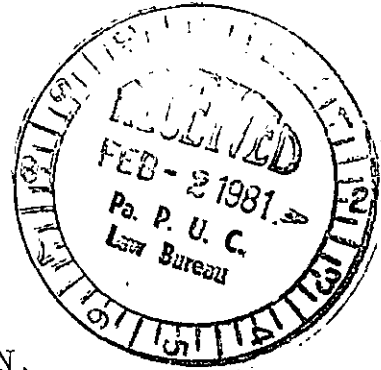
IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

No. 1415 C.D. 1980

PHILADELPHIA ELECTRIC COMPANY,
Petitioner

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondent



BRIEF OF CONSUMER ADVOCATE

Petition for Review of the Order of the
Pennsylvania Public Utility Commission
at R.I.D. 865

Craig R. Burgraff
Assistant Consumer Advocate

Martha W. Bush
Assistant Consumer Advocate

Office of Consumer Advocate
1425 Strawberry Square
Harrisburg, PA 17120
(717) 783-5048

DATED: January 30, 1981

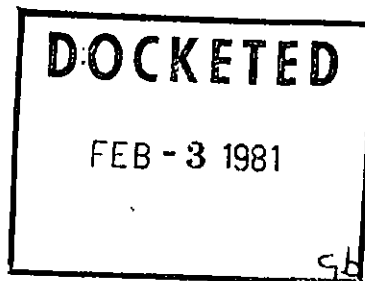


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I. COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

A. Whether the Public Utility Commission properly exercised its duty in balancing investor and ratepayer interests, based upon substantial evidence, by finding excess capacity on Philadelphia Electric Company's System and making a rate base adjustment based upon a representative amount of generation, thereby removing ratepayer return on a portion of PECO's generation, while at the same time providing that ratepayers would still be responsible for all expenses and depreciation on that plant? Answered in affirmative below.

B. Whether the Public Utility Commission properly struck testimony as to the Salem No. 1 audit and carried forward a rate base adjustment on said unit from PECO's prior rate case at R.I.D. 438 based upon principles of res judicata, where PECO had a reasonable opportunity to litigate the issue in the prior case, the Commission's determination in that case was based upon conditions and facts that have not and will not change, and its decision was quasi-judicial in nature? Answered in affirmative below.

C. Whether the Public Utility Commission's reduction of PECO's cash working capital for accrued interest on bonds was based upon substantial evidence and followed recent legal precedent established by Pennsylvania Court's? Answered in affirmative below.

II. SUMMARY OF ARGUMENT

In making its excess capacity adjustment, the Commission properly exercised its discretion in balancing ratepayer and investor interests. Pursuant to legal precedent, the risk of obsolescent or non-useful generating capacity belongs to the investor regardless of whether the initial decision to construct or employ plant was prudent. The removal of a return on certain investment representative of excess capacity places that risk on investors. Ratepayers continued to pay all operation and maintenance expenses, including fuel, and depreciation expense for the plant representative of excess generating capacity on the system. In finding excess capacity and in making the rate base adjustment, the Commission relied upon substantial evidence.

The Commission's decision is striking Company testimony as to Salem No. 1 and carrying forward a rate base adjustment for said unit from PECO's prior rate case at R.I.D. 438 was appropriate as based upon principles of res judicata since PECO had a reasonable opportunity to litigate the issue in the prior case, the Commission's determination was based upon conditions and facts that have not and will not change, and its decision was quasi-judicial in nature.

The Commission's reduction of PECO's cash working capital requirement for accrued interest on bonds follows recent legal precedent accepted by Pennsylvania Courts and was supported by substantial evidence.

III. ARGUMENT

A. The Public Utility Commission Properly Exercised Its Duty In Balancing Investor And Ratepayer Interests By Finding Excess Capacity On PECO's System And Making A Rate Base Adjustment Based Upon A Representative Amount Of Generation, Thereby Removing Ratepayer Return On A Portion Of PECO's Generation, While At The Same Time Providing That Ratepayers Would Still Be Responsible For All Expenses And Depreciation On That Plant.

1. Commission, In Dealing With Excess Capacity on PECO's System, Properly Exercised Legal Discretion Available To It.

A fundamental principle in utility regulation is the balancing of investor and consumer interests. The classic enunciation of this precept was stated by the United States Supreme Court in Federal Power Commission v. Hope Natural Gas, 340 U.S. 591, 603 (1944): "The ratemaking process under the [Natural Gas] Act, i.e., the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests."

The Pennsylvania Supreme Court recently affirmed this view by deciding that the overriding principle governing the Pennsylvania Public Utility Commission's performance of its duty is to determine just and reasonable rates pursuant to Section 1301 of the Public Utility Code, 66 Pa. C.S. 1301. Pennsylvania Public Utility Commission v. Pennsylvania Gas and Water Company, ___ Pa. ___ (Slip Opinion filed February 1, 1980, page 8). It elaborated as follows:

There is ample authority for the proposition that the power to fix "just and reasonable" rates imports a flexibility in the exercise of a complicated regulatory function by a specialized decision-making body and that the term "just and reasonable" was not intended to confine the ambit of regulatory discretion to an absolute or mathematical formulation but rather to confer upon the regulatory body the power to make and apply policy concerning the appropriate balance between prices charged to utility customers and returns on capital to utility

investors consonant with constitutional protection applicable to both. (Slip Opinion, pps. 8-9).

The Advocate submits that the treatment of PECO's excess capacity defined by the Commission as capacity over and above that necessary to meet peak demand plus that capacity to insure that there is a margin to allow for day-to-day variations in the operating condition of installed generation (page 10, May 9 Order), by the Commission was based on sound, substantial evidence, effectuated a sharing between investors and ratepayers based upon sound regulatory principles, and was not in violation of law.

Before analyzing the legal challenge to the exercise of the Commission's discretion, it is important to review the May 9, 1980 Order to determine what the Commission did in balancing the investor and ratepayer interests and, even more importantly, what it did not do.

Six witnesses testified as to load forecasting and excess capacity in R.I.D. 865. Dr. Stutz of Energy Systems Research Group, Inc., testified on behalf of the Consumer Advocate's Office, and presented a detailed load forecast CA Statement No. 3 and 3-A, Ex. JS-4, R. 703a-850a. Dr. Birx of the Commission Trial Staff testified to excess capacity and recommended a rate base adjustment. Staff Statement DLB-1, R. 660a-668a. Mr. Boonin and Ms. Barret of the Commission Trial Staff testified as to excess capacity and recommended a revenue adjustment. Staff Statement DMB/EMB-1, R. 669a-685a. Dr. Shakow, also of ESRG, on behalf of the Consumer Advocate's Office, presented a detailed study evidencing that PECO could reliably serve its customers with its generation mix with a 14-22% reserve capacity margin over peak CA Statement No. 4 and 4-A, R. 927a-1063a. Finally, Mr. Weiss of Hess & Lim, Inc., testifying for the Consumer Advocate's

Office, recommended that certain plant representative of a level of excess capacity based upon Dr. Stutz and Dr. Shakow's work be removed from rate base. CA Statement No. 5, pp. 6-19, CA Exhibit THW-6, R. 1194a-1215a, 1216a-1217d.

The Commission essentially accepted the testimony of Drs. Stutz and Shakow and Mr. Weiss. It used the peak load forecast of Dr. Stutz and the reliability criterion of Dr. Shakow which resulted in excess capacity of 748 megawatts using the mid-range of Dr. Shakow's 14-22% reliability criterion. The Commission also accepted Mr. Weiss' methodology of identifying plants as representative of the excess capacity on the basis of the least economical units and identified those plants as Chester 5 & 6, Richmond No. 9, Barbadoes No. 6 & 8 and Southwark Units 1-6. The dollar amount eliminated from rate base was arrived at by totaling the depreciated original cost of said units (pp. 11-14 of May 9 Order).

The Commission did not retire any of the plants selected as representative of excess capacity, it still allowed PECO to recover its operation and maintenance expenses, fuel stocks, etc. associated with those plants from ratepayers, and it continued to allow PECO to recover annual depreciation expense on those plants from ratepayers. (pp. 14-15 of May 9 Order). Stated simply, the sharing adopted by the Commission imposed upon ratepayers the burden of paying all operating expenses of the plants chosen as representative of the excess capacity on the system and the burden of bearing the return of the investment, i.e., depreciation. The burden placed upon investors was the bearing of the return on investment since depreciated original cost was removed from rate base for the plants chosen as representative of excess

capacity on PECO's system. The principal applied was essentially that ratepayers should not have to pay a return on plant representative of capacity in excess of reserve needed to generate their needs, since that risk properly belongs to investors.

PECO challenges, as a legal matter, the Commission's decision principally on two grounds.

The first ground is that the investment in the plants at issue was prudent when made and that this standard alone dictates that no rate base treatment can be afforded for excess capacity. Second, the Company argues that the amount of plant representing excess capacity will be useful in the future and, hence, no rate base deduction can be properly made.

The Advocate submits that the Company's arguments fail based upon legal precedent.

Initially, a prudent/imprudent management test applied at the time of the decision by the utility to construct or employ particular plant would effectively negate any discretion on the part of the Public Utility Commission in this area. It would effectively insure that ratepayers would bear all the risk in any situation of overexpansion when the expansion appeared prudent at the time. Courts and commissions have clearly rejected this legal premise and have held that, even if an investment may have been prudent when made, the investor bears the risk of obsolescence or non-usefulness.

Three early cases laying the foundation in the area were St. Joseph Stock Yards v. United States, 11 F. Supp. 322 (1935), Wisconsin Telephone Co. v. Public Service Commission, 237 N.W. 122, 232 Wisc. 274 (1939), and San Diego Land and Town Company v. Jasper, 189 U.S. 439, 23 S. Ct. 571, 47 L.Ed. 892 (1903). The District Court, in St. Joseph, stated:

The matter of including or excluding land or property held for business expansion in the rate base is the matter of who-the ratepayers or the Company-shall carry property which is not being used to produce the service paid for by the rate. Obviously, it may be proper and good business judgment may sometimes dictate provision for future expansion of the business. It is equally clear that, so far as the present ratepayers are concerned, there must be a limit to the extent to which they can be compelled to pay for providing possible future facilities for future business. While a broad power and discretion must be left undisturbed in company management, yet, even as to expenditures directly entering into the present service for which the now customer pays, this discretion is not beyond control. (page 329).

The Court in Wisconsin Telephone, supra, stated that the utility was the proper repository of the burden of an unreasonable extension of its plant and the risk that portions of it prudently acquired may become obsolete or not useful. (237 N.W. at 158). That Court found excess plant where the Company had argued that its plant was reasonably and properly provided at the time, i.e. prudent investment at the time, and it appeared the excess could be traced to the depression. A similar case in point, also with the depression as the focal point of an excess, is Southern Bell Telephone & Telegraph Co. v. Public Service Commission, 174 So. 180, 187 La. 137 (1937), wherein the Court held that a deduction in rate base for excess plant on account of an economic depression was warranted since investors in

public utilities have no right to expect the public to underwrite their investments. It should be remembered that depressed actual demand over anticipated demand is a main factor in the excess capacity present in PECO's case.

The United States Supreme Court, in San Diego Land and Town Company, posited:

If a plant is built, as probably this was, for a larger area than it finds itself able to supply, or apart from that, if it does not, as yet, have the customers contemplated, neither justice nor the Constitution requires that, say, two thirds of the contemplated number should pay a full return.

The statute of California no doubt was contemplating the case of waterworks fully occupied within the area which they intended to supply. It hardly can have meant that a system constructed for 6,000 acres should have a full return upon its value from 500, if those were all that it supplied. At all events, we will not be the first to say so. If necessary to avoid that result, we should assume that only a proportionate part of the system was actually used and useful within the meaning of the statute.

If the original company embarked upon a great speculation which has not turned out as expected, more modest valuations are a result to which it must make up its mind. (189 U.S. at pps. 446, 447).

More recent cases standing for the identical proposition are Fern Lake Company v. Kentucky Public Service Commission, 357 S.W. 2d 701, 704, 705 (1962); Terra Utilities, Inc. v. Public Service Commission, 575 P.2d 1029, (1978); Public Service Commission v. Montana-Dakota Utilities Co., 100 N.W. 2d 140 (1959); and Pacific Telephone & Telegraph Company v. Public Utilities Commission, 401 P.2d 353, 44 Cal. Rptr. 1 (1965). Illustrative of these decisions is the Court's statement in Montana-Dakota Utilities, supra at 150:

We believe the evidence is all but conclusive that the excessive size of the pipeline proposed from the Signal plant at Tioga to Minot is not necessary to serve the communities proposed and not at the present actually to be used nor be made useful for the purpose of rendering its public service to Minot and the intervening communities. It may be a prudent investment to provide for possible future growth by expansion into other and new communities to the east at some future date providing sufficient gas is made available. The anticipated patrons of the Company under the present proposal cannot be burdened in order to provide for possible needs of other patrons in other communities sometime in the future.

In like fashion, state utility commissions have found excess capacity in situations where there was no imprudent management at the time of construction or addition and, in the interest of balancing consumer and investor interests, made adjustment therefore.

In Re: Northern States Power Company, 32 P.U.R. 4th 58 (1979), the Minnesota Public Service Commission dealt with the question of the Company's peak shaving facilities where excess capacity existed. The investment in those facilities was prudent when made, the shavers could be utilized by 1985 to provide service to ratepayers, and a portion of the peak shaving facilities was currently used and useful. The Company in that case made many of the arguments posited in this case by PECO. The Commission upheld an adjustment which found a portion of the peak shavers as excess capacity and noted, in referring to an earlier opinion:

In summary, the Commission found the "used and useful" test to be the proper standard for evaluating the rate base of a Minnesota utility. It found that rate base items must be truly available to its ratepayers generally, not just to a few contract customers. The Commission concluded that only plant that would be imminently used could justify an exception to the "currently used" standard. Further, the Commission noted that investors must bear some of the risks of a utility's business operations.

All the reasons relied upon by the Commission in Re Northern States Power Co. (1977) Docket No. G-002/GR-76-3627, are fully applicable here.

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The Commission continues to reject the "prudent management decision" test as sufficient grounds for inclusion of plant in rate base. . . . The prudence of the decision to build the plant is simply not dispositive. . . . The fact remains that the capacity is not presently serving the public, and the public is therefore not to be burdened with paying a return on plant not useful to them. (page 72).

The position of the New York Public Service Commission is identical. In Re Niagara Mohawk Power Corp., 16 P.U.R. 4th, 317, 328, 329 (1976), that Commission stated, in a factual situation containing similarities to the one at hand:

There is little argument that the company's initial decision in 1970 to construct this plant was prudent. On the basis of estimates made before the 1973 oil embargo Oswego No. 5 was needed to meet expected peak loads in the winter of 1975. The decline in load growth, which resulted from both conservation and reduced industrial activity, has now-with the benefit of hindsight-brought that decision into question.

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Although the eventual need for this plant has been established to our satisfaction, we are concerned with the burden placed on present ratepayers by that portion of the facility that is now in excess of the system requirement.

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Construction of generating plants involves substantial lead times during which changes in economic conditions may result in the company having capacity in excess of its optimum objective. While this does not demonstrate imprudence, neither does it mean that the burden of picking up the fixed charges associated with the plant should be placed entirely on present ratepayers.

Finally, the principle that ratepayers should not be required to pay excessive rates on unnecessary plant not used and useful was recognized in two of the cases cited by PECO. See State ex rel. Utilities Commission v. General Telephone Company of the Southeast, 281 N.C. 318, 189 SE 2d 705, 727 (1972); and State ex rel. Utilities Commission v. Mebane Home Tel. Co., 257 S.E. 2d 623, 633 (1979).

PECO's second argument, namely that the plant will be useful in the future, begs the questions. In 1980, based upon PECO's own load forecast, which was not accepted by the Commission, the reserve level was 31%. In 1981, again using PECO's load forecast, the reserve was 28%. See PECO Brief, p. 13. Given Dr. Shakow's average reliability criteria of 18%, as accepted by the Commission, the excess capacity levels on the system breakout at 13% and 10% respectfully. Since the life of the rates set in R.I.D. 865 can be expected to last only until approximately May of 1981 given the Company's pending rate request in R.I.D. 225, whose suspension period ends in April, 1981, one need not go much beyond 1980 as a period in which to judge whether the plant at issue will border on being useful for rate base purposes. It clearly does not.

PECO also raises a red herring of its own creation, namely factual data concerning the operation of the plants used as a representative measure of excess capacity on the system.

As noted earlier, the Commission did not retire those units, it allowed operation and maintenance expense, including fuel, to be recovered from ratepayers, and it allowed depreciation expense on those units to be recovered from ratepayers. It simply used those plants, as the least economical based upon heat rates and proposed retirements, as

a representative measure of the excess capacity on the system. This measure simply was used to determine what portion of return on the system should not be paid by ratepayers, since that risk is attendant on investors. It represents a reasonable and supportable sharing between ratepayers and the investor and supplies a reasonable measure for purposes of a ratemaking adjustment. The Commission exercised its discretion in the same manner in Pennsylvania PUC v. Pennsylvania Power Co., 27 P.U.R. 4th 426, 437 (1980), and, as this Court has noted, in the area of adjustments to rate base, the Commission has wide discretion. UGI Corp. v. Pa. P.U.C., 49 Pa. Cmwlth. 69, 410 A.2d 923, 929 (1980). See also Duquesne Light Co. v. Pa. PUC, 174 Pa. Super. 62, 69-70, 99 A.2d 61, 69 (1953).

The Commission did not base its adjustment, nor did Mr. Weiss, on the alleged affects and cost/benefit analysis of an actual retirement of these units. By arguing from this basis as to limited use of the plants at issue, usefulness measured by retirement costs and potential replacement power costs, and the effect of actual retirement of said units, as PECO does in its Brief, the Company simply sets up and knocks down its own straw man.

PECO, in substance, is posturing an argument that states that actual retirement is the only acceptable exercise of the Commission's jurisdiction in the area of excess capacity. The cases cited above belie that inference, see for example Re Niagara Mohawk Power Corp., supra, which involved an excess capacity adjustment for a plant that was in operation; Re Northern States Power Company, which involved, in part, peak shaving facilities that were available for customer use but in excess of design requirement;

and Terra Utilities, where the excess portions of the system transported water.

The Commission has discretion to effectuate a sharing of the burden where rate base is concerned. Indeed, this Court, in UGI, supra, recognized this by upholding the Commission's allowance to UGI of \$6.5 million in expenses for exploration and drilling but not a rate base claim for \$1.2 million for the cost of dry wells. Fundamental law requires no particular theory or method to be used in determining a rate base, provided the resulting rates are not confiscatory. Boston Gas Company v. Department of Public Utilities, 324 N.E. 2d 372, 376 (1975).

In summary, the Commission exercised sound discretion in its finding and treatment of excess capacity. It effectively balanced ratepayer and investor interests concerning excess capacity on the system in conformance Pa. P.U.C. v. Pennsylvania Gas & Water, supra. PECO's positions would effectively prevent the Commission from fulfilling its legal duty. The Commission's decision must stand.

2. The Commission's Determination of Excess Capacity On PECO's System, And Its Selection of A Rate Base Adjustment Representing Said Excess, Was Supported By Substantial Record Evidence and Should Not Be Disturbed.

PECO has argued that the Commission, in finding excess generating capacity on the Company's system and making a rate base adjustment thereon, erred in not accepting the evidence offered by it and did not have substantial evidence before it to make such a decision. The Company's argument is without merit.

Prior to the adoption of Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704, effective June 27, 1978, judicial review of Public Utility Commission decision's was predicated upon Section 1107 of the Public Utility Law, Act of May 28, 1937, P.L. 1053, as amended, 66 P.S. 1437. That statute required that a "lack of evidence" was necessitated to overturn a Commission decision. The Commonwealth Court stated the test in Philadelphia Suburban Transportation Company v. Pa. PUC, 3 Pa. Cmwlth 184, 189-191 (1971):

In a recent opinion of this Court in the case of York v. Pennsylvania PUC, 3 Pa. Commonwealth Ct. 270, this Court set forth its scope of review in appeals from adjudications of the PUC. We said there:

"Section 1107 of the Public Utility Law... provides: "...The order of the Commission shall not be vacated or set aside either in whole or in part, except for error of law or lack of evidence to support the findings, determination, or order of the Commission, or violation of constitutional rights..."

....

Our authority to overrule an order of the Commission is limited. We may not disturb such an order except for errors of law, lack of evidence to support a finding, determination or order of the Commission, or a violation of constitutional rights... Likewise, we may not exercise our independent judgment on the record or resolve conflicting evidence. Pittsburgh Railways Company v. Pennsylvania Public Utility Commission, 198 Pa. Superior Court, 415, 182 A.2d 80 (1962). Our inquiry is directed to whether there is substantial evidence to support the Commission's action. Pittsburgh and Lake Erie Railroad Company v. Pennsylvania Public Utility Commission, 170 Pa. Superior Court, 411, 85 A.2d 646 (1952). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a

conclusion. Pennsylvania State Board of Medical Education and Licensure v. Schireson, 360 Pa. 129, 61 A.2d 343 (1968). Substantial evidence has also been said to mean evidence affording a substantial basis of fact from which a fact in issue can reasonably be inferred. Substantial evidence is synonymous with competent and relevant evidence having a rational probative force. In Philadelphia Suburban Water Company v. Pennsylvania Public Utility Commission, 425 Pa. 501, 229 A.2d 748 (1967), it was held that in view of Section 1107 of the Public Utility Law of 1937, the Pennsylvania Public Utility Commission's exercise of its discretion must be accepted by the courts unless its action is totally without support in the record, or is based on an error of law or is unconstitutional." We again hold that these statements describe our scope of review of PUC adjudications.

This test as to evidentiary review was applied as a lack of evidence standard. See Springettsbury v. Pa. PUC, 5 Pa. Cmwlth. 102, 104-105 (1972), Lower Paxton Township v. Pa. PUC, 13 Pa. Cmwlth. 135, 139 (1974), and Keystone Water Co. v. Pa. PUC, 19 Pa. Cmwlth. 292, 299-300 (1975).

The Administrative Agency Law test is one of "substantial evidence." However, in applying the new act to the Public Utility Commission, Commonwealth Court has apparently not altered its judicial review test. In Mobil fone of Northeastern Pennsylvania, Inc. v. Pa. PUC, 40 Pa. Cmwlth. 181, 184, (1979) that Court noted that the test under 2 Pa. C.S. §704 was lack of evidence to support the findings.

Regardless of whether the "substantial evidence" test is viewed as being one of any support at all in the record or one of such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, the Commission clearly had sufficient relevant, competent evidence upon which to base its decision.

As noted earlier, Dr. Stutz performed a comprehensive, independent load forecast which was methodologically sound. C.A. Statement No. 3 and CA Exhibit JS-4, R. 703a-836a. He also filed rebuttal testimony to Company witness Hoch's criticisms. CA Statement No. 3-A, R. 837a-849a. Dr. Shakow performed an independent analysis of PECO's generation planning and reliability criterion to serve its load. CA Statement No. 4, R. 927a-1054a. He also filed effective rebuttal testimony to Company witness Kasum. CA Statement No. 4-A, R. 1055a-1063a. Also, Mr. Weiss filed testimony as to the proper methodology to be used in arriving at a rate base deduction representative of excess capacity on the system. CA Statement No. 5, pp. 6-19, Exhibit THW-6, R. 1194a-1217d.

PECO has, in its Brief in this matter, simply iterated its testimony and arguments in the rate case. This testimony and the arguments attendant thereto were considered by the Commission in R.I.D. 865. No clearer evidence of this fact can be presented than Appendix D and E attached to PECO's Brief in this matter. Appendix E is little more than portions of the Company's Brief before the Commission.

Much of the alleged errors in the testimony enumerated by PECO was rebutted in C.A. Statements No. 3-A and 4-A, R. 837a-849a, R. 1055a-1063a. Said rebuttal responds cogently to the "errors" alleged by PECO, and the Advocate would simply direct the Court to that testimony.

The quality of PECO's review of the record evidence is demonstrated by its statement, at pages 33 and 34 of its Brief, that Dr. Shakow "admits" that the analysis as to the reliability criterion of 14-22% is in error.

Initially, a reading of page 15 of the May 9, 1980 Order indicates that the Commission accepted the Administrative Law Judge's conclusions as to a Limerick investigation based principally on legal grounds, i.e., prospective ratemaking adjustments would be only advisory to a future Commission, construction should not be ordered to be terminated, the Commission should not interfere with respondent's management by expressing approval or disapproval of accelerated construction for this project. That order in no way evidences PECO's view that the Commission rejected Dr. Shakow's factual analysis as to a proper reliability criterion, or that the reliability criterion is necessarily tied to the decision as to the efficacy of completing Limerick in the mid to late 1980's. As the Advocate argued to the Commission, even if one assumed a reliability criterion of 30%, that does not, by definition, assume that one particular plant, i.e. Limerick, is required to meet that criterion.

Second, PECO again bootstraps its own assumptions as proof of Dr. Shakow's "admission." Cases 2 and 8 in Table VI, C.A. Statement No. 4, R. 947a, were premised upon PECO plant cost assumptions which understated the capital costs attendant with nuclear construction and seriously overestimated the assumed capacity level for a new nuclear unit based upon the statistical history of experienced levels. C.A. Statement No. 4, pp. 19, 21a, 36-38, 42, 44-52, Exhibit DS-D, R. 946a, 948a, 964a-966a, 970a-980a, 1046a. PECO's analysis, therefore, is composed of a faulty assumption as to the Commission's view of Dr. Shakow's testimony as a whole which enables it to "prove" an alleged error relying on its own assumptions. The two principle points in the costing analysis were these two assumptions, and the Company did not rebut the Advocate's evidence as to these two points.

In essence, PECO is asking this Court to substitute its own judgment for that of the Commission. This clearly violates Philadelphia Suburban Transportation Company, supra. See also State ex rel. General Telephone Company of Midwest v. Public Service Commission, 537 S.W. 2d 655, 664 (1976). As this Court noted in Lower Paxton, supra at 139: "We may not indulge in the process of weighing evidence and resolving conflicts in testimony." The Supreme Court of Idaho stated the principle thusly in Idaho Underground Water Users Ass'c. v. Idaho Power Company, 404 P. 2d 859, 867 (1965):

The most favorable view of appellant's contention is that at best it has presented a possible conflict in the record. This, however, is insufficient to justify this court in saying that as a matter of law the Commission erred in its determination of this aspect of the rate base.

A review of the record clearly indicates that substantial evidence existed upon which the Commission could, and did, properly exercise its discretion concerning excess capacity. The fact that the Company simply does not think the decision is right does not overcome the legal evidentiary standard for review.

- B. Public Utility Commission's Decision To Strike Testimony As To The Salem No. 1 Audit, And To Carry Forward A Rate Base Adjustment In Said Unit From PECO's Prior Rate Case (RID 438) Was Appropriate Based Upon Principles Of Res Judicata, Since PECO Had A Reasonable Opportunity To Litigate The Issue In The Prior Case, The Commission's Determination Was Based Upon Conditions And Facts That Have Not And Will Not Change, And Its Decision Was Quasi-Judicial In Nature.

The rule or principle of res judicata is set forth in the Restatement of the Law, as follows:

Where a reasonable opportunity has been afforded to the parties to litigate a claim before a court which has jurisdiction over the parties and the cause of action, and the court has finally decided the controversy, the interests of the State and of

the parties require that the validity of the claim and any issue actually litigated in the action shall not be litigated again by them.

Restatement of the Law of Judgments, §1(1942). This principle is based upon the public policy of putting an end to litigation and applies not only to what was litigated, but also what could have been litigated. The U.S. Supreme Court so stated, as follows:

It is a finality¹ as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose... . Supreme Court in *Cormwell v. County of Sac*, 94 U.S. 351, 352-3, 24 L. Ed. 195 (1876).

The test in determining whether the doctrine applies is whether the particular decision was judicial in its nature and effect and not the mechanics of the proceeding. *Mulcahy v. Public Service Commission*, 101 Utah 245, 117 P. 2d 298 (1941).

The reason for the rule that judgment rendered on the merits is conclusive as to all matters which were and which might have been decided is the public policy requirement that a single controversy capable of being completely determined in one proceeding be ended by the judgment in that suit and shall not become the subject matter of subsequent litigation. *McIntosh v. Wiggins*, 123 F. 2d 316 (8th Cir. 1941), cert. denied, 315 U.S. 815.

The public utility commission once concluded that certain imprudent and unreasonable construction management practices resulted in unnecessary costs of Salem Nuclear Generating Unit in the amount of \$10.5 million (out of PECO's \$287 million share of the plant). The issue in the instant proceeding then becomes whether this general principle

as to judgments applies to that finding and conclusion. In accordance with the above-cited cases and authority, the determinants are whether reasonable opportunity to litigate the issue was afforded the parties and whether the determination was judicial in its nature and effect.

A review of the case law supports the view that the principle of res judicata is not applied to administrative decisions which are legislative and which involve resolution of issues that are based on facts and conditions that vary with time. The inapplicability of the res judicata doctrine arises out of the public policy interest in allowing administrative bodies to address new facts and conditions as they develop and change, i.e., overall rate level, depreciation rate, valuation of property. In the instant proceeding the Commission's prior determination of mismanagement at the Salem construction site was based on facts and conditions that have not and will not change. Further, the determination was quasi-judicial in nature in that it adjudicated rights and responsibilities of the consumers and the management of PECO after a full hearing.

PECO's claim that it did not have an opportunity to fully litigate the issue must be rejected as without merit and untimely. Parties are allowed to relitigate issues only for newly discovered evidence. PECO has had full opportunity to litigate this issue. The Company could have and should have requested more time to file additional testimony if it so desired. What PECO really wants is a "second bite of the apple." PECO does not even allege, nor could it, newly discovered evidence. No valid reasons have been offered to counterveil the public policy of putting an end to litigation.

The Company also argues it did not have time to respond to the audit, that it was misled by the earlier presented chapters into thinking the audit was complimentary and that it had no recourse, at the time of the last proceeding, other than to present cost comparisons instead of rebutting the substance of the audit. These arguments are without merit and were never raised in the first proceeding.

Contrary to what the Company claims, early chapters of the the audit were not "highly complimentary" of PSE&G. The auditors did include reviews of how PSE&G performed well in certain areas. However, it also criticized certain practices that were the subject of the overall adjustment. PECO knew about the audit in February and received chapters that dealt with nine areas of construction management as early as March and continuing through April, 1978. PECO had ample opportunity to know the substance of the specific criticisms and rebut them in the manner they have now attempted to do with the Mallard testimony. Further, the summary chapter--which summarized and highlighted specific areas addressed in the nine chapters and quantified the dollar savings--was available in May, 1978. Cross-examination and the Company rebuttal were not until late June. If a month and more was not adequate time for preparation, the Company could have so stated at that time and requested an extension. Apparently, the Company thought its rebuttal testimony, its cross-examination of the auditors and its arguments in briefing would be sufficient to win the issue before the Commission. The Company was wrong. All of these arguments reduce themselves to one: the Company would like an opportunity to relitigate the issue.

PECO argues that it should be given the opportunity to address the Commission "chosen standard" which presumably is the reasonableness of the construction practices as contrasted to cost comparisons that the Company relied on in the last case. PECO seems to imply that they had no way of knowing in the last proceeding that they should present this additional evidence. These arguments are without merit. [Contrary to what PECO claims, the Commission did not find PECO's cost comparisons of nuclear plants persuasive but rejected them as unreliable. The Commission stated

While such comparable evidence submitted by the Company has some probative value, it is not of sufficient weight to override the TB&A evidence. Such comparisons do not reflect the unique costs of environment protection, labor and other variable aspects of building a particular nuclear plant.

Pa. PUC et al. v. Philadelphia Electric Company, R.I.D. 438 (mimeo at 17) December 28, 1978.] With full opportunity to litigate as it thought best, the Company presented certain testimony to rebut the audit. The Commission found it unpersuasive. Now PECO wants another chance to relitigate this issue. This is an insufficient basis to override application of res judicata. The interest in repose and finality should not be overridden simply in order to give PECO a chance to try to make a better presentation than it did in the prior proceeding when it had full opportunity to do so then.

Neither Pennsylvania or any other jurisdiction's case law supports PECO's position on this issue. While it is often said by the Court that orders fixing rates are not res judicata, Duquesne Light Company v. Pa. P.U.C., 176 Pa. Super. 568, 107 A.2d 745, 749 (1954), this principle is not without limit. See, West Penn Power Co. v. Pa. P.U.C., 174 Pa. Super. 123, 100 A.2d 110(1953). The cases in

which it has been held that res judicata does not apply involve determinations of rate issues that are based on changing conditions.

In many of these cases challenge is made to the Commission's fair value determination. As the Court stated in Pa. PUC v. Pennsylvania Gas and Water Company, 19 Cmwth. Ct. 214, 225, 341 A.2d, 239, 246-47, (1975):

. . . The Commission's responsibility is to determine fair value as of the end of the test period used in this rate case. What may have been fair value at another time is not necessarily fair value 15 years later.

A finding of fair value depends on changing variables, i.e., economic conditions, rates of inflation, recessions, technological developments, and many other factors. In referring to the lack of finality of a fair value determination, the Court in a subsequent decision stated that "the law contemplates a re-examination of these [fair value and rate of return] matters as conditions change [Citations omitted]." [Emphasis added]. Pennsylvania Gas and Water Company v. Pa. P.U.C., 33 Cmwth. Ct. 143, 156, 381 A.2d 996, 1003 (1977). The law contemplates no such re-examination of construction management practices engaged in during a definitive historic time period.

Another rate determination that is based on changing technologies and plant lives was involved in the Commission's refusal to follow its earlier findings in the area of accrued and annual depreciation. Pennsylvania Power and Light's challenge to this was rejected by the Court on the ground that the prior Commission decision was not res judicata. Pennsylvania Power & Light v. Pa. P.U.C., 10 Cmwth. Ct. 328, 311 A.2d, 151 (1973). Again, the issue of rate of depreciation is an issue that varies with time and the resulting

experience in terms of lives of plants, additions to plants and other similar matters. These certainly are not the types of changing conditions that apply to a construction program that entailed various management practices that either did or did not occur over a fixed period of time.*

In citing certain earlier U.S. Supreme Court cases for the general proposition that the doctrine of res judicata does not apply to ratemaking, Brief at 43-44, the Company fails to mention two important points. First, the general doctrine has been limited. Equally importantly, the cases cited refer to types of issues such as overall level of rates and going concern value which are factually different in important ways from the type of determination appealed here.

The U.S. Supreme Court has more recently stated, as follows:

Occasionally courts have used language to the effect that res judicata principles do not apply to administrative proceedings [footnote omitted], but such language is certainly too broad. When an administrative agency is acting in a judicial capacity

* Of the two Commission decisions PECO cites as evidence of the Commission's verdict that res judicata does not apply in any circumstances to its determinations, one is quasi-judicial determination: rate base deduction for faulty ring girder pour. As to that issue, in the second proceeding the Commission agreed with the staff and the Consumer Advocate that the first determination should be followed. The Company did not except. The second issue cited by the Company--capitalization or expensing of employee benefit costs--is the type of accounting policy decision that is properly subject to reconsideration. The existence of the costs and their reasonableness is not an issue; the proper accounting treatment for the expenditure, i.e., whether it should be recorded as a capital expenditure or as an operating expense, is a policy determination that may change as the level employee benefit costs vary, the capitalization of the Company varies, or many other factors change.

and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose. [Citations omitted.]

United States v. Utah Construction & Mining Co., 384 U.S. 394, 421-422, 86 S. Ct. 1545, 1559-1560 (1966). The Supreme Court in that case considered the many factors that are relevant to a determination of whether res judicata should or should not apply to any decision. The Court noted that the Board of Contract Appeals was acting in its judicial capacity when it considered a contract claim and that all parties had had a full and fair opportunity to litigate the issues and to seek court review of any adverse findings. The Court held that there was neither need nor justification for an additional evidentiary hearing on the matters.

The recognized administrative law scholar, Kenneth Culp Davis, supports the view that application of the doctrine should be tailored to the particular determination:

The unsound idea that res judicata does not apply to administrative determinations is gradually being replaced by the sound idea that res judicata properly applies to some administrative determinations and that degrees of relaxation of res judicata are often appropriate. The movement is toward a recognition that the reasons behind the doctrine of res judicata are fully applicable to some administrative proceedings, partially applicable to some, and not at all applicable to others.

Davis, Administrative Law, §18.12 (Supp. 1965)

Similarly, language in this jurisdiction that res judicata principles do not apply to decisions by the Pennsylvania Public Utility Commission should not be applied to the instant proceeding in a wholesale manner but should be applied only in the context where it

constitutes sound policy. The finding of imprudent construction management practices at the Salem site by the Commission in the last electric rate proceeding was a factual dispute resolved by the Commission at that time after full and adequate opportunity for all parties to litigate their position. There is neither a need nor a justification for a second evidentiary hearing in this matter.

A close review of the cases relied upon by PECO will demonstrate their failure to support an application of the prohibition to the instant issue.

Mr. Justice Brandeis, speaking for the Court in Tagg Bros. & Moorhead v. U.S., 280 U.S. 420, 14 L.Ed. 524 (1930), upheld the Secretary of Agriculture's determination of a certain rate level for stockyard activities, finding a lower court's gathering of new evidence an improper usurpation of administrative authority. The Court observed that the livestock owners could apply for rehearing or institute a new proceeding and stated: "A rate order is not res judicata. Every rate order made may be superseded by another." 280 U.S. at 445, 14 L.Ed. at 537. This is the broad principle the Company would have this Court adopt without thoughtful tailoring. The very evidence improperly allowed in Tagg Bros. --evidence to show that "the charges prescribed. . . would result in injury to the livestock business...that they will be unable to continue in business" demonstrates the different applicability of the doctrine to overall rate levels, that are based on changing conditions, and to specific factual determinations based on past events. Many of the variables that effect the proper overall level of revenues change as conditions change. The construction management practices found to result in unreasonable costs have not and will not change.

International Telephone and Telegraph Corp. v. American Telephone and Telegraph Company, 444 F. Supp 1148 (S.D. NY 1978), quoted by the Company in its Brief at 17 to the effect that collateral estopped does not apply, is inopposite. The proceeding referred to in the IT&T case, was of a non-adjudicatory nature. As observed by the appellate court: "What began as a straightforward ratemaking review... expanded into a broad investigation into the economic structure of the Bell system and the telecommunication industry as a whole." IT&T, supra, at 1155. The New York appellate court specifically cited the Utah Construction & Mining Co., supra, noting that there and elsewhere res judicata has been found to apply "[w]hen the agency made the findings while acting in a judicial capacity and the parties were given a full and fair opportunity to litigate the issues in the administrative proceeding. [Citation omitted.]" IT&T, supra, at 1156. The New York court went on to delineate why the prior proceeding was not adjudicatory, but legislative, stating, inter alia, "[s]pecific findings that past acts did or did not occur were essentially unnecessary to a reasoned conclusion about what was necessary or desirable for the future." Id. at 1158. The Court further observed of the non-adjudicatory proceeding, that it was unclear "whether effective judicial review" could have been obtained. Id. at 1157.

Although the Public Utility Commission was created by the legislature it does perform quasi-judicial functions. Cage v. PSC, 125 Pa. Super. 330, 189 A. 896 (1937). The determination here appealed is quasi-judicial in nature. It is an adjudication of the rights of the parties after full litigation and from which the parties have the right of appeal.

The Company's reliance on Judge Leventhal's concurring opinion in Federal Trade Commission v. Texaco, Inc., 555 F.2d 862 (D.C.C.A. 1977), cert denied, 97 S. Ct. 2939 (1977) fails to note the sound reasoning in the majority opinion, by Chief Judge Bazelon, and its explicit refusal to embrace the broad principle propounded by Judge Levanthal. The issue on appeal was the propriety of the district court's restriction of the Federal Trade Commission's (FTC) discovery of gas reserve information from certain gas producers. The Federal Power Commission (FPC) had earlier accepted a particular producer's estimates of "proved reserves" in a rate proceeding. The gas producers argued that the FPC's earlier decision precluded relitigation of that issue. The producers also argued that the current investigation was only as to the accuracy of the estimates of reserves and conspiracy in reporting those reserves not broader issues of the amount of reserves including comparisons of different reports of the reserves in the same geographical areas by different parties. The district court had restricted the scope of the FTC's subpoenas on "a variety collateral estoppel" and thereby required the FTC to take as a "given" the accuracy of the reserves. 555 F.2d at 879.

The reason that the majority found collateral estoppel could not be invoked to preclude discovery was not the broad rationale offered by Justice Leventhal and relied upon by PECO. On the contrary, the majority found "the assertion of collateral estoppel in this enforcement proceeding... premature [and did] not reach the issue, discussed in Judge Leventhal's concurring opinion, of whether a determination in an essentially rate making proceeding can be ever given preclusive effect." 555 F.2d. at 880, footnote 42.

The North Carolina Utilities Commission action that was the subject of decision cited by PECO, dealt with gas exploration incentive costs. State Ex Rel. Utilities Commission v. Edmisten, 242 S.E. 2d 862, 866 (N.C. 1978) Gas development is clearly a legislative issue, disposition of which would depend on varying conditions such as gas supply and demand, alternative fuel supplies and a myriad of other factors.

The interest in repose does not apply to overall rate levels or to policy questions the resolution of which depends on many factors that can vary at any time. The interest of repose does apply to quasi-judicial determinations such as the reasonableness of certain past management practices. The latter is more akin to a contract action than to a policy determination. For this reason the Commission properly refused to allow relitigation of these issues at bar. It is also for this reason PECO's quote from Professor Davis (Brief at 49-50) that "[a] rate order is not res judicata" is inapposite. The resolution of whether res judicata should apply to a particular public utility determination depends on the nature of the determination.

All of the requisites conditions of res judicata have have been satisfied. The Company's argument that PSE&G's construction management at the Salem site was not decided in the prior proceeding is without merit. The bulk of the audit addresses practices of PSE&G at the site. The Company had full opportunity to litigate the issue and did litigate the issue. Counsel for the Company extensively cross-examined the auditors on practices of PSE&G at the site.

The Commission's adjustment to the value of Salem was not based entirely on PECO's role in the construction of Salem. Rather, it

was based on the failure by PSE&G and PECO to implement certain practices in the actual construction of the plant, including PECO's failure to intervene and direct so that the more active constructor, PSE&G, would implement cost saving practices.

Several of the management practices cited by the Commission in its Order, as areas wherein savings could have resulted, were:

Improved control and resolution of rework;

Increased control over and higher utilization of the work force;

Improvement in management of warehousing and inventories;

Better management of constructing equipment;

Improved planning; scheduling, estimating and cost control;

Pa. PUC, et al. v. Philadelphia Electric Company, R.I.D. 438, Order of December 28, 1978 (Mimeo at 16). These were failures of PSE&G and PECO. Four other areas were mentioned in this list addressed PECO's relationship to PSE&G.

Sound policy and fairness require this Honorable Court to uphold the Commission's application of res judicata to its quasi-judicial determination of imprudent construction practices in the construction of Salem. PECO has full and fair opportunity to litigate this issue in the prior proceeding and has offered no sound reason that would override the interest for which res judicata is applied: putting an end to litigation.

C. The Commission Reduction Of PECO's Working Capital Requirement For Accrued Interest On Bonds Followed Recent Practice Accepted By The Courts Of Pennsylvania And Was Supported By Substantial Evidence.

The Commission in R.I.D. 865 made downward adjustments to PECO's cash working capital claim to reflect accrued bond interest.

The Company challenges this adjustment as not supported by substantial evidence in the record.

The Commonwealth Court of Pennsylvania has, in 1980, upheld three Commission decisions reducing a utility's cash working capital claim for failure to recognize the accrued bond interest available to the Company, collected from ratepayers through rates, prior to the actual payment of that interest on a semi-annual basis. See UGI Corp., supra, Pennsylvania Electric Company v. Pennsylvania Public Utility Commission, Pa. Cmwlt, 417 A.2d 819 (1980), and Peoples Natural Gas Co. v. Pennsylvania Public Utility Commission, Pa. Cmwlt, 415 A.2d 937 (1980). These cases apply directly to the case at hand.

Mr. Michael Arndt testified on behalf of the Consumer Advocate as to the working capital effect of interest on bonds and dividends on preferred stock. See CA Statement No. 5, pp. 9-11, R. 1225a-1228a. That testimony established that a utility's revenue requirement includes an allowance for the costs of long-term debt and preferred stock which are paid at a later date, namely on a semi-annual and quarterly basis.

Trial Staff witness George Markovci testified, as follows, in Trial Staff Statement GFM-1, p. 2, R. 692a:

The rates paid by PECO customers include a revenue requirement to service debt and preferred obligations. These rates are collected on a continuous basis throughout the year. In the case of bonds, the interest is paid semi-annually and preferred dividends are paid quarterly. If revenues collected from customers but not yet paid to bondholders and preferred stockholders are not recognized as a source of working capital contributed by the ratepayer and correspondingly offset against the cash working capital requirement, the equity holders will earn on capital not supplied

by them and receive a supplemental return or windfall profit. PECO recognizes this principle in its revenue-expense lag study for tax revenues received in advance of payment. There is no valid basis for ignoring the same principal and application to funds collected to service debt and preferred instruments.

I believe that an adjustment should be made on the basis that the mid-point of semi-annual interest payment and quarterly preferred dividend payments are proper in determining the adjustment to cash working capital requirement for debt service and preferred obligation. (Emphasis original).

Mr. Arndt's calculations as to his adjustment to reflect these accrued funds appears at CA Statement No. 5, Exhibit MLA-1, R. 1229a-1231a while Mr. Markovci's adjustment appears at Trial Staff Exhibit Nos. GFM-1A and 1B, R. 699a, 701a.

Record evidence exists, as it did in the above-cited cases, that funds are accrued from ratepayers prior to payment and that working capital should reflect this in order to prevent a double payment. This Court's opinion, as expressed in the above-cited cases, that cash working capital is properly reduced to reflect accruals applies with equal force in this case.

PECO attempts to distinguish this case from the prior cases by arguing that, indeed, there is no accrual of these funds present. In so doing, it reargues its case before this tribunal since that factual opinion is based upon its own witnesses testimony. As noted above, there is substantial evidence supporting the Commission's decision to make the adjustment. The fact that Company witness Rimerman's testimony was not accepted does not render the decision as being against the substantial evidence test.

However, there was excellent reason on the Commission's part for rejecting Mr. Rimerman's testimony.

Mr. Rimerman testified at PECO St. 7-A, pp. 1-2, that a lag in collection can exist between a new issuance of bonds and the embedded cost of debt reflected in rates at that time if the cost of the new bond issue exceeds said embedded cost of debt. However, as Mr. Rimerman testified, that lag only applies to the increment between the debt costs and only applies pending the next rate case.

The Company, at pages 60 and 61 of its Brief, takes this testimony and suggests that the increment being considered, at least over the last ten years, has effectively eliminated the accrued payments and its positive contribution to working capital. The record does not support this conclusion and the Commission exercised proper restraint in not accepting an unsupported fact.

Nowhere in the record does Mr. Rimerman, or any other witness, demonstrate that the alleged effect is any more than a short-term one on the total accrual as a whole. There is no testimony presented that demonstrates that the incremental impact alleged effectively obviated the known ongoing accrual through rates for all of the outstanding issues. The Advocate submits that the Company has failed to demonstrate the "fact" it alleges, namely that the incremental impact alleged but not quantified by Mr. Rimerman would come anywhere near reducing the total accrual to a lag posture.

On an ongoing basis, the Company was granted rates in R.I.D. 438, which rates went into effect around March of 1979, with the most up-to-date calculation of PECO's embedded cost of debt. Therefore, in measuring any incremental effect, one would be left with the future test year period March 1979 to March 1980. Since PECO is an ongoing entity, the Commission has properly weighed the record and

decided accordingly. It used proper discretion in rejecting the unsubstantiated fact presented by the Company that an alleged incremental increase in debt cost for one issue, which is built into rates and contributed in total by ratepayers in the next rate case, somehow removes entirely the accrued interest on total bond debt being contributed by ratepayers through rates and available as working capital. There is no record evidence that establishes this "fact."

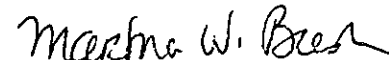
As a last attempt at overturning accepted regulatory practice, PECO argues that accrued interest doesn't represent customer contributed capital because it belongs to investors. This Court has rejected this assertion in UGI, 410 A.2d 923 at 930.

In light of the above, the Commission's decision is based upon substantial evidence and is in conformity with existing law. As such, it should stand.

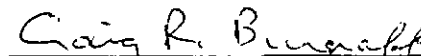
IV. CONCLUSION

For the above-enumerated reasons, those portions of the Public Utility Commission's Orders of February 28, 1980 and May 9, 1980 challenged by the appeal of the Philadelphia Electric should be affirmed as supported by substantial evidence and consistent with law. The Appeal of PECO should be dismissed.

Respectfully submitted,



Martha W. Bush
Assistant Consumer Advocate



Craig R. Burgraff
Assistant Consumer Advocate

Dated: January 29, 1981

B-80062683

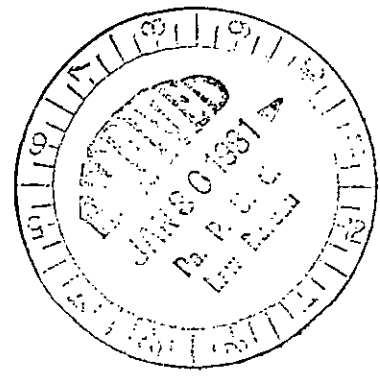
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January 29, 1981

G. Ronald Darlington, Esq.
Prothonotary
Commonwealth Court of Pennsylvania
620 South Office Building
Harrisburg, Pennsylvania 17120



Re: Philadelphia Electric Company
v.
Pennsylvania Public Utility Commission
No. 1415 Commonwealth Docket 1980

Dear Mr. Darlington:

Enclosed are 27 copies of Petitioner's Brief with Definitive Record Pagination in the above-captioned case, along with a copy of the Proof of Service form. The originals of these documents were filed today at the Prothonotary's Philadelphia office in accordance with Pa. R.A.P. 2185(c).

As evidenced by the Proof of Service form, copies of Petitioner's Brief with Definitive Record Pagination have been served on all parties of record to this proceeding.

Sincerely yours,
Thomas P. Gadsden
Thomas P. Gadsden

TPG/gma
enclosures

cc: All Parties of Record.

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COMMONWEALTH COURT OF PENNSYLVANIA

PHILADELPHIA ELECTRIC COMPANY,	:	
	:	
Petitioner	:	No. 1415
	:	
v.	:	Commonwealth Court
	:	
PENNSYLVANIA PUBLIC UTILITY	:	Docket 1980
COMMISSION,	:	
	:	
Respondent	:	

BRIEF FOR PETITIONER

PHILADELPHIA ELECTRIC COMPANY

In support of its Petition for Review of the Order of the Pennsylvania Public Utility Commission, entered May 9, 1980 at Docket No. R-79060865.

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<u>Re Monmouth Consolidated Water Co., 24 P.U.R. 4th 464</u> (N.J. Board of Public Utility Commissioners 1978).	63
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I. STATEMENT OF JURISDICTION

Philadelphia Electric Company's Petition for Review of the final Order of the Pennsylvania Public Utility Commission entered May 9, 1980 at Docket No. R-79060865 is taken pursuant to Section 5 of the Act of April 28, 1978, P.L. 202, No. 53, known as the Judiciary Act Repealer Act (2 Pa.C.S. §701(a)). Jurisdiction is conferred upon this Court by Section 10(8) of the Judiciary Act Repealer Act (42 Pa.C.S. §763(a)).

II. ORDER IN QUESTION

Relevant portions of the Order entered by the Public Utility Commission on May 9, 1980 are quoted below, The full text of this Order and relevant portions of the Commission's Opinion are attached as Appendix A.

Relevant Portions of May 9, 1980 Order

"IT IS ORDERED:

1. That Respondent, Philadelphia Electric Company - Electric Division, shall not place into effect its Supplement No. 6 to Tariff Electric - Pa. P.U.C. No. 25 but shall continue its presently existing tariff in effect until such time as it shall file a Tariff or Tariff Supplements consistent with our findings in this Order containing rates which will provide total annual operating revenues of \$1,254,449,000. This increase in rates shall apply to service rendered on or after May 10, 1980.

2. That Respondent shall file detailed calculations, at such time as it shall file a revised tariff or tariff supplement, by which it shall demonstrate that the filed rates comply with this Order.

3. That the several complaints filed in this proceeding are sustained to the extent indicated by the disallowance of \$33,918,000 of the requested annual rate increase.

4. That except as herein granted, or herein modified, all exceptions to the Recommended Decision are denied.

5. That except as modified herein, the findings and conclusions contained in the Recommended Decision are adopted as this Commission's decision.

* * * * *

10. That upon the filing of tariff revisions accepted to the Commission as being in compliance with this Order and Decision, and upon approval of the tariff revisions by the Commission, the inquiry and investigation at R-79060865, et al. will be terminated and the record in this proceeding marked closed."

III. STATEMENT OF QUESTIONS INVOLVED

1. Was it not error and confiscation of the Company's property for the Commission to reduce the Company's rate base on account of alleged excess generating capacity, notwithstanding substantial evidence that the Company's plant investment decisions were prudent when made and that all generating facilities were used and useful in providing service to the public during the period in question?

2. Was it not error and an arbitrary abuse of administrative discretion for the Commission to preclude the Company from introducing substantial evidence clearly relevant to the construction of Salem Nuclear Generating Unit No. 1 on grounds of res judicata, where all authorities state that the doctrine is inapplicable to ratemaking proceedings and where other parties were permitted to relitigate prior Commission findings?

3. Was it not error and confiscation of the Company's property for the Commission to make downward adjustments to the Company's rate base by eliminating working capital necessary to bridge the gap between rendition of service and receipt of revenue on the basis of assumptions unsupported by any record evidence?

IV. STATEMENT OF THE CASE

This proceeding was initiated by a Petition for Review filed on June 5, 1980 by Philadelphia Electric Company ("PECO" or the "Company"). The Company's Petition seeks to set aside as unlawful and confiscatory an Order of the Pennsylvania Public Utility Commission (the "Commission") entered on May 9, 1980 (the "May 9 Order") disallowing \$33,918,000, or approximately 28%, of a requested \$122,731,000 increase in PECO's annual revenues from electric service. PECO is a regulated public utility rendering electric, gas and steam service in a service territory of 2,255 square miles with a population of approximately 3.9 million.

On July 27, 1979, the Company filed Supplement No. 6 to Tariff Electric - Pa. P.U.C. No. 25 to become effective September 25, 1979. Supplement No. 6 was designed to increase rate levels to yield additional annual revenues from electric operations of \$122,731,000, based on a fully adjusted future test year for the twelve months ended March 31, 1980.

By Order entered August 14, 1979, the Commission initiated an investigation at Docket No. R-79060865 to determine the lawfulness, justness and reasonableness of the rate levels proposed, and suspended Supplement No. 6 by operation of law until April 25, 1980 (66 Pa.C.S. §1308(d)). The Company subsequently

voluntarily extended the statutory suspension period until May 9, 1980. A pre-hearing conference, twenty-nine days of evidentiary hearings and five public comment hearings were held between September 5, 1979 and December 21, 1979. On February 29, 1980, the Administrative Law Judge issued his Recommended Decision.

Exceptions and Replies to Exceptions to the Recommended Decision were filed with the Commission and oral argument was heard on March 31, 1980. On May 9, 1980, the Commission entered its final Order, approving the imposition of rate levels designed to produce total annual operating revenues of \$1,254,449,000 and directing that certain alterations be made in the structure of PECO's rate schedules.

A full statement of the issues raised by PECO and discussion of relevant facts is set forth in the Argument Section of this Brief.

V. SUMMARY OF ARGUMENT

In its Order entered May 9, 1980, the Commission made three adjustments which are wholly unsupported by the record, are contrary to law and which must, accordingly, be reversed by this Court.

The first and most significant of these errors was the elimination from rate base of \$25 million of allegedly excessive electric generating plant. This substantial disallowance was based on a finding that a certain portion of the Company's generating facilities were not "used" and "useful" in providing service to the public. In so concluding, the Commission disregarded unrebutted evidence that these facilities are required to maintain PECO's generating capacity at the levels which it is contractually obligated to maintain and that such facilities reduce the total cost of service borne by ratepayers. Moreover, the Commission's "excess capacity" adjustment is plagued by both conceptual and numerical errors.

The Commission further erred by excluding, on res judicata grounds, evidence directly relevant to the proper rate base allowance for Salem Unit No. 1, notwithstanding the universal view that that doctrine is inapplicable to ratemaking proceedings. Finally, the Commission, solely on the basis of unsupported assumptions, reduced the Company's working capital requirement below the level necessary to bridge the gap between the rendition of service and the receipt of revenue.

VI. ARGUMENT

The scope of this Court's review of an Order of the Public Utility Commission is set forth in the Administrative Agency Law (2 Pa.C.S. §704):

"After hearing, the court shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that provisions of Subchapter A of Chapter 5 (relating to practice and procedure of Commonwealth agencies) have been violated in the proceedings before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence."

As fully explained below, the Commission's Order is based on "findings" which are either contrary to law or unsupported by the evidence or both. The result is the confiscation of the Company's property in violation of its constitutional rights, an injustice which demands correction by this Court.

- A. The Elimination from Rate Base of \$25,043,000 of Electric Generating Plant Investment as Excess Capacity is an Error of Law and Unsupported by the Record.

The Commission, adopting an adjustment proposed by the Advocate's witness Weiss, eliminated \$25,043,000 of electric generating plant investment from PECO's claimed rate base. The

Commission apparently concluded that this investment is not "used and useful." As stated by the Commission (May 9 Order, pp. 11, 13 & 14; R. 84a).

"[W]e established a two-part test that must be met prior to the allowance of a return on a particular investment: the evidence must show (1) that the investments were prudent when made, and (2) that the property invested in will be used and useful during the time the rates will be in effect...

Some question has been raised regarding the prudence of PECO's generating plant construction program. PECO argues that many of its plants were built in response to Commission concerns arising during a period when portions of the Northeast were experiencing brownouts and blackouts. We cannot find that PECO's decision to build intermediate units until such time as base load units could be built, was imprudent when made. However, these units have served their purpose and are not currently needed. As such, they are not used and useful, and properly should be excluded from rate base for ratemaking purposes....

We... see our duty to review continually the functioning of a utility to insure reliable service at just and reasonable rates. While not questioning PECO's management decisions made when these units were constructed, we are of the opinion that they have served the purpose for which they were constructed and cannot be considered used and useful for ratemaking purposes." (emphasis added)

The adjustment adopted by the Commission is based upon the identification of seven PECO generating units as being "those units most representative of the excess on the basis of the least economical units." (R. 84a).

The existence and level of excess capacity are supported by reference to Advocate testimony on PECO's future estimated load growth and appropriate capacity reserve requirement. Having determined that "excess capacity" is present, the Commission directs that the economic burden of this capacity be shared between PECO's shareholders and ratepayers. As part of this sharing, shareholders are denied a return on their investment in this plant, but are permitted to recover that investment from ratepayers through depreciation accruals. (May 9 Order at pp. 14-15; R. 84a).^{1/}

^{1/} PECO is also permitted to recover fuel stocks and operating and maintenance costs incurred in the actual operation of the units for the benefit of ratepayers. The Commission also asserts that, as an offset to its capacity adjustment, it has increased PECO's equity cost allowance to reflect the greater risk borne by investors as the result of the creation of a regulatory climate in which such adjustments are made. The Commission, however, does not quantify the extent of such adjustment which must clearly be viewed as minimal when it is recognized that PECO's lesser risk debt and preferred equity securities cost between 14-15% at the time of decision. In any event, the adjustment is appropriate regardless of the outcome of this case as the Commission has been threatening to impose such an adjustment upon PECO and other electric utilities for the past several years. See Pa. P.U.C. v. PECO, R.I.D. 438 (Order entered February 5, 1979); Pa. P.U.C. v. Pennsylvania Power Co., R.I.D. 521 (Order entered September 5, 1978); Pa. P.U.C. v. West Penn Power Co., R.I.D. 183 (Order entered June 29, 1979). Accordingly, this risk is and has been experienced by PECO investors for a number of years and is only belatedly being recognized by the Commission in this case.

The Record does not support this Commission adjustment. The generating units identified by the Commission as "excess" were "used" during the test year and their retirement from service would increase cost levels borne by ratepayers. Therefore, the units are also "useful". To assure adequate service reliability, and under its agreement with the PJM Interconnection, PECO is obligated to maintain capacity levels approximately 540 mw in excess of the level permitted under the Commission's adjustment or pay substantial penalties which exceed the apparent "savings" to the ratepayers as the result of this adjustment. Moreover, the Commission's "excess capacity" adjustment is riddled with conceptual and numerical errors.

1. PECO's Generation Capacity and its Planning to Assure that Such Capacity Neither Exceeds Nor Falls Below that Level Required for Economic and Reliable Service has been Prudent and Beneficial to Ratepayers.

The proper generation capacity for an electric utility is the result principally of two factors: the present and anticipated maximum demand for the utility's service and the desired reliability of that service. The maximum demand for a utility's service, measured over a half hour interval, is referred to as the "peak demand" upon the utility's system.^{2/} In addition to sufficient capacity to "meet" the peak demand, an electric utility must

^{2/} In the case of PECO, this typically occurs at mid-day and mid-week during the summer and results from air-conditioning usage.

have additional capacity, i.e. reserve capacity, to provide a margin of safety against the mechanical failure or other unavailability of generating units and to provide for the possibility that actual peak demand will be greater than anticipated (R. 134a-138a).

As explained by Vincent S. Boyer, PECO's Vice President, Engineering and Research Department, the "object of... [PECO's]... planning process is to plan an electric system that will reliably supply our customers at a minimum cost to our customers" (Ex. VSB-2, p. 1). This objective is accomplished by means of an annual review of the Company's existing capacity construction and retirement program, which program is then adjusted as required to reflect changed load projections, unit availability dates, changes in operating economics and other factors. The mechanics of this program are fully described in Exs. VSB-2 and WCH-1 (R. 133a-194a and R. 237a-529a).

PECO, and most other electric utilities, employ a "reliability criterion" in generating plant planning which requires that generation capacity be sufficient to assure that service will not be interrupted (either by blackout or voltage reduction) as the result of a shortage in generation capacity more often than once in ten years (R. 618a). On the basis of PJM's most recent detailed computer analysis, Mr. Boyer testified that a 25% reserve capacity is presently required to attain this standard (R. 164a - 168a). This reliability criterion

(i.e. LOLP), was adopted by PECO, as a member of the PJM Interconnection (PJM), in the early 1960's.^{3/}

The 25% reserve capacity "design goal" is, stated in simplified terms, PECO and PJM's "planning reserve." To assure the service reliability of the PJM system over time, all member companies are required under the PJM contract to plan for generation capacity at least equal to this reserve level. There is, in addition, an "accounting reserve." Under the PJM Agreement, when a company's reserve capacity falls below this latter contractual requirement, presently established at 22%, it is required to purchase capacity from other companies at a present cost of \$25.55/kw. The purpose of the "accounting reserve" is to assure that all PJM member companies bear a relatively equal burden of the cost of assuring the reliability of the PJM system (R. 127a-128a; R. 168a).

During the five-year period 1975-1979, PECO's average actual reserve capacity equalled 35% (36% on a weather-corrected basis) (R. 139a). The principle reasons for these higher

^{3/} The PJM Interconnection consists of eleven operating companies in Pennsylvania, New Jersey, Maryland, Delaware and the District of Columbia who operate their electric systems as though they were but a single system for the purposes of assuring reliable and least cost service for customers. Member companies' generating units are operated on an "economic dispatch" basis; the load is served by the lowest cost generating unit available regardless of whether that unit is owned by the company whose customers are creating the load which must be served (R. 125a).

than planned reserve capacity levels is the failure of PECO's peak load in recent years to maintain historic growth rates. For example, in 1967, PECO's annual peak load equalled 3,727 mw. Average annual peak demand growth during the prior approximately twenty years had equalled 6%. By 1973, the annual peak had increased to 5,760 mw. However, in 1979, peak load actually dropped to 5,641 mw. The reasons for this failure of peak load to grow as projected were fully explained by Mr. Boyer (R. 645a-646a; R. 138a-158a). Mr. Boyer also explained the many changes which have been made in capacity addition and retirement programs by PECO to counter this cessation of peak load growth.

Based upon PECO's projected peak load forecast, its reserve capacity will equal 31% in 1980, 28% in 1981, 23% in 1982 and as little as 17% in 1984 (R. 141a).

2. An Excess Capacity Adjustment is Improper Where a Utility's Generation Capacity Level is the Result of Prudent Management Planning and is Beneficial to Ratepayers.

A utility is entitled to an opportunity to earn a fair return on its property used and useful in providing service to the public. The Peoples Natural Gas Co. v. Pa. P.U.C., 47 Pa. Cmwlth. 512, 409 A.2d 446 (1979) ("Peoples I"); Equitable Gas Co. v. Pa. P.U.C., 45 Pa. Cmwlth. 610, 405 A.2d 1055 (1979). Whether specific plant investment is used and useful depends upon

the prudence of decisions which led to its construction, i.e. whether such investment was reasonably calculated to benefit ratepayers as measured on the basis of conditions at the time such decisions were made. See The Bell Telephone Co. v. Pa. P.U.C., 47 Pa. Cmwlth. 614, 408 A.2d 917 (1979); UGI Corporation v. Pa. P.U.C., ___ Pa. Cmwlth. ___, 410 A.2d 923 (1980).

"Excess capacity" adjustments have been often proposed, but only rarely adopted, in electric utility rate proceedings in recent years. As the result of economic and other circumstances, such as the Arab Oil Embargo and recent public emphasis on conservation, the generating plant reserve capacity of many electric utilities presently exceeds their design goals (R. 645a-646a). As a result, consumer groups and others have asserted that generating plant capacity to the extent that it exceeds levels claimed to be sufficient to assure reliable service, is not "used and useful" and investment in such plant should not be permitted into rate base.

In passing upon these proposals, Courts and Regulatory Commissions, in recognition of the necessity of plant expansion to meet future service needs, and that such expansion may require years to complete and must be based upon projected service requirements, have emphasized the prudence of utility planning as a basis for rate base inclusion and that the "used" or "useful" characterization of plant investment must recognize the realities which surround such planning.

For example, in State ex. rel. Utilities Commission v. Mebane Home Telephone Co., 257 S.E.2d 623, 633 (N.C. 1979), the Supreme Court of North Carolina described the considerations governing its determination of the propriety of an "excess capacity" adjustment as follows:

"[P]roperty is includable in the rate base only when it is 'used and useful' in providing service to the public as determined at the end of the test period....This does not mean, however, that a utility can never purchase plant or equipment in anticipation of future needs. As we stated in Utilities Commission v. General Telephone Company, 281 N.C. at 352, 189 S.E.2d at 727:

'[A] public utility is under a present duty to anticipate, within reason, the demands to be made upon it for service in the near future. Substantial latitude must be allowed the directors of the utility in making the determination as to what plant is currently required to meet the service demand of the immediate future, since construction to meet such demand is time-consuming and piecemeal construction programs are wasteful and not in the best interests of either the ratepayers or the stockholders....'

Both the Commission and the Courts recognize that predictions of the economic future can never be exact. A utility should not be penalized because its reasonable predictions have failed to materialize. The question for the Commission is whether the utility's expenditures were reasonable in the light of circumstances which the company knew or should have known at the time it made its purchase."^{4/}

^{4/} As stated by this same Court in State Ex. Rel. Utilities Commission v. General Telephone Company, 281 N.C. 318, 189 S.E.2d 705, 728 (1972):

"[T]he fact that a transmission line, a building or a telephone company's central office equipment is not presently used to its full capacity does not necessarily justify the exclusion of any portion of it from the rate base on the theory that such portion is not presently 'used and useful' in rendering service."

In Mebane, and also General, the Court found that the utilities' capacity level was unreasonably excessive, both in light of present conditions and of those known to the utility at the time its decision to expand was made. Accordingly, the plant expansion there at issue was not "prudent" and therefore not "used or useful."^{5/}

That the prudence of utility plant investment is to be examined in light of the conditions existing at the time such investment was made has been accepted by a number of Regulatory Commissions. See Re Consumers Power Company, 14 P.U.R.4th (Mich. P.S.C. 1976); Re Consolidated Edison Company, 54 P.U.R.3d 43, 112 (N.Y.P.S.C. 1964). As stated by the Michigan Commission:

"[T]he Commission reviews these questions (i.e. of prudence, not with hindsight, but based upon the circumstances that existed at the time those decisions were made." (at pp. 15-16)

Similarly, in Re Southern California Edison Company, 23 P.U.R.4th 44, 52-53 (F.P.C. 1977), the Federal Power Commission rejected a proposed "excess capacity" adjustment advanced on the theory that capacity in excess of a design reserve level was not "used and useful", as follows:

^{5/} For example, in Mebane, the Company projected a growth in telephone connections of 400 per year as the basis of its expansion decision, though in fact additional connections of only approximately 160 were experienced during the year in which the expansion decision was made. Moreover, in prior years new connections had never exceeded 250.

"Because of the long lead time required for the construction of new generating capacity, Edison plans years in advance for the installation of the new capacity needed to maintain reliable service to its customers. Such planning is predicated on projections of anticipated customer demand during this future period, as well as estimates of the capacity needed to provide service reliably to this projected demand. It is in the nature of things that projections of future circumstances are rarely precise. This is especially the case in the area of electric utility reliability where underestimations of needed reserves could spell disaster.

In this proceeding, however, cities argue that the generating reserve margin experienced on Edison's system during the test period, being in excess of the Company's planned goal, should result in an artificially limited rate base for ratemaking purposes...There is little merit in cities' position. It has not been shown that Edison's historical planning was extravagant or imprudent, such as would necessarily have resulted in excess or unnecessary generating capacity being available at a time in the future. Even assuming *arguendo* that unneeded capacity was available on the Edison system during the test period, this fact proves nothing with respect to Edison's prudence in the planning and construction of additional capacity."

Accord L. S. Ayres & Co. v. Indianapolis Power & Light Co., 351 N.W.2d 814 (Ind. Ct.App. 1976) (emphasizing that the Commission should inquire into the reasonableness of the "business judgment" of the Company); Re New York Telephone Company, 2 P.U.R.4th 1 (N.Y.P.S.C. 1973).

Upon application for rehearing, the Federal Energy Regulatory Commission (having in the interim assumed the jurisdiction of the FPC) affirmed the prior order with the following additional explanation: (23 P.U.R.4th 472, 473-74 (1978):

"In Opinion No. 821 the Commission found that Edison's claimed rate base included only that plant which was used and useful in the public service, notwithstanding Cities' argument that a portion of Edison's plant capacity should be excluded from rate base as representing excess or unnecessary generating reserve capacity."

In Re Columbus and Southern Ohio Electric Co., 24 P.U.R.4th 261 (Ohio P.U.C. 1978), the Ohio Commission rejected a proposed rate base deduction on account of alleged "excess capacity", noting that:

"Even assuming that appropriate reserve criteria can be established, it would certainly be unreasonable to expect that any electric utility would have the forecasting capacity to predict the level of capacity necessary to precisely satisfy that standard, or the flexibility, considering the extensive lead time involved, to construct additional capacity in the exact increments necessary to meet it. Hindsight is always perfect, and before the Commission will consider denying a return on property actually used in providing service, something more need be shown than that the Company's foresight was not."

The Ohio Commission has repeatedly rejected proposed excess capacity adjustments where based simply upon the "existence of capacity in excess of needs plus adequate reserve", especially where a utility has shown that "expenses, more than counterbalancing the return to be earned on that portion of the rate base (alleged to be excess capacity), would have to be added to operating costs (if the capacity was not available), creating an even greater revenue requirement." Such a showing, the Commission has noted,

establishes the used and useful character of the generation capacity investment, even without regard to the prudence of management planning. See Re Dayton Power & Light Co., 21 P.U.R. 4th 376, 383 (Ohio P.U.C. 1977); Re Dayton Power & Light Co., 29 P.U.R.4th 145 (Ohio P.U.C. 1979).

Finally, it has been held that Regulatory Commissions should not interfere with management judgment except in clear cases of abuse. As stated by the Supreme Judicial Court of Maine in Central Maine Power Company v. Public Utilities Commission, 405 A.2d 153, 178 (Me. 1979):

"Where, as here, the road chosen by management is arguably at least as economical as any alternative and a benefit (i.e. a labor cost) does not clearly appear to be "excessive, or unwarranted, or incurred in bad faith," management's judgment must be respected."

Accord Northwestern Bell Telephone Company v. State, 216 N.W.2d 841 (1974).^{6/}

^{6/} Capacity adjustments have been made by several Regulatory Commissions. In Re Western Massachusetts Electric Company, D.P.U. 18731 (1977), the Massachusetts Commission eliminated from a utility's rate base rarely used, old combustion turbines upon the basis of a finding of management imprudence where test year and immediately prior year reserve capacity equalled 60% and was anticipated to increase to 70% during the following year. The Minnesota Public Service Commission has reduced rate base on account of excessive gas production plant, the majority of which had been leased by the utility for use in non-utility operations and which would not be needed in utility service until at least 1990. See Re Northern States Power Company, 32 P.U.R.4th 58, 72 (Minn. P.S.C. 1979). As will be noted in subsection A(3) of this Brief, the factual predicates of these decisions are not present in the instant case.

These basic regulatory principles have been adopted by our own Appellate Courts. For example, in Pennsylvania Power & Light Co. v. Public Service Commission, 128 Pa. Super. 195, 216-17, 193 A.2d 427, 436-437 (1937), the Superior Court affirmed in part and reversed in part a Commission decision to eliminate as not "used and useful" certain plant investments in a utility's claimed rate base. The Court expressed the standard to be employed in such determinations as follows:

"A public service company, as any other company, has the right to manage its own affairs to the fullest extent consistent with the public interest and insofar as they do not act contrary to law... . It is primarily, as we have pointed out, the duty of the directors or managers of the corporation, even though it be a utility, to determine the policy of the Company, and that policy should not be interfered with or ignored in the determining of a rate base unless there is shown improvidence or other bad management upon the part of such officers."

Accord Pittsburgh, v. Pa. P.U.C., 370 Pa. 305, 318 (1952); ^{7/}
Pittsburgh v. Pa. P.U.C., 173 Pa. Super. 87, 92 (1953).

In UGI, supra, this Court recognized that utilities are entitled to recover prudent expenditures though such expenditures do not create immediate and direct benefits for ratepayers. In that case, the utility sought recovery of the cost of feasibility studies undertaken to determine whether it was economically beneficial for it to join in a synthetic natural gas production

^{7/} "It is well settled that neither the Commission nor the court can substitute its judgment for that of management of a corporation unless there is an abuse of discretion."

plant. The utility, upon determining that a better alternative to augment its gas supplies was available, terminated such studies prior to obtaining any gas from the project.

In reversing the Commission's disallowance of the utilities' claimed cost for this project, this Court held that:

"A public utility is entitled to recover all of its reasonably incurred expenses. The feasibility studies here in question were a direct and clearly prudent step in providing public service, and UGI is entitled to recover their cost.

The Commission's position that only those actions which result in increased gas supplies provided to UGI's customers may be considered recoverable expenses is untenable. Such a rule would discourage feasibility studies conducive to efficient operations. The question to be asked and answered with regard to this kind of management action is not whether the utility got more gas as a result of the study but whether the study was reasonably calculated to achieve such a result. Cheltenham and Abington Sewerage Company v. Public Service Commission, 122 Pa. Super. Ct. 252, 275, 186 A. 149, 160-61 (1936). The reasonableness of UGI's decision in the latter sense is not questioned." UGI, 410 A.2d at 932.

Accordingly, so long as expenditures or plant investments are prudent and reasonably calculated to benefit ratepayers as measured against conditions existing when the decision to invest or spend was made, the costs of such expenditures or investments are properly recoverable from ratepayers.

In a number of its past decisions, the Commission has recognized that "excess capacity" adjustments are appropriate

only if based upon a finding that excessive plant investments were committed or maintained in rate base as the result of management imprudence. For example, in Pa. P.U.C. v. PECO, 49 Pa. P.U.C. 135 (1975), the Commission held that:

"We have stated previously in other cases that since a public utility must engineer and construct plant in advance of actual customer needs and cannot wait until those needs actually occur, the utility cannot be denied a reasonable return thereon unless it can be shown that the investment has been improvident and imprudent. We can find nothing in the present record to support such a finding."

Accord Pa. P.U.C. v. West Penn Power Company, R.I.D. No. 183

(Order entered June 29, 1979); Pa. P.U.C. v. Equitable Gas Company, 61 P.U.R.3d 1, 12 (Pa. P.U.C. 1965).

3. PECO's Generation Capacity Planning has been Prudent and Beneficial to its Customers. All Generation Units, Including those Eliminated from Rate Base as the Result of the Commission's Adjustment, are Used and Useful.

In Section A-1 of this Brief, the prudence of PECO's capacity planning program was described. In its May 9 Order, the Commission, moreover, did not make a finding of imprudence (See discussion pp. 8-9, supra.^{8/} As noted in the previous Section,

^{8/} It would have been difficult for the Commission to reach such a conclusion in light of its determination at R.I.D. 438, PECO's most recent prior electric rate proceeding. The Commission there determined that PECO's capacity planning and reserves were not "the result of imprudent management policies." (February 5 Order, p. 14; see Appendix C to this Brief. The Commission further noted that a number of factors, including the increasing length of construction periods, the increasing size of base load units, the associated increase in required reserve capacity, rapidly rising fossil fuel costs which could render economical capacity additions though not required for reserve margin purposes, and finally the serious potential that historic growth rates will be renewed in the future, all militated against making a capacity adjustment. (See Appendix C to this Brief, pp. 14-15).

such a finding has been required by other Courts and Commissions as a prerequisite for an "excess capacity" rate base adjustment. Rather, the Commission has, apparently, held either that the specific units identified as "representative" of PECO's alleged excess capacity are not "used and useful" or that capacity in excess of design reliability levels is not "used and useful."

There can be no dispute that the specific plants identified by the PUC in its adjustment were "used" during the test year. As set forth in the Table below, these units were used both to produce energy (i.e. capacity factor) and to reduce the cost of purchased energy (i.e. utilization factor) (R. 86a-90a; R. 1233a-1249a):^{9/}

	MW Capacity	Historic Test Year MWH Produced	Historic Test Year Capacity Factor	Historic Test Year Utilization Factor	Future Test Year Capacity Factor (Projected)
Chester 5&6	124	169, 282	15.6%	39.1%	11.2%
Richmond 9	166	236, 832	16.3%	38.7%	11.2%
Barbadoes 6&7 ^{10/}	38	NA	2.4%	4.9%	2.4%
Southwark 1&6	420	401,662	12.9%	34.1%	7.7%

The Table indicates that, during the historic test year, these units (except for Barbadoes 6&7) were actually producing electricity at full capacity 15% of the time and were being employed as the unit bought against in energy purchase transactions 35-40% of the

^{9/} The capacity factors for these older peaking or intermediate units are well within the ranges considered as full utilization of this type of capacity (R. 131a; R. 156a-157a).

^{10/} Capacity and utilization factors provided are average for non-Croydon combustion turbines, and do not reflect the actual utilization of the Barbadoes 6 & 7 units.

time. ^{11/} Moreover, continued substantial utilization of this equipment was estimated for the future test year.

PECO also introduced uncontradicted evidence that such units are "useful" in that their continued service availability results in reduced total service costs for ratepayers. For example, Mr. Kasum, PECO's Chief System Planning Engineer, testified that were PECO to actually retire the units identified by the Commission, ratepayer borne costs would increase substantially. This occurs for the following reasons: 1) retirement, sale or lease of more than 200 mw of capacity during the 1980-81 period that the proposed rates will be in effect would require PECO to purchase capacity from other PJM members at a cost of \$25.55/kw under the terms of the PJM Agreement; 2) retirement, sale or lease of any of the units employed as the basis of the proposed "excess capacity" adjustments would result in increased cost due to the necessity to replace the generation of those units with generation by more costly units or due to the units' present use in reducing the cost of energy purchases; and 3) retirement, sale or lease of any of the units in question would require additional transmission investment to assure local area system reliability (R. 646a-651a).

^{11/} Because of environmental restrictions, it is often less expensive for PECO to purchase coal or even oil (produced from lower cost, higher sulfur content oil than PECO can use) fired generation from surrounding utilities than to produce that energy itself. For this reason, during the historic test year, PECO purchased 24% of its total energy requirements from other companies. The cost of this purchased energy depends, to a substantial degree, on what it would have cost to produce similar energy on available PECO generating units. Accordingly, when a unit is "bought against," it is being used to reduce energy costs over levels which would exist if the unit were unavailable (R. 86a-89a).

In fact, Mr. Kasum testified that the cost to replace energy generated by the Southwark units during the first ten months of 1979 and the effect of losing those units' availability in reducing energy purchase costs would be to increase costs to ratepayers by approximately \$8.4 million, as compared to the approximate \$4 million saving for ratepayers affected by the Commission's entire capacity adjustment.^{12/}

Perhaps because of its awareness that actual retirement of the units identified as "representative" of PECO's alleged excess capacity would increase costs borne by ratepayers, the Commission, in its May 9 Order, notes that "[b]y utilizing specific generating units in our calculations, it should not be construed that we are of the opinion that these specific plants be retired from service, rather that the capacity represented by these units is above that necessary." (May 9 Order, p. 15; see Appendix A to this Brief).

^{12/} Calculated as \$25 million rate base adjustment times 16% combined rate or return, depreciation and income tax factor. Mr. Kasum noted that "a similar analysis could be made for Richmond 9" (R. 648). The Court should note that the above cost/benefit analysis compares Southwark energy cost savings alone to the total "cost/benefit" of the Commission's adjustment. The comparison ignores energy cost savings from units other than Southwark, avoidance of the capacity charge penalty and substitution cost required to assure local area reliability.

Apparently, it is the Commission's theory that the capacity represented by these units is not needed for reliability purposes and that that fact alone justifies a finding that they are not "used and useful." However, as noted by Mr. Kasum, PECO is obligated under the PJM Agreement to maintain capacity available for service during the 1980-81 planning year, upon which the Commission's capacity adjustment of 7,483 mw is based. Should the Company fail to maintain such capacity, it would be required to buy additional generating capacity from other PJM companies at a contract rate of \$25.55/kw (R. 649a-650a). Were PECO to actually implement the Commission adjustment and reduce its installed capacity of 7,689 mw by 748 mw, its remaining installed capacity would equal but 6,941 mw - or 542 mw less than its contract capacity obligation to PJM. Under these conditions, the Company would be required to purchase additional capacity from other PJM companies to meet its contract obligation at a total cost of \$13.7 million.^{13/}

Clearly, as the cost to ratepayers if this capacity were not available exceeds the savings obtained for them by the Commission's adjustment, this capacity is needed even to meet PECO's capacity requirements. Moreover, the Commission's theory ignores the many purposes served by generating capacity other than simply to assure system reliability. As noted above, this capacity, even if not needed for reliability purposes, is "used and useful" as viewed by ratepayers

^{13/} 542,000 kw x \$25.25.

because of the savings in energy costs which it produces and the local area service reliability function which it performs.

In his Recommended Decision, the Administrative Law Judge held that the above are facts established by the record (ALJ Recommended Decision, pp. 90-92). Accordingly, he concluded that: "As stated earlier, I did not find that the record shows such management imprudence as to warrant an adjustment. Furthermore, the adjustments proposed are severely flawed." (R. 79a). In specifically rejecting the Advocate's proffered adjustment, the ALJ stated:

"OCA witness Weiss' adjustment proposes the elimination of the Richmond 9 and Southwark units 1 and 2. PECO witness Kasum points out (PECO St. 15A, pp. 3-4) that retirement of these units would require additional transmission reinforcements to assure local area reliability in an amount greater than \$16,000,000. Southwark Units 1 & 2 oil-fired steam units generate at 394,325 mwh in 1978 and 344,068 mwh in the first ten months of 1979. This energy would need to be generated from higher cost sources should the units be retired. These additional costs would be passed on to ratepayers through PECO's energy clause. Assuming the cost increment would be as little as \$5/mwh, this additional energy cost for 1979 (10 months) would equal approximately \$1.7 million. ... PECO's cost of purchased energy would have increased by \$6.7 million in the first ten months of 1979. This increase would have been passed on to ratepayers through PECO's energy clause. These costs exceed the cost savings which could be obtained as the result of the units' retirement." (R. 81a)

Accordingly, and as found by the ALJ, whether viewed from a simple capacity requirement viewpoint or from the vantage point of a more appropriate recognition of the many functions performed by generating capacity, PECO's generation capacity level and the specific generation units identified by the Commission are "used and useful" and therefore properly includable in rate base.

4. The Adjustment Adopted by the Commission is Conceptually and Numerically in Error, Requires Acceptance of Numerous Unsupported Assumptions and Non-Record Data and is Inconsistent with the Commission's Rejection of its Necessary Assumptions.

The Commission's "excess capacity" adjustment, as proposed by Advocate witness Weiss, depends for its propriety upon the accuracy of the Advocate's forecasted future peak load and the appropriateness of its suggested reliability criterion and associated reserve capacity of approximately 18% (May 9 Order, pp. 11-14; See Appendix A of this Brief, R. 1210a-1212a).^{14/} As will be demonstrated below, each is inaccurate and requires the acceptance of assumptions not demonstrated as reasonable upon the record. Moreover, the reasons advanced by the Commission

^{14/} The Court should note that the adjustment draws little persuasive force from its proposal by Mr. Weiss. Mr. Weiss' qualifications in this area were substantially impeached by his inability to accurately compute the Company's capacity reserve and his confusion as to the reliability levels to which the Company is required by contract to plan its generating capacity (R. 1199a-1200a and 1202a; R. 654a-656a; R. 1218a-1219a; R. 1220a and 1221a-1224a).

for rejection of PECO's load forecast and the reliability criteria upon the basis of which its generating capacity has been designed are without substance.

The principal conceptual error of the adjustment is its employment of a reliability criterion which is substantially different, and lower, than that employed by PECO in designing its generation capacity. PECO's present generation capacity has been designed to produce service reliability such that a failure to serve customer load as the result of insufficient generation capacity will occur no more than once every ten years. PECO has employed this criterion for more than a decade with the full knowledge and approval of the Commission (R. 137a, R. 164a).

Advocate witness Shakow, on the other hand, employed a reliability criterion which permits numerous service failures due to insufficient generating capacity (which failures can range from voltage reductions to a total blackout in Southeast Pennsylvania) to the extent that such interruptions in aggregate could exceed 1-2 days every ten years (R. 618a-623a). The Commission, moreover, has adopted this reduced reliability level, which is premised upon the expectation that load interruptions will occur, without any examination of the costs of such interruptions as compared to the minimal benefits to ratepayers of the Advocate's proposed rate base adjustment.

As the discussions of the mid-1960's blackouts in Pennsylvania and New York and as recent experience with the

New York City blackout of 1978 demonstrate, the costs of substantial area blackouts to the public is extremely high (R. 186a-191a). Moreover, the importance which is normally ascribed to service reliability can be seen in the following Commission quotation:

"We believe that voltage reduction, brownouts, blackouts and eventual rationing of energy would be intolerable, not only because of the general public inconvenience, but because of the direct effect on commerce and industry and the ultimate effect on employment and economic well-being in the Commonwealth...[W]e must not sacrifice the public's interest in the assurance of adequate and reliable service." Pennsylvania Public Utility Commission v. Metropolitan Edison Company, 44 Pa. P.U.C. 709, 718 (1970).

The Commission, despite the fact that its adoption of this adjustment would appear to direct the Company to reduce its design criteria both now and in the future for the planning of generation capacity from 25 to 18%, fails entirely to address the question of what the effect of such a reduction would be upon PECO's service territory. In fact, the Commission provides this Court with no reason why it believes this reduction in service reliability is appropriate despite the obvious criticality of this subject.

The Commission's adoption of the Advocate's reliability criterion is inequitable for several additional reasons, as stated by Mr. Boyer, as follows:

"Philadelphia Electric Company plans its generating capacity to meet a reliability standard of loss of load no more than one day in ten years. This standard is followed by much of the electric industry and has been employed by PJM for over 15 years. In fact, under the PJM agreement, we presently must employ this reliability criterion in our generating plant planning program.

It is true that this is not the only standard which could be employed in generating plant planning. However, it is our judgment that this standard is the most appropriate for planning purposes at this time. More importantly, this is the standard which has been employed, with the knowledge of this Commission, in planning our present generating plant facilities... [To the extent these proposals (i.e. excess capacity adjustments) rely upon rejection of the Company's generating plant capacity planning criterion, they penalize the Company retroactively by applying to it a standard which is different from that which has been employed in the past." (R. 195a-196a)

As found by the ALJ: "After reviewing the record here, certain conclusions seem evident. First, for all its claimed faults, the one-day in ten-years planning criterion has been used by the Company, by the PJM Interconnection, by MAC and by this Commission over the last decade. It should be used in this proceeding to determine PECO's reserve capacity levels. It is a reasonable standard, one in general use by the industry and the one upon which PECO has based its capacity planning." (R. 78a) Clearly, it is neither equitable nor reasonable for the Commission to change "the rules of the game" after it has been played.

The Advocate's load forecast and reliability criterion are, moreover, riddled with errors and unsupported assumptions. In its load forecast, the Advocate has made numerous simple data errors and advances projections and assumptions which existing data already demonstrate to be wrong. For the convenience of the

Court, these errors, as identified in the Company's rebuttal testimony, are described in Appendix D to this Brief.

The Advocate's reliability requirement (i.e. reserve capacity - 14 to 22%) is even more substantially flawed. That criterion, which purports to be based upon a detailed computer analysis determination of the least cost reliability and generation capacity alternative, is in error as a result of the many inaccuracies in the Advocate's computer analysis and its reliance upon certain erroneous cost assumptions. Even more basic is the fact that the statistics advanced by Advocate witness Shakow as the basis of his conclusion do not support that conclusion, but rather indicate that the appropriate reliability reserve requirement is between 22 and 30% (R. 615a; R. 1061a).^{15/} For the convenience of the Court, Appendix E to this Brief, employing excerpts from PECO's Initial Brief before the ALJ, contains a more detailed discussion of these errors as set forth in the Company's rebuttal testimony.

Additionally, the Court should note that the Commission's Order is internally inconsistent. In its rejection of the Advocate's proposal that construction at PECO's Limerick Nuclear Generating Station be terminated, the Commission recognizes many of the flaws in the Advocate's testimony described above. For example,

^{15/} The mid-point of this range, i.e. 26%, is approximately equal to PECO's claimed reserve reliability requirement of 25%.

the ALJ, in rejecting the Advocate's Limerick proposal, found as follows:

"After weighing all the evidence, I recommend that the Commission reject the claims of certain parties that construction of Limerick be terminated, even assuming that this authority resided in the Commission.

I find Dr. Shakow's presentation interesting and worthy of future study by the Commission in any subsequent proceeding on Limerick. His conclusion that construction at Limerick should cease is based, however, on assumptions which are not supported on this record. He assumes a reserve capacity of 14-22%, which has not been demonstrated here. He assumes that PECO can recover most of its investment, an assumption that cannot be supported here. His original cost estimate contains a substantial miscalculation, as PECO points out. His subsequent cost estimate is so much greater that it must be treated with considerable caution (Tr. 2959-71). The Company's arguments cast sufficient doubt on the validity of the assumptions made by Dr. Shakow in his studies to warrant rejection of his recommendations in this proceeding, especially in light of the grave consequences which would result from its adoption."
(Recommended Decision, p. 71.) (emphasis added)

In its May 9 Order, the Commission held: "We find the ALJ's opinion accurately and correctly disposes of the issues regarding this plant." (i.e. Limerick) (May 9 Order, p. 15; See Appendix A to this Brief). What the Commission fails to recognize, however, is that rejection of the Shakow analysis as inaccurate for purposes of Limerick requires its rejection as basis for determining proper capacity levels as well. As noted above, witness Shakow performed but a single computer analysis. If that analysis' full costing and plant costing assumptions

are in error, as the Commission appears to have found, then the analysis' 14-22% reserve margin is also in error. Indeed, witness Shakow himself admits this to be so (R. 947a).^{16/}

The Commission's criticisms of PECO's load forecast and its reserve reliability criterion are completely without record support. PECO's load forecast is not "historically based" (May 9 Order, p. 12, See Appendix A). Rather, as explained by PECO witness Hoch, the Company's load forecast is prepared each year upon the basis of a great variety of data as to anticipated future conditions affecting the demand for electric energy (R. 218a-235a; R. 236a-529a). Nor is it PECO's position that increases in its reliability reserve requirement should be met by the construction of additional base load capacity (R. 156a-158a).

5. The Commission has Failed Entirely in its Order to Discuss or Make Necessary Findings as Respects the Record Evidence and Its Decision is Inconsistent with Its Recent Prior Decisions in this Area.

As a review of the Commission's Order against the evidence described in this Brief clearly demonstrates, the Commission has failed entirely to discuss the major part of the evidence and arguments presented to it by PECO in opposition

^{16/} As shown upon the witness' Table VI, p. 20 (R. 947a), when PECO plant costs and incremental costing assumptions are substituted for Shakow's assumptions; the optimal reserve margin under the Shakow analysis method is indicated to be 30%, or in excess of that employed by PECO. (Table VI, cases 2 & 8) (R. 947a).

to the Advocate's "excess capacity" adjustment. This failure, without more, justifies this Court in reversing the Commission's Order. See Peoples I, supra; Equitable, supra; United States Steel Corp. v. Pa. P.U.C., 390 A.2d 865 (1978).

As stated by this Court in Peoples I, supra, at pp. 526-27:

"[W]e are left 'in the position where we simply cannot tell as a matter of law whether the P.U.C. abused its discretion or not'...Therefore, as in the previous situations above-cited, we must remand with the requirement that the P.U.C. set forth its reasoning...[W]e must have a statement of reasons for departing from the testimonial conclusions, and the weights and considerations assigned in doing so---in other words, an articulation of the process which the P.U.C. majority necessarily followed in reaching its... determination."

In light of the uncontradicted evidence described in previous sections of this Brief and to avoid the substantial delays experienced in prior cases remanded to the Commission by this Court, the Court should do more than simply reverse the Commission because of its failure to address this evidence. The record clearly establishes that the Commission's adjustment is in error and the Commission should be reversed and directed to recompute PECO's revenue entitlement accordingly. There is no additional "explanation" or "findings" which could permit this Court to affirm the Commission's adjustment.

This Court has also held that "the Commission must make definite, consistent, detailed findings, so as to enable this Court to review the decision and respond to the questions

raised on appeal," and "that we can rightly expect the P.U.C. to follow a consistent path" in its decisions as to a particular rate adjustment. See Western Pennsylvania Water Company v. Pa. P.U.C., No. 83 C.D. 1979 (October 1, 1980); The York Water Co. v. Pa. P.U.C., No. 2178 C.D. 1978 (April 28, 1980); Peoples I, supra. In addition to the internal inconsistency in the Commission's findings noted in the prior Section, the Commission's adoption of a capacity adjustment in this case is not consistent with its most recent prior determinations as to such adjustments. As has been previously noted, the Commission rejected a virtually identical adjustment (also proposed by the Advocate) as that here adopted in PECO's 1977 Electric Rate Proceeding. See Pa. P.U.C. v. PECO, R.I.D. 438 (Order entered February 5, 1979) (See Appendix C).

Moreover, in Pa. P.U.C. v. West Penn Power Co., R.I.D. 183 (Order entered June 29, 1979), the Commission concluded that an "excess capacity" adjustment was not appropriate despite the existence of "large amounts of excess capacity" at the 1974 test year end, because "reserve capacity margins become slim" by 1978.^{17/} The Commission concluded that no

^{17/} The Commission's West Penn Order was entered following this Court's reversal and remand of a prior Commission Order adopting an "excess capacity" adjustment similar to that adopted in this case. This Court reversed because it found that this prior adjustment was not explained nor was its Record's support set forth in the Commission's Order. Upon further review of the Record in the remand proceeding, the Commission determined that its initial decision could not be supported. See West Penn Power Co. v. Pa. P.U.C., 33 Pa. Cmwlth. 403 (1978).

adjustment could be made, as "we cannot on the record here find that the Company acted with a reckless disregard of the interests of its customers, nor can we find that this plant would not be used and useful during the time these rates were in effect." See West Penn Power Order, p. 4. The facts of this case are virtually the same as those presented by West Penn. Although PECO's test year end reserve capacity margin equalled 36%, that margin was projected to decline to 31% in 1980 and to as little as 20% in 1983. Clearly, and as found by the Commission in West Penn, PECO's generating reserve levels will shortly be reduced to its design goals and are not excessive.

For all of the reasons described above, the Commission's adjustment to PECO's claimed rate base on account of alleged "excess capacity" should be reversed by this Court and the Commission should be directed to recompute PECO's reserve entitlement without employment of such adjustment.

B. The Commission's Adjustment to Rate Base to Eliminate \$10.5 Million of PECO's Investment in Salem Unit No. 1 Was an Error of Law and an Arbitrary Abuse of Administrative Discretion

In its final Order at R.I.D. 438 (Order entered February 5, 1979), the Commission reduced PECO's claimed measures of value by \$10.5 million to reflect "savings" which allegedly could have been achieved in the construction of Salem Nuclear Generating Unit No. 1. The sole basis for this adjustment was a report prepared by a private consulting firm, Theodore Barry & Associates, and submitted on behalf of the Pennsylvania Office of Consumer Advocate (the "TB&A Report"). In adopting, in part, the TB&A Report's findings, the Commission specifically noted that the Company had failed to present the testimony of a representative of Public Service Electric and Gas Company ("PSE&G"), the co-owner of the plant who supervised its construction (R.I.D. 438 Order, p. 17; See Appendix C to this Brief).^{18/}

The Commission's findings at R.I.D. 438 have been

^{18/} In fact, such testimony was not presented simply because it was not available. Due to the late submission of the final TB&A Report, i.e. approximately one month prior to the close of the record, and the pendency of an investigation of the TB&A allegations by the New Jersey Board of Public Utilities, the preparation and presentation of PSE&G rebuttal testimony was not possible given the scheduled date for the close of the record.

appealed and are currently pending review by this Court. See Philadelphia Electric Company v. Pennsylvania Public Utility Commission, No. 1211 Commonwealth Docket 1980. In its Brief, which was filed with the Court on August 27, 1980, the Company argued that the TB&A Report provides no basis upon which it could reasonably be concluded that PECO's investment in Salem No. 1 was either extravagant, wasteful or imprudent as measured against the circumstances and at the time at which it was made. In this regard, the Company further directed the Court's attention to the decision of the New Jersey Board of Public Utilities, issued subsequent to the Commission's final Order at R.I.D. 438, where it was specifically found that:

"...PSE&G managed the construction of the Salem Nuclear Generating Station in a reasonable and prudent manner and that PSE&G exercised due diligence in implementing sophisticated management techniques in an effort to reduce costs and improve performance." Re Public Service Electric and Gas Company, Docket Nos. 7711-1107 and 776-492 (Order entered March 28, 1979, p. 2).

In so holding, the New Jersey Board adopted the decision of the Hearing Examiner in that case, who concluded:

"In weighing the quality of the judgments contained in the TB&A audit against the quality of the testimony presented by PSE&G, not only the testimony of PSE&G's witnesses but also the major portion of the TB&A audit, supports PSE&G's position that it constructed the Salem facility in a reasonable and prudent manner."

In view of the significance which the Commission attached to the Company's failure to submit the testimony of a PSE&G representative at R.I.D. 438 and the critical role which such testimony played in the New Jersey Board's final determination, the Company sought to present, as a witness in the instant proceeding, Mr. Stephen A. Mallard. Mr. Mallard, Vice President - System Planning of PSE&G, is uniquely qualified to respond to the TB&A Report since he was actively involved in supervising the construction of Salem No. 1 (R. 530a-550a).

At a hearing held on October 16, 1979, various opposing parties moved to exclude all testimony relating to the construction of Salem No. 1 on the ground that the Commission's findings at R.I.D. 438 barred the presentation of further evidence on that issue (R. 203a-215a). By Order entered October 29, 1980, the Administrative Law Judge granted the Motion and thereby struck the testimony of Mr. Mallard, as well as that portion of the testimony of Mr. Vincent Boyer relating to Salem construction management (R. 13a-17a; R. 129a-131a). However, a week later the ALJ stayed his October 29 Order pending the Commission's resolution of a certified question addressing the applicability of res judicata principles to ratemaking

proceedings.^{19/}

On February 28, 1980, the Commission affirmed the ALJ's October 29 Order striking the testimony in question. In so doing, the Commission concluded that res judicata could, in certain circumstances, be applied to administrative proceedings and that the preconditions for its application, i.e. identity of parties, etc., had been satisfied in this instance (See Commission February 28 Order, attached hereto as Appendix B). Although the February 28 Order expressly left open the question of whether a rate base adjustment should again be made in this proceeding, any uncertainty as to this issue was dispelled in the Commission's final Order, where it stated:

"...having considered all the evidence in this proceeding, we conclude that the imposition of a sanction is appropriate" (May 9 Order, p. 4); See Appendix A).

On the basis of this "finding", the Commission eliminated \$9.7 million (\$10.5 million alleged "savings", as found at R.I.D. 438, less accrued depreciation) of the Company's investment in Salem No. 1 from its claimed rate base.

The Commission's decision to strike admittedly relevant

^{19/} As a result, on November 15, 1979, Mr. Mallard was permitted to testify, subject to the Commission's review of the ALJ's evidentiary ruling, and was cross-examined at length by the opposing parties (R. 551a-610a).

evidence should be rejected because it is contrary to the universal view, as expressed by the United States Supreme Court and the Appellate Courts of this and other jurisdictions, that the principles of res judicata do not apply to ratemaking proceedings. Moreover, it was manifestly unfair and a clear denial of due process for the Commission to preclude further discussion of this particular issue while, at the same time, permitting opposing parties to relitigate a number of prior Commission findings whose factual underpinnings had not changed.

1. The Doctrine of Res Judicata Does Not Apply To Ratemaking Proceedings.

In precluding the Company from introducing testimony directly relevant to the construction of Salem No. 1, the Commission rejected the universal view that res judicata does not apply to ratemaking proceedings.

This principle was first clearly articulated by the U.S. Supreme Court in Tagg Bros. & Moorhead v. United States, 280 U.S. 420 (1930). In that case, the Supreme Court rejected a utility's claim that it had not been put on notice that the Secretary of Agriculture might reduce its rates below existing levels and, consequently, failed to present evidence it might have offered otherwise. In so doing, the Court stated:

"Where it is believed that the Secretary erred in his findings because important evidence was

not brought to his attention, the appropriate remedy is to apply for a rehearing before him or to institute new proceedings. He has the power and the duty to modify his order, if new evidence warrants the change. [citation omitted.] A rate order is not res judicata. Every rate order may be superseded by another." 280 U.S. 420, 444-45 (emphasis added).^{20/}

Two years later, the Supreme Court confirmed the inapplicability of res judicata and collateral estoppel to ratemaking proceedings, reasoning:

"The rule of estoppel by judgment obviously applies only to bodies exercising judicial functions; it is manifestly inapplicable to legislative action. The Commission's error arose from a failure to recognize that when it prescribed a maximum reasonable rate for the future, it was performing a legislative function..." Arizona Grocery v. Atchison, T. & S.F. Ry., 284 U.S. 370, 389 (1932).

Similarly, in St. Joseph Stock Yards Co. v. U.S., 298 U.S. 38, 64 (1936), the Supreme Court affirmed the Secretary of Agriculture's rejection of a prior rate case finding as to going concern value, concluding that:

"The Secretary was not estopped or controlled by the ruling in the first proceeding. He was entitled, and it was his duty, to re-examine

^{20/} The Court did not condition its holding by requiring a showing that the new evidence was not available at the time of the earlier rate proceeding, and in fact the evidence in Tagg was available but was simply not presented to the agency.

the case on the second hearing and to reach the conclusion which the evidence justified. In that process, he in effect overruled the earlier allowance and left it without force. The question remains one of evidence."

The Courts of this Commonwealth have applied these same governing principles in repeatedly holding that rate orders and their underlying factual determinations are without res judicata effect. Thus, in Cheltenham and Abington S. Co. v. Pennsylvania Public Service Commission, 122 Pa. Super. 252 (1936), the issue, as in St. Joseph Stockyards, supra, concerned the Commission's re-examination of a prior rate base allowance for going concern value. Notwithstanding the fact that all evidence as to the existence of going concern value was available to and had been reviewed by the Commission in reaching its initial determination, the Superior Court concluded that that prior finding was not res judicata in a subsequent proceeding:

"It follows with even greater force that when the Commission has prescribed rates after fixing fair value and reasonable return, the findings made by the commission as then constituted and unappealed from, may be assumed to be fair, just and reasonable in the absence of proof that there is either a change of factual circumstances, a mistake as to facts previously found or the commission followed an improper course in arriving at its legal conclusions. Such former conclusions are not res adjudicata for the law contemplates by its express terms a re-examination when conditions change." 122 Pa. Super. 252, 264-65.

In Duquesne Light Co. v. Pennsylvania Public Utility Commission,

176 Pa. Super. 568, 107 A.2d 745, 749 (1954), the Superior Court again rejected an attempt to apply res judicata in the ratemaking context, stating:

"While Tariff No. 11 and Tariff No. 12 involve two separate rate schedules, the findings previously made in the proceeding upon Tariff No. 11 were not conclusive for the future. Orders fixing rates are not res judicata."

See also Pennsylvania Gas & Water Co. v. Pa. P.U.C., 33 Pa. Cmwlth. 143, 156, 381 A.2d 996, 1003 (1977); Pa. P.U.C. v. Pennsylvania Gas & Water Co., 19 Pa. Cmwlth. 214, 225, 341 A.2d 239, 246-47 (1975); Pennsylvania Power & Light Co. v. Pa. P.U.C., 10 Pa. Cmwlth. 328, 339, 311 A.2d 151 (1973); Pittsburgh v. Pennsylvania P.U.C., 178 Pa. Super. 46, 67 (1955); Philadelphia v. Pa. P.U.C., 173 Pa. Super. 38, 52-53, 95 A.2d 244 (1953).

The lower Federal Courts and the Appellate Courts of other jurisdictions are similarly in agreement that the principles of res judicata are inapplicable in ratemaking proceedings. In International Telephone and Telegraph Corp. v. American Telephone & Telegraph Co., 444 F.Supp. 1148, 1155-1160 (S.D.N.Y. 1978), the District Court rejected plaintiff's argument that res judicata effect should be given to certain determinations made by the Federal Communications Commission as to the lawfulness of past-purchasing activities of AT&T, holding that:

"The general rule in the case of non-adjudicatory agency action, however, is that collateral estoppel does not apply."

The Court explained that res judicata effect is not given to proceedings which involve "primarily the fashioning of prospective rules to govern future conduct" and further noted that the technical requirements for the doctrine's application are generally not satisfied since such proceedings do not result in "the kind of conclusive factual findings upon which judicial resolution of legal issues depends."^{21/}

The same fundamental principles were expressed in the concurring opinion of Judge Leventhal in F.T.C. v. Texaco, Inc., 555 F.2d 862, 893-94, (D.C. Cir. 1977):

"Different considerations emerge and a different balance is struck, when an agency exercises an essentially legislative function like ratemaking, especially the kind of broad area ratemaking lately conducted by the Federal Power Commission. The agency must remain free 'to adapt [its] rules and policies to the demands of changing circumstances.' Perman Basin Area Rate Cases, 390 U.S. 747, 784, 88 S. Ct. 1344, 1369, 29 L.Ed 2d 312 (1968). Changes may occur not only in objective circumstances but in the way the agency perceives initial facts, whether, say service life of equipment or calculations of gas reserves.

^{21/} Ratemaking is also characterized as legislative or quasi-legislative in this jurisdiction. Cheltenham & Abingdon Sewage Co. v. Public Service Commission, 344 Pa. 366 (1942); Philadelphia v. Pa. P.U.C., 174 Pa. Super. 641 (1954).

With such legislative activity focused primarily prospectively the need for flexibility outweighs any interest in repose. Thus, the Supreme Court has repeatedly held that an individualized ratemaking is not res judicata." (emphasis added)

In State Ex Rel. Utilities Commission v. Edmisten, 242 S.E.2d 862, 866 (N.C. 1978), the North Carolina Supreme Court refused to grant res judicata effect to determinations made in a state-wide investigation of the propriety and proper rate treatment of expenditures by intra-state gas distribution companies in gas supply exploration ventures. Analogizing the nature of this investigation to that of ratemaking, the Court held:

"The ratemaking activities of the Commission are a legislative function. (citation omitted.) Rulemaking is likewise an exercise of the delegated legislative authority of the Commission under G.S. 62 Item 30, G.S. 62-31, to supervise and control the public utilities of this State and to make reasonable rules and regulations to accomplish that end. Actions of an administrative agency which involve the exercise of a legislative rather than a judicial function are not res judicata."

Also see Utah State Board of Regents v. Utah Public Service Commission, 583 P.2d 609 (Utah 1978).^{22/}

^{22/} In rejecting the utility's res judicata argument, the Utah Supreme Court held as follows:

"In regard to the contention of Utah Power that the Order of March 4, 1976, is res judicata and hence not assailable, we conclude

In the February 28 Order, the Commission completely ignored this substantial body of precedent. Instead, it based its conclusion on a general statement, extracted from the works of Kenneth Culp Davis, that there may be instances in which the doctrine of res judicata is properly applicable to administrative proceedings. The point, however, as observed by the U.S. Supreme Court in Arizona Grocery, supra, and by Davis himself, is that a rate case is not one of those proceedings. As explained by Professor Davis:

"The key to a sound solution to problems of res judicata in administrative law is recognition that the traditional principle of res judicata as developed in the judicial system should be fully applicable to some administrative action, but that that principle should not be at all applicable to other administrative action, and that much administrative action should be subject to a qualified or relaxed set of rules concerning res judicata.

Continued

that that doctrine had no application to the facts of this matter. By their very nature, public utility rates are inescapably subject to constant circumspection and justification. The Commission is charged with the responsibility of establishing rates as are "just and reasonable" and the propriety of such rates is forever subject to challenge upon complaint by interested parties who are entitled to a hearing and to introduce evidence. The Commission may also initiate a hearing on its own without complaint, and it may at any time rescind or amend orders." (At p. 611).

"Some administrative determinations are clearly without res judicata effect in any circumstances - a zoning board after hearing amends a regulation, a utilities commission prescribes a maximum rate..."
(emphasis added)

In name and tradition, "res judicata" means thing adjudicated. Only what is adjudicated can be res judicata. Administrative action other than adjudication cannot be res judicata. Even if an exercise of the rule-making power depends on a finding of facts, neither the rule nor the finding is regarded as res judicata.

'A rate order is not res judicata. Every rate order may be superseded by another.' This is true irrespective of the separation-of-powers labels - whether fixing rates for the future is deemed legislative, as in the federal system, or judicial, as in New York. The main reason is that conditions change. A rate desirable for one period of time may be undesirable for another period.'

[A]n agency must at all times be free to take such steps as may be proper in the circumstances, irrespective of its past decisions. This is why it is held that "a rate order is not res judicata. Every rate order made may be superseded by another."...Even when conditions remain the same, the administrative understanding of those conditions may change, and the agency must be free to act..." (emphasis added) [Davis, Administrative Law Treatise, Vol. 2, 559, 568, 597-598, 610.]

In summary, to the best of the Company's knowledge, all of the legal authorities who have reviewed this issue, including the leading commentator on administrative law, have concluded that the principles of res judicata are not applicable to ratemaking proceedings. Accordingly, the Commission's decision to strike the testimony in question was in error and

the resulting \$9.7 million rate base adjustment must be reversed.

2. The Requisite Conditions For The Application Of Res Judicata Have Not Been Satisfied.

Even assuming arguendo that certain ratemaking findings may be given res judicata effect, it is clear that the prerequisites for the doctrine's application have not been satisfied in the instant proceeding. In its February 28 Order, the Commission enumerated the classic criteria for the application of res judicata as follows:

- "1. Identity of parties;
2. Identity of issues;
3. An opportunity to litigate the issue; and
4. A final decision on the merits." (February 28 Order, p. 3, see Appendix B)

Notwithstanding the Commission's conclusion to the contrary, only the first of these four conditions, i.e. identity of parties, was met.

At R.I.D. 438, the issue addressed by the Commission, and the finding upon which it based its \$10.5 million rate base adjustment, concerned PECO's role in the construction of Salem No. 1. However, as previously noted, PSE&G, by written agreement of the Unit's co-owners, was and continues to be primarily responsible for the design, construction and operation of that facility. Accordingly, a second and distinct issue of equal or greater importance is the quality of PSE&G's management of

the Salem project's construction.

This latter issue, which PECO sought to address through the stricken testimony of Mr. Mallard, was not fully litigated at R.I.D. 438 because of the timing of the submission of the TB&A Report. Although portions of the Report were made available at an earlier date, only in the Summary Report, which was not provided to PSE&G and PECO until late May 1978, was any indication of rate base impact given. In fact, and as subsequently found by the New Jersey Board, the body of the audit was highly complimentary of PSE&G. However, the summary rate base recommendations were highly conclusory and required substantial discovery. As a result, cross-examination of the TB&A witnesses could not be scheduled until June 29, 1978, one day prior to the closing of the record. Accordingly, and due to the unavailability during this brief time period of necessary PSE&G personnel, full litigation of this issue was not possible.^{23/}

^{23/} The assertion, set forth in the Commission's February 28 Order (p. 3, Appendix B), that PECO made a deliberate choice to forego presenting a PSE&G witness is wholly without merit. In this regard, it must be remembered that PSE&G is an independent company not subject to PECO's control. In addition, the RID 438 rate application was, at this point, approximately one year old and any further delay in the proceedings would have seriously undermined the Company's efforts to obtain needed rate relief on a timely basis.

3. The Policies Which Underlie the Creation and Application of the Res Judicata Doctrine Establish that the Doctrine is Inapplicable to this Case.

The policies underlying the doctrine of res judicata, i.e. finality to litigation, prevention of needless litigation, and avoidance of unnecessary burdens of time and expense, have no application to rate proceedings. Ratemaking is continuous in nature, i.e. public utility rates are constantly subject to challenge and repeated justification at the instance of private Complainants or the Commission. Accordingly, neither rate levels nor any of the Commission's factual findings are ever finally determined. Application of res judicata principles will therefore not minimize litigation, but instead merely create time-consuming debates over the extent of the doctrine's applicability, thus delaying analysis of the merits of proposed rate levels.

Because ratemaking, unlike a judicial proceeding, is ongoing in nature, the standards employed by a regulatory agency are not well-defined, but rather are, of necessity, constantly being revised as conditions dictate. As Judge Leventhal observed in Texaco, supra, 555 F.2d at 893-94, "[c]hanges may occur not only in objective circumstances but in the way the agency perceives initial facts." Repeated examination of an issue permits the Commission to develop the appropriate standards and, of equal importance, permits the litigants to bring forth the necessary

evidence to permit proper application of the Commission's chosen standard. Such reexamination is a particularly crucial element of the ratemaking process due to the time constraints within which the parties, and the Commission, must operate. For example, in the prior case, the Commission, though admitting the persuasiveness of PECO's cost comparisons, rejected them as an improper standard of adjustment in favor of analysis of specific construction practices. By applying res judicata principles, the Commission now precludes PECO from presenting evidence directed at the Commission's chosen legal standard, which evidence, because of time constraints and the novelty of the issue examined, could not be produced in the earlier proceeding. See K. Davis, Administrative Law Treatise §18.01, pp. 545-546 (1958).

Moreover, res judicata is not a flexible standard to be employed selectively on the basis of ephemeral distinctions to some circumstances but not to others. Rather, its application is governed by rigid rules developed by the Courts to enable litigants to make rational decisions without fear that the doors of the tribunal will arbitrarily be closed against them. It is precisely this lack of flexibility which has led legal authorities, including the Commission,^{24/} to the unanimous verdict that the principles of res judicata should not be applied to rate-making proceedings.

^{24/} The Commission has never previously considered itself foreclosed from re-examining a prior rate case finding. Compare Pa. P.U.C. v. Metropolitan Edison Co., R.I.D. 170-171, 50 Pa. P.U.C. 82, 102 with R.I.D. 434, p. 4 (rate base deduction for faulty construction of TMI-1 Ring Girder) and Pa. P.U.C. v. The Peoples Natural Gas Company, R.I.D. 205, p. 20 with R.I.D. 308, p. 5 (capitalization of employee benefit costs).

For example, as discussed in the previous section of this Brief, the Commission, based on substantially the same evidence presented at R.I.D. 438, reversed its earlier finding and concluded that the Company possessed sufficient excess generating capacity to justify a rate base adjustment. See discussion, supra, at 22, fn. 8. In so doing, the Commission offered no rationale for distinguishing between its excess capacity and Salem No. 1 adjustments, both of which involved facts and decisions which occurred many years ago and which were at issue at R.I.D. 438. Obviously, if the former justified a reassessment of Commission policy, then the latter is equally entitled to be reconsidered.

Finally, the February 28 Order establishes a new legal principle, i.e. the applicability of res judicata to ratemaking proceedings, which is at best a dramatic departure from prior judicial and Commission pronouncements on this issue. The Commission applies this new principle to actions taken by PECO in past years in reliance upon what would appear to be well-settled and uncontrovertable Pennsylvania legal doctrine. As such, the February 28 Order is manifestly unfair and denies the Company the right to properly present its case in violation of the Public Utility Code and due process of law. See 66 Pa.C.S. 332(c); In re Shenandoah Suburban Bus Lines, 158 Pa. Super. 638, 644, 46 A.2d 26, 29 (1946); West Alexander Borough Annexation Case, 450 Pa. 453, 301 A.2d 662 (1973).

For the reasons set forth above, the Commission's decision to bar the presentation of evidence directly relevant to the construction of Salem No. 1 was arbitrary and manifestly unfair and

must, therefore, be reversed.

C. The Adjustments to Claimed Working Capital
Are Unsupported By Substantial Evidence and
Are Not in Accordance with Law.

Working capital constitutes an important element of a utility's rate base upon which this and other Courts have recognized that a utility is entitled to earn a fair return. As this Court recently observed, a working capital allowance is provided out of recognition of "...the utility's need for cash to meet current obligations arising out of the rendition of services for which revenues have not yet been received." UGI Corp. v. Pa. P.U.C., ___ Pa. Cmwlth. ___, 410 A.2d 923, 929 (1980). The extent of a utility's working capital requirement must, however, be determined on the particular facts presented in each case. See The Peoples Natural Gas Co. v. Pa. P.U.C., ___ Pa. Cmwlth. ___, 415 A.2d 937 (1980) (Peoples II).

In the proceeding below, the Commission disallowed approximately \$20.7 million, or 39%, of the Company's total working capital claim of \$52.8 million. In so doing, the Commission erred in two major respects--(1) it assumed the existence of a source of funds which could be used for working capital purposes despite unrebutted testimony to the contrary and (2) it concluded, in the absence of any evidentiary support, that minimum bank balances maintained by the Company to ensure access to credit on favorable terms and for other reasons could be supported from its cash working capital allowance. As a result, PECO has been denied

sufficient funds to bridge the gap between the rendition of service and receipt of revenues.

1. Accrued Bond Interest

The Commission improperly reduced the Company's working capital claim by \$9.1 million to reflect an alleged lag in interest payments to bondholders (May 9 Order, p. 9, Appendix A of this Brief). Simply stated, the Commission assumed that the Company collected revenues in advance of satisfying its semi-annual interest obligations on long term debt securities and that some portion of those funds could be used for working capital purposes. Accordingly, in the Commission's view, the level of funds required from investors for working capital purposes was thereby reduced.

This substantial disallowance, however, was not based on a finding that such a pool of dollars actually exists. To the contrary, as evidenced by the following passage, the Commission merely accepted, without further comment, the recommendation of the Administrative Law Judge:

"Respondent's exceptions to the cash working capital determination in the recommended decision are:...(3) that the ALJ should not have offset the cash working capital requirement associated with operation and maintenance expense by \$16.431 million by assuming that debt interest and preferred dividend costs are collected from ratepayers in advance of payment;...

We find that respondent's exceptions (3)...simply reiterate arguments previously raised. We find that the ALJ's opinion and discussion contained in his recommended decision accurately and correctly concludes, that an offset to the working capital requirement associated with operating and maintenance expense...is proper. Accordingly, we adopt the ALJ's conclusions and reasoning as our opinion and deny these exceptions." (May 9 Order, pp. 5-6, see Appendix A of this Brief)

The ALJ's proposed adjustment was, in turn, advanced without any discussion of the evidence submitted in this case, relying for its support simply upon the "precedent" established by prior Commission Orders:

"The Commission, in R-79030781, also considered the arguments of Trial Staff and the OCA that PECO has available to it as sources of working capital, accrued interest on long-term debt and accrued preferred stock dividends. This position has been vociferously opposed by the company. Extended discussion on this point would not be beneficial to any party or to the public. The Commission has over the recent past consistently upheld the Trial Staff's and OCA's position. See, e.g. Pa. P.U.C. v. Philadelphia Electric Co., R.I.D. 438 (Order entered February 5, 1979); Pa. P.U.C. v. Peoples Natural Gas Co., R-78010545 (Order entered February 2, 1979)."

That similar working capital adjustments have been adopted in other cases is clearly not dispositive for purposes of the instant proceeding. As this Court has repeatedly held, the Commission must support its Orders with findings based on the evidence of record before it. This is particularly true where, as here, resolution of the contested issue, i.e. whether the alleged lag in payment of debt interest actually exists, depends upon an analysis of the facts, and not the legal argumentation presented:

"[A] determination of a public utility's cash working capital needs depends upon the factual situation presented by each case, Pittsburgh v. Pennsylvania Public Utility Commission, 370 Pa. 305, 88 A.2d 59 (1952), and necessarily therefore requires the exercise of sound Commission discretion as the particular facts warrant." Peoples II, supra, 415 A.2d at 939.

Moreover, by relying exclusively on prior Orders which were neither appealed nor made a part of the record below, the Commission denied the Company its due process rights of notice and an opportunity to be heard. See City of Erie v. Pa. P.U.C., 41 Pa. Cmwlth. 194, 197 (1979); West Penn Power, supra. Indeed, by the logic of this decision, the Commission renders irrelevant the hearing process and evidence as to actual changed circumstances.

On three recent occasions, similar Commission adjustments have been reviewed and affirmed by this Court. See Pennsylvania Electric Company v. Pa. P.U.C., ___ Pa. Cmwlth. ___, 417 A.2d 819 (1980); UGI, supra; Peoples II, supra. In each instance, this Court found that the utility appellant had failed to demonstrate any error in the Commission's determination.^{25/} While the record in those cases may well have justified those Commission determinations, it is clear that a similar adjustment cannot be supported on this record. Moreover, the Commission has provided no basis in its Order upon which this Court could reach such a conclusion.

^{25/} In both UGI and Peoples II, this Court cited with approval the Pennsylvania Supreme Court's decision in Pittsburgh v. Pa. P.U.C., 370 Pa. 305, 88 A.2d 59 (1952). In Pittsburgh, the subject utility had established for accounting purposes an unsegregated reserve which it used to satisfy its quarterly federal and state income tax obligations. As the Supreme Court specifically observed, those installment payments were made on average some thirteen months after the income upon which the tax was levied had been earned. Pittsburgh, supra, 370 Pa. at 311. Accordingly, the existence of funds collected prior to payment of the associated expense was not in question and the sole issue presented to the Court was whether those dollars could properly be employed for working capital purposes. Such is clearly not the case in the instant proceeding.

The record in this proceeding establishes beyond question that PECO's bond interest costs are not recovered from customers in advance of their payment. Accordingly, there is no fund which reduces the investment required from Company shareholders to provide for the working capital needs which the Commission, in the absence of such fund, found was required. As explained by the Company's Treasurer, Morton W. Rimerman, the Company may collect bond interest costs only after they have been investigated and approved by the Commission in a rate proceeding (R. 104a-105a). Thus, when PECO issues debt, it is not until the Company's next rate case that the associated interest expense is reflected in its cost of service upon which rates are based. As such, if the cost of a debt issuance exceeds previously approved debt cost levels upon which rate levels have been established, or reflects additional capital invested in plant in service, the Company will necessarily pay this interest expense for months and even years prior to its recovery from ratepayers.

Due to steadily increasing interest rates throughout the 1970's, the Company's debt costs have, in fact, considerably led rather than lagged revenue collections (R. 104a-106a). For example, on October 15, 1979, PECO issued \$100 million in mortgage bonds at a cost of 12.5%. At that time, the Company's rates were based on results for a test year ending December 31, 1977, and a Commission embedded debt cost finding of 8.0% (R.I.D. 438 Order, entered February 5, 1979 (see Appendix C)). While the higher cost of the October 1979 issuance is reflected in PECO's current rates,

those rates did not become effective until May 9, 1980, or not until after the Company had made its first interest payment.

The record establishes that this pattern has prevailed for at least the past ten years. In other words, since 1970 the cost of every new issue has exceeded the then effective embedded debt cost upon the basis of which rates were established and revenues recovered from ratepayers (R. 104a-105a). Accordingly, the recovery of interest expense from customers has not provided the Company with a ready source of funds for use as working capital pending payment to debt holders. Rather, the Company has been required to employ shareholder funds to pay this cost pending its subsequent recovery, after Commission investigation and approval, from ratepayers.

Mr. Rimerman's presentation was not rebutted by either of the two witnesses who proposed interest lag adjustments. To the contrary, Commission Trial Staff witness Markovci admitted under cross-examination that PECO was not, in fact, recovering these higher costs on a current basis:

"Q. However, is it not true, Mr. Markovci, that the company is not compensated through its rates, for the increase in these costs?

A. That is correct to the extent of not being compensated due to regulatory lag.

Q. Would it also be true to the extent that the company had experienced an increase in its debt or preferred costs, which increase had been since the time of the company's last rate order, with no subsequent filing having been made? Is that not correct?

A. That is substantially correct, Mr. Hall."
(R. 702a).

Simply stated, the Commission's finding is belied by all of the evidence of record and must, for that reason, be rejected.^{26/}

The Commission's adjustment is improper and inequitable for the additional reason that PECO's cash working capital claim is limited (as is customary) to an allowance for operating and maintenance expenses paid in advance of the receipt of revenue. If debt interest is to be considered, consideration should be given to the lag in the collection of depreciation and other capital related costs. For example, depreciation expense is incurred at the time service is provided, yet payment is not made until 57 days (R. 106a-107a).^{27/} Fairness requires that if a lag in payment of one capital cost is considered, all costs associated with capital cost lags must be recognized.

^{26/} That the Company is contractually obligated to make interest payments and must, as Mr. Markovci noted, obtain these funds by reducing its shareholders' earnings is certainly no justification for the Commission's adjustment. Diversion of shareholder earnings for this purpose is nothing more than "conscripted" additional shareholder investment upon which the shareholder is entitled to a return. When the Commission denies shareholders a return upon this investment, as it does by means of this adjustment, that "conscripted" investment is unlawfully confiscated.

^{27/} Although depreciation expense does not represent a cash disbursement in the year in which it is charged, it is, quite obviously, a major source of annual cash flow. See Rhode Island Consumers' Council v. Smith, 322 A.2d 17, 23 (R.I. 1974).

Finally, even if there were some reason to believe that a debt interest payment lag existed, the Commission's adjustment is in error and should be rejected. Again, unlike the accumulated tax expense at issue in Pittsburgh, supra, interest, as part of a utility's return allowance, belongs to the utility from the moment received and is not, in any sense, customer contributed capital. Consequently, if any portion of the investors' return is used in the operation of the utility, e.g. to fund working capital requirements, it is entitled to earn an appropriate rate of return. This point was recognized and articulated by the Federal Power Commission in Re Florida Gas Transmission Co., 93 P.U.R. 3d 477 (FPC 1972):

"Interest on long-term debt is not a cost-of-service expense, but rather a below-the-line item that must be paid out of corporate earnings. As such the funds in these accounts constitute corporate funds which belong unconditionally to the pipeline and the stockholders and, thus, Florida Gas cannot be required to utilize them, without remuneration, as working capital for the benefit of the consumers. These accruals differ markedly from such items as prepaid purchased gas or accrued federal income taxes which are paid by the consumer as part of the rates for the sole purpose of meeting those expenses." (emphasis added.)

Accord Michaelson v. New England Tel. & Teleg. Co., 404 A.2d 799 (R.I. 1979); Rhode Island Consumers Council, supra; Re Monmouth Consolidated Water Company, 24 P.U.R. 4th 464 (New Jersey Board of Public Utility Commissioners 1978).

2. Minimum Bank Balances.

The Commission further disallowed all but \$256,000 of the Company's \$10.5 million claim for minimum bank balances. In

so doing, the Commission concluded that the Company's minimum bank balance requirements could be satisfied from funds which PECO keeps on deposit to meet its daily operating cash needs. It, therefore, asserts that these balances are supported by PECO's cash working capital allowance and no separate rate base allowance for minimum bank balances is required. The record, however, is completely devoid of any evidence which suggests that the Company's claims for minimum bank balances and cash working capital are either conceptually or in fact overlapping and, accordingly, the Commission's adjustment must be rejected.

As this Court is aware, minimum bank balances serve a number of critical financial functions. Of primary importance to the Company, they support \$159.1 million in bank lines of credit (out of a total of \$209.1 million). These lines of credit not only provide PECO with a vital source of cash reserves to meet unforeseen emergencies but also enable the Company to obtain short-term loans for operating and construction purposes at a lower cost than otherwise would be available (R. 96a). Such balances are also required to reimburse PECO's depository banks for a number of banking services performed for the Company, and permit PECO to obtain such services at a significantly lower cost than would alternative fee arrangements (R. 100a - 101a & R. 102a - 103a).

The novel theory of this Commission adjustment was not advanced by any witness who testified in the proceeding

below.^{28/} Instead, it was proposed for the first time in the Commission Trial Staff's Initial Brief and was subsequently adopted by the Administrative Law Judge on the basis of a cryptic exchange during the cross-examination of Mr. Rimerman. However, in that vague passage, which is reproduced in the ALJ's Recommended Decision (pp. 45-46), Mr. Rimerman merely confirmed that the Company was not required to segregate the balances which it maintains to support lines of credit from those which support other banking services. He did not state, nor may his testimony be construed to suggest, that the Company's cash working capital and minimum bank balance claims are duplicative.

Obviously, Mr. Rimerman does not hold to this opinion, as he has proposed rate base inclusion of both claims. Although there is no record evidence to this effect, as no witness or party proposed elimination of this claim prior to the close of the record and, therefore, no rebuttal evidence was presented, PECO's cash working capital claim, because of its derivation from a revenue/expense lag study, reduces PECO's cash working capital allowance to the minimum necessary to "bridge the gap." Nothing in the computation of this claim provides for the maintenance of

28/ Nor; to the Company's knowledge, has it been advanced in any other proceeding. In The Peoples Natural Gas Co. v. Pa. P.U.C., 47 Pa. Cmwlth. 512, 409 A.2d 446 (1979), the Commission's adjustment, which was affirmed by this Court, was based on a finding that the utility had failed to establish that it was, in fact, required to maintain minimum balances at certain banks. A similar Commission finding was expressly rejected in Equitable Gas Co. v. Pa. P.U.C., 45 Pa. Cmwlth. 610, 405 A.2d 1055 (1979).

minimum bank balances. Even if this Court could find that the Company has on bank deposit cash which serves both working capital and minimum bank balance purposes, that would not be proof that a return upon that cash investment is being provided by the claimed cash working capital allowance. As noted in Peoples I, supra, 409 A.2d at 449, the mere fact that such is required to be maintained does not mean that Peoples has identified them as a minimum bank balance properly includable in rate base. Similarly, the mere fact that actual bank deposits can be used for both minimum bank balance and cash working capital purposes does not establish that a claimed cash working capital allowance compensates investors for all or even part of such deposits.

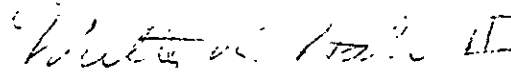
Clearly, the Commission's disallowance of claimed minimum bank balances is unsupported by the record and, moreover, denies PECO due process of law in that PECO had no opportunity to submit testimony in rebuttal to such disallowances - a right which is provided by the Public Utility Code. See 66 Pa.C.S. §332(c).

VII. CONCLUSION

For the reasons stated above, the Order of the Pennsylvania Public Utility Commission entered May 9, 1980 at Docket No. R-79060865 should be reversed as unsupported by the evidence, based on errors of law, and in violation of PECO's constitutional rights.

The Court is requested to remand the record to the Commission with the directive that an Order be entered correcting the errors described above and granting additional revenues as indicated thereby.

Respectfully submitted,



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January 29, 1981

A

APPENDIX A

Full Text of the Commission's
May 9, 1980 Order

Portions of the Commission's
Opinion Accompanying the May 9,
1980 Order Which Are Relevant
to the \$25 Million Rate Base
Adjustment for Excess Capacity
(pp. 9-15), the \$9.7 Million
Rate Base Adjustment for Salem
Unit No. 1 (pp. 3-5) and the
Disallowance of Working Capital (pp. 5-9).

PENNSYLVANIA PUBLIC UTILITY COMMISSION

ORDER ADOPTED MAY 9, 1980
at
DOCKET NO. R-79060865

RE: Filing of Supplement No. 6 to Electric Tariff No. 25
of Philadelphia Electric Company - Electric Rate Increase

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120

Public Meeting held May 9, 1980

Commissioners Present:

Susan M. Shanaman, Chairman
Michael Johnson
James H. Cawley
Linda C. Taliaferro

Pennsylvania Public Utility Commission

v.

Philadelphia Electric Company

R-79060865

I. HISTORY

On July 27, 1979, Philadelphia Electric Company ("PECO", "Respondent" or "Company") filed Supplement No. 6 to Tariff Electric-Pa. P.U.C. No. 25 to become effective September 25, 1979. Supplement No. 6, if approved, would increase the company's revenues from electric operations by approximately \$122,731,000 per year, or 10.9% of adjusted base rate revenue, based upon a future test year ended March 31, 1980. Before us for disposition is a recommended decision filed by Administrative Law Judge Joseph J. Klovekorn (ALJ) granting the Philadelphia Electric Company \$79,871,000 in additional annual rate relief, or approximately 65% of the requested relief. Our independent review of the instant proceeding and proposed order indicates that PECO has established a need for an annual estimated revenue increase of \$88,813,000, or 7.3% of adjusted base rate revenue.

For the sake of order and simplicity, we will address only those issues wherein we disagree with the conclusion or reasoning of

the ALJ; in all other respects, we adopt the reasoning and conclusions expressed by the ALJ as our findings.

II. MEASURES OF VALUE

A. Salem Unit No. 1 - Excessive Cost

Various parties to the proceeding contend that the construction cost of Salem Unit No. 1 is excessive and the ratepayers should not be burdened with this cost. This position is taken on the basis of a report by Theodore Barry and Associates, a management consulting firm, which concluded that if preferred management procedures had been adhered to in the construction of the Salem Project, a savings of from \$22 million to \$70 million could have been achieved, and that respondent's possible savings on Salem Unit No. 1 would be from \$5.9 to \$15.2 million. The ALJ recommended that respondent's rate base be reduced \$10.5 million.

Two exceptions have been filed by respondent to the ALJ's recommended disposition of this issue.

The first exception avers that a \$10.5 million rate base reduction is improper. In our order at R.I.D. 438 we discussed the issue of the prudence of Respondent's management and its agent Public Service Electric And Gas Company, during construction of Salem No. 1 (mimeo pp. 15-17). We concluded that:

1. respondent's conduct during the construction of Salem No. 1 amounted to total abdication of its responsibility for the management thereof;
2. this was an unacceptable management practice on its part;
3. prudent management of construction could have resulted in

cost avoidance between \$5.9 million and \$15.2 million; and 4. an appropriate sanction was the reduction of the rate base in the amount of \$10.5 million.

Conclusions 1 through 3, above, have been determined to be res judicata in an order entered in this proceeding on February 28, 1980. With regard to issue No. 4, above, having considered all the evidence in this proceeding, we conclude that the imposition of a sanction is appropriate. Accordingly, we deny this exception.

Respondent's exception avers that if a reduction to rate base is deemed appropriate, it should be reduced to \$9.7 million to reflect accrued depreciation. The report by Theodore Barry and Associates analyzes Salem Unit No. 1 construction costs. Construction costs exclude accrued depreciation because depreciation commences at the time property is placed in service. Due to the facts: (1) that the ALJ decision does not state whether the disallowance is a depreciated original cost figure, and (2) that the disallowance is approximately at the midpoint of two undepreciated amounts contained in the report by Theodore Barry Associates; presumably, the recommended disallowance by the ALJ excludes accrued depreciation. Salem Unit No. 1 is in service and therefore included in rate base at a depreciated value. In order to exclude a portion of this plant from rate base, it must be excluded on a depreciated

basis. Based on the foregoing, respondent's second exception^{1/} is granted, and we are excluding the excessive cost of Salam Unit No. 1 on a depreciated basis in the amount of \$9.7 million.

3. Cash Working Capital

Cash working capital is summarized:

	<u>Claimed by Respondent</u>	<u>Recommended by ALJ</u>
	(\$000)	(\$000)
Operating and Maintenance Expense	72,386	66,266
Debt Interest and Preferred Stock Dividends	NONE	(16,431)
Taxes Accrued and Collections Payable Against Taxes Prepaid and Other Prepayments	(30,100)	(30,100)
Compensating Bank Balances	<u>10,500</u>	<u>256</u>
Total Cash Working Capital	<u>52,786</u>	<u>19,991</u>

Respondent's exceptions to the cash working capital determination in the recommended decision are: (1) that the ALJ failed to include fuel expense not recovered in base rates in operation and maintenance expense when computing the associated cash working capital requirement; (2) that the ALJ should not have reduced operation and maintenance

^{1/} In its exception, respondent's calculation of the estimate of the accrued depreciation applicable to the excessive cost appears reasonable.

expense by his recommended decommissioning expense disallowance when calculating the associated cash working capital requirement, (3) that the ALJ should not have offset the cash working capital requirement associated with operation and maintenance expense by \$16.431 million by assuming that debt interest and preferred dividend costs are collected from ratepayers in advance of payment; (4) that if an adjustment is appropriate for debt interest and preferred dividends, the ALJ's calculation of the adjustment is in error because it ignores lag day and capital structure data; and (5) that the ALJ improperly recommended the disallowance of all but \$256,000 of respondent's compensating bank balance requirement on the theory that these requirements are included in the cash working capital requirement associated with operating and maintenance expense.

We find that respondent's exceptions (3) and (5), above, simply reiterate arguments previously raised. We find that the ALJ's opinion and discussion contained in his recommended decision accurately and correctly concludes, that an offset to the working capital requirement associated with operating and maintenance expense and that the disallowance of virtually all of the compensating bank balance claim, is proper. Accordingly, we adopt the ALJ's conclusions and reasoning as our opinion and deny these exceptions.

A working capital allowance is required for all cash operating and maintenance expense. A working capital allowance is not required for non-cash operating expenses such as annual depreciation expense, etc.

The operation and maintenance expense shown in Table III in the recommended decision does not include the cost of fuel. This expense was subsequently utilized by the ALJ in his working capital computation (ALJ decision, p. 43). The cost of fuel is a cash expense; therefore, the cost of fuel in excess of that recovered in base rates requires a working capital allowance. The ALJ has erred, and respondent's exception (1) above, is granted.

A review of Table III in the recommended decision discloses the ALJ improperly deducted a disallowed non-cash expense, i.e. decommissioning expense, from operating and maintenance expense, rather than deducting it from depreciation and amortization where decommissioning expense was claimed.

The ALJ then used this reduced operation and maintenance expense in his computation of the associated working capital requirement (ALJ decision, p. 43). Obviously, the ALJ understated operating and maintenance expense utilized in the working capital computation by his decommissioning disallowance; consequently, respondent's exception (2) is granted.

The ALJ does not explain the mathematical derivation of the \$16,431,000 offset to the working capital requirement associated with operation and maintenance expense. The methodology described on page 31 of respondent's exceptions is consistent with the methodology this Commission adhered to in respondent's recent gas rate proceeding

The operation and maintenance expense shown in Table III in the recommended decision does not include the cost of fuel. This expense was subsequently utilized by the ALJ in his working capital computation (ALJ decision, p. 43). The cost of fuel is a cash expense; therefore, the cost of fuel in excess of that recovered in base rates requires a working capital allowance. The ALJ has erred, and respondent's exception (1) above, is granted.

A review of Table III in the recommended decision discloses the ALJ improperly deducted a disallowed non cash expense, i.e. decommissioning expense, from operating and maintenance expense, rather than deducting it from depreciation and amortization where decommissioning expense was claimed.

The ALJ then used this reduced operation and maintenance expense in his computation of the associated working capital requirement (ALJ decision, p. 43). Obviously, the ALJ understated operating and maintenance expense utilized in the working capital computation by his decommissioning disallowance; consequently, respondent's exception (2) is granted.

The ALJ does not explain the mathematical derivation of the \$16,431,000 offset to the working capital requirement associated with operation and maintenance expense. The methodology described on page 31 of respondent's exceptions is consistent with the methodology this Commission adhered to in respondent's recent gas rate increase proceeding

(R-79030781); this is the methodology which the ALJ attempted to adhere to in the instant proceeding. Consequently, respondent's exception (4) is granted.

Consistent with the foregoing our allowance for working capital is as follows:

	Claimed by <u>Respondent</u> (\$000)	<u>By Commission</u> (\$000)
Operating and Maintenance Expense	72,386	70,992
Debt Interest and Preferred Stock Dividends	NONE	(9,119)
Taxes Accrued and Collections Payable Against Taxes Prepaid and Other Prepayments	(30,100)	(30,100)
Compensating Bank Balances	<u>10,500</u>	<u>256</u>
Total Cash Working Capital	<u>52,786</u>	<u>32,029</u>

C. Generating Capacity

One of the central issues in this proceeding has been the claims of various parties that PECO has such excessive capacity that an adjustment to rate base is necessary.

The ALJ, (R.D. 74) after reviewing all positions of the parties, found that Respondent's reserve capacity is not "...so excessive as to warrant an adjustment to its reserve requirement." Accordingly, the ALJ recommended the dismissal of the arguments presented. Trial Staff, the Office of Consumer Advocate, CEPA, and the City of Philadelphia have all specifically excepted to the ALJ's conclusion.

It is important to note that all parties throughout the proceeding have referred to "excess capacity." We shall construe this to mean capacity over and above that necessary to meet peak demand plus that capacity to insure that there is a margin to allow for day-to-day variations in the operating condition of installed generation.

The issues of PECO's generating capacity and reserve margin has been considered by us before. In Respondent's last case R.I.D. 438, February 5, 1979, we stated:

"The fact that excessive plant investments were prudent when made does not necessarily preclude the Commission from allotting responsibility for their cost."

Under similar circumstances which arose in Pa. P.U.C., et al. v. Pennsylvania Power Company, R-77110521, January 22, 1979, we stated:

"For purposes of this proceeding we agree with the [Administrative Law] Judge that the sudden burden of this new plant investment of the Company's customers was no fault of Penn Power or of its investors; but neither was it the fault of the ratepayers. Under these circumstances there must be some sharing of the risk associated with bringing large plants on line."

We continue to subscribe to this sharing of risk and will make adjustments for excessive capacity when adequately supported by the record.

The ALJ cites Pa. P.U.C. et al. v. West Penn Power Company, R.I.D. 183 (June 29, 1979), wherein we affirmed an order, reversing an earlier order making an adjustment for alleged excess capacity, for

the proposition that we have rejected excess capacity adjustments. In the June 29, 1979 order relied upon we stated:

"Having recognized the need for some reserve capacity, we must consider whether the reserve capacity here is so excessive as to demonstrate serious miscalculation of the system's requirements resulting from management imprudence. As noted above we interpret the Court's remand here as an admonition to us to review thoroughly the record here to determine whether our original position that there was imprudence can be clearly and convincingly demonstrated. After such a review we find that while there is evidence for our original position, it does not meet the high standards of proof necessary to support such a finding of imprudence."

In our discussion of reserve capacity in our December 14, 1978, decision in West Penn Power, R.I.D. 183, we established a two part test that must be met prior to the allowance of a return on a particular investment: the evidence must show (1) that the investments were prudent when made, and (2) that the property invested in will be used and useful during the time the rates will be in effect.

The evidence we found lacking is present in the instant case. The Consumer Advocate has presented to us an independent load forecast prepared by Dr. Stutz (C.A. Exh. JS-4), and a reliability study by Dr. Shakow, enabling us to determine the proper capacity for PECO to meet projected customer needs.

The load forecast shows that average annual growth rates for 1977-1978 are 1.4% in energy consumption and 1.1% in peak load. The average annual growth rates for 1987-1997 are 1.1% and 0.9% respectively. PECO has challenged this forecast as being too low and suggests that

their historically based figure of 2.3% is more appropriate. PECO argues that projection of future needs is by its very nature imprecise, and that historic data should be utilized. We note, however, that PECO's forecast is based in part upon the large growth in load which occurred prior to the 1973 oil embargo. Testimony has been presented which indicates to us that population growth has tapered, economic conditions have changed, technologies have evolved, and both State and Federal energy policies have changed. (C.A. Exh. JS-4, p.3). Although PECO's forecasts have begun to adjust to reflect these changes, the Stutz methodology more adequately addresses and quantifies these changes. Therefore, we find that the load forecast prepared by Dr. Stutz more accurately reflects the level of capacity needed for the period of time the rate level approved in this order will be in effect.

A second factor to be considered in a proposed capacity adjustment is one of system reliability. PECO has claimed that a reserve margin of at least 25% is necessary to insure the reliability criterion of loss of load probability of one day in ten years, and that this reliability criterion will probably increase. The increase in reliability criterion may be attributed to the increase in base load generating capacity built in response to PECO's load forecasts. To adopt PECO's position, that because of the increase in reliability criterion more and larger base load units are necessary, leads one on a circuitous route. Increasing base load capacity to meet PECO's projected increased reliability criterion, would lead to excess reserves in a system already top heavy

with base load generation, thereby creating higher reliability criteria, which in turn eventually leads to greater construction.

Testimony has been presented by Dr. Shakow indicating reserve margins of 14-22% will be adequate to insure reliable service to PECO's customers (C.A. Statement No. 4).

Some question has been raised regarding the prudence of PECO's generating plant construction program. PECO argues that many of its plants were built in response to Commission concerns arising during a period when portions of the Northeast were experiencing brownouts and blackouts. We cannot find that PECO's decision to build intermediate units until such time as base load units could be built, was imprudent when made. However, these units have served their purpose and are not currently necessary. As such, they are not used and useful, and properly should be excluded from rate base for ratemaking purposes.

In computing our adjustment for excessive capacity of 775 MW, we have taken PECO's 1981 estimate of installed generating of 7,689 MW at summer estimated peak and reduced it by 6,914 MW which is, in our opinion, the capacity necessary to service the Company's 1981 projected peak load with an installed generating reserve margin set at the midpoint of the 14-22% reliability criterion.

Having determined the level of excess capacity, we proceeded to identify those units most representative of the excess on the basis of the least economical units. These units have been identified as follows:

Chester 5 and 6	124 megawatts
Richmond No. 9	166 megawatts
Barbadoes Nos. 6 and 7	38 megawatts
Southward Units 1-6	<u>420</u> megawatts
TOTAL	748 megawatts <u>2/</u>

In order to ascertain the dollar adjustment to rate base, we eliminated the depreciated original cost of the aforementioned units (\$25,043,000) from rate base.

PECO argues that the standard we must apply in our determination of necessary capacity is one of prudence viewed at a time when the units in question were built. As stated above, we find this to be partially true. We also see our duty to review continually the functioning of a utility to insure reliable service at just and reasonable rates. While not questioning PECO's management decisions made when these units were constructed, we are of the opinion that they have served the purpose for which they were constructed and cannot be considered used and useful for ratemaking purposes.

In order to balance the interests of the ratepayers and the stockholders regarding the burden of these plants, we will allow PECO to continue to recover operation and maintenance expenses, fuel stocks, etc. associated with these plants. These amounts will not be removed from our cost of service determination. An additional cost being recovered for these plants from ratepayers is annual depreciation. By allowing PECO to continue to recover annual depreciation we are imposing

2/ C.A. Statement No. 5

upon the ratepayer the burden for sharing responsibility for these units, because the term of their usefulness was, to some extent, unpredictable at the time of investment. This sharing will have the effect of requiring the stockholders to bear the return on investment (although we have taken our capacity adjustment into account in determining rate of return), and requiring the ratepayers to continue to be responsible for the return of investment (depreciation).

By utilizing specific generating units in our calculations, it should not be construed that we are of the opinion that these specific plants be retired from service, rather, that the capacity represented by these units is above that necessary.

D. Limerick Nuclear Generating Station

Currently respondent has one major generating plant under construction. Planning for the Limerick station commenced in the late 1960's; the in-service dates for unit Nos. 1 and 2 are 1985 and 1987 respectively. Controversy regarding the Limerick generating stations revolves around its anticipated total cost, prior and current construction scheduling, whether the project should be cancelled, and prospective ratemaking treatment. We find the ALJ's opinion accurately and correctly disposes of the issues regarding this plant. The ALJ concluded:

1. that the Commission defer any decision on the prudence of respondent's decisions to delay construction at the Limerick Station during 1975-1978;

In conclusion, Respondent is directed to apply the allowed increase in rates in the following manner:

(1) the allowable increase in annual revenues will be spread to all rates in accordance with the "compromise approach" as set forth in the Company's exceptions; and (2) that portion of the increase, spread as above, applicable to the first 500 Kwh of monthly consumption for Rate R and Rate R-H will be allocated on the basis of the Kwh consumption by all classes; THEREFORE,

IT IS ORDERED:

1. That Respondent, Philadelphia Electric Company - Electric Division, shall not place into effect its Supplement No. 6 to Tariff-Electric-Pa. P.U.C. No. 25 but shall continue its presently existing tariff in effect until such time as it shall file a Tariff or Tariff Supplements consistent with our findings in this Order containing rates which will provide total annual operating revenues of \$1,254,449,000. This increase in rates shall apply to service rendered on or after May 10, 1980.

2. That Respondent shall file detailed calculations, at such time as it shall file a revised tariff or tariff supplement, by which it shall demonstrate that the filed rates comply with this Order.

3. That the several complaints filed in this proceeding are sustained to the extent indicated by the disallowance of \$33,918,000 of the requested annual rate increase.

4. That except as herein granted, or herein modified, all exceptions to the Recommended Decision are denied.

5. That except as modified herein, the findings and conclusions contained in the Recommended Decision are adopted as this Commission's decision.

6. That Philadelphia Electric shall file with this Commission, on an annual basis, a comprehensive report detailing all costs incurred in connection with Salem Unit No. 2 as well as the revenues received from Jersey Central under the contract. Included in this report shall be detailed calculations of long-term debt and preferred stock costs as they pertain to Salem Unit No. 2 as well as a calculation of return on equity invested in Salem Unit No. 2 earned under this agreement.

7. That Philadelphia Electric Company shall file with this Commission a comprehensive report on the construction status of the Limerick Nuclear Generating Station. This report will be included in the agenda of the Commission's next "Annual Review".

8. That Philadelphia Electric Company shall notify the Commission approximately six months prior to commercial operation at the Limerick Nuclear Generating Station.

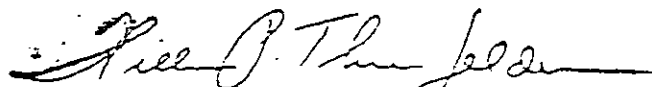
9. That Respondent shall report to the Bureau of Consumer Services within ninety days of the date of this Order the following:

- (a) Why it should not design and implement a clear and complete set of written standards for the development of payment agreements for overdue accounts.

- (b) Why it should not revise its collections policies and procedures to prevent the issuing of termination notices which cannot be acted on by its field collections staff.
- (c) Why it should not act to prevent the issuing of duplicate termination notices on overdue accounts.
- (d) Why it should not undertake to eliminate residential arrearages of over \$1,000 and to otherwise reduce the average size of arrearages.
- (e) Why it should not comply with 52 Pa. Code Chapter 56. In specific, those sections regarding using termination as a collection device, estimation of bills, payment of undisputed portion of bills, and the consideration of ability to pay in mediation disputes.

10. That upon the filing of tariff revisions, accepted to the Commission as being in compliance with this Order and Decision, and upon approval of the tariff revisions by the Commission, the inquiry and investigation at R-79060865, et al. will be terminated and the record in this proceeding marked closed.

BY THE COMMISSION,



William P. Thierfelder
Secretary

(SEAL)

ORDER ADOPTED: May 9, 1980

ORDER ENTERED: May 9, 1980

B

APPENDIX B

Full Text of the Commission's
Order of February 28, 1980

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120

Public Meeting held February 15, 1980

Commissioners Present:

Susan M. Shanaman, Chairman
Michael Johnson
James H. Cawley
Linda C. Taliaferro

Pennsylvania Public Utility Commission

R-79060865

v.

Philadelphia Electric Company

O R D E R

BY THE COMMISSION:

On October 23, 1979 the Office of the Consumer Advocate (OCA) filed a Motion to Strike and a Memorandum in support thereof, regarding certain prepared testimony of Respondent's witnesses concerning the construction of Salem No. 1. The Consumer Education and Protection Association (CEPA) filed a similar motion. A brief in opposition to these motions was filed by Respondent. On October 25, 1979 oral argument on the matter was heard by the Administrative Law Judge. On October 29, 1979 the Administrative Law Judge issued a written order granting the motions to strike. The thrust of the motions was that the proposed testimony was legally irrelevant in this proceeding because the issue to which the subject testimony was logically relevant was res judicata, having been addressed and decided in the Commission's order in Respondent's last general rate increase proceeding at R.I.D. 438.

On November 2, 1979 Respondent filed a Request for Certification and a Brief in support thereof. OCA filed a Brief in Opposition to the Request for Certification. CEPA filed a Memorandum in Opposition to the Request for Certification.

On November 5, 1979, while Respondent's Request for Certification was under consideration, Respondent filed a Petition for Clarification and Reconsideration of the order of the Administrative Law Judge granting the motions to strike. By order dated December 10, 1979 the Administrative Law Judge denied this petition.

On December 11, 1979 the Administrative Law Judge issued an order granting certification. The question which the Respondent requested be certified was as follows:

Should the Company be precluded from introducing testimony relating to the construction of the Salem Generating Station and the Commission thereby be denied the opportunity to review substantial evidence clearly relevant to a matter as issue in this proceeding on grounds of res judicata despite the fact that all authorities state that that doctrine is inapplicable to ratemaking?

In a less argumentative form, the question certified by the Administrative Law Judge was as follows:

Should the Company be precluded from introducing testimony relating to the construction of the Salem Generating Station No. 1 on the grounds of res judicata?

The rule or doctrine of res judicata is procedural in nature and is based upon a need to accord finality to an issue which has been decided and thus avoid repetitive, time consuming, and a costly relitigation of issues once decided. Central to a decision of the certified question is that of the applicability of the rule to administrative proceedings. Case law is replete with loosely worded and overly broad statements to the effect that res judicata is not applicable to administrative proceedings in general or in a particular forum. We find a more reasonable statement of the law in Davis' Administrative Law Treatise §18.12, which is that ". . . res judicata properly applies to some administrative determinations and that degrees of relaxation of res judicata are often appropriate". With regard to the court decisions pertaining to this Commission, we find that the language of the decisions is overly broad and not infrequently involves a generalized statement of inapplicability of the doctrine in situations in which the conditions precedent to its applicability were not extant. We find that res judicata is applicable in proceedings before us if the classic requisite conditions are present.

In our order at R.I.D. 438 we discussed the issue raised before us of the prudence of Respondent's management and that of its agent Public Service Electric And Gas Company during construction of Salem No. 1 (mimeo pp. 15-17). We concluded that:

1. Respondent's conduct during the construction of Salem No. 1 amounted to total abdication of its responsibility for the management thereof;
2. This was an unacceptable management practice on its part;
3. Prudent management of construction could have resulted in cost avoidance between \$5.9 million and \$15.2 million; and
4. A sanction was appropriate and an appropriate sanction was the reduction of the rate base in the amount of \$10.5 million.

The evidence which Respondent sought to introduce in this proceeding was logically relevant to the first three factual determinations set forth above.

The classic criteria for the application of the rule are:

1. Identity of parties;
2. Identity of issues;
3. An opportunity to litigate the issue; and
4. A final decision on the merits.

We find that these criteria are met and that consequently the doctrine does apply and that the motions of OCA and CEPA were properly granted and the proffered testimony properly excluded as irrelevant to any issue in this proceeding.

As to that portion of the proffered evidence which dealt with the prudence of the Public Service Electric and Gas Company, Respondent asserted in its brief that the perceived time constraints in the R.I.D. 438 proceeding dictated that it forego producing such evidence. Respondent made a deliberate choice in this regard, rather than suffer the burdens, if any, of a delay to present such evidence. Having done so, it will not be heard to complain of the consequences of that decision.

Before concluding we will point out that the fourth factual determination set forth above, involved an issue which is different from that which we anticipate we will be called upon to decide in this proceeding, which is whether "a sanction is appropriate at this time, and if so the nature of an appropriate sanction." Consequently, our decision as to that issue is not res judicata in this proceeding; THEREFORE,

IT IS ORDERED: That the certified question is answered in the affirmative and the order of the Administrative Law Judge is affirmed.

BY THE COMMISSION,



William P. Thierfelder
Secretary

(SEAL)

ORDER ADOPTED: February 15, 1980

ORDER ENTERED: FEB 28 1980

C

APPENDIX C

Full Text of the Commission's
February 5, 1979 Order at
Rate Investigation Docket 438

Portions of the Commission's
Opinion Accompanying the February 5,
1979 Order Which Are Relevant
to the \$25 Million Rate Base
Adjustment for Excess Capacity
(pp. 1-5, 10-15)

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120

Public Meeting held December 28, 1978

Commissioners Present:

W. Wilson Goode, Chairman, concurring
Robert K. Bloom
Louis J. Carter, dissenting
Helen B. O'Bannon
Michael Johnson, dissenting

R.I.D. 438

PENNSYLVANIA PUBLIC UTILITY COMMISSION

C. 22500 and
C-R 0438008

MEENAN OIL COMPANY AND PENNSYLVANIA
PETROLEUM ASSOCIATION

C. 22551
C. 22562

MARK P. WIDOFF, CONSUMER ADVOCATE
LEE FRISSELL, MAX WEINER AND CONSUMERS
EDUCATION AND PROTECTIVE ASSOCIATION

C. 22588
C. 22592
C. 22597
C. 22598
C. 22599

JOHN DeMANIO
WILLIAM L BAUER, III
FRANK K. JONES
CLYDE SIEGFRIED
NICHOLAS B. KUHN

C-R 0438001
C-R 0438002
C-R 0438003
C-R 0438004
C-R 0438005
C-R 0438006

ROBERT A. CRIST
JACK J. ALOFF
CITY OF PHILADELPHIA
MIRIAM KAUTERMAN, ET AL
ADMINISTRATOR OF GENERAL SERVICES (GSA)
EMIL SABATINI AND ACTION ALLIANCE OF
SENIOR CITIZENS OF GREATER PHILADELPHIA

C-R 0438007
C-R 0438009

MRS. DORCAS D. McCLELLAND
LUKENS STEEL COMPANY, THE CELOTEX
CORPORATION, SCOTT PAPER COMPANY,
STAUFFER CHEMICAL COMPANY, UNION
CARBIDE CORPORATION

C-R 0438010

MS. FRANCES SMITH AND PENNSYLVANIA
ASSOCIATION OF COMMUNITY ORGANIZATION
FOR REFORM (ACORN)

C-R 0438011
C-R 0438012
C-R 0438013
C-R 0438014
C-R 0438015

GEORGE C. BACH
EDWARD A. SCHWARTZ
UNITED STATES STEEL CORPORATION
CONCETTA HENSLEY
PARK TOWNE AND MADWAY ENGINEERS AND
CONSTRUCTORS (PARK TOWNE)

v.

PHILADELPHIA ELECTRIC COMPANY

O R D E R

BY THE COMMISSION:

On August 5, 1977, Philadelphia Electric Company (PECO) filed Supplements Nos. 72 and 73 to its Tariff Electric Pa. P.U.C. No. 24 to become effective October 4, 1977. Supplement No. 72 eliminates the fuel adjustment clause for residential and small commercial customers while rolling into their base rates approximately 0.9¢ kwh. The Supplement creates a new energy adjustment clause for all other customers, primarily large commercial and industrial, and rolls into their base rates a portion of the present charge. In Supplement No. 73, PECO requests a base rate increase in the amount of approximately \$115.8 million or 11 per cent based on operating results for the test year ended December 31, 1977.

By order adopted August 17, 1977, the Pennsylvania Public Utility Commission initiated an investigation and suspended each Supplement for the initial six months period provided under Section 308(b) of the Public Utility Law. By Order adopted September 26, 1977, the Commission did not lift the suspension of Supplement No. 72, but provided that PECO should be permitted interim relief in the form of continued accruals of AFDC (allowance of funds during construction) on its investment in Salem No. 1 nuclear plant from July 1 to December 31, 1977. The Commission further directed that the Administrative Law Judge assigned to the case file an interim decision prior to December 31, 1977, indicating "whether this interim relief should be extended or whether additional relief, either in the form envisaged by Supplement 72 or otherwise, should be granted."

Petitions for Modification and Clarification of the Commission's September 26 order were filed by Mark P. Widoff, Consumer Advocate on October 12 and October 14, 1977, respectively. In these Petitions, the Consumer Advocate requested that the September 26 order be modified by eliminating the permission granted to continue AFDC accruals on Salem No. 1 and be clarified to restrict the scope of the Administrative Law Judge's interim decision to the grant or denial of Supplement No. 72. These petitions were denied by the Commission at its public meeting on November 1, 1977.

A total of twenty-two Complaints have been filed against the proposed rate increase, which Complaints were consolidated with the Commission's investigation for hearing and decision purposes.

Parties actively participating in this proceeding were The Trial Staff of the Public Utility Commission (COMMISSION STAFF); the Consumer Advocate; The City of Philadelphia; Park Towne and Madway Engineers and Constructors (PARK TOWNE); the

General Services Administration (GSA); The Action Alliance of Senior Citizens of Greater Philadelphia and Pennsylvania Acorn (ACORN); Meenan Oil Company, Inc. and Pennsylvania Petroleum Association (MEENAN); Lukens Steel Company, The Celotex Corporation, Stauffer Chemical Company and Union Carbide (INDUSTRIALS); United States Steel Corporation (USS); and Miriam Kauterman.

A pre-hearing conference attended by all active parties was held on October 3, 1977 before the Administrative Law Judge.

Pursuant to the Commission's September 26 Order, a preliminary investigation was held with respect to the interim relief. Six days of hearings and three evenings of non-evidentiary hearings were held during the months of October and November on this subject. Briefs limited to the interim relief issues framed in the Commission's September 26 Order were filed November 30, 1977, and oral argument was heard on December 6, 1977. A Recommended Order was issued by the Administrative Law Judge on December 30, 1977, calling for the approval of an interim increase of \$32.5 million.

Exceptions to the Recommended Order on interim relief were filed by the Commission Staff, the Consumer Advocate and various Complainants. PECO filed comments on the Order. At a public meeting on February 24, 1978, the Commission allowed the Company interim relief in the amount of \$11.883 million. On March 21, 1978 the Commission adopted a further Suspension Order suspending the effective date of Supplements Nos. 72 and 73 to July 4, 1978.

A petition requesting that temporary rates be established effective July 4, 1978 so as to provide additional relief above current levels in the amount of \$41.8 million was filed by the Company on May 26, 1978. Responses to the Petition were filed by several Complainants. In an Order entered July 10, 1978, the Commission established Temporary Rates at the level of the previously effective interim relief.

A total of 59 days of hearings have been held in Philadelphia and Harrisburg, producing 8949 pages of transcript. The Company submitted 23 prepared statements and 90 exhibits. Additional prepared statements and exhibits have been submitted by Commission Staff and the Complainants.

A total of 904 pages of main briefs and 217 pages of reply briefs were filed.

Oral Argument before the Administrative Law Judge was held on August 16 and 17, 1978.

On November 15, 1978, the Recommended Decision of the Administrative Law Judge was issued for exceptions. Responses

were received from the Company, the Staff, the Consumer Advocate, Park Towne, the Industrials, ACORN, MEENAN and USS. Replies to exceptions were received from the Company, the Consumer Advocate, and Park Towne. Oral Argument was held before the Commission on December 8, 1978.

It is impossible to understand, interpret or pass judgment upon the many issues involved in this proceeding without a prior analysis and review of some historical background affecting, over the past two decades, the electric industry in general, and Philadelphia Electric Company in particular. Changes in environment, unexpected or unusual events, and changes in electric energy demands, must be examined together with the Company's responses thereto.

As a result of the Northeast blackout on November 9, 1965, the Commission stimulated the electric utilities to increase their generation capacity. On March 31, 1966, the utilities were told by the Commission that immediate preparations should be made to increase installed capacity until a reserve of 20 per cent above forecasted peak loads was reached.

Again, on June 19, 1967, after the June 5, 1967 blackout, the Commission was concerned that there was "insufficient reliable capacity and transmission lines to meet customer demands."

Electric utilities are mandated to provide reliable service. First, they must serve all customers within their service area without discrimination up to the limits of their capacity, and they may even be required to increase their capacity if demand for electricity expands.

Because electricity cannot be stored, sufficient generation must be installed to reliably supply the forecasted peak demands. Some additional generating capacity is needed to provide an acceptable margin of safety to insure against the probability of the demand exceeding the available generating capacity. In determining such level, allowance must be made for the fact that generation may be unavailable due to either a forced outage or scheduled outage for routine maintenance. Also, there must be considered the lead time necessary to construct additional generation plants of various types. In the planning for additional generation to meet the expected demand in the future, it is readily seen that a reliable forecast of demand is very important because it is the basis for additional construction.

Power Pools are generally established by several electric companies to share with each other's excess or shortage of generation capacity. PECO is a member of the Pennsylvania-New Jersey-Maryland (PJM) Pool, composed of eleven companies.

The amount of generation reserves required depends on the desired reliability of the system. The public has grown to depend on highly reliable electric service. However, electric utilities are expected only to supply service as reliable as can be justified economically. The PJM Interconnection reliability criterion is that the customers will not experience a curtailment on electric service more than one day in ten years because of inadequate supply of generation. For Philadelphia Electric Company and other members of the PJM Interconnection, approximately 20 per cent above the estimated peak demand has been the reserve generating capacity standard to meet that reliability criterion.

There are different "capacity factors" of different kinds of generation. The capacity factor has been defined as the actual output over the maximum possible output, over a given period, of a generating unit. They are classified as follows:

Base	50 to 85
Intermediate	20 to 50
Peaking	less than 20

Each type has its own features:

- (a) Base capacity must have low fuel and operating costs but may have high capital costs.
- (b) Intermediate capacity has intermediate operating, fuel and capital costs. These units are often the older generating units which were previously base capacity.
- (c) Peaking units are characterized by high operating costs and low capital costs.

Nuclear generating units, because of their low fuel and operating costs, are designed to be base generating units. Historically, PECO has installed a mixture of these types of generating units.

Recent studies indicate that, on the average, a kilowatt-hour of electricity generated by nuclear fuels costs about 60 per cent less than a kilowatt-hour generated by oil, and nearly 20 per cent less than a kilowatt-hour generated by coal.

In 1965 PECO first announced its plans for the Peach Bottom and Salem Units. The schedule was as follows:

<u>Year</u>	<u>Unit Additions</u>
1971	Peach Bottom #2: 450 MW
1972	Salem #1: 450 MW
1973	Peach Bottom #3: 450 MW
1974	Salem #2: 450 MW

Successive peak load forecasts made in 1968, 1969 and 1970 were each higher than the previous one. Therefore, on the basis of the load forecast made in 1968, the Company decided to build two more nuclear units at Limerick for service in 1975 and 1977. Also, in 1968, Pennsylvania utilities were urged to set a generation reserve goal of 20 per cent of the estimated annual peak load. Because of the time required to construct base generating units it was impossible by the early 1970's to reach that reserve capacity by building additional base generating units; therefore, PECO turned to combustion turbine generation which could be installed more rapidly. The installation of combustion turbines was planned in 1970, 1971 and 1972.

Then in 1970 it was recognized that Peach Bottom No. 2 and Salem No. 1 would be delayed one year from 1971 to 1972 and 1972 to 1973 respectively. In addition, a one year delay in Peach Bottom No. 3, Salem No. 2 and Limerick Nos. 1 and 2 was anticipated. Because of the large number of combustion turbines installed and planned for installation (about 1100 MW) there was an excess of peaking capacity and thus a need to meet further requirements with base and intermediate capacity. Therefore Eddystone Nos. 3 and 4 (400 MW each) were planned as intermediate units for service in 1974 and 1975. At that time the estimated reserves were: 1971-15.1%; 1972-16.0%; 1973-8.6%; 1974-9.7%; and 1975-4.3%, without Eddystone. With Eddystone, the estimated reserves for 1975 reserve was increased to 15.6%.

In spite of the reduction of the annual peak load forecast in 1972, the already experienced capacity delays led the Company to believe that additional generating capacity had to be installed by 1974 if PECO was to have the desired generation reserves. Because the time was short, combustion turbines were turned to as the only viable alternative; therefore, 400 MW of combustion turbines were installed, which unlike other combustion turbines previously available, have regenerative heat exchangers and can operate as intermediate generation, and oil at that time was a relatively inexpensive fuel.

Currently, the only PECO generating units under construction are Salem No. 2 (a jointly-owned unit) and Limerick No. 1 and 2.

Because of the decrease in demand, the Company has mothballed Richmond No. 12(108 MW) and Barbadoes Nos. 3 and 4 (130 MW), and has delayed the in-service date of Limerick Nos. 1 and 2 from 1983-85 to 1985-87.

Original Cost

As the name implies, original cost is the original cost of the plant property, including the financing charges accumulated until the plant is placed in service. Undepreciated original cost is the cost of the plant property before any accrued depreciation is deducted. PECO claims \$3,382,205,000 for undepreciated original cost of electric plant in service at December 31, 1977.

The undepreciated original cost of PECO's electric plant (\$3,270,467,000) and allocated common (\$103,074,000) has been developed from the Company's books of account.

Plant balances are developed from the Company's continuing property records maintained in accordance with the uniform system of accounts prescribed by this Commission and the Federal Energy Regulatory Commission. The original cost values recorded in these accounts were originally approved by the Commission in the mid-1940's and were last audited by the Federal Power Commission in 1973. These account balances are audited annually by a firm of independent certified public accountants. Additionally, the original cost of PECO's electric and allocated common plant in service as of August 31, 1975 was reviewed and accepted in the Company's last rate case at R.I.D. 295.

Included in PECO's claimed original cost of plant in service is \$287 million representing the Company's investment in the Salem Nuclear Generating Unit No. 1 and 50 per cent of the station's common plant. PECO has further claimed \$8.7 million on account of additional AFDC for the period of July 1, 1977 to December 31, 1977, as permitted by the Commission's Order of September 26, 1977. Various parties have challenged each of the above claims. Also included in the claimed plant in service is the Keeney-Salem 500 KV transmission lines which was placed in service on December 19, 1977.

Excess Capacity

During this investigation a large amount of time was devoted to the required generating capacity and the alleged excess capacity of the Philadelphia Electric Company.

This Commission, in the rate proceeding of PECO at R.I.D. 295, recognized but was not prepared at that time to resolve the problem of excess capacity (page 4 of Order adopted February 3, 1977 and entered April 21, 1977):

We are concerned about respondent's capacity

...

* * *

...we shall order respondent to justify all its generating units in the context not only of respondent's system, but also of the PJM pool of which it is a member, before filing for another general tariff change.

The reserve capacity of PECO during the test year, weather corrected, was 47.5 per cent. Such reserve capacity is not a temporary situation. In R.I.D. 295, the Examiner found the PECO reserve capacity of 27 per cent in 1974, 30 per cent in 1975 and a then predicted reserve of 34 per cent in 1976, to be "unusually high." In that proceeding, the Company predicted that its reserves will be down to 22.1 per cent by 1980 and 16.1 per cent by 1981. At that time, the Company curtailed its construction program and projected a delay in the completion of its Limerick nuclear units for two years until 1983-85. In this proceeding, the Company now forecasts a reserve capacity in 1980 of 39 per cent and in 1981 of 35 per cent. By mothballing Richmond No. 12 (108 MW) and Barbadoes Nos. 3 and 4 (130 MW) units, PECO has reduced its generating capacity from 8202 MW to 7964 MW. While eliminating these plants from rate base, the Company still claims, depreciation, property taxes and a limited amount of maintenance expense related thereto.

Further, toward the conclusion of the record in this proceeding, the Company announced that because it recently lowered its projected growth of energy usage and peak load from 5 per cent to 3 per cent year due to economic sluggishness in its service area and continued conservation by its customers, it had decided to reschedule the in-service dates of Limerick from 1983-85 to 1985-87. With the lower peak-load projections, PECO states that Limerick is not required for its reserve margins until 1985-87.

The Consumer Advocate submitted the testimony of Drs. John K. Stutz and Richard R. Rosen in regard to the forecasting of energy sales and peak load for PECO. Based upon these forecasts for 1979 and 1980, Consumer Advocate's witness, Robert C. Towers, a public utility consultant, recommended an adjustment based on a projected need for 7,100 MW for the Company. He urged the elimination from rate base and depreciation expense of the following plants:

Chester Nos. 5 and 6	124 MW
Southward Nos. 1 & 2	356
Nos. 3, 4, 5, & Diesel	64
Richmond No. 9	166
Barbadoes Nos. 6, 7 & Diesel	<u>56</u>
Total	766 MW

Towers chose to eliminate from rate base these older plants which are already highly depreciated and generally of lower original cost, rather than the newer and more efficient nuclear plants, as the plants representing excess capacity. He had determined from PECO exhibits depreciated original cost of these units totaled \$39.1 million and an annual depreciation expense of \$4.0 million. These are the amounts he suggested should be eliminated from rate base and operating expense on account of excess capacity. He did not recommend that these units be retired, however, leaving that to the Company to decide. He would allow the test year operation and maintenance expenses on these plants, as well as out-of-pocket property taxes associated with these units. Towers estimated that under the Stutz and Rosen forecasts, the Company would still have reserve margins of 23.0 to 23.5 per cent, which he considers adequate to maintain a load probability of 1 day in 10 years. He also recommends that the depreciation expense and property taxes be eliminated in connection with the plants mothballed by the Company.

Pennsylvania Association of Community Organization for Reform, (ACORN) and General Services Administration (GSA) in their briefs, supported the recommendations of the Consumer Advocate as submitted through witness Towers.

Park Towne and Madway Engineers and Constructors (Park Towne) urged that only a 9 per cent reserve is required by PECO because of the effect of the pooling arrangements with PJM. It recommended that 2050 MW of generating capacity of the Company be eliminated from rate base as excess capacity, representing 880 MW of marginal steam plants, 410 MW of combustion turbine production, and 760 MW of Eddystone Nos. 3 and 4. This would result in rate base reduction of \$305.5 million, or about 12 per cent of the claimed original cost measure of value. Included is the \$240,675,000 depreciated original cost of Eddystone Nos. 3 and 4, which it proposed to be made subject to AFDC with capitalized earnings. Unlike the Consumer Advocate, however, Park Towne would permit the allowance of depreciation of the plants eliminated from rate base. Park Towne contended that PECO's decision in 1970 and 1972 to construct the Eddystone and Croydon units were "acts of mismanagement." And even if the construction of Eddystone were to be held to be prudent until 1973, it urges that after the oil embargo, with but \$39 million expended on this project, the Company should have stopped construction of these unneeded plants, rather than continue to plow in an additional \$200 million. It theorizes that the Company then decided to complete the plants so as to assure inclusion of the \$39 million already spent in rate base. Although Park Towne also states that Croydon was not needed, it proposes no special treatment for Croydon, suggesting that it be used as a stand-in for some of the eliminated units.

PECO presented two witnesses, Vincent S. Boyer, Vice-President, Engineering and Research Department, and William B.

Morlok, Vice-President, Commercial Operations, who testified with respect to the Company's energy sales and peak load forecasts, its generating capacity and its mix of generating units. The Company asserts that its reserve margin presently exceeds the PJM reliability goal of 20 per cent, as a result of significant reductions in the growth of demand for electricity in recent years. Witness Boyer gave several reasons for the present generation reserve levels (Exhibit B-1, p. 9):

The reasons for the high generation reserves over the past four years was that the recent generating unit additions were planned many years ago to supply estimated annual peak loads which were higher than those recently experienced and because additional short lead time units had to be installed because of these delays in construction of large units. The reduction in annual peak loads has been the result of the conservation of electrical energy usage; the curtailment of electrical energy usage caused by the higher oil prices and the resulting higher prices for electricity; the 1973-75 business recession; and the emigration of people from the Philadelphia region. None of these circumstances were or could have been foreseen by PE peak load forecasters.

PECO insisted that its current reserve levels are the result of prudent management. The Company states that the additional short-lead units include 600 MW of combustion turbines, the Eddystone Nos. 3 and 4 plants and the Croydon combustion turbines. It stated that these were committed in 1968 in response to the urging of the Commission that a generation reserve goal of 20 per cent be established and that construction programs designed to achieve that goal in the shortest time be adopted. It asserts that the combustion turbines were installed because these units have the shortest construction period and were thus most responsive to the Commission's concern for an immediate increase in reserve capacity.

It has been noted that the Company overestimated its test year adjusted peak of 1977 in each and every one of its forecasts from 1970 on, beginning with a 1970 estimate of 8600 MW in 1977 against an experienced weather adjusted peak of 5560 MW, or a 58 percent error. Even after reducing the 1977 forecast in virtually every successive year, it ended up by overestimating the 1977 experience in the late 1976 forecast by a 7 percent error. It is the consistency of the errors that raises a serious question as to the reliability of PECO's forecasts in the future. But PECO has not been alone in overly optimistic forecasts; this has been the general situation in the electric industry throughout the nation since the oil embargo.

In the past, with customers paying for Company errors in forecasts with resulting excess capacity, there has been no incentive for Company planners to adopt a more responsible and reliable posture in their forecasts of load requirements. Though the forecast track record of the Company has been very poor, we cannot conclude, under all of the circumstances and in view of the industry-wide forecast record, that such erroneous forecasts were the result of imprudent management policies. We must view the matter in light of the conditions prevailing at the time investment may have been, in part, an over-reaction to capacity shortage fears encouraged in the past by the Commission itself.

The fact that excessive plant investments were prudent when made does not necessarily preclude the Commission from allotting responsibility for their cost. Though the excess capacity may have not been the fault of the Company or its investors, as we said in Pa. P.U.C. v. Pennsylvania Power Co., R-77110521 (1978):

Neither was it the fault of the ratepayers. We must consider such abnormal situation [excess capacity] to be a business risk. We cannot view as equitable or fair the placing of all such risk on the consumer alone. Investors, as well, in such situation, should bear a part of the risk.

Even though the Company, unlike other business enterprises, has an affirmative duty to provide facilities to serve the needs of its customers, its errors in trying to meet such criteria need not be its sole responsibility, nor the sole responsibility of the ratepayers. Under appropriate circumstances, there should be a sharing of the burden of excess capacity.

The considerations which have a logical bearing upon a rational decision as to whether to make some adjustment because of alleged excess capacity are almost unending. Some of which we are mindful are that:

(a) The increasing length of construction periods which requires that estimates of capacity be projected further into the future.

(b) The increasing size of base load units which of necessity result in wider swings in reserve capacity when they are placed on line, than has been historically experienced.

(c) The increased size of base load units has a rational bearing upon the amount of reserve capacity and spinning reserve which is needed for a given utility and even the interconnect pool to survive a forced outage.

(d) The historic trade-off between capital costs and economic dispatch has been materially impacted by rapidly rising fuel costs on the one hand and rapidly rising construction costs on the other, which may have a significant bearing upon historic views as to appropriate reserve capacity margins.

(e) The same new socio-economic factors that have adversely affected the validity of past estimates of growth also cloud future estimates, i.e. will they continue to moderate growth below historic levels, as they have in the recent past, or has their impact been fully experienced with a resultant expected movement back toward historic growth levels.

These are but a few of the many concerns which could be enunciated. While we are acutely aware of and concerned with the financial burden which true "excess capacity" might impose upon ratepayers, we are unwilling to make any adjustment based upon alleged "excess capacity" based upon the record in this proceeding.

Salem No. 1 Audit

On May 1, 1968, Philadelphia Electric Company, Public Service Electric and Gas Company (PSE&G), Atlantic City Electric Company and Delmarva Power & Light Company executed a two page "Memorandum of Owners' Agreement, Salem Nuclear Generating Station No. 1 and 2", to construct two 1090 megawatt nuclear units, of which Salem No. 1, in which PECO has a 42.59 percent interest, went into commercial operation on June 30, 1977. This memorandum confirmed prior verbal agreements for the respective companies made on December 15, 1965 and May 31, 1966. This agreement stipulated that PSE&G:

. . . shall be responsible for the design, construction and operation of the aforesaid units. The design and construction of the aforesaid units are in process and contracts with the construction manager and some of the equipment suppliers have been negotiated.
[Emphasis added]

An owners' formal agreement for the two units was not executed until November 24, 1971, at which time approximately \$150 million had already been expended on the project.

The total cost of the Salem (Nos. 1 and 2) project, exclusive of AFDC has increased from an estimated \$342 million in 1968 to \$1,210 billion. For PECO, as owner of 42.59 percent, the corresponding figures are \$121.6 million to \$513.6 million. Salem No. 1 and parts of the plant in common are requested to be included in rate base at \$287 million.

IT IS ORDERED:

1. That the several complaints are dismissed except as otherwise indicated herein.

2. That the Respondent is authorized to file within 30 days after the date of entry of this Order, tariff revisions consistent with our above order, to provide total annual operating revenues of \$1,150,100,000 (exclusive of revenues from the State Tax Adjustment Surcharge and the Fuel Adjustment Clause), as computed and allowed herein at the level of operations ending December 31, 1977.

3. That the additional revenues allowed herein in the amount of \$78,894,000 be allocated to customer classes, as designated by separate tariff schedules, on an equal percentage of increase basis, over revenues at the level of operations ending December 31, 1977.

4. That Respondent proceed expeditiously to implement the power factor monitoring program in accordance with the provisions of this Order and timely file the reports required.

5. That Respondent transfer the MLP and FLP customers described herein to rate schedule GS effective with the next regular billing cycle after the date of entry of this Order, and notice all other customers as provided.

6. That Respondent, implement a test demand metered rate, and to investigate other proposals as previously described herein and report the results thereof as directed.

7. That Respondent, when filing a revised tariff for schedule R, make provision for a 1¢ winter/summer differential in charges for energy usage over 500 KWH per billing period.

8. That Respondent, when filing a revised tariff for rate schedule WH, make provision for a differential of 1.25¢ per KWH as between the charge for unrestricted service and the charge for the first 400 KWH of off-peak service.

9. That Respondent, when filing a revised tariff for rate schedule R-H, make provision for only a 1.3¢ differential between charges for the first 100 KWH and the charges for service from 101 KWH through 500 KWH applicable to water heating service.

10. That Respondent, when filing revised tariff schedules for rates PD and HT, redesign the schedules to provide for:

- a. a separately stated customer charge set at average cost;
- b. a single demand charge set at average cost;
- c. a single energy charge set at average cost; and,
- d. eliminate the 100 hour provision in the minimum charge clause, substituting therefore the customer charge.

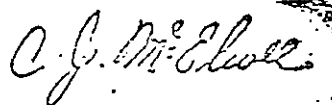
11. That Respondent file detailed calculations at the time of filing revised tariffs pursuant this order that clearly demonstrate that the rates filed comply with all the provisions and requirements of this order, to include but not limited to, data as to revenue increases by customer class and on an overall company basis. Additionally, for each tariff schedule, a 1977 bill frequency analysis will be provided or in the absence thereof, such other data regarding sales in each rate block of the various rate schedules as will permit revenue verification, with an explanation regarding the manner in which such sales data was derived.

12. That Respondent, may file a detailed recoupment of revenues plan for the period from July 4, 1978 to the effective date of the revised tariffs authorized therein, based upon actual sales data.

13. That, except to the extent granted in the above Order, all exceptions to the Recommended Decision of the Administrative Law Judge in this proceeding are denied.

14. Upon the filing and approval by the Commission of acceptable tariff revisions, as prescribed by the Commission's Order, the inquiry and investigation at R.I.D. 438 and the consolidated complaint proceeding thereunder shall be terminated and the record marked closed.

BY THE COMMISSION



C. J. McElwee
Secretary

(SEAL)

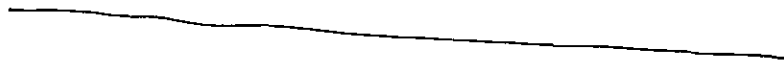
ORDER ADOPTED: December 28, 1978

ORDER ENTERED: February 5, 1979

D

APPENDIX D

Summary Review of Consumer
Advocate Load Forecast



Summary Review of Consumer Advocate
Load Forecast

The following is a brief exposition of the numerous methodological and factual errors contained in the Advocate's forecast. These include: 1) the employment of inaccurate assumptions with respect to residential appliance saturations, miscellaneous appliance growth and the use of erroneous data in forecasting heating load (PECO St. 10-A, pp. 1-8); 2) employment of a model for forecasting commercial sales which, in addition to containing factual errors and unsupported assumptions, is grossly inaccurate in representing the Company's recent and current commercial sales level (PECO St. 10-a, pp. 9-17); and 3) assumed expansion of industrial cogeneration in the PECO service territory unsupported by any data or analysis related to that territory (PECO St. 10-A, pp. 17-19). As demonstrated by Mr. Hoch, PECO has employed in its forecast specific data applicable to its service territory in each of the above areas, including residential appliance survey data, data obtained from direct and continuing contacts with all major industrial customers and data compiled to reflect the growth in new building structures in the area (to name but a few). The ESRG forecast, on the other hand, relies upon a mixture of national and statewide "data" which are adjusted in various assumed ways to hopefully make it applicable to the PECO service territory (PECO St. 10-A, PECO St. 10-B).

In the residential area, the Advocate's forecast includes a number of simple data errors (most particularly in forecasting space heating), a number of assumptions as to residential appliance saturations which are unsupported by any data drawn from the PECO service territory and a totally unexplained projection for miscellaneous usage (i.e. such usage is not projected on a disaggregated basis, as PECO does, and as the witness deems essential in commercial forecasting) (PECO St. 10-A, pp. 3-8; PECO St. 10-B, pp. 1-2). In fact, Advocate witness Stutz' analysis of residential sales was so cursory that his initial effort at explaining the differences between his and PECO's forecast levels was, as he subsequently admitted, grossly inaccurate (Tr. 2806-2841).

The witness' commercial square footage growth projection, asserted to be a major difference between the ESRG and PECO commercial forecasts, is grossly understated. In fact, PECO has already experienced in a 3-1/2 year period approximately 60% of the full growth predicted by this witness over the 10-year forecast period (PECO St. 10A, p. 14).

Finally, the witness' commercial forecast represents a complete break with the historic growth pattern of PECO's commercial sales. In his surrebuttal, witness Stutz admits this, but attempts to avoid the logical conclusion by asserting that:

"The ESRG model is, by design, a long-range model.... Thus in the long run, through and beyond 1988, to 2000, the final year of the ESRG forecast, the ESRG forecast will I believe provide an accurate guide to the probable pattern of commercial load growth." (OCA St. 3A, p. 6)

The witness further notes that:

"In our view electrical consumption, particularly in the commercial sector, is undergoing a historic shift." (OCA St. 3A, pp. 4-5)

The witness, however, has presented no evidence to support his view that such a shift is occurring.

The witness' projection of increased industrial cogeneration, the sole difference between his and PECO's industrial forecasts, must be rejected in light of Mr. Hoch's testimony, based upon direct contact with PECO's large industrial customers capable of employing this option, that such will not occur. Clearly, in light of its many inaccuracies and unsupported assumptions, witness Stutz' load forecast should be rejected (PECO St. 10A, pp. 17-19; PECO St. 10B, pp. 3-4).

Finally, as was also the case with the forecast submitted by this witness at R.I.D. 438, the commercial section is entirely dependent upon data as to commercial kilowatt-hour usage per square foot by type of commercial building assertedly derived from an A.D. Little Study. This study, which has not

been published and is not publicly available, could not be provided by the witness in response to the Company's data request. In fact, it is unclear whether the study has even yet been completed. Indeed, in PECO's last case, the witness appeared employing at "earlier version of the A.D. Little Study." The A. D. Little Study of that day, also not published and unavailable to the Company, was revised during the course of the proceeding, and has apparently been revised again. No one apparently knows whether these revisions will continue, nor can the accuracy or meaning of the study or the witness' employment of it be determined for the record (Tr. 2848-2865). As approximately 30% of the witness' forecast sales are entirely dependent upon this study, it would be a gross denial of the Company's due process rights for the Advocate's forecast to be employed for any purpose in this proceeding. Clearly, the Advocate's forecast must be disregarded.

E

APPENDIX E

Portions of Initial Brief
Filed By Philadelphia Electric
Company at Docket No. R-79060865
Which are Relevant to the \$25 Million
Rate Base Adjustment For Excess
Capacity (pp. 46-55; Appendix B).

Edison's historical planning was extravagant or imprudent such as would necessarily have resulted in excessive or unnecessary generating capacity being available at a time in the future. Even assuming arguendo that unneeded capacity was available in the Edison system during the test period, this fact proves nothing with respect to Edison's prudence in the planning and construction of additional capacity." (at p. 53)

The adjustments proposed in this case should similarly be rejected.

- C. The Recommendation of Certain Complainants that construction of the Limerick Nuclear Generating Station should be terminated is without rational basis and should be rejected.

Consumer Advocate witness Shakow, Keystone Alliance witnesses Noguee and Breslow and Limerick Ecology Action witness Dufour each assert that proper generation plant expansion planning requires termination of construction at PECO's Limerick Nuclear Generating Station.^{13/} In addition, witness Shakow

^{13/} During the hearings, PECO moved to strike all or portions of the testimony of each of these witnesses. The Administrative Law Judge denied each of these Motions (Tr. 2883, 3492, 3522, 4073, 4215-16). The Company will not reargue its position in this Brief. However, it adheres to the views expressed in these Motions and, if necessary, will pursue them before the Commission. A demonstration of witnesses Noguee, Breslow and Dufour's lack of qualifications to express the opinions stated in their testimony and the many erroneous assumptions contained therein can be found in their cross-examination (Tr. 3476-3516, 4071-4076).

recommends the adoption of an "economic reliability criterion" which he asserts produces an optimum reserve capacity of 14-22% for PECO (OCA Sts. 4 & 4A).

Witness Shakow, whose principal employment prior to his present position was as a self-employed food wholesaler (i.e. from 1970-75), has had since 1975 limited experience in "critiquing" principally utility load forecasts, but also on one, possibly two, occasions a utility capacity plan (OCA St. 4, pp. 1 & 2; Tr. 2886-2892). Employing a computer model (i.e., the ESGEM Model) which compares the witness defined "total social costs" for a "PECO planning case" (i.e., Limerick) versus an "ESRG planning base case" (i.e., 1500 mw of coal facilities) at various reserve capacity levels, Dr. Shakow testified to the following conclusions: 1) the PECO capacity plan is biased in favor of base load units, as opposed to cycling units, and particularly nuclear base load units^{14/} and 2) PECO employs an excessive service reliability criterion in its generating plant planning. To rectify these errors, he recommends that construction of Limerick be terminated and that PECO plan in future years for a reserve capacity level of between 14 and

^{14/} The witness' conclusion that PECO's plan is "biased" toward base load generation is curious in that witness Shakow himself recommends the addition of 1500 mws of base load coal plant, and not a single mw of cycling capacity (Tr. 1982).

22 percent (OCA St. 4, pp. 3-4).

The principal problem in analyzing the fallacies in witness Shakow's recommendations is where to begin. His recommendations, in addition to being unsupported and in obvious error, are often internally in conflict. The witness' explanation of how certain of his conclusions have been reached varies as between his direct testimony, his cross-examination and his surrebuttal testimony. Perhaps it is best to start by stating that the analytic procedures employed in the ESGEM program are simplistic and in error, the witness' data assumptions are shockingly inaccurate and many intermediate judgmental conclusions are completely without support.

As examples only of the witnesses many methodological and factual errors, two of the most fundamental will be briefly stated. A collection of the more substantial of the remainder is set forth in Appendix B. Mr. Emil Kasum, PECO's Chief System Planning Engineer and head of its System Planning Division, testified as to these errors.^{15/} Of principal significance,

^{15/} Mr. Kasum has had many years of experience in electric system planning. He has served as PECO's Chief System Planning Engineer since 1971 and has been a member of its System Planning Division for 29 years. An electrical engineer, Mr. Kasum is a senior member of the Institute of Electrical and Electronic Engineers, a member of the Committee on Power System Planning and Dispatching of the Us-USSR Technology Engineering Program, is Chairman of the Generation Subcommittee of the System Planning Committee of the Edison

witness Shakow's analysis is based upon an inappropriately short planning period (12 years) and relies upon an inexact interpolation procedure in the computation of social costs (Tr. 2910-13). Obviously, and as explained by Mr. Kasum, selection between available generating plant alternatives must be made on the basis of their comparative costs over the entire life span of the units being considered (i.e. approximately 30-35 years) (PECO St. 15, pp. 5-6). Second, the witness has included a 600 mw coal plant and Salem 2 capital costs in his calculation of total social cost for the PECO construction plan. In fact, PECO's present capacity plans do not include the 600 mw unit employed by the witness. Moreover, he has not included the Salem 2 capital costs in the calculation of his plan's total social cost though he employs the unit (PECO St. 15, pp. 28-29).

But even ignoring these errors, the witness himself agrees that his major conclusion is in error (i.e., termination of Limerick's construction) if two of his principal assumptions are rejected. These assumptions are 1) that "full" rather than

Continued

Electric Institute, is a member of the Electric Industry Technical Committee to aid and advise DOE on the power system reliability study mandated by PURPA and is a member of the National Power Grid Study Task Force of the National Electric Reliability Council (PECO St. 15, pp. 1-2).

"incremental" costing analysis is the appropriate methodology for selecting between generating plant construction alternatives and 2) that the Limerick Plants will cost somewhere between \$4.2 billion and \$7 billion (as compared to the Company determined cost of \$3.1 billion and depending upon which of the witnesses' conflicting figures is accepted). If these assumptions are inaccurate, then indeed, even witness Shakow agrees, the recommended termination of Limerick plant construction is in error (OCA St. 4, pp. 19-21A, 32; Tr. 2935-2955).

Incremental cost analysis refers to recognition in long-term planning of the fact that certain decisions have already been made and their cost or investment consequences cannot now be reversed. Applying this principal to Limerick, it requires recognition of the fact that PECO has already invested \$1.2 billion in Limerick. Under almost any planning scenario, other than that of witness Shakow, sunk investment costs are excluded from consideration in analyzing the costs of available alternatives.

Witness Shakow argues that full costing should be used as this analysis more accurately reflects the position of ratepayers who are not presently supporting any part of the Limerick investment, and because that investment might be recovered through sale of the unit or by means of tax write-

offs. The inaccuracy of witness Shakow's view of ratepayers' best interests is discussed below. As for the possibility of the plant's sale or tax write-offs, the witness admitted that he made no analysis to determine whether PECO's investment could in fact be recovered by either of these alternatives. Both Mr. Kasum and Mr. Paquette unequivocally testified that such recovery was not even a remote possibility (PECO St. 15, p. 28; PECO St. 15-A, pp. 4-5; Tr. 3814).

The gross impropriety of witness Shakow's position is obvious from the fact that he alters it (i.e., Limerick should be completed) if the Commission were, in directing that the plant's construction be terminated, also to direct that PECO recover from ratepayers its existing investment in the plant. Clearly, for both reasons of equity to investors and economic rationality, the comparison in question can only be made by employment of an incremental analysis (Tr. 2945-2946).

PECO's cost estimate for the completed Limerick plant on a 1985/1987 schedule is \$3.1 billion, based upon the \$1.2 billion which has been expended to date in completing approximately 50% of the plant and detailed cost estimates by the plant's engineer/constructor. PECO computes the Shakow cost estimate as \$4.2 billion employing the ESRC LOW case assumption (i.e., \$1994/kw x 2110 mw Limerick capacity) and \$4.9 billion employing ESRC High case assumptions (i.e., \$2321/kw

x 2110 mw), including a \$1 billion overstatement due to uncontradicted AFUDC calculation errors. (OCA St. 4, Ex. DS-E, sheet 5; PECO St. 15, pp. 20-22). This Limerick cost range was confirmed by witness Shakow during his cross-examination (Tr. 2959). In his surrebuttal, the witness advances a new cost estimate for Limerick of \$7 billion (which estimate cannot be derived from any of the cost/KW figures stated in his Ex. DS-E) (OCA St. 4A, p. 8).

Witness Shakow's \$7 billion figure obviously lacks credibility given that the Limerick plant is already 50% complete at approximately 17% of his total estimated cost. The estimate further lacks credibility when compared to PECO's plant specific cost estimate. The Shakow estimate is derived from a generalized equation (i.e. the Komonoff equation, see Appendix A for discussion) (OCA St. 4, pp. 44-52).

This equation, and the data upon which it is based, were developed by a Mr. Komonoff, who was not produced for examination. Moreover, Mr. Komonoff's study, obtained by witness Shakow in a "private communication," also could not be produced for evidentiary examination as the material had "not yet been copyrighted." For this Commission to rely upon conclusions directly dependent upon a study whose production was refused, which study was prepared by an individual whose qualifications have not been subject to examination, would be a gross denial

of PECO's right to due process of law and would make a mockery of the hearing process (Tr. 2959-2971).^{16/}

To demonstrate the inaccuracy of witness Shakow's generating plant expansion cost comparison, Mr. Kasum recalculated the comparison employing consistent methods and cost assumptions. The results of this calculation, which for simplicity employs witness Shakow's erroneous twelve-year planning period and does not penalize his lower reliability with his unsupported "curtailment costs," demonstrates that there is a substantial cost penalty to the ESRG proposal (PECO St. 15, pp. 29-34).

If there were any doubt as to the gross impropriety of witness Shakow's recommended termination of Limerick construction, such doubt must be dispelled by a recognition of the consequences of Commission adoption of that recommendation. As testified by Mr. Paquette, if construction

^{16/} Because of this denial of its due process rights, PECO moved to strike this portion of the Shakow testimony. The ALJ denied that motion at the close of the record (Tr.). PECO adheres to the position stated in its motion and will renew that motion before the Commission if required. The witness' assertion that the Komonoff data was "verified by myself" is obviously untrue as the witness was unable to state the source of the data, the methods employed in adjusting it to a 1979 dollar base, and could not even successfully complete the equation's mathematical computations (Tr. 2959-2977).

at the Limerick plant were terminated and the Company's investment in that plant could not be recovered by its sale, as the evidence demonstrates would be the case, the Company's capital loss as the result of that action, net of income tax write-offs assuming that such would be available, would be \$700 million. When written off against the Company's present book common equity investment of \$1.6 billion, the resulting reduction in the value of the Company's common equity shares would be 44% (Tr. 3814-16). In terms of the present market value of those shares, that would represent a decline from \$14 to \$6 per share (Tr. 3815).

Clearly, in the wake of such a financial disaster, the Company would for many years be unable to raise all forms of capital investment, even assuming it could continue as a viable enterprise. Continued safe and reliable electric service in the Company's service territory would become an impossibility. Even ignoring the gross confiscation of investor's capital and the uncontradicted record evidence of the substantial future energy cost savings which the plant will produce, the recommended Limerick construction termination is clearly not in the best interest of PECO's customers.

Only three observations are required with respect to witness Shakow's second conclusion, i.e., that the proper

reserve capacity for PECO is between 14 and 22%. They are:

1) the conclusion is derived by employing a different reliability standard (an "economic criterion") than has historically been employed by PECO, 2) witness Shakow again admits that the 14-22% conclusion is accurate only where the full costing analysis and cost assumptions discussed above are accepted, i.e., if PECO cost assumptions are employed a 30% reserve capacity results even under the Shakow revised criteria; and 3) the conclusion is mathematically in error even if the witness' approach is accepted, his calculations in fact supporting a 22-30% reserve margin (i.e. see footnote) (OCA St. 4, pp. 4 & 25; PECO St. 15; Tr. 2528).^{17/}

^{17/} Mr. Kasum demonstrated that the appropriate reserve margin for the PECO system is somewhere between 22 and 30% even based upon witness Shakow's analysis. In his surrebuttal, witness Shakow seeks to rebut Mr. Kasum's demonstration. The numbers he advances are not supportive of his position (OCA St. 4a, p. 7). The two-element partial sums, referred to by Dr. Shakow, are an indication of the average annual cost which would be employed in interpolation analysis to obtain total social costs. These are lowest for the 30% margin (i.e., 14% reserve: 1981 + 1987 = 1173.7 and 1987 + 1992 = 1131.5, whereas 30% reserve: 1981 + 1987 = 1166.8 and 1987 + 1992 = 1129.7). The column sums are irrelevant. The cost figures are, in any event, inconsistent with those advanced in the witness' original testimony. (PECO St. 15, p. 15; OCA-4, Ex. C, Sheets 8 & 12).

APPENDIX B

Summary of Significant Methodological, Statistical and Factual Errors in Consumer Advocate Capacity Planning Analysis

Mr. Emil Kasum, PECO's Chief System Planning Engineer, explained that ESGEM, the computer model employed by Consumer Advocate witness Shakow in his capacity planning analysis, is a simplistic and completely inappropriate basis for making judgments between alternative generating plant programs (PECO St. 15, pp. 4-8). As admitted by witness Shakow, ESGEM fails to properly depict either the system reliability or cost consequences of PECO's membership in PJM (i.e. modeled "only in the crudest way," Tr. 2956). This is a significant failing given that 20% of Shakow's total social cost results from interchange transactions. ESGEM incorrectly models (i.e., in fact ignores) pumping energy required to operate PECO's Muddy Run Pumped storage facility. This energy is a significant contributor to PECO's need for base load generation. ESGEM is further admittedly inaccurate in its modeling of the effects of generating plant maintenance outages upon service reliability and needed reserve capacity (Tr. 2955-56).

Even without regard to methodological problems, witness Shakow's social cost comparisons are ripe with outright errors. For example, in computing the total social costs of the ESRG construction plan, witness Shakow employs, ignores (i.e. retires) and reemploys (i.e. unretires), PECO's existing

generating units as appropriate to meet his chosen reserve capacity goal at the lowest possible cost. In reality, PECO lacks such flexibility except at substantial cost which is not recognized in the Shakow analysis (PECO St. 15, p. 13; Tr. 2985-88). The witness further computes total social cost for his "ESRG/ESRG Low/ESRG Planning" case employing different reserve reliability goals in the several years analyzed on his Table I (for example 1981-14%; 1987-22% etc.). Such planning flexibility does not exist in the real world (OCA-4, p. 7; Tr. 2929-30). He further assumes continued operation through 1992 of eight old PECO generating units (1521 mw) which will have exhausted their useful lives and are scheduled for retirement in the mid-1980's. These units, which are oil-burning plants, are operated in the Shakow analysis at 60-80% capacity factors despite their age and high operating costs (PECO St. 15, pp. 13-14; Tr. 2984-85). A further inaccuracy in the witness' calculations arises from ignoring the effects of the investment tax credit and accelerated depreciation in reducing the costs of capital intensive generating plants (i.e. the former of which can give rise to a tax credit of up to 10% of total construction cost) (PECO St. 15, pp. 28-29; Tr. 2918-19).

As noted by Mr. Kasum, the Komonoff equations employed to estimate Limerick and generic plant capital costs are extremely imprecise. Results could vary by an order of magnitude of "ten or more" and still produce future plant costs as compared with the plant data on which the equations are based

within the range of statistical accuracy employed by Mr. Komonoff. The cost estimates produced by the Komonoff nuclear equation exceed estimates from other reputable sources, including the Nuclear Regulatory Commission and Nuclear Plant Engineer/Constructors by an order of magnitude of three (PECO St. 15, pp. 16-17). Although this record does not have the benefit of a direct examination of Mr. Komonoff's qualifications, in a recent New Mexico proceeding, that Commission rejected a similar analysis because of "his demonstrated lack of engineering expertise" and "numerous unsupported assumptions and calculations" (Tr. 2963-64).

Witness Shakow employs a higher assumed inflation rate in his cost assumptions than does PECO. This higher inflation rate, while it inflates the relatively small amount of costs to which the rate is applied (i.e., only non-fuel operating and maintenance costs) at a more rapid rate than does the PECO rate, is principally important because it produces a higher "discount rate" under the witness' methodology which deflates all costs at a more rapid rate than that of PECO. Thus, regardless of which inflation rate is correct, the mathematical effect of comparing, as does the witness, the social costs in 1979 real dollars of the PECO planning case based upon a low inflation rate compared to the ESRG case based upon a high inflation rate, is to substantially prejudice the result

in favor of the ESRG case (PECO St. 15, pp. 26-28).

Turning to the witness' reliability calculations, even accepting the witness' unsupported curtailment cost figures (Tr. 2998-3001), his computations understate curtailment costs associated with his proposed reserve margins as he ignores limitations upon the Company's ability to react to capacity shortages (PECO St. 15, pp. 8-13). The witness also understates the amount of blackouts and other curtailments which he proposes by stating these as "days" during a ten-year period, the implication being that the stated values are equivalent to the one day in ten year employed in the Company's reliability criterion. As noted by Mr. Kasum, and as admitted by the witness, this is not in fact the case and a one day in ten year curtailment under the witness' method of measurement indicates greater curtailment than under the Company's reliability criterion by an order of magnitude of six or more (PECO St. 15, p. 8, Tr. 2993-98).

F

APPENDIX F

Full Text of Administrative Law
Judge Klovekorn's October 29, 1979
Order Granting Motions to Strike
Testimony Relating to the Construction
of Salem Unit No. 1

the construction of the Salem No. 1 project. The Commission after an extended discussion (see mimeo, pp. 15-17) made the following finding of fact: "that PECO exercised unacceptable imprudent management practices in regard to its engagement in, and its total abdication of responsibility for the management of the construction of the Salem No. 1 project."

The Commission held PECO accountable for \$10.5 million of the costs of Salem No. 1, costs which would not have been incurred had prudent management been exercised.

The movants point to these findings and conclusions and argue that the doctrine of res judicata stops the company from relitigating this point. The doctrine of res judicata precludes the same parties from relitigating controversies which have already been finally determined by a court of competent jurisdiction. Since there is no question that the Commission has already considered this matter in R.I.D. 438, strict application of the doctrine was seem to support the movants' arguments. The company argues, however, that the doctrine of res judicata does not apply to rate cases. The company's statement is overly broad. It is true that the courts in this jurisdiction have held that certain elements of a rate case are not subject to the principles of res judicata, e.g. Duquesne Light Co. v. Pa. P.U.C., 176 Pa. Super 568 (1954); Pennsylvania Gas and Water Co. v. Pa. P.U.C., 33 Commw. Ct. 143 (1977). It makes

sense certainly that the fair value finding in one proceeding should not be binding on a subsequent proceeding; so also a rate of return finding should not preclude relitigation of this question in a subsequent proceeding. These items are constantly changing due to changed circumstances.

But when, as here, the Commission makes a finding involving certain definite factual issues, which are not subject to change, there is no reason why the doctrine should not apply. See Allegheny Steel Co. v. N.Y.C.R. Co., 324 Pa. 353 (1937). As Professor Davis states in his treatise on Administrative Law, the doctrine of res judicata should apply in varying degrees to administrative determinations. Davis, Administrative Law, §18.12. As noted above a fair value or rate of return finding should not be subject to res judicata. A policy determination, such as whether the effective tax rate or the statutory tax rate should be used in computing the tax liability of a utility which is part of a corporate entity filing a consolidated tax return, similarly is an inappropriate area to apply this doctrine. The flexibility essential to the administrative process would be lessened if policy determinations were frozen in time. But here we are dealing with a limited number of past events. The Commission considered these facts and concluded that PECO's management was unsatisfactory. The policy considerations underlying the doctrine of res judicata, i.e. finality to litigation, prevention

of needless litigation, avoidance of unnecessary burdens of time and expense, make this specific case an appropriate one for the application of this doctrine. There is no claim of changed circumstances; indeed, much of the testimony sought to be stricken was considered and rejected by the Commission in R.I.D. 438. The company's claims, however, that it did not have time to present an adequate case in that proceeding. This argument should have been addressed to the Administrative Law Judge and the Commission in R.I.D. 438.^{1/}

The company also claims that it must relitigate this issue in order to preserve its rights to appeal the Commission's earlier decision. This argument is unpersuasive. Since it has been held that a judgment may be final for res judicata purposes even though the time to appeal that judgment has not yet run, Reed v. Allen, 286 U.S. 191 (1932), I find no basis to support the company's position.

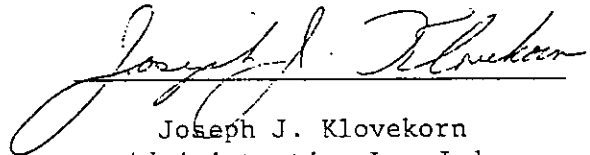
This decision is limited solely to those parts of the testimonies of witnesses Boyer and Mallard which involve PECO's management practices in connection with the construction of Salem No. 1. Since this question has already been considered by the Commission in R.I.D. 438, it is not at issue in this proceeding. The testimony and supporting data are, therefore, immaterial to this proceeding.

^{1/} It is also to be noted that there were no statutory time constraints on the parties in that case.

Therefore,

It is Ordered:

That to the extent consistent with the above Order the motions to strike filed October 23, 1979 by the Consumer Advocate and CEPA, et al., are granted.


Joseph J. Klovekorn
Administrative Law Judge

Dated: October 29, 1979

PROOF OF SERVICE

I hereby certify that I am this day serving the attached Brief for Petitioner with Definitive Record Pagination upon the persons and in the manner indicated below, which service satisfies the requirement of Pa. R.A.P. 121, Pa. R.A.P. 2185(c) and Pa. R.A.P. 2187(a).

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

January 30, 1981

IN REPLY PLEASE
REFER TO OUR FILE

B-80062683

G. Ronald Darlington, Prothonotary
Commonwealth Court of Pennsylvania
Sixth Floor, South Office Building
Harrisburg, PA 17120

Re: Philadelphia Electric Company v.
Pennsylvania Public Utility Commission

No. 1415 C.D. 1980

Dear Mr. Darlington:

Enclosed please find twenty-seven copies of brief for
Respondent Pennsylvania Public Utility Commission, including a
certificate of service.

Very truly yours,

Gregg C. Sayre
Assistant Counsel

GCS/jem

Enclosures

- cc: Walter R. Hall II, Esq.
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- Edward J. Riehl, Esq.
- Charles J. Streiff, Esq.
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- Andre C. Dasent, Esq.
- Michael P. Kerrigan, Esq.

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PHILADELPHIA ELECTRIC COMPANY,

Petitioner

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondent

No. 1415 C.D. 1980

BRIEF FOR RESPONDENT
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition for Review from the Order of the
Pennsylvania Public Utility Commission at
Docket No. R-79060865, entered May 9, 1980

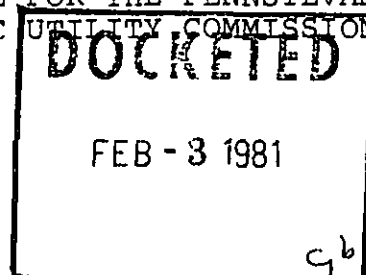


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COUNTER-STATEMENT OF QUESTIONS INVOLVED

- I. Does the record contain substantial evidence to support the Commission's conclusion that PECO's reserve capacity is so excessive that not all of it is used and useful in the public service?

[Answered in affirmative below.]

- II. Was it appropriate for the Commission to apply the doctrine of res judicata to an issue which depends on facts which will not change and which was decided in PECO's last rate case?

[Answered in affirmative below.]

- III. Does the record contain substantial evidence to support the Commission's reduction of cash working capital by accumulated debt interest?

[Answered in affirmative below.]

- IV. Does the record contain substantial evidence to support the elimination of most of PECO's minimum bank balance claim, due to the duplication of PECO's working capital and bank balance claims and also due to lack of need and use?

[Answered in affirmative below.]

SUMMARY OF ARGUMENT

The Commission's excess capacity adjustment was based on its weighing of the testimony of three Consumer Advocate witnesses on the subjects of load forecasting, reliability requirements and excess capacity. PECO's arguments are based on its own testimony, which disagrees with the testimony of the Consumer Advocate witnesses but which was rejected by the Commission. There is no legal necessity to establish the imprudence of PECO's historic construction decisions, because the evidence supports the conclusion that some of PECO's generating capacity is not presently used and useful in the public service.

The doctrine of res judicata should be applied to a rate case issue if the legal criteria of res judicata are met, when the rate case issue is one which should not be reexamined in every rate case. The Commission properly refused to allow relitigation of whether \$10.5 million of investment in the Salem 1 Nuclear Station was unreasonable.

This Court should for the fourth time affirm the Commission's reduction of cash working capital by accumulated debt interest which is collected monthly from ratepayers, disbursed semi-annually to bondholders, and used by the company in the interim period.

The Commission's reduction of the minimum bank balance claim is supported by PECO's own evidence. Where

the same funds are used for cash working capital and minimum bank balances, PECO should not earn a double return on those funds. In addition, PECO did not meet its burden of proof to establish the need for its minimum bank balances.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S CONCLUSION THAT PECO'S RESERVE CAPACITY IS SO EXCESSIVE THAT NOT ALL OF IT IS USED AND USEFUL IN THE PUBLIC SERVICE.

A. There is substantial evidence in the record establishing that at least 748 megawatts of PECO's capacity are not required to provide adequate and reliable service to PECO's ratepayers.

PECO's installed average reserve capacity from 1975-1979 was 35% (Exhibit VSB-2, pp. 6,8. R. 139a, 141a). The Commission determined that such a high level of reserve capacity was not necessary. All 35% was above and beyond the level of the peak demand of PECO's customers. The question presented is whether there is substantial evidence to support the Commission's finding that not all of PECO's investment in generating plant is used and useful in the public service.

The Commission's excess capacity adjustment was based primarily upon the testimony of Thomas Weiss, a public utility rate consultant who testified on behalf of the Consumer Advocate. Mr. Weiss is a registered professional engineer with considerable experience in capacity planning who has previously testified before the Federal Energy Regulatory Commission on electric rate base matters (OCA Statement 5, pages 1-3; R. 1194a-1196a). Mr. Weiss' testimony

regarding his recommended rate base adjustment of \$25,043,000 is at pages 6-19 of his testimony (R. 1199a-1212a). Apart from a challenge to his qualifications which merely involves a dispute as to what numbers should be used in calculating reserve capacity (PECO Brief at 28, n. 14), PECO does not directly challenge Mr. Weiss' testimony. The bulk of PECO's argument is against the testimony of Dr. Shakow, upon whose testimony Mr. Weiss in part relied.

The very scope and detail of PECO's criticism of Dr. Shakow's findings indicates that those findings are indeed substantial evidence, and substantial evidence is all that is required for this court to affirm the Commission. 2 Pa..S. §704. PECO's assertions that Dr. Shakow's reliability criteria would lead to numerous voltage reductions or blackouts is based on PECO's testimony. Dr. Shakow, an expert with considerable experience in load forecasting (OCA Statement 4, pages 1-2, R. 928a-929a), disagreed. He testified that his recommended reserve margin of 14-22% would yield a reliability of less than one day in ten years for partial blackouts (Statement 4, page 4, R. 931a). His analysis determined what reserve capacity would be cheapest for ratepayers, and included the costs of blackouts (OCA Statement 4, pages 9-11, R. 936a-938a), emergency power purchases and voltage reductions (pages 15-18, R. 942a-945a). PECO obviously disagrees with Mr. Shakow's conclusions, and

presented conflicting testimony. This conflicting testimony was rebutted by Mr. Shakow in his surrebuttal statement, OCA Statement 4A (R. 1055a-1063a).

The Commission was presented with conflicting evidence and opinions. PECO's arguments against the testimony of Mr. Weiss and Dr. Shakow all go to the question of whether their testimony or PECO's testimony was more accurate or more worthy of belief. PECO has by no means shown that there is no substance to the Consumer Advocate's testimony.

The Commission's adjustment is also based on the load forecast submitted by Dr. Stutz, also presented by the Consumer Advocate (Commission order at 11-12, Petitioner's Brief Appendix A; Consumer Advocate Statement 3, R. 703a-732a; Consumer Advocate Exhibit JS-4, R. 733a-836a). PECO's argument against Dr. Stutz's substantial evidence is again based on its own witnesses' disagreement with it. Dr. Stutz also provided surrebuttal testimony which added to the weight of his evidence (Statement 3A, R. 837a-849a). The Commission must be affirmed, regardless of PECO's or this Court's opinion as to the weight of the evidence, if there is substantial evidence underlying the Commission's decision. Johnstown-Pittsburgh Express, Inc. v. Pennsylvania Public Utility Commission, 5 Pa. Commonwealth Ct. 521, 525, 291 A.2d 545, 547 (1972).

PECO stresses the fact that a capacity level of less than 7,483 megawatts would require it to buy additional capacity under a contract between PECO and the other utilities in the PJM power pool. The record supports the Commission's rejection of the PJM reserve requirement as the floor of PECO's needed capacity. In Trial Staff Statement DMB/EMB-1, pages 7-12 (R. 676a-681a), Trial Staff witnesses David M. Boonin and Eileen M. Barrett criticized the contractual reserve margin set by the PJM Management Committee. That reserve margin in part depends on the forced outage rate of each company (Exhibit VSB-2, Appendix E; R. 192a-194a). PECO's forced outage rate has been consistently higher than the PJM average, which is due in part to a cutback in maintenance expenses and to a tendency not to repair units quickly because of the existence of a very comfortable reserve margin (Statement DMB/EMB-1, pages 11-12; Tr. 718; Tr. 720; R. 680a-681a; 216a; 217a). Thus, slower repairs increase the capacity requirement which in turn increases the likelihood of slower repairs.

Furthermore, the contractual reserve requirement is based on the peak demand forecasts of PECO and the other PJM companies (Exhibit VSB-2, Appendix E; R. 192a-194a), which, as admitted by PECO's witness Mr. Kasum, have been too high for years (Tr. 3533, 3536; R. 657a-658a). The Commission was, therefore, justified in rejecting the PJM contractual reserve level because it, too, overstates the need for capacity.

A further reason for rejecting the PJM contract is that utility companies can be expected to promote their own self-interest. The PJM system as a whole is blessed with a good deal of excess capacity (Exhibit VSB-2, pages 7-8; R. 140a-141a). The member companies can be expected to contract among themselves for as high a reserve margin as a regulatory commission could be persuaded to accept. The Commission is not bound by an agreement among utilities.

PECO argues that the Commission's order is inconsistent, because it adopted ALJ Klovekorn's opinion which, in turn, had criticized Dr. Shakow's study. That criticism, however, was a minor aside in Judge Klovekorn's opinion on the Limerick Nuclear Generating Station. The main thrust of the opinions of the Judge and the Commission was that this rate case, occurring in the middle of the construction of Limerick, was not an appropriate time to decide whether rate base adjustments should be made to the Limerick plant. (Recommended Decision at 61-62; R. 42a-43a). The criticism of Dr. Shakow's study was clearly more a dictum than a finding, in an eighteen page discussion which recommended not making a current decision.

At p. 34-36 of its brief, PECO argues that the Commission must be reversed because it did not discuss and rebut PECO's rebuttal testimony presented in opposition to the Consumer Advocate's testimony. There is no such requirement. The Commission has clearly adopted the calculation of

Mr. Weiss, the reliability criterion of Dr. Shakow, and the load forecast of Dr. Stutz (Order at 11-14, Petitioner's Brief Appendix A), so there is no confusion over what the Commission did. The Commission is not required to rebut explicitly every argument made against each position upheld by the Commission, when the Commission's choice of actions is fully explained on the record. UGI Corp. v. Pennsylvania Public Utility Commission, _____ Pa. Commonwealth Ct. _____, 410 A.2d 923, 934-935 (1980). PECO also argues (Brief at 36-37) that the Commission should be barred by its decisions in earlier cases, many involving different companies and all involving different facts, with respect to excess capacity. The Commission's findings of what is presently used and useful simply do not apply to later cases or other companies. Cheltenham & Abington Sewerage Co. v. Pennsylvania Public Service Commission, 122 Pa. Superior Ct. 252, 264-265, 186 A. 149, 156 (1936), quoted at P. 45 of PECO's Brief. The Commission is empowered by 66 Pa. C.S. §1311 to value and revalue from time to time the fair value of the property of any public utility, and has simply done so in this case.

There is additional support in the record for the Commission's finding of excess capacity. In Statement DLB-1, pages 13-20 (R. 660a-668a), Trial Staff witness Donald L. Birx recommended the disallowance of 500 megawatts of capacity from the equity component of return on investment, based on his opinion that the 588 megawatt difference

between PECO's reserve and the PJM requirement was not necessary for reliability (pp. 16-17; R. 664a-665a). In Statement DMB/EMB-1 (R. 669a-685a), Trial Staff witnesses David M. Boonin and Eileen M. Barrett presented an alternative recommendation treating 850 megawatts of capacity as excessive for the needs of PECO's ratepayers. Witnesses Boonin's and Barrett's recommendation was to impute additional revenue to PECO due to the excess capacity, but their 850 megawatt excess could just as well have been removed from rate base. The adjustment adopted by the Commission removed only 748 megawatts from rate base.

- B. The Commission was not required to find that PECO's decisions to build its plants were imprudent when made.

The Commission's adjustment to rate base of \$25,043,000 was based on its finding that 748 megawatts of PECO's capacity are not currently necessary to provide adequate and reliable service to PECO's ratepayers (Order at 13-14, Petitioner's Brief Appendix A). The Commission did not question the prudence of PECO's management decisions when the units were constructed; PECO's argument that its construction program was prudent is therefore irrelevant. If capacity is not presently used and useful, it does not matter whether it was properly constructed many years ago. The Commission's duty to value public utility properly is a duty to value it as of the end of the

test year, not as of the date the property is constructed. See City of Pittsburgh v. Pennsylvania Public Utility Commission, 187 Pa. Superior Ct. 341, 348-349, 144 A.2d 648, 653 (1958); Citizens Water Co. v. Pennsylvania Public Utility Commission, 181 Pa. Superior Ct. 301, 306, 124 A.2d 123, 125 (1956), and cases cited therein.

PECO's position is that a utility merely needs to establish that its investment in rate base was prudent at the time of the investment, and that such prudence automatically establishes that the plant will be used and useful for an unspecified period of time, presumably until the utility decides to retire it. PECO cites Bell Telephone Company v. Pennsylvania Public Utility Commission, 47 Pa. Commonwealth Ct. 614, 408 A.2d 917 (1979) to support its argument that rate base inclusion is determined on the basis of conditions when a company decides to construct plant. That case actually holds that the "used and useful" nature of property (in that case, construction work in progress) is properly decided by the Commission based on conditions at the time of the rate case. PECO also cites UGI Corp. v. Pennsylvania Public Utility Commission, _____ Pa. Commonwealth Ct. _____, 410 A.2d 923 (1980). In that case this Court held that the Commission properly excluded from rate base wells which were prudently drilled but proved to be dry. Also, as noted by the Court:

In the area of adjustments to rate base, the Commission has wide discretion. Duquesne Light Co. v. Pennsylvania Public Utility Commission, 174 Pa. Super. 62, 69-70, 99 A.2d 61, 69 (1958).

_____ Pa. Commonwealth Ct. at _____, 410 A.2d at 929.

The Commission in the question at hand has not disallowed any expense, so the question presented is not whether an expense was reasonably incurred, as were the gas storage project feasibility studies in the UGI case. The question presented here is whether PECO's excess capacity is presently used and useful, and is therefore analagous to the dry hole investments in UGI. Reasonably incurred expenses should be allowed, but rate base which is not used and useful should not earn a return.

The case at hand represents a situation, similar to the dry holes in UGI, where it has not been established that PECO was imprudent in building its plants, but it has been established that PECO is saddled with more capacity than it needs to provide adequate service. The question that must be answered is who must bear the loss, when management in the past made a series of decisions which turned out to be wrong. The Commission in this case has provided a sharing of the burdens of the wrong decision between the investors, who are ultimately responsible for management's decisions, and the ratepayers, who realistically have no choice but to buy electric power from PECO at whatever price

is set by the Commission. This sharing was accomplished by removing the excess capacity from rate base but allowing PECO's claims for the operating and maintenance expenses of all its generating units, and a return of the investors' investment through the depreciation allowance.

The Commission's apportionment of the burden of a wrong decision by management is more generous to the utility than a competitive market would be. If an industry subject to competition builds more capacity than it needs, it makes no difference whether or not management was reasonable or prudent in constructing the excess capacity. The result is the same: the investors suffer a loss because the plant built by their dollars is not presently used and useful in making profits.

If, however, the decision makers are aware that a wrong decision may come back to haunt the utility if it proves to be wrong, the utility will be stimulated to do its utmost to make the right decisions. The competitive market provides such a stimulus for private industry; the Commission should be permitted to provide a similar stimulus to utility executives, upon substantial evidence of record, by apportioning the burdens of a wrong decision.

II. THE COMMISSION PROPERLY APPLIED THE DOCTRINE OF RES JUDICATA TO AN ISSUE ENTIRELY INVOLVING HISTORICAL FACTS, WHICH ISSUE WAS FULLY LITIGATED BY THE SAME PARTIES AND WAS DECIDED BY THE COMMISSION IN PECO'S LAST RATE CASE.

In its argument that res judicata never applies to rate cases, PECO confuses the difference between findings of fact which are used in order to determine a level of rates, and the level of rates determination itself. Obviously, a company's rate base will change from one case to the next. Even the rate base allowed for a single plant will differ from case to case because of intervening capital additions, interim retirements and the accrual of depreciation. The case at hand, however, involves a single, narrow issue which does not change from case to case: was \$10.5 million of PECO's investment in the Salem 1 nuclear station unreasonable and therefore properly excluded from rate base. The issue turns entirely upon the facts and costs of construction of the plant. These facts and costs were known before the record closed in R.I.D. 438, and were admittedly (PECO Brief at 51) litigated by the same parties.

The decision in R.I.D. 438 is before this Court at No. 1211 C.D. 1980. PECO's arguments on the merits of the Commission's adjustment in R.I.D. 438 (Brief at 40) are irrelevant to the issue in this case, the appeal of R-79060865, and should not be considered. The Commission's order in

R.I.D. 438 is still considered final for res judicata purposes, even though appealed. Reed v. Allen, 286 U.S. 191 (1932).

Most of the cases cited by PECO involve issues in a rate case which must be reexamined every time a rate case is filed. They involve the level of reasonable rates, or the current value of the utility's property. In one case, International Tel. & Tel. Co. v. American Tel. & Tel. Co., 444 F. Supp. 1148, 1155 (S.D.N.Y. 1978), the issue involved dicta, that is, findings not necessary to the ratemaking order. The findings referred to in the concurring opinion in F.T.C. v. Texaco, 555 F.2d 862, 893-894 (D.C. Cir. 1977) were services lives and calculations of gas reserves. These findings too must be subject to later reappraisal. Many things may happen in the life of a plant or piece of equipment which will affect the Commission's judgment as to how much longer it will last. The amount of gas reserves should also be recalculated if better methods develop for estimating reserves. The reasonableness and prudence of a portion of a past investment is entirely another kind of issue. There is no policy reason for a commission to want to reexamine in every case, as long as the nuclear power plant lasts, whether \$10.5 million of the original investment could and should have been saved. The Commission has determined that this

issue should be put to rest. Pursuant to 66 Pa.C.S. §316, the Commission is permitted to treat a finding or determination as conclusive upon the parties. The Commission followed Professor Davis's recommendation in his Administrative Law Text, §18.02, at 360 (1972):

The sound view is . . . to use the doctrine of res judicata when the reasons for it are present in full force, to modify it when modification is needed, and to reject it when the reasons against it outweigh those in its favor.

PECO quotes Professor Davis in another passage where he states that a maximum rate adjudication should never have res judicata effect. His reasoning is that a reexamination should take place in cases where conditions change. In the case at hand, conditions will not change. Either \$10.5 million of PECO's investment could (and should) have been saved, or it could not have been saved. The future will not change this historical situation.

PECO's confusion between decisions which must be reevaluated and decisions which should not be reevaluated becomes apparent in its complaint that the Commission permitted the relitigation of other "prior Commission findings whose factual underpinnings had not changed." (Brief at 43). PECO is referring to the excess capacity adjustment which was made in this case and not in R.I.D. 438, PECO's last case (Brief at 55). The excess capacity issue is an excellent example of one which must be reexamined in

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