

every case. The demands of PECO's customers change from year to year, and so do the reliability of PECO's units, the availability of power from other PJM pool utilities, and the status of the construction of new units.

PECO's position that res judicata never applies in rate cases is a resurrection of the old and discredited principle that res judicata never applies in administrative cases. That principle has been abandoned for administrative cases in general.

When an administrative agency is acting in a judicial capacity 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.

United States v. Utah Construction & Mining Co., 384 U.S. 394, 422 (1966) (citations omitted).

There is no good reason to apply the outmoded principle generally to all issues which might arise in a rate case.

It does not matter whether the Commission acts legislatively or judicially in setting rates. The Public Utility Code provides all of the safeguards of a judicial proceeding, including a code of ethics for Commissioners and judges (66 Pa.C.S. §319), separation of the Law Bureau's prosecutory and advisory functions (66 Pa.C.S. §308(a)), and

the prohibition of ex parte contacts (66 Pa.C.S. §344(c)). Instead of looking at the historical precedent distinguishing legislative and judicial decisions, the question at hand should be answered in terms of the policy of res judicata. The policy question is whether this issue is an appropriate issue to lay to rest with finality. The Commission submits the answer is yes.

PECO also asserts that it did not have the full opportunity to litigate this issue in R.I.D. 438 because it did not have time to present a witness from the co-owner of the plant (Brief at 38, n. 18). PECO asserts that it could not fully respond to TB&A witnesses because PSE&G (the co-owner) personnel were not available to PECO between late May and June 29, 1978 (Brief at 52). There are two answers to this contention. First, as pointed out by ALJ Klovekorn in his December 10, 1979 Order, the proffered testimony in this case did not differ substantially from the testimony received in R.I.D. 438. PECO was therefore not prejudiced by the absence of PSE&G personnel. Independently of the doctrine of res judicata, the Commission is empowered to exclude irrelevant, immaterial or unduly repetitious evidence. 66 Pa.C.S. §332(b).

Secondly, PECO made no attempt to postpone the closing of the record in R.I.D. 438 to permit the introduction of further testimony rebutting the TB&A findings. See ALJ Klovekorn's December 10, 1979 order at 9-10 (R. 32a-33a).

PECO's excuse in this case is that it decided it wanted the case in R.I.D. 438 closed sooner so that it could get its rate increase more quickly (PECO Brief at 52, n.23). In R.I.D. 438, as noted by ALJ Klovekorn (December 10, 1979 Order at 9-10; R. 32a-33a), PECO also stated that it chose not to ask for a delay because of what PECO felt to be the lack of substance in the TB&A findings. The failure to ask for time to present additional witnesses was therefore obviously a tactical decision. If a party chooses not to ask for time to present a witness, it should not be permitted later to cry foul when the issue is resolved against it. If that issue is one which is suitable for the application of res judicata, the party is not entitled to another bite of the apple. The doctrine of res judicata bars the further raising of not only the issues actually raised, but also the issues the party could have raised. Fleming v. Strayer, 367 Pa. 284, 80 A.2d 786 (1951); Wallace's Estate, 316 Pa. 148, 174 A. 397 (1934).

III. THE COMMISSION PROPERLY REDUCED PECO'S CASH WORKING CAPITAL REQUIREMENT BY THE FUNDS COLLECTED FROM RATEPAYERS IN ADVANCE OF PECO'S LONG TERM DEBT INTEREST OBLIGATIONS.

This issue is before this Court for the fourth time. In UGI Corp. v. Pennsylvania Public Utility Commission, _____ Pa. Commonwealth Ct. _____, 410 A.2d 923, 930 (1980), counsel argued that because interest is part of the return allowance, it is therefore the property of the company. Counsel for UGI also argued that the precollection of interest should not be considered when the lag in collection of depreciation is not (No. 2242 C.D. 1978 and No. 2246 C.D. 1978, Brief for Petitioner at 51-52). These arguments are being made once again (PECO's brief at 62, 63) and should be rejected again as they were in the UGI case.

In Peoples Natural Gas Co. v. Pennsylvania Public Utility Commission, _____ Pa. Commonwealth Ct. _____, 415 A.2d 937, 939 (1980), counsel for Peoples Gas Company (who is counsel for PECO in this appeal) argued that debt interest accruals belong to the company and therefore should not be considered as an offset to working capital, the same argument raised in the UGI case (No. 2749 C.D. 1978, Brief for Petitioner at 28-29). Counsel also raised the argument, which is again made in the case at hand, that bond interest is collected in arrears because a bond issue is not recognized until a subsequent rate case (No. 2749 C.D. 1978,

Brief for Petitioner at 31-32). As in the case at hand, the argument by Peoples Gas Company was based on the testimony of a utility witness that interest is collected in arrears. These arguments were rejected by this Court. Said the Court:

However, 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. . . . "To the extent that the customers are providing revenues before the utility pays its costs, the investors are not supplying the funds to carry on." Pittsburgh, supra, 370 Pa. at 309, 88 A.2d at 62. The Commission's decision to disallow this amount is supported by the evidence and will remain undisturbed. The ultimate requirement is of course that the utility have adequate funds to carry it across the lag between rendition of services and receipt of revenues.

_____ Pa. Commonwealth Ct. at _____, 415 A.2d at 939.

Pennsylvania Electric Company raised this issue before this Court for the third time in Pennsylvania Electric Co. v. Pennsylvania Public Utility Commission, _____ Pa. Commonwealth Ct. _____, 417 A.2d 819, 823 (1980) (No. 430 C.D. 1979, Brief for Petitioner at 23-24). This Court for the third time rejected the argument that a utility owns the debt component of the rate of return as soon as it is received.

There is no substantial difference between the arguments raised in this case and those raised in the preceding three cases. The argument that the debt component

of the return allowance belongs to the company ignores the fact that these funds, paid by ratepayers, give the company cash working capital which was never supplied by the investors. Revenue is collected from ratepayers monthly, while interest must be paid only semiannually, making funds available to the company.

These facts are fully established in the record in the testimony of George F. Markovci, statement GFM-1, page 2 (R. 692a) and the testimony of Michael L. Arndt, OCA statement 5, part 2, pages 9-11 (R. 1225a-1228a) and Exhibit MLA-1, page 1 (R. 1229a). There is therefore no substance to PECO's assertion that the Commission's adjustment cannot be supported on this record (Brief at 59).

PECO's main argument is that an individual debt issue is not recognized until a subsequent rate case (Brief at 60-62). PECO's inference from this fact is that debt interest is collected in arrears. This inference does not follow logically. The inference confuses the difference between the incremental effect of a higher (or lower) cost debt issue on rate of return, and the total interest paid to all bond holders. If an issue of debt is at a higher cost than the imbedded cost of debt, that issue will marginally increase the imbedded cost. The return required by this increase in the debt cost rate is much smaller than the overall interest, which is being paid on all debt, new and old. The amount by which the new issue

may change the overall return percentage is not related to the amount of interest PECO must and does pay to its bondholders. If the new issue is less than the imbedded cost rate, the effect of a subsequent rate case is to lower PECO's return requirement on debt. There is therefore no connection between the marginal increase in the embedded debt cost rate and the total interest paid on all debt.

The Commission's adjustment is based on the actual interest being paid on all of PECO's debt. This interest is being collected monthly and paid semi-annually, regardless of whether a new issue increases or decreases the imbedded cost of debt. PECO's argument was rejected in Peoples Natural Gas Co. v. Pennsylvania Public Utility Commission, _____ Pa. Commonwealth Ct. _____, 415 A.2d 937, 939 (1980), and should be rejected again.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S DISALLOWANCE OF \$10,344,000 OF PECO'S RATE BASE CLAIM FOR MINIMUM BANK BALANCES.

A. The Commission's Decision is Fully Supported on the Record.

PECO asserts that the record is "completely devoid of any evidence" supporting the Commission's disallowance (Brief at 64). This assertion is simply wrong.

During cross-examination, Mr. Rimerman, the Company Treasurer, testified as follows:

Q. Now, that money, the average daily balance, let's say, that the Company has in the bank, that it uses for financing its expenses, do those average daily balances count toward the five to ten per cent of line requirements or towards the activity balance requirement that the bank requires?

A. It accounts toward both.

Tr. 423; R. 108a.

In short, the Company's actual cash working capital counts towards its compensating bank balance requirements.

Mr. Rimerman made this doubly clear at Tr. 429 (R. 109a):

Q. The figure of \$15,098,000, your actual compensating bank balance, how much of that amount is in addition to the normal balances that you keep in the accounts for operations?

A. As shown in this Exhibit [PECO Exhibit 1, Volume II, Section II-A-16, page 3 of 24], I would say that our normal balances for operations are about 12 million dollars, and that would be the 11.9 million that you see in the first column. (Bracketed material added).

The normal balance for operations of the Company is therefore \$12 million. This amount is included in the Company's cash working capital requirements for operations and maintenance expenses. The total compensating bank balance claimed for the entire Company (not just the Electric Division) was \$12.3 million (Exhibit DPS-2, page C-25; R. 1254a). Based upon the above exhibits and admissions, the only amount not accounted for as part of the "normal balance for operations" is \$300,000. The electric portion of that figure, 85.718% (Exhibit DPS-2, page B-17; R. 1253a), is \$256,000. This was the amount allowed by the Commission for compensating bank balances.

Clearly, PECO is claiming double rate base treatment for its bank balances. They are necessary to fund operating and maintenance expenses, and they are also to some extent required by the banks. Only one rate base addition for these funds should be allowed.

PECO criticizes the Commission's decision because it was not advanced by any direct testimony (Brief at 64-65). Such criticism is not well founded. The Commission is not limited to adjustments directly sponsored by witnesses for Trial Staff, the Office of Consumer Advocate or other non-Company parties. PECO's own evidence and admissions during cross-examination are just as probative as the direct testimony of other parties.

If PECO's claim is that it was not afforded due process, such claim is also devoid of merit. The issue was fully developed in Trial Staff's Initial Brief before the Administrative Law Judge (admitted in Petitioner's Brief at 65), to which PECO was entitled to and did file a Reply Brief. PECO also used its opportunity to challenge Trial Staff's position at oral argument before the Administrative Law Judge (Transcript of February 1, 1980 Oral Argument at 125). After ALJ Klovekorn adopted the Trial Staff's position, PECO had further opportunities to argue the point to the Commission in its Exceptions to the Order of the Administrative Law Judge and at oral argument before the Commission.

PECO can only argue that it was not able to submit a witness to rebut Trial Staff's contention (Brief at 66). It is difficult to see what PECO might have rebutted, because the Commission's adjustment was based entirely on PECO's rate case filing and on the admissions made by PECO's witness during cross-examination. If the rate case filing was in error, PECO could have corrected it during the proceedings. If the admissions during cross-examination were not true, PECO could have corrected any misstatement on redirect examination or could have offered supplemental testimony from the witness as part of its rebuttal case.

PECO argues that even if a bank deposit can be used both for minimum bank balances and cash working capital, PECO should still receive a full rate base inclusion for both cash working capital and compensating bank balances with no offset of one against the other (Brief at 66). This argument should be rejected. It is apparent both from logic and from the record that when a Company has a cash working capital requirement, it needs cash. One expects to find this cash in a bank. PECO uses the same bank accounts to finance its normal operations as it uses to satisfy its compensating balance requirements. Therefore, if the Commission allows a return on the average balance of cash that PECO needs to operate, plus a second return on the average balance of cash it has in the bank to operate, PECO would receive a double return, because its working capital is satisfying its bank requirements.

In addition, the cash advanced by ratepayers for long-term debt interest accruals (discussed above in Part III of this Brief) also can be expected to be kept in the banks, also counting toward the compensating balance requirement. PECO should not be earning a return on this cost-free ratepayer loan in the guise of compensating balance requirements.

B. PECO Failed to Meet its Burden of Proof to Establish its Need for More Than \$256,000 of Bank Balances.

In a rate case, the burden of proof is on the utility. 66 Pa.C.S. §315(a). PECO's own evidence was

insufficient to prove its need for compensating bank balances. In the historic test year, they were not borrowed against even once (Tr. 431; R. 112a). One of the reasons advanced by PECO for the need for bank credit lines is that buyers of PECO's commercial paper require bank credit lines which, in turn, require compensating bank balances (Tr. 432; R. 113a).. The banks are not the buyers of the commercial paper (Tr. 433; R. 114a).

It is well established in Pennsylvania that a company must establish, for each bank, the requirement of a compensating balance by some kind of letter or memorandum from each bank. Peoples Natural Gas Company v. Pennsylvania Public Utility Commission, 47 Pa. Commonwealth Ct. 512, 517-518, 409 A.2d 446, 449 (1979). In this case, PECO admitted that it had not furnished any documentary proof of requirements by purchasers of commercial paper (Tr. 435; R. 116a). It was therefore proper for the Commission to completely disregard the compensating balance claim insofar as it related to commercial paper. The Company's evidence on this point was pure hearsay, and subject to the Commonwealth Court's decision that the Company did not meet its burden of proof.

Another purpose of compensating bank balances is to allow the Company a source of short-term borrowing, as discussed in PECO's Brief at 64. Short-term debt is composed of both bank borrowings and the sale of commercial

paper (Tr. 432, 437; R. 113a, 118a). Mr. Rimerman during cross-examination estimated short-term debt at the end of 1979 would be "somewhat in excess of \$100 million." (Tr. 435; R. 116a). At the time of cross-examination, before the issuance of \$100,000,000 of long-term debt, short-term debt was larger, amounting to \$120,000,000 (Tr. 435-436; R. 116a-117a). Of that \$120,000,000, \$51,000,000 was in bank loans and \$69,000,000 in commercial paper (Tr. 438; R. 119a).

From these figures, it is apparent that the Company did not meet its burden of proof as to the need for bank lines of credit of any more than \$51,000,000 of the total credit lines of \$209,100,000 (Tr. 438; R. 119a). This amount represented the high point of usage during the future test year, with short-term debt naturally reaching a maximum the day before long-term debt was issued in order "to pay short-term debt down" (Tr. 436, 1366; R. 117a, 659a). Of that \$51,000,000, as much as \$50,000,000 could have been provided from fee-supported lines of credit (Exhibit 1, Attachment II-A-17a, R. 1251a), for which no compensating balances are required because fees are paid for the credit lines.

The Company further did not provide evidence of the average amount of bank loans outstanding during the future test year, and improperly limited its filing data in Exhibit 1, Volume II, Section II-A-17a (R. 1251a) to the historic test year only, when no bank loans were made at all

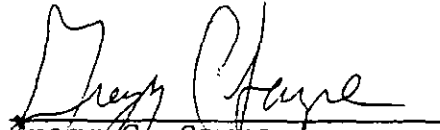
(and therefore, none were needed) (Tr. 440; R. 121a). PECO thereby violated 52 Pa. Code §53.53 II-A-17, requiring it to provide compensating bank balance information for the actual test year. Since PECO used a future test year in its filing, the data should have been provided for the future test year.

In summary, PECO failed to prove either substantial need for or substantial use of the lines of credit supported by compensating bank balances.

CONCLUSION

For all the aforementioned reasons, the Commission respectfully requests the Court to affirm its Order in all particulars.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that I am this 30th day of January, 1981, serving five copies of Respondent's definitive brief upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

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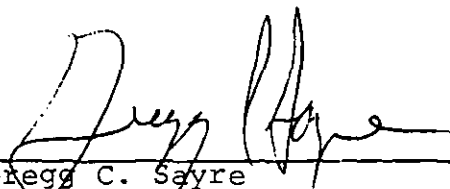
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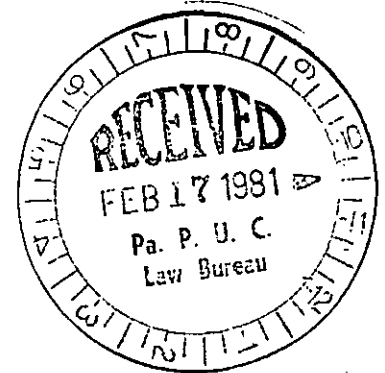
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B-80062683

February 12, 1981



G. Ronald Darlington, Esquire
Prothonotary, Commonwealth Court of PA
South Office Building
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RE: Philadelphia Electric Co. v.
PA Public Utility Commission,
No. 1415, C.D. 1980

Dear Mr. Darlington:

Enclosed please find twenty-seven (27) copies of the Brief with defining record pagination submitted on behalf of Intervenor-Appellees CEPA, ACORN, and Action Alliance of Senior Citizens of Greater Philadelphia.

Please be advised that all parties have been served in accordance with the attached Certificate of Service.

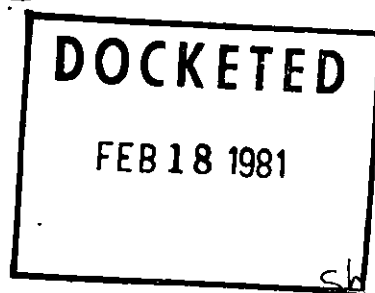
Very truly yours,


MARK B. SEGAL, ESQUIRE

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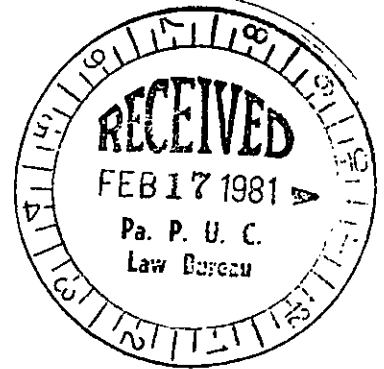
Enclosures

cc: All parties



B-80062683

COMMONWEALTH COURT OF PENNSYLVANIA



PHILADELPHIA ELECTRIC COMPANY	:	
	:	
Petitioner,	:	NO. 1415
	:	
v.	:	COMMONWEALTH COURT
	:	
PENNSYLVANIA PUBLIC UTILITY	:	DOCKET 1980
COMMISSION,	:	
	:	
Respondent.	:	

BRIEF FOR INTERVENING RESPONDENTS
 CONSUMER EDUCATION AND PROTECTIVE
 ASSOCIATION INTERNATIONAL, INC.
 (CEPA), ASSOCIATION OF COMMUNITY
 ORGANIZATIONS FOR REFORM NOW (ACORN),
 AND ACTION ALLIANCE OF SENIOR CITIZENS
 OF GREATER PHILADELPHIA.

In Opposition to the Petition for
 Review of Philadelphia Electric
 Company of the Order of the Penn-
 sylvania Public Utility Commission,
 entered May 9, 1980 at Docket No.
 R-79060865.

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DOCKETED
 FEB 18 1981

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I. COUNTER STATEMENT OF THE
QUESTIONS INVOLVED.

1. Did the Public Utility Commission act properly in providing for a sharing of the burden of PECO's excess capacity between its ratepayers and shareholders by reducing PECO's rate base by the value of capacity which it found to be in excess of that which is used and useful in the public service?

2. Did the Public Utility Commission act properly in reducing the value of the Salem Nuclear Generating Station based on its finding in PECO's prior rate case of excessive cost due to PECO's abdication of its management responsibility during construction?

3. Did the Public Utility Commission act in accordance with established precedent in reducing PECO's claim for cash working capital by the amount of accrued bond interest and bank balances available?

II. SUMMARY OF ARGUMENTS

The Pennsylvania Utility Commission (hereinafter "PUC") determined, based upon substantial evidence, that Philadelphia Electric Company (hereinafter "PECO") has 775 MW (megawatts) of generating capacity, valued at approximately \$25 million, in excess of its projected summer peak demand including a safe and reasonable reserve margin, and thus not used and useful in the public service. The PUC equitably apportioned the burden of this capacity between ratepayers and investors by allowing PECO a return of its investment and operating and maintenance expenses associated therewith, but not a return on its investment by reducing its rate base.

The PUC also acted properly by continuing to reduce the value of the Salem Nuclear Generating Station by the amount of excessive cost it found in PECO's prior rate case to be attributable to PECO's abdication of its management responsibility during construction. The PUC properly refused to allow PECO to attempt to re-litigate the immutable facts of its past conduct with respect to the construction of the Salem station.

The PUC followed clear, established precedent in reducing PECO's claim for a return on investor supplied cash working capital by the amount of funds collected from ratepayers and accrued for payment of interest on debt. This Court has repeatedly held that such a deduction is warranted because such funds do not belong to investors until paid. See, e.g., Pennsylvania Electric Company v. PUC, ___ Pa. Cmwlth. ___, 417 A.2d 819, 823 (1980).

Finally, the PUC was correct in not allowing PECO a return on all but \$256,000 of claimed compensating bank balances. There was substantial evidence to support the finding that \$12 million of such claimed bank balances were allowed a return as part of PECO's normal operating cash working capital. Furthermore, the record reflects that such claimed minimum balances were not contractually required, and were not actually kept.

III. ARGUMENTS

- A. THE PUBLIC UTILITY COMMISSION ACTED PROPERLY IN PROVIDING FOR A SHARING OF THE BURDEN OF PECO'S EXCESS CAPACITY BETWEEN ITS RATEPAYERS AND SHAREHOLDERS BY REDUCING PECO'S RATE BASE BY THE VALUE OF CAPACITY WHICH IT FOUND TO BE IN EXCESS OF THAT WHICH IS USED AND USEFUL IN THE PUBLIC SERVICE.

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1. There was Substantial Evidence to Support the PUC's Findings With Respect to PECO's Excess Generating Capacity.
-

The PUC defined "excess capacity" as:

capacity over and above that necessary to meet peak demand plus that capacity to insure that there is a [reserve] margin to allow for day-to-day variations in the operating condition of installed generation.

(May 9 Order, p. 10)

Upon reviewing all of the evidence, the PUC found as a fact that PECO's installed generating capacity is 775MW in excess of that which is necessary to meet PECO's projected demand at time of the summer peak plus the appropriate reserve margin. (May 9 Order, p. 13.) There is ample evidence to support this finding.

The level of excess capacity found by the PUC was derived by comparing PECO's 1981 estimates of installed generating capacity of 7,689 MW at time of the summer peak demand with the 6,914 MW which the PUC found to be the capacity necessary to serve the projected peak load with a reserve margin of 18%. (May 9 Order, p.13.) The 6,914 MW finding was specifically based on the load forecast of the Consumer Advocate's witness Dr. Stutz (R733a) and the reliability study^{1/} by the Consumer Advocate's witness Dr. Shakow. (May 9 Order, pp. 11-13.)

Based upon the testimony of the Consumer Advocate's witness Mr. Weiss, the PUC valued the excess capacity at approximately \$25 million, which represented the depreciated cost of PECO's least economic plants with a total installed generating capacity of 748 MW. (May 9 Order, pp. 13-14.) The PUC then found that the excess capacity so valued was not "used and useful".

PECO alleges that this finding was in error, because the specific plants utilized in determining the value of excess capacity were actually "...used' during the test year and their retirement from service would increase cost levels borne by ratepayers. Therefore, the units were also 'useful'". (PECO Brief, p.10.)

^{1/} The PUC utilized the midpoint of Dr. Shakow's range of 14-22% reserve margin (i.e., 18%). (May 9 Order, p.13.)

This argument ignores the PUC's caveat that:

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 [which is] necessary. (May 9 Order, p.15.)

Thus, PECO's argument clearly lacks merit.^{2/}

PECO's argument is not that there is not substantial evidence to support the findings of excess capacity, but rather, that its evidence is more persuasive, in its view.^{3/}

Thus, PECO is asking this Court to independently weigh the evidence, judge the credibility of witnesses, and substitute its judgment for that of the PUC. It is clear that this process is beyond the Court's scope of review. See, e.g., PUC v. Pennsylvania Gas and Water Co., (Water Division), ___ Pa. ___ A.2d ___ (No. 35 May Term, 1978) Slip Opinion at 15 (Feb. 1, 1980).

^{2/} PECO further claims that it will be penalized under the PJM agreement if its capacity falls below the level that the member utilities have agreed upon. Even if this factor were relevant for ratemaking purposes in Pennsylvania, it incorrectly presupposes that the units identified by the PUC for valuation purposes will be retired. There is a critical distinction between management's decision to retire a plant, and "...[W]hat value should be allowed..." Pennsylvania Power and Light Co. v. P.S.C., 128 Pa. Super. 195, 217 (1937).

^{3/} See, PECO's Brief, pp. 10-13; 22-34-35; and Appendix D.

PECO presents to this Court, as if it were trier of fact, the section of its initial brief before the Administrative Law Judge which presents its arguments as to the weight and credibility of the testimony of Dr. Shakow as compared with its witness Mr. Kasum. (Appendix E). PECO also presents to this Court its argument as to the qualifications of Mr. Weiss (PECO Brief, p. 28, n. 14).

The issues of load forecasting, appropriate reserve margin, and excess capacity are certainly of the type which requires the technical expertise of the PUC to resolve. Where, as here, there is substantial evidence to support the PUC's findings, those findings cannot be disturbed on appeal. Pennsylvania Gas and Water Co., supra.

2. The PUC's Adjustment Was a Proper and Equitable Apportionment Between Ratepayers and Investors of the Economic Burden of the Excess Capacity.

The PUC concluded that because PECO had 775 MW of capacity in excess of its needs to serve its ratepayers, the value of such capacity (i.e. \$25 million) should be disallowed from PECO's rate base as not "used and useful in the public service", pursuant to Section 1311 of the Public Utility Code, 66 Pa. C.S. §1311 (May 9 Order, p.14), and thus, PECO cannot earn a return on the investment. However, the PUC did allow PECO to earn a return of the investment, by allowing it to recover depreciation associated with the plants used to value the excess capacity, operation and maintenance expenses, and fuel stocks. The PUC opined that there should be such a sharing between shareholders and ratepayers of the economic burden of the excess capacity. (May 9 Order, pp. 14-15.)

PECO argues that, as a matter of law, such an adjustment cannot be made, unless it is found that its decision to build generating capacity was imprudent (PECO Brief, pp. 13-14).

PECO is incorrect in its statement of the law. The determination as to whether utility property is presently used and useful for rate-making purpose cannot logically be dependent upon the prudence of management decisions many years in the past to build plant. Cf. Pennsylvania Gas and Water v. PUC, 19 Pa. Cmwlth. 214, 225, 341 A.2d 239, 246 (1975), rev'd. on other grounds ___ Pa. ___, ___ A.2d ___ (1980) (No. 35 May Term 1978). It is for this reason that the PUC explicitly stated in its Order that it was "not questioning PECO's management decisions made when these units were constructed"; but

rather, that it was determining that various units "cannot be considered used and useful for ratemaking purposes." (May 9 Order, p. 14.)

Furthermore, the cases cited by PECO do not stand for the proposition that a finding of imprudence is a necessary as well as sufficient condition for an adjustment to rate base.

PECO incorrectly relies upon Pennsylvania Power and Light Co., supra, to support its argument that a finding of imprudence is necessary in the context of valuating the utility's property (PECO Brief, p. 20). The paragraph cited by PECO goes on to say:

We therefore approach the subject with the presumptions that are in favor of the proper exercise of the duties of those charged with the management of a company. The question for the commission and for this court is therefore whether there is evidence from which it may be concluded that good management will require this company at this time to junk its manufactured gas plant. We do not believe the records will support a conclusion that the directors in this respect were wasteful or improvident. What value should be allowed is a different question. At the same time, this is a matter to be taken into account in reaching the ultimate question as to what is a fair rate to be charged to consumers, a subject which we will next discuss. (emphasis added), 128 Pa. Super. at 216-17. 4/

4/ The Superior Court then went on to remand because there was no prescribed tariff and insufficient findings to determine if rates were fair. (Ibid.)

In the case at bar the PUC did draw the distinction between management's decision whether or not to retire plant, and its obligation to value the utility's property in a way which properly balances the interests of consumers and investors. (May 9 Order, pp. 14-15.)

Similarly PECO relies upon Pittsburgh v. PUC, 173 Pa. Super 87, 95 A.2d 555 (1953) and Pittsburgh v. PUC, 370 Pa. 305, 88 A.2d 59 (1952). This reliance is misplaced. In Pittsburgh (1953) the issue was whether a fare increase should be denied to the Railway, as contended by the City, because of the Railway's refusal to modernize by converting street cars to buses. The Superior Court held that that type of a decision was peculiarly one "...within the realm of management and the Commission cannot interfere unless an abuse of discretion or arbitrary action be shown." 95 A.2d at 558. In the Pittsburgh (1952) case, the Supreme Court reversed the Superior Court's holding that Bell Telephone should have commenced adjustments to its pension account in 1927 rather than 1941, and therefore, there should be a reduction in claimed current expenses. The Supreme Court reversed because the Superior Court was substituting its judgment for that of the PUC where "...no abuse of discretion was here proved and none can be inferred based solely upon hindsight..." 88 A.2d at 66. Thus, the Supreme Court merely held that there could not be an adjustment to present expense claims based upon an unproven past mistake.

In the case at bar, the PUC explicitly refused to question PECO's past management decisions, and instead, quite properly focused on present conditions (May 9 Order, p. 14).

PECO also cites past PUC decisions for the proposition that management imprudence is a necessary finding to support an excess capacity adjustment (PECO Brief, p. 22).

In PUC v. West Penn Power, R.I.D. 183 (Order entered June 29, 1979) the PUC reversed its prior finding of management imprudence because of a lack of sufficient quantum of evidence to make such a finding. In its prior decision (Order entered December 14, 1978) the PUC had established a two part test for inclusion of plant in rate base; i.e., "(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. Thus, the PUC was saying that to include plant in rate base two conditions are necessary. However, it does not logically follow that one may exclude plant from rate base only if one finds that the decision was imprudent when made and that the property will not be used and useful. Where as here, there is a finding "supported by substantial evidence that there is capacity which will not be used and useful during the time the rates will be in effect" (May 9 Order, p. 11), there is a sufficient basis to exclude plant from rate base. This is consistent with the PUC's view in PECO's prior rate case at R.I.D. 438 (Order entered February 5, 1979):^{5/}

The fact that the excessive plant investments were prudent when made does not necessarily preclude the Commission from allotting responsibility for their cost (quoted in May 9 Order, p. 10).

^{5/} See, also, statement from Pa. PUC v. Pennsylvania Power Co., R-77110521 (Order entered January 22, 1979) quoted in PECO May 9 Order, p. 10.

Finally, it is clear from PECO's Brief, (p. 21) that it has misconstrued the PUC's Order concerning excess capacity. PECO relies upon UGI Corp. v. PUC, ___ Pa. Cmwlth. ___, 410 A.2d 923 (1980) to support its objection to the PUC's excess capacity adjustment. That case involved a current expense claim for a feasibility study which the Court found to be "reasonably incurred." In the case at bar, the PUC allowed PECO its current expenses associated with all of its plant, and also, a return of its investment; i.e. depreciation. It is only a return on its investment in excessive capacity not "used and useful" in the public service which was disallowed. The PUC was acting within its authority in making the excess capacity adjustment.

The Pennsylvania Public Utility Code, 66 Pa. C.S. §101 et seq., authorizes utilities to seek a just and reasonable return on the fair value of property used and useful in the public service. What constitutes used and useful utility property is committed to the discretion of the Commission. If the Commission reasonably finds that a particular class of property is not used or useful in serving the public, it may exclude the value of that property from the rate base and thus disallow the utility's return on that property. (Emphasis added)

Bell Telephone Co. v. PUC, 47 Pa. Cmwlth. 614, 408 A.2d 917, 925 (1979). Accordingly, its decision should be affirmed.

B. THE PUC PROPERLY ELIMINATED \$9.7 MILLION FROM RATE BASE AFTER FINDING THAT COSTS IN SALEM I CONSTRUCTION WERE EXCESSIVE DUE TO IMPRUDENT ABDICATION OF PECO'S MANAGEMENT RESPONSIBILITY.

1. PECO is Barred by the Doctrine of Res Judicata from Relitigating the Factual Issues Already Decided at R.I.D. 438

Testimony of two PECO witnesses was stricken from the record below because it related to the issue of PECO's imprudent management in connection with the construction of Salem No. 1; the P.U.C. had already compiled an extensive record and made appropriate findings of fact on that issue in R.I.D. 438 and therefore the new testimony was stricken under principles of res judicata. (May 9 Order, pp. 3-4.)

The facts at issue had not changed, indeed, they could not change - the issue being contested was whether or not PECO had or had not acted in a certain manner. The question was one of history and, unlike other elements of a rate case which estimate future events, the events here described were immutable and irrelevant to future financial issues. ^{6/} The Administrative Law Judge held that

^{6/} Irrelevant to future issues except as direct notice by the P.U.C. that improvident management cannot subject rate payers to extra burdens.

[T]he 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 had already considered this matter in R.I.D. 438, strict application of the document was (sic) seem to support the movants' arguments. The company argues, however, that the doctrine of res judicata does 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)...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 consideration underlying the doctrine of res judicata, i.e. finality to litigation, prevention of needless litigation, avoidance of unnecessary burdens of time and expense, made this specific case an appropriate one for the application of this doctrine. (R14a-16a)

PECO claims not that the facts underlying the finding imprudence have changed, but that they were offering a new witness to impose his interpretation of those facts. PECO claims that this witness had previously been unavailable for R.I.D. 438. As Judge Klovekorn noted below, those arguments should have been addressed to the Administrative Law Judge and the Commission in R.I.D. 438 which was

not limited by statutory time constraints imposed on later cases. Ibid at 4. Mistake of counsel has never been sufficient excuse to overcome the broader principles of res judicata. ^{7/}

The policy considerations which underlie res judicata - finality to litigation, prevention of needless litigation, avoidance of unnecessary burdens of time and expense - are as relevant to the administrative process as to the judicial.

Painters District Council No. 38, Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO v. Edgewood Contracting Company, 416 F.2d 1081 (5th Cir. 1969). See also Coulter v. Weinberger, 527 F.2d 224 (3rd Cir. 1975).

In deciding whether or not to apply res judicata or collateral estoppel, the courts distinguish between the adjudicative and legislative functions of administrative agencies. See, e.g. International Telephone and Telegraph Corporation v. American Telephone and Telegraph Company, 444 F. Supp. 1143, 1156 (S.D. N.Y., 1978). Where an adjudication takes place, res judicata or collateral estoppel apply. K. Davis, Administrative Law Treatise §13.08. The court in ITT, supra cited the opportunity to present and cross-examine witnesses and the allocation of a burden of proof as indication that resolution of issues of fact take place in an adjudicative rather than legislative process. Id. at 1156. Another element of the test is whether or not effective judicial review is available. Id. at 1157. All of those elements are present in this case.

^{7/} One must question the very offer of Mr. Mallard's testimony. The question before the Commission in R.I.D. 438 was whether or not PECO had acted imprudently in failing to protect its interest in the construction of Salam I. Yet, Mr. Mallard, an employee of P.S.E.&G, did not have responsibility for the details of the actual construction project. (R598a, line 19-20). PECO thus requests this Court to restore \$9.7 million to rate base on the basis of testimony from a witness who worked for the company that PECO should have controlled more thoroughly and who was not even familiar with the facts at issue!

The Court has, by implication, adopted a similar position. Most recently, in Pennsylvania Gas and Water Company v. P.U.C., 381 A.2d. 996 (1977), the Court said at 1003:

It is true that orders of the PUC fixing rates are not res judicata nor are its findings of fair value conclusive for the future since the law contemplates a reexamination of these matters as conditions change.
[Emphasis added.]

Res judicata never applies to changed circumstances; res judicata could not be applied to rates or findings of fair value because the circumstances do change. The necessary implication, however, is that where the circumstances do not change, the principle applies.

PECO argues that res judicata does not apply to rate making proceedings, but a careful reading of the cases cited by them indicates clearly that they have no foundation for that position. Each of the cases cited describes specifically those elements of the rate making process which rely on constantly changing conditions. Pennsylvania Gas and Water v. P.U.C., 381 A.2d 996 (fair value); City of Pittsburgh v. P.U.C., 112 A.2d 826, 835 (prior rate schedule); Tagg Bros. and Moorehead v. U.S., 280 U.S. 420 (1930) (an entire rate order); Cheltenham and Abington S. Co. v. PUC, 122 Pa. Super. 252 (1936) (fair value and reasonable return); Duquesne Light Co. v. PUC, 107 A.2d 745 (1954) (an entire rate order). No party here urging that the Commission order below be sustained would urge the application of res judicata to general rate orders or to findings of fair value or fair rate of return specifically because they are based on ever-changing conditions. The historical facts which form the basis for the finding of imprudent management will never change.

2. Given the Findings of Fact or to PECO's Abdication of its Management Responsibility, the PUC Properly Reduced PECO's Rate Base.

The PUC properly reduced PECO's rate base by the value of the cost saving,^{8/} it found in PUC v. PECO, R.I.D. 438 (Order entered February 5, 1979) would have been realized if PECO had acted prudently during construction of the Salem station. (May 9 Order, pp.3-4.) As a matter of law such action by the PUC was proper. See, e.g., Pennsylvania Power and Light Co., supra., 128 Pa. Super. at 216-17.

^{8/} The PUC granted PECO's exception, and excluded the cost on a depreciated basis. (May 9 Order, pp. 4-5.)

C. THE PUC ACTED IN ACCORDANCE WITH ESTABLISHED PRECEDENT IN REDUCING PECO'S CLAIM FOR A RETURN ON CASH WORKING CAPITAL BY THE AMOUNT OF ACCRUED BOND INTEREST AND BANK BALANCES AVAILABLE.

1. Accrued Bond Interest

The PUC deducted from PECO's claim for cash working capital the amount of accrued bond interest collected from ratepayers and available to it as working capital prior to subsequent payment to bondholders (May 9 Order, pp. 5-9).

PECO argues that there is no reason to believe that a debt interest payment lag exists, and even if there were, "...interest... belongs to the utility from the moment received and is not, in any sense customer contributed capital". (PECO Brief, p. 63.) PECO's argument is erroneous.

PECO maintains that debt interest payments lead rather than lag behind collection of revenue from ratepayers. This argument has been raised by PECO before and rejected by the PUC.

Accrued bond interest and preferred stock dividends are paid in arrears. Between the time the Company receives these funds from its customers through the rates and charges for electric service and the time it is required to make a disbursement, the funds are at the Company's disposal and may be used for any corporate purpose. The Company's debt service cost and preferred stock dividend requirement are passed on to the customers. They are reflected in full measure in the Company's allowed rate of return requirement. The return requirement has been included in the total revenue requirement for ratemaking purposes. Therefore, the accrued interest and preferred dividends clearly represent cost-free funds

which are provided by the customers. Using the accruals as an offset to cash working capital merely keeps the ratepayers from being saddled twice for the same cost. If such accrued interest and preferred dividends are not recognized as a source of working capital contributed by the ratepayers, the stockholders will earn a return on capital not supplied by them and will receive a windfall. In Re: Iowa Power & Light Co., 20 PUR 4th 397 (1977); New England Telegraph Co., 22 PUR 4th, 391, 404; Pa. PUC v. Pennsylvania Electric Co., R.I.D. 392. It is our judgment that long term debt interest and preferred stock dividend accruals are no less traceable to customer-provided revenues than accrued taxes. Such funds do not belong to the investor until paid. Pa. PUC v. PECO, R.I.D. 438, p. 33. (Order entered February, 5, 1979),

PECO attempts distinguish the evidence in this record by arguing that there is no pool of funds supplied by ratepayers available to pay interest on bonds because of regulatory lag (PECO Brief, pp. 60-62). This argument is incorrect because it ignores several factors. The embedded cost of debt which the PUC allows PECO as part of its revenue requirement is a weighted average of all outstanding debt (see PECO Exhibit DPS-2, p. B-19). The PUC found that PECO's embedded cost of debt in the instant case was 8.61% (May 9 Order, p. 26). Thus, PECO collects revenue from ratepayers which includes an allowance to repay debt at 8.61% interest. While it is true that some of the interest payments are made at rates higher than 8.61%, it is equally true that some interest payments are made at rates lower than 8.61%. Thus, it is only

interest payments in excess of the allowed interest rate on debt issued after the close of the future test year which lags behind rather than leads revenues supplied by ratepayers. The Administrative Law Judge recognized this and reduced the adjustment accordingly:

...as the company points out...and the Commission has recognized, Pa. PUC v. Philadelphia Electric Co. (R-79030781, mimeo pp. 17-18), the revenue lag associated with interest and dividend collection must also be considered. This reduces the claimed adjustment by \$16,431,000. 9/

Finally, PECO's argument that, as a matter of law, interest belongs to the investors from the moment received, has been repeatedly rejected by this Court. Pennsylvania Electric Co. supra. at 823. It again should be rejected, and the PUC adjustment should be affirmed.

9/ The findings of the Administrative Law Judge were adopted by the PUC except to the extent to which the adjustment was not properly calculated. The PUC granted PECO's exception and revised the deduction to \$9,119,000 from \$16,431,000 as calculated by the Administrative Law Judge (May 9 Order, pp. 6-9).

See, (Decision of Administrative Law Judge, p. 43-44).

2. Minimum Bank Balances

The PUC properly disallowed all but \$256,000 of PECO's claim of \$10.5 million ^{10/} in minimum bank balances. This adjustment was based on the Administrative Law Judge's finding that..."ratepayers are already providing a return on the [\$12 million] normal balances that the company requires to operate", (Recommended Decision, p.45), because "these normal balances can be used to fulfill the bank's compensating balance requirement". (Id., p. 46). These findings are supported by the testimony of PECO's Treasurer, Mr. Rimerman (R108a).

By Mr. Sayre:

Q. Now, let's say that the company uses some of these banks, as I am sure it does, to deposit the amounts that it receives from its customers and then uses those accounts to pay its expenses, its payroll and other expenses.

I presume that the banks with the high activity balance shown would be that kind of bank; is that right?

A. Yes.

Q. Now, that money, the average daily balance, let's say, that the company has in the bank, that it uses for financing its expenses, do these average daily balances count toward the five to ten per cent of line requirement or toward the activity balance requirement that the bank requires?

A. It accounts (sic) toward both.

10/ Calculated as 85.718% of \$12,300,000 which is the Electric Operations portion of PECO's average bank balance. See PECO Exhibit DPS-2, R1254a..

- Q. That is, the company is not required to maintain these amounts that you have shown in column E separately apart from the company's normal accounts and business that is transacted at the bank?
- A. Do I gather you are asking whether we segregate funds to satisfy activity requirements and segregate funds to satisfy line requirements?
- Q. I gather the answer is no?
- A. Is that what you are asking?
- Q. Yes.
- A. The answer is no.
- Q. And the bank doesn't obviously then require you to do so; right?
- A. That is right. (Emphasis added)

Obviously, Mr. Rimerman did more than confirm that PECO was not required to segregate the balances which it maintains to support lines of credit from its normal operating balances. The above-quoted colloquy affirmatively establishes that PECO's normal bank balances count toward any credit requirements. These findings cannot, therefore, be disturbed on appeal. Pennsylvania Gas and Water Co., supra.

Furthermore, PECO's claim for compensating bank balances cannot be allowed because there is no evidence that such balances were legally or contractually required, nor that they were actually maintained.

The record reflects that such balances were clearly not contractually required. The relationship is only an "understanding" that the balances be maintained. (R96a). This understanding is evidenced by letters dispatched from various banks at the request of PECO. (PECO Exhibit 1, Vol. II, Sch. 2-A-16).

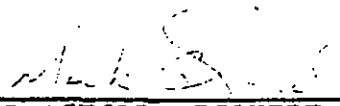
Further, the company has not maintained the minimum balances for each of the banks. The required line of credit by the banks is \$21,671,000. The amount maintained in the banks was \$15,098,000 (PECO Exhibit 1, Vol. II, Sch. 2-A-16, 3 of 24). PECO attempts to explain this discrepancy by referring to the "float" which is the difference between the bank balance and the company cash balance. (Tr. pp. 427-500). The \$6,000,000 difference is an unreasonable float amounting to greater than 20% of the alleged required balance. It can hardly be stated that PECO has maintained the lines of credit as required by the bank. There is no evidence that the banks assess any penalties for balances below the minimum. Such balances are not formally required and therefore, should not be allowed in rate base when the minimum balance was never adhered to or enforced. Compare, Equitable Gas Co. v. PUC, 45 Pa. Cmwlth 610, 405 A.2d 1055, 1058-59 (1979) with, Peoples Natural Gas Co. (II) v. PUC, ___ Pa. Cmwlth. ___, 415 A.2d 927, 939 (1980) and, Peoples Natural Gas Co. (I), 47 Pa. Cmwlth. 512, 409 A.2d 446, 449 (1979).

Therefore, the disallowance of all but \$256,000 of PECO's claim for minimum bank balances should be affirmed.

IV. CONCLUSION

WHEREFORE, for all the foregoing reasons intervenors pray this Honorable Court to affirm the Order of the PUC.

Respectfully submitted,



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DATED: December 22, 1980

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PROOF OF SERVICE

I hereby certify that I am this day serving the attached Brief for Intervenor-Appellees 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).

Service by first class mail addressed as follows:

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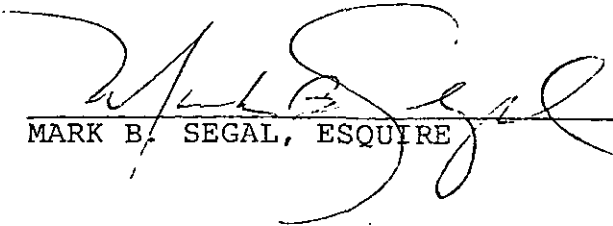
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Dated: February 12, 1981



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

February 23, 1981

IN REPLY PLEASE
REFER TO OUR FILE

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

In re: Certified Record
Petition of Philadelphia Electric Company
No. 1415 C. D. 1980

Dear Mr. Darlington:

Enclosed is a supplemental certification of the record in the above captioned case. This supplemental certification is offered to correct a typographical error found on page 6, item 9 of the certification filed with the Court on July 21, 1980.

Very truly yours,

Carol J. Barnes
Appeals Clerk

Enclosure

cc: Walter R. Hall, II, Esquire
Martha W. Bush, Esquire
Mark B. Segal, Esquire
Charles J. Streiff, Esquire
Andre C. Dasent, Esquire
Edward J. Riehl, Esquire

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COMMONWEALTH COURT
OF
PENNSYLVANIA

PHILADELPHIA ELECTRIC COMPANY, : IN THE COMMONWEALTH COURT OF
Petitioner : PENNSYLVANIA
v. :
PENNSYLVANIA PUBLIC UTILITY :
COMMISSION, :
Respondent : No. 1415 C. D. 1980

SUPPLEMENTAL CERTIFICATION OF THE RECORD

TO THE HONORABLE, THE PRESIDENT JUDGE AND JUDGES OF THE COMMONWEALTH COURT:

PENNSYLVANIA PUBLIC UTILITY COMMISSION DOES HEREBY CERTIFY THAT
this is the supplemental certification of the record in the matter of the
Petition for Review filed by Philadelphia Electric Company from the findings,
determination and order of the Commission in the Rate Investigation of
Philadelphia Electric Company, Docket No. R-79060865, said record consisting
of the following:

Transcript of testimony taken at hearing held
December 10, 1979, including Consumer Advocate
Statement Nos. 3, 4, Consumer Advocate Exhibit
Nos. JS-1, JS-2, JS-4, JS-5;

IN TESTIMONY WHEREOF, PENNSYLVANIA PUBLIC UTILITY COMMISSION
has caused its seal to be hereunto affixed, duly attested by its Assistant
Secretary this twenty-third day of February, 1981.

PENNSYLVANIA PUBLIC UTILITY
COMMISSION

ATTEST:

Joanne Kassi

Assistant Secretary

Commonwealth Court of Pennsylvania

B-80062683

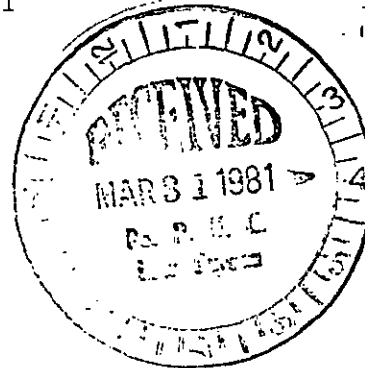
HARRISBURG, PENNSYLVANIA 17120

OFFICE OF THE PROTHONOTARY

March 31, 1981

TELEPHONE:
1717 787-5884 - 787-8836

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Thomas P. Gadsden, Esq.
Morgan, Lewis & Bockius
2100 Fidelity Building
123 S. Broad Street
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Edward G. Bauer, Jr., Esq.
Philadelphia Electric Company
2301 Market Street
Philadelphia, Pa. 19101

Re: Philadelphia Electric Company
v. Pa. P.U.C.
No. 1415 C. D. 1980

See attached list of counsel

Gentlemen and/or Madames:

Notice is hereby given that argument on the above case is fixed for:

Wednesday, June 3, 1981 - 9:30 A.M., E.D.S.T.
Before the Court sitting en banc, Supreme Court Room
Fourth Floor, Main Capitol Building
Harrisburg, Pennsylvania

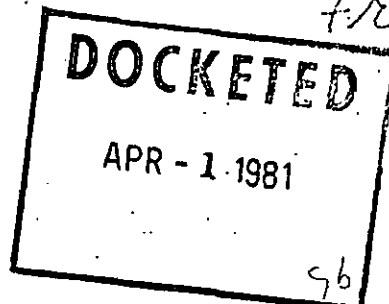
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Kindly confirm receipt of this notice by signing and returning to me the enclosed copy of same. Also, if your address is different from that appearing above, please advise us of the change so that your argument book will be mailed to the correct address.

Very truly yours,

Francis C. Barbush

Francis C. Barbush
Chief Clerk



FCB:slr
Enclosure

96

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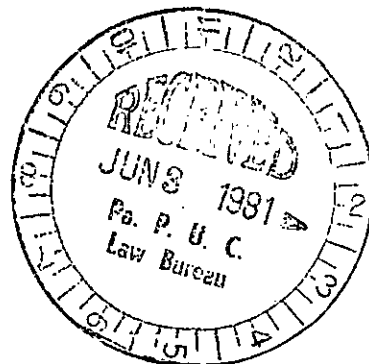
**COMMUNITY
LEGAL
SERVICES, INC.**

SYLVANIA HOUSE
JUNIPER AND LOCUST STREETS
PHILADELPHIA, PA. 19107
215-893-5300

B-80062683

June 1, 1981

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

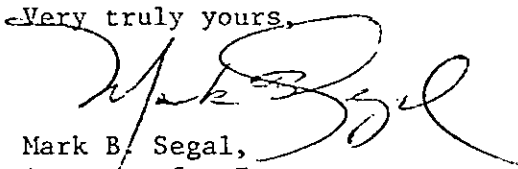


RE: Philadelphia Electric Co. v. Pa. P.U.C.
No. 1415 C.D. 1980.

Dear Mr. Barbush:

I regret that my schedule will not permit me to participate in the oral argument before the Court in the above-captioned matter, which is scheduled for June 3, 1981. Accordingly, on behalf of my clients, I would like to rely upon the previously submitted brief, and the arguments presented by Respondents Pennsylvania Public Utility Commission, and Office of Consumer Advocate.

Very truly yours,


Mark B. Segal,
Attorney for Intervenors,
CEPA, ACORN and ACTION ALLIANCE
OF SENIOR CITIZENS

MBS/cmm

cc: Walter R. Hall, II, Esq.
Gregg C. Sayre, Esq. ✓
Craig R. Burgraff, Esq.

**DOCUMENT
FOLDER**

DOCKETED

JUN - 4 1981

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B-80062683

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PHILADELPHIA ELECTRIC COMPANY, :
Petitioner :

FILED :
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v. :

No. 1415 C.D. 1980

PENNSYLVANIA PUBLIC UTILITY :
COMMISSION, :
Respondent :

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LUKENS STEEL COMPANY et al., :
Intervenors :

FILED :
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AUG 17 1981

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BEFORE: HONORABLE JAMES C. CRUMLISH, President Judge
HONORABLE THEODORE O. ROGERS, Judge
HONORABLE GENEVIEVE BLATT, Judge
HONORABLE JOHN A. MacPHAIL, Judge
HONORABLE MADALINE PALLADINO, Judge

Argued: June 3, 1981 - Harrisburg

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OPINION

OPINION BY JUDGE ROGERS

FILED August 17, 1981

On July 27, 1979, the Philadelphia Electric Company (PECO) filed Supplement No. 6 to Tariff Electric - Pa. P.U.C. No. 25, designed to produce additional annual revenues from PECO's electric service of \$122,731,000, based on a future test year ending March 31, 1980. Supplement No. 6 was to become effective on September 25, 1979. The PUC suspended operation of the proposed rates and ordered that an investigation and hearing be conducted to determine the lawfulness of the proposed rates, at R.I.D. 865. Twenty-nine days of evidentiary hearings and five public comment hearings were conducted by an Administrative Law Judge, who thereafter issued a Recommended Decision in which he found that PECO was entitled to \$79,871,000 in additional annual revenues. PECO filed exceptions to the Recommended Decision. The PUC thereafter issued an order approving rates designed to produce additional annual revenues of \$88,813,000 from which PECO has appealed.

PECO contends that the PUC's order is erroneous in three respects. In this class of case our review is "limited to a determination of whether constitutional rights have been violated, an error of law committed or whether the findings, determinations or order of the Commission are supported by substantial evidence."

U.S. Steel Corp. v. Pennsylvania Public Utility Commission, 37 Pa. Commonwealth Ct. 195, 201, 390 A.2d 849, 853 (1978).

A. EXCESS CAPACITY ADJUSTMENT

PECO contends that the PUC improperly disallowed \$25,043,000

of its claimed rate base as a dollar amount representing excess generating capacity. The PUC found that, for the test year, PECO had installed generating capacity of 7,689 megawatts (MW) at summer estimated peak, but that it required only 6,914 MW of capacity to service its projected peak load and to maintain a generating reserve margin of 18%, which the PUC found to be the margin necessary to insure a reliability criterion of loss of load probability of one day in ten years. Thus, the PUC found that PECO had 775 MW of excess capacity, i.e., capacity over and above that necessary to meet peak demand and margin.

In eliminating excess capacity from rate base, the PUC identified as the generating units most representative of excess capacity those which were the least economical--Chester 5 and 6, Richmond No. 9, Barbadoes Nos. 6 and 7 and Southwark Units 1-6, totalling 748 MW--and deducted the depreciated original cost of these units - \$25,043,000 - from PECO's claimed rate base.

PECO contends that because its decisions to construct the eliminated units as well as its decisions to construct every other of its generating units, when made, were prudent, the PUC may not now remove any of these properties from rate base because there is presently excess capacity. This argument, however, misses the point of the determination. The PUC's order specifically states that the PUC was "not questioning PECO's management decisions made when these units were constructed." The basis for the order is the finding that to the degree that there is excess capacity, there are generating properties which are not used and useful in rendering service to rate payers.

A unit may be properly excluded from a utility's rate base if the investment in that unit is found to be a result of managerial imprudence occurring at the time the decision to invest was made.

See, e.g., UGI Corp. v. Pennsylvania Public Utility Commission, 49 Pa. Commonwealth Ct. 69, 86-87, 410 A.2d 923, 932 (1980).

It does not follow that a unit prudently constructed must always be included in the rate base. The touchstone for determining whether or not a prudently constructed unit should be included in a utility's rate base is whether or not, during the test year involved the unit will be used and useful in rendering service to the public.

Id. at 78, 410 A.2d at 928; Pennsylvania Power & Light Co. v. Pennsylvania Public Utility Commission, 10 Pa. Commonwealth Ct. 328, 334, 311 A.2d 151, 155 (1973).

What constitutes used and useful property is committed to the discretion of the Commission. If the Commission reasonably finds that a particular class of property is not used or useful in serving the public, it may exclude the value of the property from the rate base and thus disallow the utility's return on that property.

Bell Telephone Co. v. Pennsylvania Public Utility Commission, 47 Pa. Commonwealth Ct. 614, 629, 408 A.2d 917, 925 (1979). Moreover, "[i]n the area of adjustments to rate base, the Commission has wide discretion." UGI, 49 Pa. Commonwealth Ct. at 79, 410 A.2d at 929.

The determination complained of was a proper exercise of PUC's discretion. Cf. City of Pittsburgh v. Pennsylvania Public

Utility Commission, 370 Pa. 305, 88 A.2d 159 (1952) (although establishment of accrual basis pension plan was prudent, over-accrual of pension fund, if proven, may be excluded from operating expenses); UGI, 49 Pa. Commonwealth Ct. at 76-79, 410 A.2d at 928-29 (the cost of drilling unsuccessful gas wells may be excluded from rate base); City of Pittsburgh v. Pennsylvania Public Utility Commission, 171 Pa. Superior Ct. 187, 90 A.2d 607 (1952) (whether to include or exclude certain coal mine properties in the rate base is a decision entrusted to the PUC's discretion; "[t]he fact that a utility owns and operates a property or a business does not, in itself, justify its inclusions in the rate base, and the burden is upon the utility to show that the property is used and useful in the public service." Id. at 201, 90 A.2d at 614.

In removing PECO's excess capacity from the rate base, the PUC's adopting one of the four methods advanced by an expert witness for the Office of Consumer Advocate, chose for removal from the rate base as representative of the excess capacity those units which were least economical. Although there were other methods available, such as factoring the excess capacity over all of PECO's units, we cannot find that the PUC erred by using the method it did. See UGI, 49 Pa. Commonwealth Ct. at 93-94, 410 A.2d at 935.

It is important to record that only a return on the investment is involved. The PUC did not order these units retired and it allowed PECO to continue to recover from rate payers the expenses of operating and maintaining the units in question, including depreciation. PECO's investors were denied a return on their investments on these units; however, they were allowed the return of their investments in them. This was an appropriate discharge of the Commission's duty to balance the interests of PECO's customers against those of its investors. Pennsylvania Public Utility Commission v. Pennsylvania Gas and Water Co. (Water Division), ___ Pa. ___, ___ 424 A.2d 1213, 1219 (1980).

PECO also contends that the PUC's finding of excess capacity and its methods of adjustment are not supported by substantial evidence. We do not agree. All of the PUC's findings were taken directly from, and amply supported by, the evidence adduced by the Office of Consumer Advocate and by the PUC's trial staff. PECO's complaint seems chiefly to be with the PUC's acceptance of this evidence. Our duty is to determine only whether or not the PUC's findings are supported by substantial evidence; we may not substitute our judgment for that of the PUC; nor may we "indulge in the processes of weighing evidence and resolving conflicting testimony." Johnstown - Pittsburgh Express, Inc. v. Public Utility Commission, 5 Pa. Commonwealth Ct. 521, 525, 291 A.2d 545, 547 (1972).

Accordingly we will affirm the PUC's exclusion from rate base of \$25,043,000 attributable to excess capacity.

B. SALEM NUCLEAR PLANT CONSTRUCTION

In a prior rate case, R.I.D. 438, the PUC found that PECO had not properly discharged its responsibility for the management of the Salem Nuclear Plant Unit No. 1 construction; and that, as a result, PECO's share of the cost of constructing Unit No. 1 was excessive in the amount of \$10.5 million. As a consequence, the PUC refused to allow \$10.5 million of the amount included by PECO in rate base.

Public Service Electric and Gas. (PSE&G) built Salem No. 1. At the hearing before the Administrative Law Judge (ALJ) in the present case, PECO attempted to put into issue the adequacy of its and PSE&G's management of the construction of Unit No. 1. To this end, PECO offered the testimony of Vincent Boyer, a PECO employee, and of Stephen A. Mallard, vice president - system planning of the Public Service Electric and Gas Company. Upon motions by the Consumer Advocate (and another party), the ALJ struck from the record the testimony of Mr. Mallard and that portion of the testimony of Mr. Boyer relating to PECO's management of the construction of Unit No. 1 on the ground that the PUC's finding of mismanagement in the prior rate proceeding was res judicata. The ALJ, upon a request by PECO, certified to the PUC the question of whether or not res judicata precluded PECO from introducing testimony relative to the construction of Unit No. 1. The PUC ruled that the ALJ had correctly stricken the proffered testimony. Thereafter, the PUC, in its final order in this proceeding, excluded \$9.7 million from PECO's rate base as being the amount attributable to PECO's mismanagement of construction of Unit No. 1.

The question thus put to this Court is that of whether or not res judicata can apply to bar the re-litigation of an issue involved in a prior utility rate proceeding. PECO has directed our attention to the broad language of several decisions of the courts of this Commonwealth, as well as decisions of the federal courts and other state courts, stating that res judicata is inapplicable to rate cases. Our careful study of these cases has revealed that they involved the application of res judicata to areas of rate making in which the facts and circumstances controlling their solutions were subject to change--such as the reasonableness of rate schedules, determinations of fair value and fair rate of return and the propriety of items of expense. See, e.g., U.S. Steel Corp. v. Pennsylvania Public Utility Commission, 37 Pa. Commonwealth Ct. 195, 390 A.2d 849 (1978) (prior rate schedule); Pennsylvania Gas & Water Co. v. Pennsylvania Public Utility Commission, 33 Pa. Commonwealth Ct. 143, 381 A.2d 996 (1977) (prior fair value determination), Pennsylvania Power & Light Co. v. Pennsylvania Public Utility Commission, 10 Pa. Commonwealth Ct. 328, 311 A.2d 151 (1973) (prior accrued and annual depreciation allowance); City of Pittsburgh v. Pennsylvania Public Utility Commission, 178 Pa. Superior Ct. 46, 112 A.2d 826 (1955) (prior rate schedule); City of Philadelphia v. Pennsylvania Public Utility Commission, 173 Pa. Superior Ct. 38, 95 A.2d 244 (1953) (prior fair value determination). See also, e.g., Tagg Bros. & Moorehead v.

U.S., 280 U.S. 420 (1930) (rate schedule); Utah State Bd. of Regents v. Utah Public Service Commission, 583 P.2d 609 (Utah, 1978) (rate of return and inclusion of Cost of Work in Progress in rate base). We agree that where, as in the cases just cited, the facts necessary to resolve the issue in question change with time, res judicata should not apply.

The issue here--the amount of the cost of Salem No. 1 which should be excluded from rate base on account of assertedly imprudent management of its construction--is historical; the facts necessary to decide the question reside wholly in the past and are not subject to change by time. The construction of Unit No. 1 began in 1968 and concluded in 1977, when Unit No. 1 went into commercial operation. When the PUC determined in the prior proceeding that PECO had imprudently failed to monitor the construction of Unit No. 1 and that PSE&G had imprudently constructed it in some degree, all of the facts relevant to that issue were in being and are immutable. Courts have not always been at ease with the broad statement of principle that res judicata does not apply in rate cases. In Tagg Bros., supra, the United States Supreme Court flatly stated that res judicata does not apply to administrative agency decisions. However, thirty-six years later, the Supreme Court stated that such language is too broad, and that res judicata should apply ... where the agency's decision is the result of a proceeding endowed with judicial qualities. U.S. v. Utah Construction & Mining Co., 384 U.S. 394, 421-22 (1966). See

also International Telephone & Telegraph Corp. v. American

Telephone & Telegraph Co., 444 F.Supp. 1148, 1155-60 (S.D.N.Y. 1978). Similarly, in Pennsylvania Gas & Water Co., supra, the late President Judge Bowman wrote that although the PUC's prior determination of fair value may not technically be res judicata, the prior determination "provides a limit on the range of the PUC's discretion in setting fair value in a subsequent rate case where the utility "can show the non-occurrence of change in factual circumstances having the effect of reducing the value of its property and where there has been no showing that the PUC" previously erred. Pennsylvania Gas & Water Co., 33 Pa. Commonwealth Ct. at 157, 381 A.2d at 1003, and see cases cited therein. Furthermore, in UGI Corp. v. Pennsylvania Public Utility Commission, 49 Pa. Commonwealth Ct. 69, 410 A.2d 923 (1980), this Court held that if the PUC in a prior rate case had sanctioned the recovery by the utility of historically incurred unrecovered fuel costs, the recovery of these costs must be allowed in a subsequent rate case. Id. at 81-84, 410 A.2d at 930-31.

We believe that the wisest course to follow is that charted by Professor Davis.

As a matter of principle, it is completely clear that the reasons behind the doctrine of res judicata as developed in the court system are fully applicable to some administrative proceedings. The reasons against a second litigation between the same parties of the same claims or issues are precisely the same for some administrative determinations as they are for most judicial determinations. The sound view is therefore 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.

Davis, Administrative Law Treatise §18.02 (emphasis in the original) (footnote omitted). Professor Davis goes on to say by way of example that if it is found that Y's shares in Z-Company were worth \$10 a share in 1913 when the income tax law became effective, so that the capital gain is \$40 a share when Y sold some of them in 1956, the finding is res judicata on the issue with respect to 1956 income. Id., §18.03.

The instant case falls squarely within Professor Davis' example. The PUC's finding that the construction of now completed Salem Unit No. 1 was mismanaged, like the finding that Y's shares were worth \$10 in 1913 and that Y realized a capital gain of \$40 in 1956, is based solely on fixed past events. There is nothing in the test year used by PECO in this case, nor test years of future cases, which can alter this history. We believe, therefore, that the reason for res judicata - the desirability of giving finality to decisions and preventing the relitigation of issues involving precisely the same facts as those in finished litigation - apply here. Accordingly, we hold that res judicata may be a bar to the relitigation of an issue based on immutable facts and circumstances decided in a rate case.

Having decided that res judicata may apply to bar the relitigation of the PUC's prior determination that PECO mismanaged the construction of Unit No. 1, we must still decide whether it applies in this case. There must be a concurrence of the familiar conditions: (1) identity of the thing sued upon; (2) identity of the cause of action; (3) identity of the persons and parties to the action; and

(4) identity of the quality or capacity of the parties suing or
sued. See, e.g., Thompson v. Karastan Rug Mills, 228 Pa. Superior
Ct. 260, 265, 323 A.2d 341, 344 (1974). All of these conditions
are clearly present.

The remaining inquiry is that of whether the ultimate and
controlling issue has been decided in a prior proceeding in which
the parties had an opportunity to appear and assert their rights.
Id. at 226, 323 A.2d at 344.

PECO contends that it did not have the opportunity to
assert its rights and fully litigate the question of the quality
of the construction of Salem Unit No. 1 in the prior rate proceeding.
PECO argues that the Theodore Barry and Associates report, upon
which the PUC relied in deciding that the construction had been
mismanaged by PSE&G was not provided it until late May, 1978 and
that it had insufficient time to secure the appearance of witnesses
or otherwise prepare a rebuttal to the report before the scheduled
closing of the record on June 30, 1978. We are unwilling to con-
clude that the period of more than one month was not sufficient
for PECO to prepare to arrange these matters and in any event PECO
might have sought a continuance of the hearings. See 52 Pa. Code
§3.162(a). PECO's contention that it did not seek a continuance
because it badly needed early rate relief is not compelling in
view of the fact that PECO was entitled to ask for interim relief.
See Section 1308(e) of the Public Utility Code, 66 Pa. C.S.
§1308(e). In fact, it requested interim relief and its request
was granted by the PUC, effective July 4, 1978.

There remains a troublesome matter in this aspect of the case. As earlier noted, PECO appealed the PUC's prior determination of mismanagement in the construction of Unit No. 1. By order in that case--Park Towne and Madway Engineers and Philadelphia Electric Co. v. Pennsylvania Public Utility Commission, Pa. Commonwealth Ct. , A.2d Nos. 1111 and 1211 C.D. 1980, filed August 17, 1981)--filed this day, we reversed the PUC's prior order on the ground that the PUC did not explain in a fashion which permitted review by us how, from the record (consisting on this issue of the Barry report), the PUC arrived at the figure of \$10.5 disallowance from rate base. It is true that an order is deemed final, and therefore capable of being res judicata, unless and until it is reversed. Helmig v. Rockwell Manufacturing Co., 389 Pa. 21, 29, 131 A.2d 622, 626, cert. denied, 355 U.S. 832, reh. denied, 355 U.S. 855 (1957). Since the PUC's prior determination of mismanagement had not yet been reversed at the time when the PUC issued its order in the present rate case, the PUC did not err in holding that res judicata barred PECO from relitigating the issue of its mismanagement of the construction of Unit No. 1. However, although the PUC's removal of \$9.7 million from PECO's rate base in the present case as the amount attributable to mismanagement of the construction of Unit No. 1 was proper when made, we may not affirm an order based on an order now reversed.

Accordingly, we will vacate the PUC's order on this issue and we remand this matter to the PUC with directions to enter an appropriate order fixing the amount of disallowance, if any, from rate base pertinent to this issue consistent with its disposition of the same issue in Park Towne, supra.

C. ADJUSTMENTS TO WORKING CAPITAL

PECO claimed \$52.7 million as cash working capital includable in return. The ALJ recommended an allowance of \$19.9 million and the Commission allowed \$23 million. PECO's first remaining objection to the PUC's order in this regard is that the PUC improperly disallowed \$9.1 million as reflecting the amount of money PECO always had in hand in revenues received and available to meet current obligations before it was required to make semi-annual payments of bond interest (and preferred dividends). PECO says that PUC erred because (1) the money it receives to pay its interest, as part of its return allowance, belongs to it from the time of its receipt from rate payers and that this investor's money must be permitted to earn a return and (2) because recent accelerating inflation combined with the slow pace of rate cases have caused the amounts it collects from rate payers on account of its interest obligations to be less than the whole of its actual outlays for interest. PECO next contends that the PUC erroneously disallowed all except about \$250,000 of its claim of \$10.5 million as the amount necessary to maintain minimum bank balances. It claims entitlement to the whole \$10.5 million on the general principle that as cash it is required to have cash on hand to maintain its line of credit, such cash is working capital.

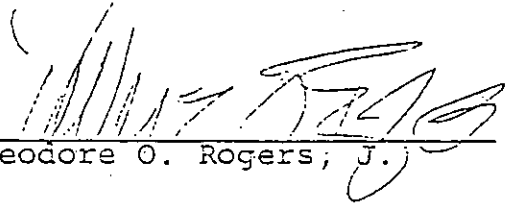
We have carefully reviewed the record and ample evidence supports the PUC's determinations. Expert witnesses have for the trial staff and the Office of the Consumer Advocate provided substantial support for PUC's finding that PECO had ample working cash

due to lag time between the receipt of revenues and the payment of interest and preferred dividends. The facts here are not different from those of other recent cases in which we have upheld similar disallowances. See Pennsylvania Electric Co. v. Pennsylvania Public Utility Commission, 53 Pa. Commonwealth Ct. 186, 193-94, 417 A.2d 819, 823 (1980); Peoples Natural Gas Co. v. Pennsylvania Public Utility Commission, 52 Pa. Commonwealth Ct. 201, 205-06, 415 A.2d 937, 939 (1980); UGI, 49 Pa. Commonwealth Ct. at 81, 410 A.2d at 930 (1980). PECO's argument based on its asserted ownership of revenues designed to provide it with money to pay interest and preferred dividends was rejected in UGI. With respect to PECO's claim for the inclusion in working capital of an allowance for the amount needed to maintain minimum bank balances, the PUC found that the required balances were maintained by PECO's accounts used in its normal operations. Indeed, its treasurer testified on cross-examination that PECO does not segregate funds to satisfy minimum account balances and that its average daily balances for normal operations (for which PECO was allowed a return) had consistently satisfied its banks' minimum balance requirements.

We agree with the PUC's treatment of cash working capital.

The order of the Pennsylvania Public Utility Commission, entered May 9, 1980, insofar as it excluded \$9.7 million from PECO's rate base, is vacated and the matter is remanded to the

Commission for further proceedings consistent with this opinion; the Commission's order in all other respects is affirmed.



Theodore O. Rogers, J.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PHILADELPHIA ELECTRIC
COMPANY,
Petitioner

v.

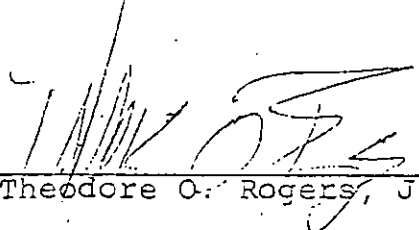
PENNSYLVANIA PUBLIC UTILITY
COMMISSION,
Respondent

LUKENS STEEL COMPANY et al.,
Intervenors

No. 1415 C.D. 1980

ORDER

AND NOW, this 17th day of August, 1981, the order of the Pennsylvania Public Utility Commission, entered May 9, 1980, insofar as it excluded \$9.7 million from PECO's rate base, is vacated and the matter is remanded to the Commission for further proceedings consistent with this opinion; the Commission's order in all other respects is affirmed.



Theodore O. Rogers, J.

RECEIVED FROM THE DEPT. OF REVENUE

AUG 17 1981

(Handwritten notes and stamps)

cc: J. Gregg

Philadelphia Electric Company, Petitioner
vs.
Pennsylvania Public Utility Commission, Respondent
Consumer Education and Protective Association International, Inc., et. al.,
Intervenors
United States Steel Corporation, Intervenor
City of Philadelphia, Walter W. Cohen, et. al., Intervenors

B-80062683

Form 2571/2572(e)-3 (Rev. 6-21-76)

No. 1415 C.D. 1980

CERTIFICATE OF CONTENTS OF REMANDED RECORD
AND NOTICE OF REMAND
UNDER

PENNSYLVANIA RULES OF APPELLATE PROCEDURE 2571 and 2572(e)

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

THE UNDERSIGNED, Prothonotary (or Deputy Prothonotary) of the Commonwealth Court of Pennsylvania, the said court being a court of record, do hereby certify that annexed to the original hereof is a true and correct copy of the whole and entire record as remanded from said court, in the following matter:

in compliance with Pennsylvania Rule of Appellate Procedure 2571.

The date on which the record has been ~~RECEIVED~~ REMANDED is Oct 16, 1981

An additional copy of this certificate is enclosed with the original hereof and the clerk or prothonotary of the lower court or the head, chairman, deputy or secretary of the other government unit is hereby directed to acknowledge receipt of the remanded record by executing such copy at the place indicated and by forthwith returning the same to the address set forth in Annex A.

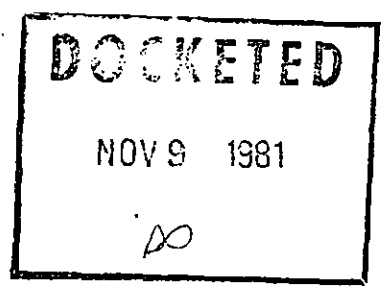
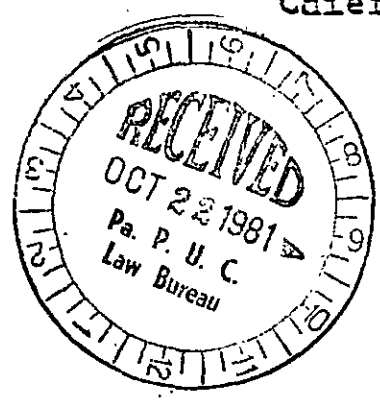
Francis C. Barbush
Pro Prothonotary
Chief Clerk

[Seal of Court]

Record Received:

(signature)

title



cc: Parties or counsel of record.
Administrative Office of Pennsylvania Courts.

Attach to:
Form 907(b)
1112(b)
1122
1123(a)-1
1311(b)
1322
1514(a)
1934
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ANNEX A
Commonwealth Court

Address all written communications to:

Office of the Prothonotary
Commonwealth Court of Pennsylvania
Sixth Floor, South Office Building
Harrisburg, Pennsylvania 17120

Filings may be made in person at the above office (except Saturdays, Sundays and legal holidays observed by Pennsylvania courts) between 9 A.M. and 4 P.M.

Information may be obtained from the following:

Francis C. Barbush, Chief Clerk
Commonwealth Court of Pennsylvania
(717) 787-5884 or
(717) 787-8836

Pleadings and similar papers (but not paperbooks) may also be filed as follows:

Commonwealth Court of Pennsylvania
Philadelphia Filing Office
The Old Federal Courthouse
Chestnut Street at 9th
Second Floor, Room 2050
Philadelphia, Pennsylvania 19107

The hours of the Philadelphia Filing Office are
9 A.M. to 4 P.M.

Under Pa. R.A.P. 3702 writs or other process issuing out of the Commonwealth Court shall exit only from the Harrisburg Office and shall be returnable thereto.

END