Original: 2061
Mizner
cc: Sandusky
Jewett
MArkham
Smith
Legal

717-257-5862

October 22, 1999

Anita M. Doucette, Esq.
Office of Chief Counsel
Department of Revenue
Dept. 281061
Harrisburg, PA 17128-1061

VIA HAND DELIVERY

Re: Utility Gross Receipts Tax (61 Pa. Code Ch. 160)

Dear Ms. Doucette:

In accordance with our prior arrangement, enclosed for filing with the Department are the Comments of the Pennsylvania Electric Association regarding the Department's Proposed Rulemaking on the Utility Gross Receipts Tax, which was published in the September 18, 1999, edition of the Pennsylvania Bulletin.

Please date stamp the extra copy of this transmittal letter and return for our files.

Very truly yours,

Richard A. Flati
Counsel

RAF
Enclosure

BEFORE
THE PENNSYLVANIA DEPARTMENT OF REVENUE

Proposed Rulemaking
61 Pa. Code Ch. 160
Utility Gross Receipts Tax

COMMENTS OF THE
PENNSYLVANIA ELECTRIC ASSOCIATION

Allegheny Power
Citizens Electric Company
Duquesne Light Company
GPU Energy
PP&L, Inc.
PECO Energy Company
Pennsylvania Power Company
Pike County Light and Power Company
UGI Utilities, Inc.
Wellboro Electric Company

Richard A. Flati
800 N. Third Street, Suite 301
Harrisburg, PA 17102
717-257-5862

Counsel for the Pennsylvania
Electric Association

Dated: October 22, 1999

Introduction:

In the September 18, 1999 edition of the Pennsylvania Bulletin the Department of Revenue ("Department") proposed amendments to Chapter 160 to purportedly clarify changes in the administration of the Utilities Gross Receipts Tax brought about by restructuring of Pennsylvania's electric utility industry. Interested parties were invited to submit comments regarding the proposed amendments. In response to that invitation the Pennsylvania Electric Association ("PEA") respectfully submits these comments focusing on a provision of the proposed amendments which PEA believes goes beyond the scope of clarification and thereby exceeds the Department's statutory authority.

Statement of position:

PEA believes that a particular provision of the proposed rulemaking of significant concern to its members manifestly exceeds statutory authority and therefore must be deleted. In brief, for reasons later stated, PEA objects to the presence of and requests deletion of the terms *customer charges, capacity charges ,demand charges,* and *stand-by charges* (hereafter "non-energy charges") present in the definition of *Sales of electric energy.*

Limiting provisions of the Department's Regulatory Analysis Form:

Before specifically elaborating its statutory authority objection to inclusion of non-energy charges in the proposed rulemaking, PEA believes it instructive to call attention to applicable provisions of the Regulatory Analysis Form (hereafter "Form") submitted by the Department in conjunction with its proposed rulemaking. PEA believes these provisions of the Form support its position that inclusion of non-energy charges in the definition of *Sales of electric energy* exceeds the Department's statutory authority.

Part 10 of the Form states this question: *"Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action."* In response to this question the Department states *"The regulation is not mandated by federal or state law, court order, or federal regulation"* Stated otherwise, the Department admits that the proposed rulemaking is solely a discretionary action on its part. It follows from the very words of the Part 10 question and the Department's response thereto that the proposed rulemaking is clearly NOT that kind of expressly delegated legislative authority to promulgate detailed regulations implementing a broad, generally stated legislative initiative. PEA submits that this limited, discretionary nature of the proposed rulemaking imposes on the Department a strict duty that its rulemaking not exceed statutory authority and imposes on the regulatory review process an obligation to apply a strict standard on that most important issue.

Part 13 of the Form states this request: *"Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)* In response to this request the Department states *"This regulation will provide guidance and clarity to out-of-state businesses and the emerging industry."* In other words the purpose of the proposed rulemaking is to provide discretionary clarification of statutory provisions that are in fact self-executing. For reasons similar to those stated in the immediately above paragraph, PEA submits that this limited, self-imposed "clarification" role of the proposed rulemaking imposes stringent duties on both the Department and the regulatory review process to assure that the final rulemaking remains within the bounds of statutory authority.

Inclusion of non-energy charges in the proposed rulemaking exceeds statutory authority:

The fundamental statutory authority of long standing on the question of what electric energy transactions are subject to the Utilities Gross Receipts Tax, (hereafter "GRT"), is contained in Section 1101(b) of the Tax Reform Code (72 P.S. 8101(b)). The only operative term in that provision is the bare term *"sales of electric energy"*. Nowhere in that provision is to be found anything similar to non-energy charges that by their very nature are NOT electric energy and, *per force*, NOT *sales of electric energy*. In actual practice all or many non-energy charges can be applied to a customer who has in fact consumed little, if any, electric energy whatsoever in a billing period. In reality, non-energy charges are reimbursement for the energy supplier's commitment to make available to the customer electric energy in specific amounts and at specific times, whether or not the customer in fact chooses to draw on that commitment by actually consuming electric energy. This being so, non-energy charges are not "bundled" with charges for actual sale to and consumption by the customer of electric energy. The very nature of non-energy charges requires that they be stated separately from charges for the sale and consumption of electric energy. For all these reasons72 P.S. 8101(b) does not authorize the Department to include non-energy charges within the meaning of *Sales of electric energy.*

Contrary to the Department's unfounded assertion in its proposed definition of *Sales of electric energy,* nothing in 66 Pa.C.S 2810(j) hints to any degree a legislative intent to include non-energy charges within the scope of that term. To the contrary, the subsection is at pains to make specific reference to a number of quite different charges, evidencing a clear legislative intent for their inclusion within the scope of *sales of electric energy*; but even then only if those charges had been, prior to January 1, 1997, incorporated in a "bundled" rate for *"sales of electric energy."* Notably absent from such legislative attention are any of the non-energy charges that are the basis of PEA's objection. Therefore the legislature did not intend that this subsection enlarge the fundamental authority of 72 P.S. 8101(b) to include non-energy charges within the scope of *sales of electric energy*. The Department exceeds its statutory authority when it proposes to do so.

Conclusion:

For the reasons set forth above, PEA urges the Independent Regulatory Review Commission to reject the Department's attempt to exceed its statutory authority by its inclusion of non-energy charges of an electric utility within the scope of *Sales of electric energy,* thereby improperly subjecting such charges to liability for the Utilities Gross Receipts Tax.

Garner, Kim

From: Smith, James M.
Sent: Friday, October 22, 1999 3:42 PM
To: IRRC
Subject: FW: PEA Comments on DOR Utility Gross Receipts Tax - Proposed Regulat ion

GRT rulemaking-transmittal let... GRT rulemaking-cover page--10-... GRT rulemaking- draft commets-...

Reg # 2061

-----Original Message-----
From: Dave Epple [mailto:depple@paea.org]
Sent: Friday, October 22, 1999 3:42 PM
To: 'jims@irrc.state.pa.us'; Karen Moury (E-mail)
Subject: PEA Comments on DOR Utility Gross Receipts Tax - Proposed Regulat ion

Attached is PEA comments on DOR proposed regulation on Utility Gross Receipts Tax. These were hand delivered to Revenue today.

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Pennsylvania Electric Association
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(717) 257-5858 Fax
depple@paea.org

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November 3, 1999

Original: 2061
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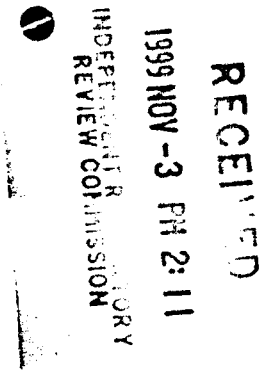


James M. Smith, Regulatory Analyst
Independent Regulatory Review Commission
14th Floor, 333 Market Street
Harrisburg, PA 17101

Re: Department of Revenue Proposed Regulatory Amendment - Gross Receipts Tax

Dear Mr. Smith:

Pursuant to our telephone conversation of November 2, 1999 enclosed please find a copy of a memorandum and exhibits that I have prepared on behalf of a client that goes into an extensive discussion of the factual and legal issues involved regarding what constitutes "sales of electric energy" for purposes of the Pennsylvania Gross Receipts Tax.

As I understand that the information I am providing you does become a matter of public record, I have excised some of the specific dollar figures and names of customers and other taxpayers to preserve the confidential nature of such information. I don't believe that any of the excised information is necessary to understanding the factual or legal issues involved. If you believe it would be helpful to have access to any of the excised information, please let me know and I will seek permission from the relevant party to make that information public.

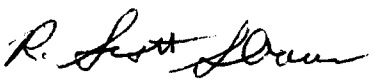
If you believe it would be helpful to you or the Commission for me to meet with you and discuss any of these issues in greater detail, I would certainly be more than happy to do so.

Thank you for providing me the opportunity of providing you with this information and I hope that it assists you and the Commission in their review of the regulation in question.

If possible, I would appreciate you advising me as to the date of any hearings on this particular matter.

Very truly yours,

KEEFER WOOD ALLEN & RAHAL, LLP

By 

R. Scott Shearer

RSS/jmd
Enclosure

February 9, 1999

DUQUESNE LIGHT COMPANY
Box No. 0658-048
1993 - 1995 Utilities Gross Receipts Tax
Docket Nos. 847-849 F.R. 1998

Memorandum

FACTUAL BACKGROUND

Duquesne Light Company ("Duquesne") is engaged in the production, transmission, distribution and sale of electric energy and electric capacity. Its service area and facilities encompass approximately 800 square miles, located in parts of Allegheny and Beaver Counties.

The gross receipts at issue in this case consist of Stand By Demand charges, Stand By Fixed charges, customer charges, and late payment charges imposed on late payment of the foregoing[1].

Stand By Charges are paid by Duquesne's commercial and industrial customers for the purchase of electric capacity. The provision of electric capacity is a guarantee by Duquesne that it will be capable of delivering a specific rate of electricity when requested (demanded) by a customer. These customers may, or may not, also purchase electric energy from

---

[1]Duquesne is not contesting tax imposed on late payment charges for "electric energy" (as contrasted with those relating to late payment of demand charges and customer charges). During the years 1993-1995, the late payment charge gross receipts received by Duquesne with regard to Stand By Demand charges, Stand By Fixed charges, and customer charges were [redacted]; and [redacted] respectively.

Duquesne. Electric capacity is composed of "Stand By Fixed" charges and "Stand By Demand" charges.

Stand By Fixed charges are amounts which must be paid by the customer regardless of whether any equipment is used, or whether the customer purchases any electric energy from Duquesne[2]. They are fixed in amount, and do not change from month to month. Stand By Fixed charges are imposed on customers which normally do not rely on Duquesne's electric energy for their primary source of power, but want such electric energy available as a backup or supplemental source of power. These charges are paid by customers, in return for Duquesne's agreement to be ready, willing and able to instantly provide an agreed upon rate of electric energy to that customer if and when that customer requests such electric energy. At such time as the customer purchases such electric energy, Duquesne imposes a separate and distinct charge at the normal tariff rate for the actual amount of electric energy sold to the customer. The Stand By Fixed charges are not from the sale of electric energy. Rather, these charges are imposed by Duqeusne in return for its agreement to make electric energy available on demand. During the years 1993-1995, the gross receipts received by Duquesne for Stand By Fixed charges were [redacted]; [redacted]; and [redacted], respectively.

Stand By Demand charges are generally based upon a customer's average demand (kilowatts) of electricity during its highest 15 minute period of use (kilowatt-hours) during the

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[2]Exhibit "A" attached hereto is a representative sample of a customer invoice indicating a Stand By Fixed charge imposed on a customer which purchased no electric energy during that billing period.

billing period[3]. Duquesne must maintain sufficient capacity to be able to guarantee delivery of a specified rate of electricity at any instant, and this charge is for Duquesne maintaining sufficient equipment capable of providing a specific capacity (rate) of electricity when needed by the customer. This demand charge has no relationship to the amount of electric energy that the customer purchases from Duquesne and does not result from the sale of electric energy. Stand By Demand charges are imposed on customers for Duquesne's agreement to provide facilities and equipment which permit the customer to obtain a specified maximum rate of electric energy at any time during a particular billing period. There is a separate and distinct charge for each kilowatt-hour of electric energy actually consumed by the customer during the billing period. During the years 1993-1995, the gross receipts received by Duquesne for Stand By Demand charges were [redacted] and [redacted] respectively.

Customer charges are flat monthly fees charged to customers to partially cover the administrative costs of Duquesne providing meters and billing. Such customer charges are imposed regardless of whether any electric energy is purchased and do not vary based on the amount of electric energy purchased. As such, these charges do not result from the sale of electric energy. During the years 1993-1995, the gross receipts received by Duquesne for customer charges were [redacted] and [redacted] respectively.

There is no direct relationship between the amount of electric energy that a customer purchases and the amount of electric capacity that it requires Duquesne to have

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[3]As is noted in Exhibits "B-1" to "B-3", the Stand By Demand charge is determined by measurement of the average kilowatts during the fifteen minute period of greatest kilowatt-hour use during the billing period adjusted for a power factor.

available for its use. Electric capacity relates to the size of the equipment and facilities that Duquesne must maintain to be able to provide a specified rate of electricity at any specific time. The availability of electric capacity is not a sale of electric energy and the resultant Stand By Charges are not receipts from the sale of electric energy (kilowatt-hours) to the customer.

LEGAL DISCUSSION

Statutory Imposition Language

Article XI of the Tax Reform Code of 1971 imposes the Utilities Gross Receipts Tax. Duquesne Light Company is subject to this tax by virtue of 72 P.S. §8101(b) which provides in relevant part as follows:

> "Every electric light company, waterpower company and hydro-electric company *** engaged in electric light and power business, waterpower business and hydro-electric business in this Commonwealth, shall pay to the State Treasurer, through the Department of Revenue, a tax of forty-four mills upon each dollar of the gross receipts of the corporation *** received from: (1) the sales of electric energy within this state ***"

For purposes of the instant case, the relevant material language is "gross receipts *** received from *** the sales of electric energy". It is initially noted that the tax is not on the entire gross receipts of an electric company, but rather only on those gross receipts that are received from "the sales of electric energy". Gross receipts received from other than sales of electric energy are not subject to the Utilities Gross Receipts Tax.

Neither the Utilities Gross Receipts Tax specifically, nor the Tax Reform Code generally, defines the term "electric energy". As will be discussed shortly, this term is a term of art that is well understood in the electric public utility industry and is specifically referred to in numerous sections of the Pennsylvania Public Utility Code, numerous Pennsylvania Commonwealth Court and Supreme Court decisions involving Pennsylvania electric utilities, in public utility treatises and in various Federal regulatory provisions regarding electric utilities. Electric energy is distinct from electric capacity, demand and administrative cost recoupment charges..

Legislative History of Taxation of Electric Utilities

The language of Article XI of the Tax Reform Code is the result of a long period of gradual change and limiting amendments. In the resolution of the issue in this case it is important to contrast the present language with the language of the statute as originally enacted, subsequently amended and interpreted by the Pennsylvania courts.

The Utilities Gross Receipts Tax on electric light companies was originally imposed by the Act of June 1, 1889, P.L. 420 (hereafter the "Act of 1889"), which provided that the tax was to be based on gross receipts "from business of electric light companies" (Emphasis added). In *Commonwealth v. Brush Electric Light Company*, 204 Pa. 249, 53 A. 1096 (1903), the company asserted that only its receipts from "electric lighting" were taxable. The Pennsylvania Supreme Court considered the statutory scope of taxable receipts of electric companies pursuant to the Act of 1889 and stated:

> "The statute imposes the tax not upon a portion of its receipts - those derived from a particular commodity it supplies to the public - but upon all of its receipts from its general business conducted under its franchises." 204 Pa. at 252, 53 A. at 1097.

In reaching this conclusion, the Court stated that the words of the statute:

> "*** are clear and unambiguous, as they must be, if the commonwealth is entitled to the taxation imposed. *** The tax is not to be paid upon the gross receipts from electric lighting, but upon the gross receipts from the business of the company." Id.

In an amendatory Act of May 14, 1925, P.L. 706, (hereafter the "Act of 1925"), the Legislature modified the statute to impose tax on "*** receipts from the sale of electricity and *** from business of electric light companies, water-power companies, and hydro-electric companies ***."

The Act of 1925 was commented upon by the Dauphin County Court in *Commonwealth v. Philadelphia Electric Company*, 36 Dauph. 265 (1932), as follows:

> "The draftsman inserted 'receipts from the sale of electricity' and may have intended to limit the tax on electric light, water power, and hydro-electric companies, to the 'receipts from the sale of electricity,' but after inserting the words just quoted the Act contains the further language 'or from the business of electric light companies, water power companies and hydro-electric companies.' So that it seems that the Act of 1925 made no change as to the imposition of the tax upon 'business of electric light companies.'" 36 Dauph. at 269.

Pursuant to the Act of April 25, 1929, P.L. 662, (hereafter the "Act of 1929"), the base of the Gross Receipts Tax in regard to electric light companies was further amended by

elimination of the words "and receipts from the sale of electricity" and by the substitution of the words "electric light and power business" for the words "from business of electric light companies."

In *Commonwealth v. Philadelphia Electric Co.*, 312 Pa. 528, 168 A. 318 (1933), the Pennsylvania Supreme Court held that the change in the Act of 1925 language ("business of electric light companies") to the Act of 1929 language ("electric light *** business") reflected a mere transposition of the word "business" which did not produce any change in the statutory measure. Gross Receipts Tax was thus, for many years, imposed on all receipts from the "business" of electric light companies.

By Act of March 26, 1945, P.L. 57 (hereafter the "Act of 1945"), the base for the Gross Receipts Tax imposed on electric light companies was significantly narrowed. Specifically, while the Act of 1929 provided that the tax was imposed on any receipts received from "electric light and power *** business," the Act of 1945 restricted the tax to "gross receipts *** from the sales of electric energy." This statutory change was consistent with the taxpayers' positions in the Brush Electric and Philadelphia Electric cases that receipts subject to tax were limited to those received from electric current sales.

Likewise, the Gross Receipts Tax imposed on entities engaged in telegraph or telephone business reflects a similar historical narrowing of the scope of the tax. In the Act of 1889, the tax was based on "telephone business". In 1925, the operative phrase was changed to

"telephone traffic". Four years later, in 1929, the base of the tax was changed to "telephone messages".

These successive changes to the measure of the tax, from telephone business, to telephone traffic, to telephone messages transmitted wholly within the State were not aimless variations in language, but rather were designed limitations upon the class of taxable gross receipts of telephone companies.

Thus, with the Act of 1929, telephone companies were subjected to tax on gross receipts from the "transmission of messages," whereas electric companies continued to be subjected to tax on receipts from the electric light and power "business." This distinction continued until the Act of 1945, in which, as indicated, the base for Gross Receipts Tax on electric companies was significantly narrowed, similar to that for telephone companies. Specifically, while the Act of 1929 provided that the tax was imposed on any receipts received from "electric light and power *** business," the Act of 1945 restricted the tax to "gross receipts *** from the sales of electric energy," later limited to the present statutory language, "the sales of electric energy within this State."

This historical background reflects both the narrowing of the Utilities Gross Receipts Tax base for the telephone and electric utilities and also the consistent strict interpretation of the Gross Receipts Tax language. Giving due consideration to this historical background, and the following discussion, it is clear that gross receipts from capacity/demand

charges and gross receipts from customer charges do not constitute gross receipts from "sales of electric energy".

Meaning of "Electric Energy" Determined by Public Utility Law

Pennsylvania courts have (with one exception discussed infra.) consistently and uniformly referred to and adopted meanings of terms contained in The Public Utility Code in cases involving the state taxation of public utilities when the tax statute in question does not contain its own definition of the relevant word or phrase. The best example of this relates to the meaning of the term "public utility service" in the Pennsylvania Sales and Use Tax provisions of the Tax Reform Code of 1971. The Pennsylvania Supreme Court in the case of *Commonwealth v. Equitable Gas Company*, 415 Pa. 113, 202 A.2d 11 (1964), was faced with determining the meaning of this term and held that the omission of a specific definition of this term in the Tax Reform Code was a positive indication that the Legislature did not wish to disturb the meaning of this term that had already been established by other statutory enactments, the Public Utility Commission and case law. The Pennsylvania Supreme Court stated as follows:

> "Although 'public utility service' is not defined in the Act [Tax Reform Code of 1971] (and there appears no reason why the Legislature should engage in repetitive definition of an already well understood term), there is no uncertainty as to what it embraces. The Legislature, in the Public Utility Law, defines 'service' as ***. [definition and citation omitted].
>
> The absence of a definition of 'public utility service' in the Sales and Use Tax Act is a positive indication that the Legislature did not wish to disturb the categorization of service already established by statutory enactments, the Public Utility Commission and decisional authorities. The character of such service remains precisely as it was prior to this Act." 415 Pa. at 116-117.

See also, *J.L. Turner Co. v. Commonwealth*, 41 Pa. Comm. Ct. 146, 399 A.2d. 433 (1979), *Commonwealth v. Lafferty*, 426 Pa. 541, 233 A.2d 256 (1967), and *Commonwealth v. Merritt Chapman & Scott Corporation*, 432 Pa. 584, 248 A.2d 194 (1968).

Reference should also be made to the case of *Hanley and Bird v. Commonwealth*, 131 Pa. Comm. Ct. 563, 590 A.2d 1382 (1991), where the Commonwealth Court determined that the use of the term "gas companies" in the Utilities Gross Receipts Tax was not limited to the meaning of that term under the Public Utility Code. Immediately after that decision, the Pennsylvania Legislature retroactively amended the Utilities Gross Receipts Tax to make it clearer that the term "gas companies" was intended to include only those gas companies whose rates and conditions of service were regulated by the Pennsylvania Public Utility Commission (see Act of August 4, 1991, P.L. 97, No. 22 §29). This is further indication that the Legislature intends that terms of art used in the Utilities Gross Receipts Tax (that are not otherwise defined therein) are to be interpreted utilizing their meaning under the Public Utility Law.

Thus, it is necessary to look to treatises, the Public Utility Code, regulations and decisional authorities under the Public Utility Code to determine the meaning of the term "electric energy".

To better understand the concepts of demand and energy and the differences between them, some basic concepts of electricity are helpful. A judicially recognized[4] treatise on

[4]See, *Allegheny Ludlum Corporation*, infra, p 11.

Pennsylvania public utility law, *Rate Case Handbook, A Guide to Utility Ratemaking before the Pennsylvania Public Utility Commission*, (Pennsylvania Public Utility Commission 1983) by J. Cawley and N. Kennard (hereafter "Cawley and Kennard Handbook") states as follows:

> "Electricity is the flow of electrons through a conductor. Electrical demand, the rate at which electricity is generated or consumed at any given point, is identified in terms of a watt. 1,000 watts equal 1 kilowatt (KW). A watt is a unit of power or rate of doing work. For example, a 1,000-watt hair dryer demands 1,000 watts or a kilowatt to operate at any given instant. Electrical energy, the amount of work performed, is measured by a unit called a kilowatt hour (KWH) or a kilowatt lasting one hour. Thus, a 1000-watt hair dryer operating for one hour consumes one KWH. In summary, the kilowatt hour is the basic measuring unit for telling how much electricity has been delivered or used; the kilowatt tells how fast these units were used." [emphasis in original]. At pages 6-7.

As noted above, electric energy is measured by kilowatt hours and electric demand or capacity is measured by kilowatts.

In reviewing the Public Utility regulations, court cases and other authoritative discussions of public utilities, it is clear that an electric utility is in the business of purchasing and selling both electric energy and electric capacity. The first involves the sale of a commodity whereas the second involves contractual guarantees regarding availability of specified rates of electricity. These are two entirely separate and distinct services that each have their own treatment insofar as the utility is concerned, the utility customer is concerned and the Public Utility Commission is concerned. The Pennsylvania Commonwealth Court in the case of *Allegheny Ludlum Corporation v. Pennsylvania Public Utility Commission*, _____ Pa. Comm. Ct. _____, 612 A.2d 604, 606-607 (1992) sets forth this distinction between capacity

(sometimes referred to as demand), energy (sometimes referred to as commodity), and customer costs or charges:

> "Cost of service is determined by consideration of cost-of-service studies, in which costs are first 'functionalized' among categories of generation, transmission and distribution, and then classified within each function as demand/capacity costs, commodity/energy costs or customer costs (expenses, such as meters and billing, affected by the number of customers served). See, *Peoples Natural Gas Company v. Pennsylvania Public Utility Commission*, 122 Pa. Commonwealth Ct. 445, 552 A.2d 1135 (1989); *J. Cawley and N. Kennard, Rate Case Handbook, A Guide to Utility Ratemaking before the Pennsylvania Public Utility Commission* (Pennsylvania Public Utility Commission 1983) at 257-61."

The Cawley and Kennard Handbook[5], at Q19, defines electric energy: "as commonly used in the electric utility industry, electric energy means kilowatt-hours". Similarly, at Q19, it defines "energy charge" as "those charges reflecting costs that vary by level of electric energy (e.g., MCF or KWH) supplied, as contrasted with the demand charge". "Demand charge" is defined, at Q15, as "the specified charge to be billed on the basis of the billing demand, under an applicable rate schedule or contract". Similarly, "demand costs" are defined, at Q15, as "costs incurred to meet customer demands for service, independent of the quantity of service used or the number of customers serviced. Largely related to investment in plant and facilities".

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[5]James Cawley was a Commissioner of the Pennsylvania Public Utility Commission when he authored this publication. Mr. Kennard was then in private practice and was previously legal counsel to Commissioner Clifford L. Jones of the Pennsylvania Public Utility Commission.

West Virginia also imposes a Utilities Gross Receipts Tax on electric companies, and specifically sets forth in its statute that the tax is imposed upon "sales and demand charges". The Supreme Court of Appeals of West Virginia, in the case of *Appalachian Electric Power v. Koontz*, 76 S.E.2d 863 (1953), notes that the word "sale" and the word "demand" have distinct meanings. The Court goes on to note that:

> "Demand charge is simply a readiness to serve charge. In other words, it is an amount paid to the power company by the customer for the privilege of having a certain portion of the company's capacity reserve for the use of the particular customer whenever he may call for it. Whether he calls for the service or not, the demand charge must be paid, because the service is held for him. However, a readiness to serve means an ability to serve. The customer pays for, and the company must receive its payment through, service rendered." At page ___.

The Pennsylvania Utilities Gross Receipts Tax statute is very specific, and imposes the tax only on those gross receipts that are "from the sales of electric energy". It is axiomatic that in order to constitute a receipt from the sale of electric energy, there must both be a transfer of electric energy from Duquesne to its customer and, secondly, the gross receipt must be based on the amount of electric energy consumed by the customer. In the case of Stand By Fixed capacity charges, such charges are imposed irrespective of any transfer of electric energy by Duquesne or any consumption of electric energy by the customer. In the case of Stand By Demand capacity charges, such charges are based solely on the maximum rate of electricity demanded during the highest 15 minute peak demand period in the billing period. The amount of electric energy consumed during that specific 15 minute period along with the remainder of the electric energy used during the billing period is subject to the electric energy charge and the gross

receipts relating to that electric energy is includible in the base of the Utilities Gross Receipts Tax. Duquesne has included those electric energy receipts in its tax returns for the years 1993-1995. The demand capacity charge is in addition to and unrelated to the commodity charge imposed for actual electric energy consumed by the customer. If the Pennsylvania Legislature had intended to tax demand charges in addition to energy charges, it would have included the term "demand charges" in the tax base, as was done by the West Virginia Legislature. However, as noted earlier, the Pennsylvania Legislature has consistently sought to limit the tax base and currently limits the tax base solely to sales of electric energy.

Discussion of *PP&L* Decision

The position that demand/capacity charges and customer charges do not constitute sales of electric energy is also supported by the Commonwealth and Supreme Court opinions in the case of *Pennsylvania Power and Light Company v. Commonwealth of Pennsylvania*, ___ Pa. Comm. Ct. ____, 668 A.2d 620 (1995), affirmed, ___ Pa. ___, ___A.2d ___ (1998) and by the Supreme Court brief of the Commonwealth of Pennsylvania (hereinafter "Brief") in that case. The issue in the *PP&L* case was whether late payment charges collected by an electric utility company on a customer's unpaid electric bill balances constitute gross receipts received from the sale of electric energy. In that case, it was not disputed that the underlying charges on which the late payment charges were computed constituted gross receipts from the sales of electric energy. The Commonwealth Court specifically held that:

> "The additional sum which PP&L charges to and collects from its customers who do not pay their monthly bills in a timely manner is levied upon the price for which electric energy has been sold to

> PP&L customers. The costs which are incurred by PP&L when customers do not pay their bills in a timely manner and which are recouped by PP&L through the imposition of late charges result directly from PP&L's sales of electric energy to its customers. As such, residential and nonresidential late charges are a part of the price of electric energy sold. We believe that the gross receipts received from the higher rates imposed on late paying customers constitute payment for the electricity sold as much as do gross receipts derived from the rates applicable to timely payments." 668 A.2d at 624.

Duquesne concurs with the Court's determination that charges directly resulting from sales of electric energy to a customer, including late charges imposed on such sales, constitute taxable gross receipts. Consistent with *PP&L*, it is Duquesne's position that since the charges in dispute in the instant case are not charges resulting from the sale of electric energy, these charges are not included in the Utilities Gross receipts Tax base.

The Commonwealth, in its Brief in *PP&L* stated that the operative fact supporting taxability was that the charges imposed were based on the volume of electricity being supplied by the utility and used by the customer. See pages 7-8 of the Brief (a copy of which Brief is attached as Exhibit "G"). The Commonwealth likewise acknowledged in its Brief that the Commonwealth does not attempt to tax flat fees imposed by a public utility or installation or transportation charges. Brief at page 34. The customer charges in dispute are flat fees charged by a public utility unrelated to the amount of electric energy sold. The demand charges involved are similarly unrelated to the amount of electric energy sold[6] and are imposed in payment for the obligation of Duquesne Light to have available and be able to provide a specific rate of electricity

[6]In the case of Stand By Fixed demand charges, these are also fixed charges that routinely stay constant from month to month.

at any given time. In both instances, actual electric energy provided, if any, is distinctly charged to the customer.

The Commonwealth also acknowledged in its Brief that "rates" charged by an electric utility "could be considered charges for any type of public service rendered". Brief at page 15. The fact that a particular charge by a utility is the subject of a rate approved by the Public Utility Commission and is contained in its tariffs does not mean that the charge constitutes the sale of electric energy. The Commonwealth stated in its Brief as follows:

> "PP&L asserts that the historical development of the Utilities Gross Receipts Tax, and the Code itself, indicate that the tax may be imposed only on 'gross receipts *** received from *** the sales of electric energy,' and that the tax may not be imposed upon gross receipts from any broader classification of activities, such as 'business' or 'service.' (*PP&L* brief, pp. 27-30) The Commonwealth agrees with that assertion *** there is nothing in the record to indicate that the bills that produced the gross receipts in question were for any service or business other than the sales of electric energy. [footnote omitted]" At pages 30-31.

As discussed earlier, the gross receipts in dispute in this case are gross receipts from providing services other than sales of electric energy and the invoices rendered to the customers clearly designate these as charges distinct from sales of electric energy.

The Commonwealth in its Brief noted that PP&L, while asserting that the late payment fees were not "received from the sales of electric energy" made no effort to state what those late payment fees were received from. Brief at pages 18-19. Similarly, at page 24 of its Brief, the Commonwealth stated that:

> "At various points through its brief, PP&L described the phrase 'sales of electric energy' as having a 'well defined and generally understood meaning in the public utility industry' [citation omitted] as being a 'clearly defined term of art in the public utility industry' [citation omitted] and as having 'a very clearly defined meaning in the electric utility industry' [citation omitted]. There is, however, no information in the record indicating the industry's understanding of the phrase in question ***".

Duquesne has provided numerous examples of the industry's understanding of the phrase "sales of electric energy" including Commonwealth Court and Pennsylvania Supreme Court public utility decisions, a treatise on public utility rate making, cited with approval by the Pennsylvania Commonwealth Court, and will set forth extensive Federal regulations relating to the electric utility industry and regulations adopted by The Public Utility Commission, that also confirm the meanings of these terms.

The Commonwealth, in its Brief stated that "PP&L does not cite any instance in which the PUC regulations employ the term 'sales of electric energy,' or even 'sales of electricity'". Brief at page 29. In contrast, in this instance, there is a series of public utility regulations that specifically discuss both sales of electric energy and sales of electric capacity making it clear that these are two separate and distinct services provided by an electric utility. See, for example, 52 Pa. Code §57.31 and, in particular, definitions of "capacity payment", "energy payment", "rate" and "sale". Each of these definitions discuss these separate and distinct concepts and services.[7] Section 57.32 of these regulations also refer separately to "sales of

[7]While the Commonwealth stated in its Brief that titles and headings in regulations are not to be given any effect, it should be noted that subchapter (c) of the Public Utility Code Electric Service Regulations (52 Pa. Code §57.31, *et seq.*) is entitled "Purchase and Sale of Energy and Capacity".

energy" and "sales of capacity" (52 Pa. Code §57.32(b)). Similarly, §57.35(d) discusses "energy costs" and "demand or capacity charge". Section 57.34 of these same regulations is entitled Purchases of Energy and Capacity. Subsection (b) of this regulation covers "purchases of energy only". Subsection (b)(1) references "energy payments in mills per kilowatt hour ***". Subsequent subsections of this regulation go on to discuss purchases and sales of capacity. While this particular section of the regulation discusses the purchase of energy and capacity by an electric utility, it makes it clear that there is a distinction between the purchase and sale of electric energy and the purchase and sale of electric capacity and that these concepts are ingrained in the electric utility industry.

Regulations adopted by the Federal Energy Regulatory Commission ("FERC") also contain numerous provisions relating to sales of electric energy and sales of capacity as being distinct[8].

The applicable tariffs of Duquesne Light Company, as approved by The Public Utility Commission, also distinguish between the sales of electric energy and sales of capacity/demand. Attached as Exhibits "B-1" to "B-4" are copies of Duquesne's tariffs for rate GS/GM covering the years 1993-1995. Attached as Exhibits "C-1" to "C-3" are copies of Duquesne's tariffs for Rider 16 (Stand By Fixed Demand charges) covering the years 1993-1995. These tariffs set forth three different charges to the customer: (1) a customer charge, which is a

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[8]See, for example, 18 CFR §§292.101 (reference to "electric energy or capacity or both"), 292.302 (reference to "capacity costs on the basis of dollars per kilowatt" and "energy costs of each unit, expressed in cents per kilowatt hour"), 292.303, 304 (references to "energy and capacity" and "energy or capacity"), 292.307 (reference to "energy or capacity") and 294.101 (references to "energy and capacity" and "energy or capacity").

flat monthly fee; (2) a capacity charge which is based on kilowatts of electricity; and (3) an energy charge which is based on kilowatt hours of electricity.

The Board of Finance and Revenue acknowledged the fact that gross receipts from Stand By Demand charges are separate and distinct from gross receipts from commodity charges for purposes of the Utilities Gross Receipts Tax (see decision in *Equitable Resources*, attached as Exhibit "D"). The Equitable Resources case involved a gas company as to which the Utilities Gross Receipts Tax imposed a tax on "sales of gas", which as to a gas company is a more inclusive term than is "sales of electric energy" to an electric public utility.

In its decision involving Duquesne (Exhibit "E"), the Board, while specifically acknowledging that Duquesne's tariff and its invoices distinctly reflect both a capacity charge (based on kilowatts of demand) and an energy charge, incorrectly concludes that demand charges are taxable for two reasons. The first reason given is that the demand charges are included in the rate tariff. Simply because a charge may be included in a rate tariff does not mean that such charge produces gross receipts from sales of electric energy. The Commonwealth, in its Brief, discussed earlier, specifically acknowledged this. The second reason utilized by the Board is that the demand charges were based on kilowatts of usage. As noted earlier, demand and kilowatts is a term specifying the rate of usage at any given instant and is entirely independent of the amount of usage which is the measure of electric energy sold to the customer. The Board decision also incorrectly notes that a particular invoice included an energy charge for 49.5 kilowatts. The energy charge on the invoice was for 4,950 kilowatt hours. A copy of that invoice is attached as

Exhibit "F". That invoice clearly distinguishes between charges for capacity (demand) which are based on kilowatts and charges for electric energy which are based on kilowatt hours.

SUMMARY

The Utilities Gross Receipts Tax imposes a tax on "gross receipts *** received from *** the sales of electric energy." The term "electric energy" is well-understood in the electric utility industry. Pennsylvania courts have consistently turned to The Public Utility Code in determining the meaning of terms affecting the state taxation of public utilities when the state tax statute does not contain its own definition of the relevant term. A review of Pennsylvania public utility cases and treatises, along with state and federal regulations involving public utilities set forth a clear and well-understood meaning of the term "electric energy" and demonstrate that this term has a completely separate and distinct meaning from "electric capacity" (sometimes referred to as "electric demand"). These same authorities demonstrate that electric energy is a commodity, whereas demand and capacity are contractual guarantees or services provided by a public utility for which there are separate charges and, by necessity, separate methods for calculating the charge. The *PP&L* decision and the Commonwealth's Brief in that matter clearly reflect that only gross receipts from the sales of electric energy are taxable, not gross receipts from the provision of any service provided by an electric utility and that taxable gross receipts are those based on the volume of the commodity electric energy supplied by the utility to the customer. In its Brief, the Commonwealth acknowledges that it does not attempt to tax flat fees imposed by a pubic utility.

The legislative history of the Gross Receipts Tax clearly sets forth that while from 1889 to 1945, the tax was imposed on gross receipts from the business of an electric utility, the 1945 amendment, consistent with the position espoused in certain prior court cases, restricted the tax base to only those gross receipts from the sales of electric energy. None of the charges in dispute in this case result from the sale of electric energy, but rather from the sale of capacity (i.e. Stand By Demand and Stand By Fixed charges), from flat fees charged by the utility (i.e. Customer charges) or constitute additional charges based on the foregoing (i.e. late payment charges on the foregoing). As such, none of these gross receipts are properly includible in the Gross Receipts Tax base.

Respectfully submitted,

R. Scott Shearer, Esquire
KEEFER WOOD ALLEN & RAHAL, LLP
210 Walnut Street
P.O. Box 11963
Harrisburg, PA 17108-1963
(717)255-8017
Attorneys for Duquesne Light Company

Attachments

Duquesne Light Company

[redacted]

MAKE CHECK PAYABLE TO DUQUESNE LIGHT

ACCOUNT NUMBER 4000003550001 M 18,777.39

PLEASE RETURN THIS PORTION WITH YOUR PAYMENT

[redacted]

2

MONACA, PA 15061 2254

40000035500016 000019009212 000018777396 000018777396

SERVICE METER

4000003550001 [redacted]

MONACA, PA 15061-2254

INTERRUPTIBLE BACK-UP 426-439-000

BILLING MONTHS 1.00

DATE PREPARED JUN 30,1998

KILOWATT HOUR METER READING DATA

[redacted]							
630000001	138KV	84300529	0000	0000		10	0
							0

REACTIVE COMPONENT METER READING DATA and POWER FACTOR MULTIPLIER CALCULATIONS

[redacted]			
(REVAR	- KWH	- 0.0 - 3.0 - POWER FACTOR MULTIPLIER	
(REVAR	- KWH	- 0.0 - 3.0 - POWER FACTOR MULTIPLIER	
(REVAR	- KWH	- 0.0 - 0.0 - POWER FACTOR MULTIPLIER	
(REVAR	- KWH	- 0.0 - 0.0 - POWER FACTOR MULTIPLIER	
(REVAR	- KWH	- 0.0 - 0.0 - POWER FACTOR MULTIPLIER	

DEMAND (CAPACITY) DATA

[redacted]				
138KV		10	25000	25000

VOLTAGE	ON PEAK	OFF PEAK	[redacted]	25000
138KV	05/28/98 10:00			

CUSTOMER CHARGE [redacted]

CALCULATION OF CAPACITY (DEMAND) CHARGES

[redacted]				
500.0	@4.87	PER KW OF DEMAND	243500	
2000.0	@3.42	PER KW OF DEMAND	684000	
2500.0				9,275.00

CALCULATION OF UNTRANSFORMED SERVICE CREDIT [redacted]

CALCULATION OF ENERGY CHARGES [redacted]

CUSTOMER, CAPACITY AND ENERGY CHARGES ▶	9,275.00
PENNSYLVANIA TAX ADJUSTMENT 0.0464CR PERCENT	4.30CR
CURRENT BILLING PERIOD AMOUNT	9,270.70
AMOUNT OF LAST BILL	9,390.75
LATE PAYMENT CHARGE ON BILL DUE MAY 19	115.94
ACCOUNT BALANCE AT TIME OF BILLING	9,506.69
PRESENT ACCOUNT BALANCE	18,777.39

DUPLICATE BILL.

KIM TITLEY [redacted]

[redacted]				
@630.40	1.25	4000003550001	JUN 17 '98	18,777.39

Duquesne Light Company 411 Seventh Avenue • P.O. Box 1930 • Pittsburgh, PA 15230-1930 [redacted]

Exhibit "A"

RATE GS/GM – GENERAL SERVICE SMALL AND MEDIUM

AVAILABILITY

Availability for all the standard electric service taken on a small or medium general service customer's premises for which a residential rate is not available.

MONTHLY RATE

Customer Charge – $9.01

CAPACITY CHARGE
- First 5 Kilowatts or less of Demand ——— No Charge
- Additional Kilowatt of Demand ——— $18.23 Per Kilowatt

ENERGY CHARGE
- First 550 kilowatt–hours at ——— 13.89 Cents Per Kilowatt–Hour
- Next 750 kilowatt–hours at ——— 13.01 Cents Per Kilowatt–Hour
- Additional kilowatt–hours at ——— 3.78 Cents Per Kilowatt–Hour

MAXIMUM AVERAGE CHARGE

The average charge under the above rate shall not exceed 31.47 cents per kilowatt–hour except by reason of the Minimum Charge hereinafter provided. This provision only applicable for those bills that include Demand that is billed on the above Capacity Charge.

MINIMUM CHARGE

The Minimum Charge shall be the sum of the Customer Charge plus the Capacity Charge based on 50% of the current month Billing Demand or 30% of the highest Billing Demand during the preceding eleven months, whichever is the greater, but not less than $9.01.

RIDERS

Bills rendered under this schedule are subject to the charges stated in any applicable rider.

LATE PAYMENT CHARGE

Bills will be calculated on the rates stated herein, and are due and payable on or before fifteen days from the date of mailing of the bill to the ratepayers. The bill is overdue when not paid on or before the due date indicated on the bill. An overdue bill is subject to a Late Payment Charge of 1.25% interest per month on the full unpaid and overdue balance of the bill. The Charge shall be calculated on the overdue portions of the bill and shall not be charged against any sum that falls due during a current billing period.

DETERMINATION OF DEMAND

The Demand will be measured where a customer's monthly use exceeds 1,000 kilowatt–hours or where the Demand is known to exceed 5 kilowatts. Individual Demand, except in unusual cases, will be determined by measurement of the average kilowatts during the fifteen–minute period of greatest kilowatt–hour use during the billing period. Individual Demands which may exceed 30 kilowatts will be adjusted for power factor by multiplying by

$$\left\{ 0.8 + \left(0.6 \frac{\text{Reactive kilovolt–ampere hours}}{\text{Kilowatt–hours}} \right) \right\}$$

, where such multiplier will be not less than 1.00 nor more than 2.00.

The Billing Demand will be the sum of the individual demands of each metered service, adjusted for power factor as defined above.

CONTRACT PROVISIONS

Contracts will be written for a period of not less than one year.

STANDARD CONTRACT RIDERS

For modifications of the above rate under special conditions, see "Standard Contract Riders".

(I) INDICATES INCREASE
(C) INDICATES CHANGE

RATE GS/GM - GENERAL SERVICE SMALL AND MEDIUM

AVAILABILITY

Availability for all the standard electric service taken on a small or medium general service customer's premises for which a residential rate is not available.

MONTHLY RATE

CUSTOMER CHARGE	$9.13	(I)
CAPACITY CHARGE		
First 5 Kilowatts or less of Demand	No Charge	
Additional Kilowatt of Demand	$18.47 per Kilowatt	(I)
ENERGY CHARGE		
First 550 Kilowatt-Hours at	14.07 cents per Kilowatt-Hour	(I)
Next 750 Kilowatt-Hours at	13.18 cents per Kilowatt-Hour	(I)
Additional Kilowatt-Hours at	3.83 cents per Kilowatt-Hour	(I)

MAXIMUM AVERAGE CHARGE

The average charge under the above rate shall not exceed 31.88 cents per kilowatt-hour except by reason of the Minimum Charge hereinafter provided. This provision is only applicable for those bills that include demand that is billed on the above Capacity Charge. (I)

MINIMUM CHARGE

The Minimum Charge shall be the sum of the Customer Charge plus the Capacity Charge based on 50% of the current month Billing Demand or 30% of the highest Billing Demand during the preceding eleven months, whichever is the greater, but not less than $9.13. (I)

RIDERS

Bills rendered under this schedule are subject to the charges stated in any applicable rider.

(I) - Indicates Increase

RATE GS/GM - GENERAL SERVICE SMALL AND MEDIUM - (Continued)

MONTHLY RATE - (Continued)

LATE PAYMENT CHARGE

Bills will be calculated on the rates stated herein, and are due and payable on or before fifteen days from the date of mailing of the bill to the ratepayer. The bill is overdue when not paid on or before the due date indicated on the bill. An overdue bill is subject to a Late Payment Charge of 1.25% interest per month on the full unpaid and overdue balance of the bill. The Charge shall be calculated on the overdue portions of the bill and shall not be charged against any sum that falls due during a current billing period.

DETERMINATION OF DEMAND

The demand will be measured where a customer's monthly use exceeds 1,000 kilowatt-hours or where the demand is known to exceed 5 kilowatts. Individual demand, except in unusual cases, will be determined by measurement of the average kilowatts during the fifteen-minute period of greatest kilowatt-hour use during the billing period. Individual demands which exceed 30 kilowatts will be adjusted for power factor by multiplying by

$$\left\{0.8 + \left[0.6\ \frac{\text{Reactive Kilovolt-ampere hours}}{\text{Kilowatt-hours}}\right]\right\},$$

where such multiplier will be not less than 1.00 nor more than 2.00. The Billing Demand will be the sum of the individual demands of each metered service, adjusted for power factor as defined above.

CONTRACT PROVISIONS

Contracts will be written for a period of not less than one year.

STANDARD CONTRACT RIDERS

For modifications of the above rate under special conditions, see "Standard Contract Riders".

RATE GS/GM - GENERAL SERVICE SMALL AND MEDIUM

AVAILABILITY

Availability for all the standard electric service taken on a small or medium general service customer's premises for which a residential rate is not available.

MONTHLY RATE

CUSTOMER CHARGE $9.13

CAPACITY CHARGE

First 5 Kilowatts or less of Demand	No Charge
Additional Kilowatt of Demand	$18.47 per Kilowatt

ENERGY CHARGE

First 550 Kilowatt-Hours at	14.07 cents per Kilowatt-Hour
Next 750 Kilowatt-Hours at	13.18 cents per Kilowatt-Hour
Additional Kilowatt-Hours at	3.83 cents per Kilowatt-Hour

MAXIMUM AVERAGE CHARGE

The average charge under the above rate shall not exceed 31.88 cents per kilowatt-hour except by reason of the Minimum Charge hereinafter provided. This provision is only applicable for those bills that include demand that is billed on the above Capacity Charge.

MINIMUM CHARGE

The Minimum Charge shall be the sum of the Customer Charge plus the Capacity Charge based on 50% of the current month Billing Demand or 30% of the highest Billing Demand during the preceding eleven months, whichever is the greater, but not less than $9.13.

RIDERS

Bills rendered under this schedule are subject to the charges stated in any applicable rider.

RATE GS/GM - GENERAL SERVICE SMALL AND MEDIUM - (Continued)

MONTHLY RATE - (Continued)

LATE PAYMENT CHARGE

Bills will be calculated on the rates stated herein, and are due and payable on or before fifteen days from the date of mailing of the bill to the ratepayer. The bill is overdue when not paid on or before the due date indicated on the bill. An overdue bill is subject to a Late Payment Charge of 1.25% interest per month on the full unpaid and overdue balance of the bill. The Charge shall be calculated on the overdue portions of the bill and shall not be charged against any sum that falls due during a current billing period.

DETERMINATION OF DEMAND

The demand will be measured where a customer's monthly use exceeds 1,000 kilowatt-hours or where the demand is known to exceed 5 kilowatts. Individual demand, except in unusual cases, will be determined by measurement of the average kilowatts during the fifteen-minute period of greatest kilowatt-hour use during the billing period. Individual demands which exceed 30 kilowatts will be adjusted for power factor by multiplying by

$$\left\{0.8 + \left[0.6\ \frac{\text{Reactive Kilovolt-ampere hours}}{\text{Kilowatt-hours}}\right]\right\},$$

where such multiplier will be not less than 1.00 nor more than 2.00. The Billing Demand will be the sum of the individual demands of each metered service, adjusted for power factor as defined above.

CONTRACT PROVISIONS

Contracts will be written for a period of not less than one year.

STANDARD CONTRACT RIDERS

For modifications of the above rate under special conditions, see "Standard Contract Riders".

RATE GS/GM - GENERAL SERVICE SMALL AND MEDIUM

AVAILABILITY

Availability for all the standard electric service taken on a small or medium general service customer's premises for which a residential rate is not available.

MONTHLY RATE

CUSTOMER CHARGE	$9.07	(D)
CAPACITY CHARGE		
First 5 Kilowatts or less of Demand	No Charge	
Additional Kilowatt of Demand	$18.34 per Kilowatt	(D)
ENERGY CHARGE		
First 550 Kilowatt-Hours at	13.97 cents per Kilowatt-Hour	(D)
Next 750 Kilowatt-Hours at	13.09 cents per Kilowatt-Hour	(D)
Additional Kilowatt-Hours at	3.80 cents per Kilowatt-Hour	(D)

MAXIMUM AVERAGE CHARGE

The average charge under the above rate shall not exceed 31.66 cents per kilowatt-hour except by reason of the Minimum Charge hereinafter provided. This provision is only applicable for those bills that include demand that is billed on the above Capacity Charge. (D)

MINIMUM CHARGE

The Minimum Charge shall be the sum of the Customer Charge plus the Capacity Charge based on 50% of the current month Billing Demand or 30% of the highest Billing Demand during the preceding eleven months, whichever is the greater, but not less than $9.07. (D)

RIDERS

Bills rendered under this schedule are subject to the charges stated in any applicable rider.

(D) - Indicates Decrease

RIDER NO. 16 – RATES FOR SALES OF ELECTRIC ENERGY
TO QUALIFYING COGENERATION AND SMALL POWER PRODUCTION FACILITIES

(Applicable to all General Service Rates)

The following applies to cogeneration and small power production facilities which are qualified in accord with Part 292 of Chapter I, Title 18, Code of Federal Regulations ("qualifying facility"). Electric energy will be supplied to a qualifying facility in accord with the following:

A. Supplementary Power is electric energy supplied by Duquesne Light to a qualifying facility and regularly used in addition to that electric energy which the qualifying facility generates itself.

Duquesne Light's regular and appropriate General Service Rates will be utilized for billing for Supplementary Power.

B. Firm back–up power is electric energy supplied by Duquesne Light to a qualifying facility during an unscheduled outage of the qualifying facility's electric generating equipment to replace electric energy ordinarily generated by the qualifying facility's generating equipment.

The Company will supply such service each month at the following rates:

General Service Large –	$3.53/Kw Energy @	3.12 cents/Kwh
General Service Medium –	$4.84/Kw Energy @	3.05 cents/Kwh
General Service Small –	$5.54/Kw Energy @	3.78 cents/Kwh

During any month in which the Company is not required to provide energy to backup the customer's source of power, the customer will pay the above charges for contracted backup capacity.

The use of firm backup power at this price level will be limited to 15% usage for all hours in a year. Incremental usage above this limit will be billed on the applicable general service rates, including all ratchets applicable.

If a customer's actual Kw demand at the time back–up is being supplied exceeds the customer's contract demand by 5% or more, the actual Kw demand as established will become the customer's new contract demand for the remaining term of the contract. If a customer's actual Kw demand at the time back–up service is being supplied exceeds the customer's contract demand by 10% or more, the customer will be assessed a fee determined by the difference between the actual demand established when back–up service is being supplied and the contract demand multiplied by two times the applicable charge per kilowatt.

C. Interruptible backup is electric energy supplied by Duquesne Light to a qualifying facility during an unscheduled outage of the qualifying facilities electric generating equipment to replace electric energy ordinarily generated by the qualifying facilities generating equipment, subject to interruption by the Company.

(I) INDICATES INCREASE

RIDER NO. 16 - RATES FOR SALES OF ELECTRIC ENERGY
TO QUALIFYING COGENERATION AND SMALL POWER PRODUCTION FACILITIES

(Applicable to all General Service Rates)

The Company will provide interruptible backup service to those customers with at least 500 Kw of interruptible load. The Company reserves the right to interrupt service to the customer with a 30 minute notice period during periods of transmission limitation or peak period where service to the customer will result in the need for additional capacity sources to be acquired. The rates for such service shall be the following:

General Service Large -	$2.25/Kw Energy @	3.12 cents/Kwh
General Service Medium -	$3.40/Kw Energy @	3.05 cents/Kwh
General Service Small -	$4.23/Kw Energy @	3.78 cents/Kwh

These charges will be paid every month regardless if the Company is not required to provide energy to backup the customer's equipment.

D. Maintenance Power is electric energy supplied by Duquesne Light to a qualifying facility during outages for maintenance of the qualifying facility's electric generating equipment which are scheduled by the qualifying facility at a time mutually agreeable with Duquesne.

The following terms and conditions will apply to all customers utilizing maintenance:

Any customer who contracts for either firm or interruptible backup power will pay only the maintenance energy charges, that are 3 mills/Kwh less than the backup energy rates, for their maintenance service. However, for those customers who take maintenance service in excess of contracted demands of firm and/or interruptible backup power, the maintenance demand charges will also apply. Customers contracting for maintenance service only will pay the maintenance service demand and backup power energy charges.

General Service Large -	$2.25/Kw Energy @	2.82 cents/Kwh
General Service Medium -	$3.40/Kw Energy @	2.75 cents/Kwh
General Service Small -	$4.23/Kw Energy @	3.48 cents/Kwh

These charges for maintenance service will be paid only in months of actual usage.

The customer shall specify to the Company the amount of maintenance power required.

Beginning with the date upon which the qualifying facility's generating equipment is first operated in any manner whatsoever, and during the immediately ensuing three (3) months of operation of the qualifying facility's generating equipment, Maintenance Power will be supplied by Duquesne Light, if available in the sole judgement of Duquesne Light, to the qualifying facility at the

(I) INDICATES INCREASE

STANDARD CONTRACT RIDERS - (Continued)

RIDER NO. 16 - SERVICE TO NON-UTILITY GENERATING FACILITIES (C

(Applicable to all General Service Rates)

The following applies to non-utility generating facilities including, but not limited to cogeneration and small power production facilities which are qualified in accord with Part 292 of Chapter I, Title 18, Code of Federal Regulations (qualifying facility). Electric energy will be supplied to a non-utility generating facility in accord with the following:

A. **Supplementary Power** is electric energy supplied by Duquesne Light to a non-utility generating facility and regularly used in addition to that electric energy which the non-utility generating facility generates itself.

Duquesne Light's regular and appropriate General Service Rates will be utilized for billing for Supplementary Power.

B. Firm Back-Up Power is electric energy supplied by Duquesne Light to a non-utility generating facility during an unscheduled outage of the non-utility generating facility's electric generating equipment to replace electric energy ordinarily generated by the non-utility generating facility's generating equipment.

The Company will supply such service each month at the following rates:

General Service Large (Rates L, HVPS)	$3.58/kW	Energy @ 3.16 cents/kWh	(C
General Service Medium (Rate GL)	$4.90/kW	Energy @ 3.09 cents/kWh	(C
General Service Small (Rate GS/GM)	$5.61/kW	Energy @ 3.83 cents/kWh	(C

During any month in which the Company is not required to provide energy to backup the customer's source of power, the customer will pay the above charges for contracted backup capacity.

The use of firm backup power at this price level will be limited to 15% usage for all hours in a year. Incremental usage above this limit will be billed on the applicable general service rates, including all ratchets applicable.

If a customer's actual kW demand at the time back-up is being supplied exceeds the customer's Contract Demand by 5% or more, the actual kW demand as established will become the customer's new Contract Demand for the remaining term of the contract. If a customer's actual kW demand at the time back-up service is being supplied exceeds the customer's Contract Demand by 10% or more, the customer will be assessed a fee determined by the difference between the actual demand established when back-up service is being supplied and the Contract Demand multiplied by two times the applicable charge per kilowatt.

(C) - Indicates Change
(I) - Indicates Increase

STANDARD CONTRACT RIDERS - (Continued)

RIDER NO. 16 - SERVICE TO NON-UTILITY GENERATING FACILITIES - (Continued) (C

(Applicable to all General Service Rates)

C. Interruptible Backup Power is electric energy supplied by Duquesne Light to a non-utility generating facility during an unscheduled outage of the non-utility generating facility's electric generating equipment to replace electric energy ordinarily generated by the non-utility generating facility's generating equipment, subject to interruption by the Company.

The Company will provide interruptible backup service to those customers with at least 500 kW of interruptible load. The Company reserves the right to interrupt service to the customer with a 30 minute notice period during periods of transmission limitation or peak period where service to the customer will result in the need for additional capacity sources to be acquired. The rates for such service shall be the following:

General Service Large (Rates L, HVPS)	$2.28/kW	Energy @ 3.16 cents/kWh	(C
General Service Medium (Rate GL)	$3.44/kW	Energy @ 3.09 cents/kWh	(C
General Service Small (Rate GS/GM)	$4.29/kW	Energy @ 3.83 cents/kWh	(C

These charges will be paid every month regardless of whether or not the Company is required to provide energy to backup the customer's equipment.

D. Maintenance Power is electric energy supplied by Duquesne Light to a non-utility generating facility during outages for maintenance of the non-utility generating facility's electric generating equipment which are scheduled by the non-utility generating facility at a time mutually agreeable with Duquesne.

The following terms and conditions apply to all customers utilizing maintenance power:

Any customer who contracts for either firm or interruptible backup power will pay only the maintenance energy charges, that are 3 mills/kWh less than the backup energy rates, for their maintenance service. However, for those customers who take maintenance service in excess of contracted demands of firm and/or interruptible backup power, the maintenance demand charges will also apply. Customers contracting for maintenance service only will pay the maintenance service demand and backup power energy charges.

General Service Large (Rates L, HVPS)	$2.28/kW	Energy @ 2.86 cents/kWh	(C.
General Service Medium (Rate GL)	$3.44/kW	Energy @ 2.79 cents/kWh	(C
General Service Small (Rate GS/GM)	$4.29/kW	Energy @ 3.53 cents/kWh	(C

These charges for maintenance service will be paid only in months of actual usage.

The customer shall specify to the Company the amount of maintenance power required.

(C) - Indicates Change
(I) - Indicates Increase

STANDARD CONTRACT RIDERS - (Continued)

RIDER NO. 16 - SERVICE TO NON-UTILITY GENERATING FACILITIES - (Continued) (C)

(Applicable to all General Service Rates)

D. - (Continued)

Beginning with the date upon which the non-utility generating facility's generating equipment is first operated in any manner whatsoever, and during the immediately ensuing three (3) months of operation of the non-utility generating facility's generating equipment, maintenance power will be supplied by Duquesne Light, if available in the sole judgement of Duquesne Light, to the non-utility generating facility at the non-utility generating facility's request, in order to permit the non-utility generating facility to "shake down" the generating equipment.

After the three-month "shake down" period, the non-utility generating facility will provide the following notice to Duquesne Light for the need for maintenance power:

(1) For a non-utility generating facility requesting less than 15 mW of maintenance power, the non-utility generating facility will provide 30 calendar days' notice to Duquesne Light of the need for maintenance power. Duquesne Light will respond within seven (7) calendar days of notification by the non-utility generating facility whether or not maintenance power can be made available at the time requested or at some other time.

(2) For a non-utility generating facility requesting between 15 mW and 30 mW of maintenance power, the non-utility generating facility will provide 60 calendar days' notice to Duquesne Light of the need for maintenance power. Duquesne Light will respond within 14 calendar days of the notification by the non-utility generating facility whether or not maintenance power can be made available at the time requested or at some other time.

(3) For a non-utility generating facility requesting more than 30 mW of maintenance power, the non-utility generating facility will provide 90 calendar days' notice to Duquesne Light of the need for maintenance power. Duquesne Light will respond within 21 calendar days of the notification by the non-utility generating facility whether or not maintenance power can be made available at the time requested or at some other time.

The Company will make available the maintenance power upon mutual agreement within 30 days before or after the customer's requested scheduled maintenance outage date.

Maintenance power will be available to a non-utility generating facility not more than five (5) separate periods in a calendar year, cumulatively totalling 60 days in a calendar year.

(C) - Indicates Change

STANDARD CONTRACT RIDERS - (Continued)

RIDER NO. 16 - SERVICE TO NON-UTILITY GENERATING FACILITIES - (Continued) (C

(Applicable to all General Service Rates)

D. - (Continued)

Maintenance power may be available between the hours of 10:00 p.m. and 8:00 a.m. weekdays and all day Saturdays, Sundays and generally observed holidays upon six (6) hours' notice to Duquesne Light by the non-utility generating facility. These limited "off-peak" uses of maintenance power will be restricted to not more than 15 separate periods in a calendar year and will not be included in the five (5) separate periods or 30 days in a calendar year. The availability of maintenance power between the hours of 10:00 p.m. and 8:00 a.m. weekdays and all day Saturdays, Sundays and generally observed Holidays would be determined solely by Duquesne Light and Duquesne Light will respond within two (2) hours of the request for maintenance power by the non-utility generating facility.

E. Each non-utility generating facility will be required to install at its expense or pay in advance to have Duquesne Light install interconnection equipment and facilities which are over and above that equipment and facilities required to provide electric service to the non-utility generating facility according to Duquesne Light's General Service Rates. Any such equipment to be installed by the non-utility generating facility must be reviewed and approved in writing by Duquesne Light prior to installation.

(C) - Indicates Change

STANDARD CONTRACT RIDERS - (Continued)

RIDER NO. 16 - SERVICE TO NON-UTILITY GENERATING FACILITIES

(Applicable to all General Service Rates)

The following applies to non-utility generating facilities including, but not limited to cogeneration and small power production facilities which are qualified in accord with Part 292 of Chapter I, Title 18, Code of Federal Regulations (qualifying facility). Electric energy will be supplied to a non-utility generating facility in accord with the following:

A. **Supplementary Power** is electric energy supplied by Duquesne Light to a non-utility generating facility and regularly used in addition to that electric energy which the non-utility generating facility generates itself.

Duquesne Light's regular and appropriate General Service Rates will be utilized for billing for Supplementary Power.

B. **Firm Back-Up Power** is electric energy supplied by Duquesne Light to a non-utility generating facility during an unscheduled outage of the non-utility generating facility's electric generating equipment to replace electric energy ordinarily generated by the non-utility generating facility's generating equipment.

The Company will supply such service each month at the following rates:

Large Power Service/HVPS (5,000 kW or more).....	$3.58/kW	Energy @ 3.16 cents/kWh
General Service Large (300 to 4,999 kW)	$4.90/kW	Energy @ 3.09 cents/kWh
General Service Small/Medium (less than 300 kW) ..	$5.61/kW	Energy @ 3.83 cents/kWh

Plus for any General Service Large (300 to 4,999 kilowatts) or Small/Medium (less than 300 kilowatts) customer commencing service under Rider No. 16 after January 16, 1996, the following charges to recover the cost of existing or newly required transformation equipment that is over and above that equipment necessary for Duquesne Light to supply the customer with its contracted Supplemental Power will apply:

General Service Large (300 to 4,999 kW) $0.25/kW
General Service Small/Medium (less than 300 kW) .. $0.37/kW

(The monthly per kW charge for transformation equipment for Large Power Service/HVPS [5,000 kilowatts and over] customers will be determined by Duquesne Light on a case-by-case basis.)

However, any Large Power Service/HVPS, General Service Large or General Service Small/Medium customer electing to pay the total costs of such transformation at the onset of its contract may do so pursuant to Section E and will not subsequently be billed the aforementioned monthly per kW charges.

(C) - Indicates Change

STANDARD CONTRACT RIDERS - (Continued)

RIDER NO. 16 - SERVICE TO NON-UTILITY GENERATING FACILITIES - (Continued)

(Applicable to all General Service Rates)

B. (Continued)

During any month in which the Company is not required to provide energy to backup the customer's source of power, the customer will pay the above charges for contracted backup capacity.

The use of firm backup power at this price level will be limited to 15% usage for all hours in a year. Incremental usage above this limit will be billed on the applicable general service rates, including all ratchets applicable.

If a customer's actual kW demand at the time back-up is being supplied exceeds the customer's firm back-up Contract Demand by 5% or more, the actual kW demand as established will become the customer's new firm back-up Contract Demand for the remaining term of the firm back-up contract. If a customer's actual kW demand at the time back-up service is being supplied exceeds the customer's firm back-up Contract Demand by 10% or more, the customer will be assessed a fee determined by the difference between the actual demand established when back-up service is being supplied and the firm back-up Contract Demand multiplied by two times the applicable charge per kilowatt. (C

C. Interruptible Back-up Power is electric energy supplied by Duquesne Light to a non-utility generating facility during an unscheduled outage of the non-utility generating facility's electric generating equipment to replace electric energy ordinarily generated by the non-utility generating facility's generating equipment, subject to interruption by the Company.

The Company will provide interruptible backup service to those customers with at least 500 kW of interruptible load. The Company reserves the right to interrupt service to the customer with a 30 minute notice period during periods of transmission limitation or peak period where service to the customer will result in the need for additional capacity sources to be acquired. The rates for such service shall be the following:

Large Power Service/HVPS (5,000 kW or more).....	$2.28/kW	Energy @ 3.16 cents/kWh	(C
General Service Large (300 to 4,999 kW)	$3.44/kW	Energy @ 3.09 cents/kWh	(C
General Service Small/Medium (less than 300 kW) ..	$4.29/kW	Energy @ 3.83 cents/kWh	(C

These charges will be paid every month regardless of whether or not the Company is required to provide energy to backup the customer's equipment.

(C) - Indicates Change

STANDARD CONTRACT RIDERS - (Continued)

RIDER NO. 16 - SERVICE TO NON-UTILITY GENERATING FACILITIES - (Continued)

(Applicable to all General Service Rates)

C. (Continued)

Plus for any General Service Large (300 to 4,999 kilowatts) or Small/Medium (less than 300 kilowatts) customer commencing service under Rider No. 16 after January 16, 1996, the following charges to recover the cost of existing or newly required transformation equipment that is over and above that equipment necessary for Duquesne Light to supply the customer with its contracted Supplemental Power will apply:

General Service Large (300 to 4,999 kW) $0.28/kW
General Service Small/Medium (less than 300 kW) .. $0.42/kW

(The monthly per kW charge for transformation equipment for Large Power Service/HVPS [5,000 kilowatts and over] customers will be determined by Duquesne Light on a case-by-case basis.)

However, any Large Power Service/HVPS, General Service Large or General Service Small/Medium customer electing to pay the total costs of such transformation at the onset of its contract may do so pursuant to Section E and will not subsequently be billed the aforementioned monthly per kW charges.

The use of interruptible backup power at this price level will be limited to 15% usage for all hours in a year. Incremental usage above this limit will be billed on the applicable general service rates, including all ratchets applicable.

If a customer's actual kW demand at the time back-up is being supplied exceeds the customer's interruptible back-up Contract Demand by 5% or more, the actual kW demand as established will become the customer's new interruptible back-up Contract Demand for the remaining term of the interruptible back-up contract. If a customer's actual kW demand at the time back-up service is being supplied exceeds the customer's interruptible back-up Contract Demand by 10% or more, the customer will be assessed a fee determined by the difference between the actual demand established when back-up service is being supplied and the interruptible back-up Contract Demand multiplied by two times the applicable charge per kilowatt.

D. Maintenance. Power is electric energy supplied by Duquesne Light to a non-utility generating facility during outages for maintenance of the non-utility generating facility's electric generating equipment which are scheduled by the non-utility generating facility at a time mutually agreeable with Duquesne Light.

(C) - Indicates Change

STANDARD CONTRACT RIDERS - (Continued)

RIDER NO. 16 - SERVICE TO NON-UTILITY GENERATING FACILITIES - (Continued)

(Applicable to all General Service Rates)

D. (Continued)

The following terms and conditions apply to all customers utilizing maintenance power:

Any customer who contracts for either firm or interruptible backup power will pay only the maintenance energy charges, that are 3 mills/kWh less than the backup energy rates, for their maintenance service. However, for those customers who take maintenance service in excess of contracted demands of firm and/or interruptible backup power, the maintenance demand charges will also apply. Customers contracting for maintenance service only will pay the maintenance service demand and backup power energy charges.

Large Power Service/HVPS (5,000 kW or more).....	$2.28/kW	Energy @ 2.86 cents/kWh	(C
General Service Large (300 to 4,999 kW)	$3.44/kW	Energy @ 2.79 cents/kWh	(C
General Service Small/Medium (less than 300 kW) ..	$4.29/kW	Energy @ 3.53 cents/kWh	(C

Plus for any General Service Large (300 to 4,999 kilowatts) or Small/Medium (less than 300 kilowatts) customer commencing service under Rider No. 16 after January 16, 1996, the following charges to recover the cost of existing or newly required transformation equipment that is over and above that equipment necessary for Duquesne Light to supply the customer with its contracted Supplemental Power will apply: (C

General Service Large (300 to 4,999 kW)	$0.28/kW	(C
General Service Small/Medium (less than 300 kW) ..	$0.42/kW	

(The monthly per kW charge for transformation equipment for Large Power Service/HVPS (5,000 kilowatts and over) customers will be determined by Duquesne Light on a case-by-case basis.) (C

However, any Large Power Service/HVPS, General Service Large or General Service Small/Medium customer electing to pay the total costs of such transformation at the onset of its contract may do so pursuant to Section E and will not subsequently be billed the aforementioned monthly per kW charges. (C

These charges for maintenance service will be paid only in months of actual usage.

The customer shall specify to the Company the amount of maintenance power required.

(C) - Indicates Change

STANDARD CONTRACT RIDERS - (Continued)

RIDER NO. 16 - SERVICE TO NON-UTILITY GENERATING FACILITIES - (Continued)

(Applicable to all General Service Rates)

D. - (Continued)

Beginning with the date upon which the non-utility generating facility's generating equipment is first operated in any manner whatsoever, and during the immediately ensuing three (3) months of operation of the non-utility generating facility's generating equipment, maintenance power will be supplied by Duquesne Light, if available in the sole judgment of Duquesne Light, to the non-utility generating facility at the non-utility generating facility's request, in order to permit the non-utility generating facility to "shake down" the generating equipment.

After the three-month "shake down" period, the non-utility generating facility will provide the following notice to Duquesne Light for the need for maintenance power:

(1) For a non-utility generating facility requesting less than 15 mW of maintenance power, the non-utility generating facility will provide 30 calendar days notice to Duquesne Light of the need for maintenance power. Duquesne Light will respond within seven (7) calendar days of notification by the non-utility generating facility whether or not maintenance power can be made available at the time requested or at some other time.

(2) For a non-utility generating facility requesting between 15 mW and 30 mW of maintenance power, the non-utility generating facility will provide 60 calendar days notice to Duquesne Light of the need for maintenance power. Duquesne Light will respond within 14 calendar days of the notification by the non-utility generating facility whether or not maintenance power can be made available at the time requested or at some other time.

(3) For a non-utility generating facility requesting more than 30 mW of maintenance power, the non-utility generating facility will provide 90 calendar days notice to Duquesne Light of the need for maintenance power. Duquesne Light will respond within 21 calendar days of the notification by the non-utility generating facility whether or not maintenance power can be made available at the time requested or at some other time.

The Company will make available the maintenance power upon mutual agreement within 30 days before or after the customer's requested scheduled maintenance outage date.

Maintenance power will be available to a non-utility generating facility not more than five (5) separate periods in a calendar year, cumulatively totaling 60 days in a calendar year.

STANDARD CONTRACT RIDERS - (Continued)

RIDER NO. 16 - SERVICE TO NON-UTILITY GENERATING FACILITIES - (Continued)

(Applicable to all General Service Rates)

D. - (Continued)

Maintenance power may be available between the hours of 10:00 p.m. and 8:00 a.m. weekdays and all day Saturdays, Sundays and generally observed holidays upon six (6) hours notice to Duquesne Light by the non-utility generating facility. These limited "off-peak" uses of maintenance power will be restricted to not more than 15 separate periods in a calendar year and will not be included in the five (5) separate periods or 30 days in a calendar year. The availability of maintenance power between the hours of 10:00 p.m. and 8:00 a.m. weekdays and all day Saturdays, Sundays and generally observed Holidays would be determined solely by Duquesne Light and Duquesne Light will respond within two (2) hours of the request for maintenance power by the non-utility generating facility.

E. Each non-utility generating facility will be required to install at its expense or pay in advance to have Duquesne Light install interconnection equipment and facilities which are over and above that equipment and facilities required to provide electric service to the non-utility generating facility according to Duquesne Light's General Service Rates. (The costs of transformation equipment recovered under Sections B, C and D on a per kW monthly basis from Large Power Service/HVPS, General Service Large and General Service Small/Medium customers are not included herein.) Any such equipment to be installed by the non-utility generating facility must be reviewed and approved in writing by Duquesne Light prior to installation. Nothing in this rider shall exempt a new customer from the application of Rules No. 7 and 9 regarding Supply Line Extensions and Relocation of Facilities.

(C) - Indicates Change

INTERLOCUTORY ORDER

BF&R Docket No. 9509438
BOA Docket No. 503895
Petition Filed: 7-18-95
Box No. [redacted]

IN RE: [redacted]

PETITION FOR REVIEW OF GROSS RECEIPTS TAX FOR 12-31-92

AND NOW, DECEMBER 12, 1995, pursuant to the Fiscal Code, the Act of 1929, April 9, P.L. 343, as amended, (72 P.S. § 1 et seq), the Board of Finance and Revenue of the Commonwealth of Pennsylvania, based upon the reasons set forth herein, hereby ORDERS the following:

OPINION

This matter is before the Board of Finance and Revenue pursuant to Section 1103 of The Fiscal Code, Act of April 9, 1929, P.L. 343, as amended, 72 P.S. § 1103.

ISSUE

Whether Petitioner's standby demand charges constitute gross receipts from the sale of gas to the public?

Whether Petitioner may change its method of accounting for sales of gas to the cash method?

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Mailed: [redacted] on DECEMBER 15, 1995

PITTSBURGH, PA [redacted]

EX. CAL. NO. 3

dca [redacted]

Exhibit "D"

[redacted] DOCKET NO. 9509438

STATEMENT OF THE CASE

Petitioner, [redacted] is a domestic corporation which operates as a fully integrated natural gas public utility whose rates and conditions of service are regulated by the Pennsylvania Public Utility Commission (PUC). Petitioner claims that it inadvertently reported transportation customers' standby demand charges as taxable gross receipts and, also, requests to change its method of computing taxable gross receipts to the cash method for the 1992 tax year. Petitioner filed a Petition for Refund with the Board of Appeals which was denied by order dated April 26, 1995. Petitioner seeks resettlement by the Board of Finance and Revenue upon review of the denial order of its refund petition by the Board of Appeals.

Petitioner avers that 72 P.S. §8101(a) clearly imposes the gross receipts tax on sales of gas to the public from a public utility and is not applicable to transportation of natural gas by a public utility or to transportation customers' standby demand charges. Petitioner argues that its transportation customers' standby demand charges are extra charges customers pay Petitioner each month to guarantee firm (uninterrupted) service (i.e. as opposed to amounts Petitioner receives from customers for the actual sale of gas).

Petitioner has provided the following explanation of the nature and character of transportation customers' standby demand charges:

. . . .

> Contrary to the Board's (Board of Appeals) conclusion in attached Exhibit 3 with respect to standby demand charges being includible in gross receipts, standby demand charges merely guarantee firm sales service to customers in the event they do not deliver sufficient gas into [redacted]'s system. Firm standby sales service is subject to availability of sufficient gas supply and system capacity. Customers who elect firm standby sales service pay a monthly reservation charge to guarantee the uninterrupted service. The monthly reservation charge is based upon either (1) volumes of gas purchased from third parties and delivered into [redacted]'s system by transportation customers or (2) an estimate of the transportation customer's maximum daily firm requirements, not on volumes of gas sold to the customer. Customers who elect standby sales service are billed separately for the gas they use in excess of that which they deliver into the system. This charge is known as a Standby Usage Charge which [redacted] does treat as gas sold and upon which it does pay gross receipts tax. The standby demand charges however, are only payments to guarantee uninterrupted service and should not be subject to gross receipts tax. Standby demand charges are not sales of gas.

Petitioner claims that it inadvertently included the standby demand charges totaling [redacted] in determining its taxable gross receipts fro the 1992 tax year.

The Board of Appeals informed Petitioner, by letter dated May 19,1995, of its opinion that "standby demand charges" represent extra charges customers pay each month to guarantee uninterrupted service, based on the quantity of gas sold to the customers, which are part of the total amount of money received from selling gas to the public. See Exhibit 3, attached to Petition for Review.

Petitioner desires to change its method of reporting taxable gross receipts to the cash receipts method. Petitioner claims that the change to the cash method is necessary to be consistent with the statutory provision imposing the gross receipts tax. Petitioner argues that Black's Law Dictionary defines "gross receipts" as "the total amount ... received from selling property or performing services". Petitioner concludes, based on this definition, that the tax is based on the amount received, rather than the amount billed and, therefore, must be computed employing the cash method of accounting.

Petitioner avers that other natural gas utilities regulated by the Pennsylvania Public Utility Commission employ the cash method of accounting to determine taxable gross receipts.

In support of its request to compute taxable gross receipts using the cash method, Petitioner argues that by using the method employed to determine the amount originally reported, "the Commonwealth would subject Petitioner to the additional burden of financing the pre-payment of taxes until customers either pay their obligation or are ultimately charged-off as uncollectible." Petitioner avers that [redacted] of its total "Accounts Receivable Aging" namely [redacted] at December 1992 represented account balances of customers who were at least 90 days delinquent, or on budget billing and have arrearages, or are delinquent on final bills after either having their service shut off or having moved. Petitioner cites an Order of the Pennsylvania Public Utility Commission which concluded that "75% of the agreements negotiated by the BCS(Bureau of Consumer Services) and ordered by ALJs (Administrative Law Judges) extend beyond 48 months."

Petitioner requests resettlement to exclude from taxable gross receipts [redacted] and gross receipts not received during 1992 totaling [redacted] from the reported and settled amount of gross receipts of [redacted], resulting in a refund of [redacted]

Petitioner is a member of an affiliated group which employed the accrual method of accounting for the purpose of reporting its consolidated income tax return to the federal government. See, 1992 PA Corporate Tax Report, Form 1120, Schedule K, attached.

STATEMENT OF THE LAW

Every railroad company, pipeline company, ... and every other company ... engaged in, or hereafter engaged in, the transportation of freight or oil within this State, ... shall pay to the State Treasurer, through the Department of Revenue, a tax of forty-five mills with a surtax equal to five mills upon each dollar of the gross receipts of the corporation, company or association, limited partnership, joint-stock association, copartnership, person or persons, received from passengers, baggage and freight transported wholly within this State, from telegraph or telephone ,messages transmitted wholly within this State from express, palace car or sleeping car business done wholly within this State, or from the sales of gas to the public from a public utility, except gross receipts derived from sales to any municipality owned or operated public utility and except gross receipts derived from the sales for resale, to persons, partnerships, associations, corporations, or political subdivisions subject to the tax imposed by this act upon gross receipts derived from such resale and from the transportation of oil wholly within this State. The gross receipts from gas companies shall include the gross receipts from the sale of artificial and natural gas, but shall not include gross receipts from the sale of liquefied petroleum gas. 72 P.S. §8101(a).

CONCLUSION

Petitioner's 1992 gross receipts tax shall be resettled to reflect the exclusion of standby demand charges from taxable gross receipts. The Tax Reform Code states that the tax shall be imposed on the gross receipts "from the sales of gas to the public from a public utility." 72 P.S. §8101(a). The facts establish that [redacted] in standby demand charges were included in taxable gross receipts. Petitioner's tax shall be resettled to exclude the standby demand charges as non taxable gross receipts.

Petitioner's 1992 taxable gross receipts of [redacted] was computed as revenues computed on the billings method, less write-offs for uncollectibles, less energy assistance dollars not collected from customers, less tax exempt municipal billings.

Petitioner requests that its taxable gross receipts must be recomputed to exclude revenues accrued but not received to determine its 1992 gross receipts tax. Petitioner has set forth a schedule presenting actual cash receipts during 1992 less other adjustments less 1992 cash received during 1992 and previously taxed of [redacted] resulting in Total

Identified Cash Receipts" which reconciles to the requested "Total Identified Cash Receipts" (net of accrued revenues). Thus, the method of reporting the taxable gross receipts suggested by Petitioner fairly presents the amount of gross receipts received by Petitioner during the tax year. Under this method, the taxable gross receipts shall be determined by subtracting ending accrued revenues and adding the accrued revenues at the beginning of the year.

Accordingly, Petitioner's request for relief shall be granted.

* * * * *

ORDER

This account shall be resettled and taxed as follows:

TAXABLE RECEIPTS $[redacted]

By Order Of The Board Of Finance And Revenue

State Treasurer, Chairman
Auditor General
Secretary of Revenue
Attorney General
General Counsel
Secretary of the Commonwealth

ATTEST: Carol L. Weitzel
Acting Secretary, Board of Finance and Revenue

dca

EX. CAL. NO. 3

INTERLOCUTORY ORDER

BF&R Docket No. 9807697
BOA Docket No. 9807697
Petition Filed: 3-26-98
Box No. 0658-048

IN RE: DUQUESNE LIGHT CO.

PETITION FOR REVIEW OF GROSS RECEIPTS TAX for the year ended 12-31-93

AND NOW, July 29, 1998, pursuant to the Fiscal Code, the Act of 1929, April 9, P.L. 343, as amended, (72 P.S. § 1 et seq), the Board of Finance and Revenue of the Commonwealth of Pennsylvania, based upon the reasons set forth herein, hereby ORDERS the following:

Jurisdiction

This matter is before the Board of Finance and Revenue pursuant to Section 1103 of The Fiscal Code, Act of April 9, 1929, P.L. 343, as amended, 72 P.S. § 1103.

Issues

Whether Petitioner is entitled to compute taxable gross receipts on the cash basis of accounting?

Whether late payment charges where properly included in taxable gross receipts for the 1993 tax year?

Whether Petitioner's standby fixed, standby demand, and customer charges constitute gross receipts from the sale of electricity?

Whether Petitioner's late payment charges constitute taxable gross receipts from the sale of electricity?

******

ailed: Keefer Wood Allen and Rahal on August 3, 1998
Attn: R. Scott Shearer
P.O. Box 11963
Harrisburg, PA 17108-1953

Exhibit "E"

jlh

CAL. NO. 193

Statement of the Case

Petitioner Duquesne Light Company, is a Pennsylvania electric light company which requests resettlement to recalculate taxable gross receipts on the cash basis of accounting and to exclude from taxable gross receipts late payment charges, customer charges, standby fixed charges, and standby demand charges.

The Department of Revenue increased the reported taxable gross receipts to [redacted] to included standby charges of [redacted]

On June 25, 1998, a pre-hearing conference was held at which time Mr. Scott Shearer presented reasons for the requested relief and additional evidence including correspondence between Petitioner and the Department of Revenue, Pennsylvania Code sections, and schedules of the requested relief for the 1993, 1994 and 1995 tax years.

Petitioner reported taxable gross receipts of [redacted] computed on the accrual basis of accounting. A worksheet schedule has been submitted showing the exclusion of accounts receivable at December 31, 1993, from the reported taxable gross receipts, resulting in cash basis gross receipts of [redacted] of a cash basis for the 1993 tax year. The 1994 and 1994 tax years have been adjusted by adding account receivables at the beginning of the tax year to the reported taxable gross receipts before subtracting ending gross receipts.

Petitioner avers late payment charges in the amount of [redacted], customer charges of [redacted] standby fixed charges of [redacted] and standby demand charges of [redacted] are not gross receipts from the sale of electricity within the scope of section 1101(b) of the Tax Reform Code and, therefore, requests resettlement to exclude such receipts from taxable gross receipts. A copy of the a schedule headed "GS/GM – General Service Small and Medium" effective October 31, 1996, has been submitted showing customer charges, capacity charges for demand, and energy charges.

A copy of 52 Pa. Code § 57.34 which distinguishes purchases of capacity from the purchase of electricity has been submitted. Petitioner contends that standby demand charges represent the purchase of capacity rather than electricity and, therefore, gross receipts from such purchases are not within the scope of section 1101(b) of the Tax Reform Code. Petitioner also asserts that a prior Board decision granted relief on standby charges.

On June 29, 1998, a written request was made for the rate structure tariffs for the 1993 , 1994 and 1995 tax years, as well as invoices for standby fixed charges levied solely for the availability of energy during months when no energy was accessed by the customer. This Board received the requested evidence on July 7, 1998.

Petitioner states, "A duplicate bill for a customer who is charged only for a standby fixed demand charge, and did not utilize any energy for that same period." The invoice shows "Capacity (Demand) Charges" of $974.00 based on 200 kilowatt hours and "Energy Charges" of $151.97 based on 49.5 kilowatt hours.

Petitioner's petitions numbered 9807697, 9807699, and 9807702 have been consolidated before the Board for argument purposes.

Statement of Law

Every electric light company, waterpower company and hydro-electric company now or hereafter incorporated or organized by or under any law of this Commonwealth, or now or hereafter organized or incorporated by any other state or by the United States or any foreign government and doing business in this Commonwealth, and every limited partnership, association, joint-stock association, copartnership, person or persons, engaged in electric light and power business, waterpower business and hydro-electric business in this Commonwealth, shall pay to the State Treasurer, through the Department of Revenue, a tax of forty-four mills upon each dollar of the gross receipts of the corporation, company or association, limited partnership, joint-stock association, copartnership, person or persons, received from:

> (1) the sales of electric energy within this State, except gross receipts derived from the sales for resale of electric energy to persons, partnerships, associations, corporations or political subdivisions subject to the tax imposed by this subsection upon gross receipts derived from such resale; and
>
> (2) the sales of electric energy produced in Pennsylvania and made outside of Pennsylvania in a state that has taken action since December 21, 1977 which results in higher costs for electric energy produced in that state and sold in Pennsylvania unless the action that was taken after December 21, 1977 is rescinded according to the following apportionment formula: except for gross receipts derived from sales under clause (1), the gross receipts from all sales of electricity of the producer shall be apportioned to the Commonwealth of Pennsylvania by the ratio of the producer's operating and maintenance expenses in Pennsylvania and depreciation attributable to property in Pennsylvania to the producer's total operating and maintenance expenses and depreciation.

72 P.S. §8101(b).

The Pennsylvania Commonwealth Court has stated that the question of how to assess late payments is essentially a rate structure question. Kornafel v. Pennsylvania Public Utility Commission, 114 Pa. Commw. 212, 538 A.2d 146 (1988).

In Pennsylvania Power & Light Company v. Commonwealth, the court held that gross receipts from the charges for the late payment of monthly bills are taxable under section 1101(b) of the Tax Reform Code. 668 A.2d 620 (1995). The court stated, "The additional sum which PP & L charges to and collects from its customers who do not pay their monthly bills in a timely manner is levied upon the price for which electric energy has been sold to PP & L customers. The costs which are incurred by PP & L when customers do not pay their bills in a timely manner and which are recouped by PP & L through the imposition of late charges result directly from PP & L's sales of electric energy."

There is no prohibition which prevents the Board of Finance and Revenue from adopting a new position with respect to a particular issue, where warranted by circumstances, after further thought and reflection on the issue. Pennsylvania Power & Light Company v. Commonwealth, 668 A.2d 620 (1995).

Conclusion

Petitioner's gross receipts shall be resettled.

The Tax Reform Code imposed a tax on gross receipts "received" from the sale of electricity. 72 P. S. §8101(b). The cash basis of accounting reflects gross receipts received, while the accrual basis reflects gross receipts earned whether received or not. As Petitioner reported taxable gross receipts on an accrual basis, resettlement shall be made to reflect the cash basis. As accounts receivable at December 31, 1992, were included in taxable gross receipts for the 1992 tax year, the 1993 taxable gross receipts of $[redacted] shall be computed as the resettled taxable gross receipts of $[redacted] ess accounts receivable at December 31, 1993, of $[redacted]

The question of how to assess late payments is essentially a rate structure question. Kornafel v. Pennsylvania Public Utility Commission, 114 Pa. Commw. 212, 538 A.2d 146 (1988). The customer charges, late payment charges and standby demand charges are shown in the rate tariff effective October 31, 1996. As such charges are only levied upon the price for which electric energy has been sold to customers, the charges are properly included in taxable gross receipts. See, PP & L v. Comm., supra.

Petitioner alleges that standby fixed charges are levied as a charge for the availability to purchase electricity from Petitioner as an alternative energy source and is incurred regardless of whether energy is actually provided to the customer. Petitioner's standby fixed charges for the 1993 tax year totaled $[redacted], or nearly 10% of reported gross receipts from the sale of electricity. A copy of the 1993 tariff has been submitted which shows includes a "Capacity Charge" based on kilowatts of demand. The invoice submitted by Petitioner shows 200 kilowatts at "$4.87 per KW of Demand," as well an energy charge for 49.5 kilowatts. Based on this evidence, standby fixed charges shall be included in the resettled taxable gross receipts since they are included in the rate tariff and charged to the customer based on kilowatts of usage.

In light of the foregoing, including the guidance and reasoning of the intervening PP&L decision, this Board no longer finds its prior decision to grant relief on standby charges persuasive. See, Id.

Accordingly, Petitioner's request for relief shall be partially granted.

* * * * *

Duquesne Light Co.
BF&R Docket No. 9807697

ORDER

This account shall be resettled and taxed as follows:

TAXABLE GROSS RECEIPTS [redacted]

BY ORDER OF THE BOARD OF FINANCE AND REVENUE

State Treasurer, Chairman
Auditor General
Secretary of Revenue
Attorney General
General Counsel
Secretary of the Commonwealth

BOARD OF FINANCE AND REVENUE TREASURY DEPARTMENT PENNSYLVANIA

ATTEST: Jeffrey F. Smith
Secretary, Board of Finance and Revenue

jlh

CAL. NO. 193

Duquesne Light Company
411 Seventh Avenue
P.O. Box 1930
Pittsburgh, PA 15230-1930

ACCOUNT NUMBER 4000004404002 H

MAKE CHECK PAYABLE TO DUQUESNE LIGHT
1,152.40

PLEASE RETURN THIS PORTION WITH YOUR PAYMENT

[redacted]
PITTSBURGH, PA 15217

40000044040020 000001166244 000001152407 000001152407

4000004404002 [redacted]
PITTSBURGH, PA 15217
BILLING MONTHS 1.00
DATE PREPARED JUN 30,1998
FIRM BACK-UP POWER 426-407-000

KILOWATT HOUR METER READING DATA

681285815	230	05140615	0000	0000	3200		0
680886882	230	05140615	0000	0000	3200		0
						4950	
							4950

REACTIVE COMPONENT METER READING DATA AND POWER FACTOR MULTIPLIER CALCULATIONS

(REVAR	- KVAR	) ÷ 0.0 = 0.0 =	POWER FACTOR MULTIPLIER
(REVAR	- KVAR	) ÷ 0.0 = 0.0 =	POWER FACTOR MULTIPLIER
(REVAR	- KVAR	) ÷ 0.0 = 0.0 =	POWER FACTOR MULTIPLIER
(REVAR	- KVAR	) ÷ 0.0 = 0.0 =	POWER FACTOR MULTIPLIER
(REVAR	- KVAR	) ÷ 0.0 = 0.0 =	POWER FACTOR MULTIPLIER

DEMAND (CAPACITY) DATA

VOLTAGE	ON PEAK	OFF PEAK	[redacted]	2000

CUSTOMER CHARGE

CALCULATION OF CAPACITY (DEMAND) CHARGES

280.0	04.87	PER KW OF DEMAND	97400
280.0			974.00

CALCULATION OF UNTRANSFORMED SERVICE CREDIT

CALCULATION OF ENERGY CHARGES

4950	3.07	CENTS PER KWH	15197
4950			151.97

CUSTOMER, CAPACITY AND ENERGY CHARGES ▶	1,125.97
PENNSYLVANIA TAX ADJUSTMENT 0.0841CR PERCENT	.95CR
ENERGY COST RATE - .3628CR CENTS PER KWHR	17.96CR
CURRENT BILLING PERIOD AMOUNT	1,107.06
AMOUNT OF LAST BILL	3,626.94
LATE PAYMENT CHARGE ON BILL DUE JUNE 03	45.34
PAYMENT - JUNE 12	3,626.94CR
ACCOUNT BALANCE AT TIME OF BILLING	45.34
PRESENT ACCOUNT BALANCE	1,152.40

DUPLICATE BILL.

0 CONTRACT DEMAND

		BILL DOLLARS - 0		
675.28	1.25	4000004404002	JUL 06 '98	1,152.40

Duquesne Light Company 411 Seventh Avenue • P.O. Box 1930 • Pittsburgh, PA 15230-1930 [redacted]

Exhibit "F"

IN THE SUPREME COURT OF PENNSYLVANIA

No. 21 M.D. Appeal Docket 1996

PENNSYLVANIA POWER & LIGHT COMPANY,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee

BRIEF FOR APPELLEE

Appeal of Pennsylvania Power & Light Company from the January 29, 1996, Order of the Commonwealth Court following filing of exceptions in the case docketed at No. 111 F&R 1991, which affirmed a decision of the Board of Finance and Revenue dated February 20, 1991 (No. R-13,514)

THOMAS W. CORBETT, JR.
ATTORNEY GENERAL

BY: Matthew W. Tomalis
Deputy Attorney General
Atty. ID #37453
OFFICE OF ATTORNEY GENERAL
TAX LITIGATION SECTION
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Harrisburg, PA 17120
(717) 783-1460

Exhibit "G"

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

COUNTERSTATEMENT OF THE CASE

Petitioner, Pennsylvania Power & Light Company ("PP&L"), is a public utility company subject to the Pennsylvania utilities gross receipts tax, at 72 P.S. §8101, et seq. (Stipulation of Facts ["S/F"] ¶¶2, 4, Reproduced Record ["RR"] 6a-7a) PP&L is engaged in the business of furnishing electric utility service to customers, including the production, distribution and sale of electricity. (S/F ¶5, RR 7a)

For the tax year in question, 1987, PP&L reported taxable gross receipts of $1,847,580,681, which included $6,024,321 of residential and nonresidential late charges. (S/F ¶¶9, 8, 30, RR 7a, 12a) The Commonwealth accepted that return as filed. (S/F ¶¶10, 11, RR 7a, 8a)

Throughout the administrative appeals process, PP&L contended that those residential and nonresidential late charges should be excluded from its taxable gross receipts for purposes of the gross receipts tax. (S/F ¶¶13-21, RR 8a-10a) In an order mailed on February 22, 1991, the Board of Finance and Revenue denied PP&L's petition for review. (S/F ¶22, RR 10a)

At issue in this case is whether the $6,024,321 of residential and nonresidential late charges constitute "gross receipts . . . received from . . . the sales of electricity . . .," so as to be subject to the Pennsylvania utilities gross receipts tax. 72 P.S. §8101(b).

Of the total amount in dispute, $3,408,432 consists of residential late charges imposed by PP&L on residential customers at a rate of 1.25 percent monthly on the overdue and unpaid balances of residential bills. (S/F ¶31, RR 12a-13a) The remaining $2,615,889 of the total amount in dispute consists of nonresidential late charges imposed by PP&L on nonresidential customers as the difference between the "net rate" and the "gross rate," as those terms are used in the "Payment" sections of the nonresidential rate schedules included in PP&L's tariff. (S/F ¶32, RR 13a) Both of these amounts were reported to the Federal Energy Regulatory Commission in Account 450, labelled "Forfeited discounts" (S/F ¶¶31, 32, RR 12a-13a), and were included in PP&L's federal income tax return as "Gross receipts or sales" and "Electric Revenues." (S/F ¶52, RR 18a-19a)

The complete factual record of this case was stipulated by the parties.

This case was argued before the Commonwealth Court en banc on September 13, 1995. On December 14, 1995, the Commonwealth Court issued a decision in favor of the Commonwealth, affirming the decision of the Board of Finance and Revenue, with a dissent by President Judge Colins and Judge Pellegrini. Pennsylvania Power & Light Company v. Commonwealth, 668 A.2d 620 (Pa. Cmwlth. 1995). PP&L timely filed exceptions to that decision, and those exceptions were overruled by the Commonwealth Court on January 26, 1996. PP&L timely filed an appeal with this court on February 22, 1996.

SUMMARY OF THE ARGUMENT

PP&L has asserted that the receipts in question are not receipts from the sales of electric energy, and has based that assertion primarily on how those receipts are reported to the Federal Energy Regulatory Commission (FERC). PP&L's interpretation of the FERC characterization of the gross receipts in question is, however, neither relevant to the instant inquiry nor supported by the existing case law.

The Commonwealth, on the other hand, has demonstrated that the receipts in question are no different in substance from what PP&L has conceded to be taxable gross receipts, in that both groups of receipts constitute components of cash working capital intended to account for a lag between the time of a utility's rendering of its service and the utility's receipt of payment for that service. As such, the receipts in question are "received from . . . the sales of electric energy," and should be considered taxable.

ARGUMENT

Section 1101(b) of the Tax Reform Code of 1971, Act of March 4, 1971, P.L. 6, as amended ("Code" or "statute"), 72 P.S. §8101(b), requires electric utilities, among others, to pay "a tax . . . upon each dollar of the gross receipts of the corporation . . . received from . . . (1) the sales of electric energy within the State . . . " PP&L is contending that certain of its gross receipts, that were reported by PP&L as taxable and considered by the Commonwealth as taxable, were not gross receipts received from the sales of electric energy, and so, should not be considered taxable.

The receipts in question in this case consist of residential late charges of $3,408,432, and nonresidential late charges of $2,615,889, for a total of $6,024,321.[1] (S/F ¶¶31, 32, 30, RR 12a-13a) The residential late charges were imposed by PP&L on residential customers at a rate of 1.25 percent monthly on the overdue and unpaid balances of their bills. (S/F ¶31, RR 12a) The nonresidential late charges were imposed by PP&L on nonresidential customers as the difference between the "net rate" and the "gross

[1]Throughout its brief, PP&L refers to the gross receipts in question as "late payment charges." It should be noted, however, that the parties stipulated to terms for the receipts in question for purposes of the stipulation of facts, calling them "residential late charges" and "nonresidential late charges" (S/F ¶¶ 3, 32, RR 12a, 13a). The parties also stipulated that the use of those terms is to have no legal impact. (S/F ¶33, RR 14a) Throughout this brief, the two items will also be referred to collectively as "the gross receipts in question."

rate," as those terms are employed in the rate schedules included in PP&L's tariff. (S/F ¶32, RR 13a)

PP&L's primary basis for asserting that these receipts are not taxable as "gross receipts . . . received from . . . the sales of electric energy" is that accounting standards of the Federal Energy Regulatory Commission (FERC) - and, piggybacked thereon, the Public Utility Commission (PUC) - include such receipts in an account that is itself included in a category of accounts other than one labelled "Sales of Electricity." PP&L also asserts that strict construction of the statute requires that the receipts in question be excluded from the tax.

Before addressing those arguments, however, it will be demonstrated that, based on the substance of what the gross receipts in question are, those gross receipts are "received from . . . the sales of electric energy," as required by the statute to be taxable.

I. THE GROSS RECEIPTS IN QUESTION ARE RECEIVED FROM THE SALES OF ELECTRIC ENERGY.

In simplest terms, the gross receipts in question are taxable as having been "received from . . . the sales of electric energy" because they are simply more of the same of what is already unquestionably taxable. That is, the gross receipts in question are no different in kind from gross receipts PP&L itself considers taxable.

A. There is no reason to treat the gross receipts in question any differently than the other gross receipts derived from PP&L's tariff rates.

The rates charged by PP&L to its intrastate, retail customers are determined pursuant to tariffs filed with and approved by the PUC. (S/F ¶29, RR 12a) As both the residential late charges and the nonresidential late charges at issue in this case are authorized by PP&L's tariff (S/F ¶¶31, 32, RR 12a-13a), it is clear that these charges are rates.[2] PP&L has not contested the taxability of any of the gross receipts derived from rates authorized by its tariff other than the receipts derived from the residential late charges and the nonresidential late charges.[3] It is clear, however, that those receipts are derived from the same rates as the receipts PP&L has conceded to be taxable.

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[2]Other states' courts and at least two federal courts have determined that charges imposed by public utilities for the late payment of bills constitute rates, as opposed to interest. See, e.g., Tennyson v. Gas Service Company, 506 F.2d 1135 (10th Cir. 1974); Ferguson v. Electric Power Board of Chattanooga, Tenn., 378 F.Supp. 787 (E.D. Tenn. 1974); Appalachian Electric Power Co. v. Koontz, 138 W.Va. 84, 76 S.E.2d 863 (1953); City of Dearborn v. Michigan Consol. Gas Co., 297 Mich. 388, 297 N.W. 534 (1941); and State ex rel. Ashcroft v. Public Service Commission, 674 S.W.2d 660 (W.D. Mo. 1984).

[3]The $1,818,817,066 shown as "TOTAL Sales to Ultimate Consumers" (Exhibit 20-5, RR 206a; emphasis in original) and as the total sales derived from the different rate schedules (Exhibit 20-8, RR 209a), corresponds to the $1,809,291,999 designated on PP&L's 1987 Utilities Gross Receipts Tax Report as "From the sales of electric energy not including sales for resale," after adjusting for uncollectible accounts. (PP&L brief, pp. 8-9; citations omitted.) The total gross receipts in question, $6,024,321, is not included in that amount. (S/F ¶¶6, 8, RR 7a)

That the receipts in question are simply more of the same as receipts conceded to be taxable is best illustrated by an inspection of how the nonresidential late charges - which account for $2,615,889, or 43 percent, of the $6,024,321 of gross receipts in question - are calculated.

The typical nonresidential rate schedule included in PP&L's tariff provides for a "net monthly rate," consisting of a series of dollar amounts to be charged for each kilowatt of electricity being supplied (with those charges being based on the volume of usage), as well as the following provision, designated "PAYMENT":

> The above net rate applies when bills are paid on or before the due date specified on the bill, which is not less than 15 days from the date bill is mailed. When not so paid the gross rate applies which is the above net rate plus 5% on the first $200.00 of the then unpaid balance of the monthly bill and 2% on the remainder thereof.[4]

The nonresidential late charges at issue in this case consist of the difference between the "net rate" and the "gross rate" referred to in this provision. PP&L believes that gross receipts received from payments at the net rate are taxable as having been "received from . . . the sales of electric energy," while gross receipts received from payments at the gross rate, in excess of the net rate, are not taxable as not having been "received from . . . the sales of electric energy." The Commonwealth believes that

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[4]While PP&L's tariff includes over a dozen nonresidential rate schedules that do vary somewhat, the language quoted above, and the reference to the "net monthly rate," are typical of what appears on each bill. For example, see Rate Schedule GS-3, at RR 130a. (See also S/F ¶32, RR 13a; emphasis in original.)

there is no difference in the substance of the receipts, that, at either the net rate or the gross rate, the receipts are "received from . . . the sales of electric energy."

The residential late charges are calculated similarly, although without an explicit reference to a "gross rate." Each of the three residential rate schedules included in PP&L's tariff includes a provision for a "net monthly rate," which, as with the nonresidential rate schedules, provides for dollar amounts to be charged for each kilowatt of electricity being supplied, with some variation based on volume of usage or the time-of-day of use. (Exhibit 13; RR 116a, 118a, 122a) Each residential rate schedule also contains the following "PAYMENT" provision:

> The above net rate applies when bills are paid on or before the due date specified on the bill, which is not less than 20 days from the date bill is mailed. After the due date, the Company may initiate collection procedures and a late payment charge of 1.25% per month on the then unpaid and overdue balance is applicable.

(Exhibit 13, RR 117a, 118a, 122a; emphasis in original.) As with the nonresidential rate schedules, the residential rate schedules simply employ a net rate for timely payments and another rate for late payments. Under either rate, "the sale[] of electric energy" is what is being paid for.

In a case involving the former federal excise tax on the sale of electric energy, a federal district court determined that additional amounts charged to late-paying customers constitute payment for the sales of electricity. Iowa-Illinois Gas & Electric Co. v. Birmingham, 66 F.Supp. 441 (S.D. Iowa 1946). The federal

tax involved in that case was "imposed upon electrical energy sold . . . ," and a regulation in effect at that time provided that "additional amount[s] . . . added for [a consumer's] failure to make payment within a prescribed period" would be included in determining the price for which electrical energy was sold. 66 F.Supp at 442. The plaintiff utility in that case was protesting the inclusion of those additional amounts in the tax base. In dismissing the plaintiff's claim, the court made the following finding of fact:

> The increased amount required to be paid for electrical energy assessed and collected by the plaintiff for failure to pay its monthly bills promptly is a part of the price of electrical energy sold and not a revenue from a penalty which is outside of, and in addition to, the price of the energy.

66 F.Supp. at 443.

As this decision indicates, gross receipts received from higher rates imposed on late-paying customers, such as the residential and nonresidential late charges involved in this case, constitute payment for the electricity sold as much as do gross receipts derived from rates applicable to timely payments.

B. The residential and non-residential late charges in question are a factor in determining cash working capital, a component of the rate base.

The PUC is charged with establishing rates public utilities may charge consumers for the utilities' services. (S/F ¶29, RR 12a) In ascertaining the amounts that a public utility may charge

its customers, the PUC permits a public utility to collect sufficient revenue to recover operating and maintenance expense costs, taxes, allowance for depreciation and a fair rate of return to investors on the "rate base." (S/F ¶49, RR 17a-18a) The rate base consists of, among other things, utility plant less accumulated depreciation, accumulated deferred income taxes, materials and supplies, prepayments, fuel inventory, and working capital, including a consideration of cash working capital. Ibid.

This court has described cash working capital as follows:

> Cash working capital ordinarily is the amount of cash required to operate a utility during the interim between the rendition of service and the receipt of payment therefor. . . . The determination of the dollar amount of cash working capital is based on the time lag between the service rendered and the payment therefor by the consumer.

City of Pittsburgh v. Pennsylvania Public Utility Commission, 370 Pa. 305, 88 A.2d 59, 61 (1952).

To evaluate a cash working capital claim, the PUC uses a traditional lead-lag method, which computes the overall timing difference between a utility's incurrence of expenses in the rendition of service and the receipt of revenues in payment for the service; by netting lags and leads for various operating expenses in relation to revenue collection, the PUC determines whether revenues lead or lag expenses. (S/F ¶50, RR 18a)

In City of Pittsburgh, supra, this court affirmed the state superior court's reversal of the PUC's allowance for cash working capital, which had been based on the PUC's finding of a 24-day lag between the time service was rendered and the time that payment for

that service was made, with that 24-day lag being the weighted average of intervals including an average lag of 11 1/2 days between the time service was rendered and the time payment was received for local exchange service, a lag of 41 1/2 days for toll service, and a lag of 24 days for coin box collections. 88 A.2d at 62. The court determined that the PUC "ignored the counteracting effect of the lag enjoyed by the Company in the payment of its obligations as well as the availability for cash working capital purposes of the amount collected and allocated for income tax purposes." 88 A.2d at 63. Thus, in City of Pittsburgh, the lag in the utility's payment of its own bills was viewed as an offset to the lag in payments received by the utility.

The regulation at 52 Pa. Code §56.21, included in a chapter entitled "Standards and Billing Practices for Residential Utility Service," states, "The due date for payment of a bill may be no less than 20 days from the date of transmittal, that is, the date of mailing . . . " This requirement is reflected in the "PAYMENT" sections of the residential rate schedules included in PP&L's tariff, an example of which is quoted above (supra, p. 8). The nonresidential rate schedules, an example of which is also quoted above (supra, p. 7), also provide for such grace periods, usually of 15 or 20 days. These grace periods represent an obvious example of a lag in revenues to be considered in a determination of cash working capital. It stands to reason that, if the grace periods were extended by regulation or tariff, the additional lag would be considered in determining the cash working capital component of the

rate base, presumably to result in an increase in the cash working capital allowance.

The residential and nonresidential late charges at issue in this case serve exactly the same purpose as would an adjustment to cash working capital caused by an extension of the grace periods: to offset the costs attributable to the delayed payment. In fact, the PUC has determined that the residential and nonresidential late charges and the allowance of lag days serve a similar function, the recovery of carrying costs.

In Pa. PUC v. UGI Corporation, 55 Pa.P.U.C. 155 (1984), which involved a gas company's petition for a rate increase, the PUC reduced the lag days allowed in calculating the company's cash working capital needs following a determination that the allowance of lag days, combined with collection costs included in operating and maintenance expenses and late payment charges, led to the double recovery of the carrying costs. The Commission noted that, in a previous order, it had determined that the imposition of a late payment charge was for the purpose of covering carrying and collection costs caused by overdue accounts, and stated:

> Clearly, we considered two types of cost that a utility incurs when a utility bill is not paid by the due date. As we intended therein, and shall so state now, carrying costs are costs incurred by the utility in providing service while payment is overdue. Therefore, we agree with the [administrative law judge] that to provide investors with a return for outstanding payment days and still charge the customer involved directly would result in a double recovery for the Company.

55 Pa.P.U.C. at 166. (Citation omitted.)

Thus, the PUC determined that the combination of an allowance for the outstanding payment days - the lag - and a direct charge on the customer - the late payment charge - resulted in a double recovery of the same costs for the utility. This case illustrates that the residential and nonresidential late charges at issue in this case are merely another component factored into the rate base as part of the lead-lag analysis employed in calculating a cash working capital allowance.

The Commonwealth concurs in PP&L's citation of the Commonwealth Court's ratification of the statement by the administrative law judge in Kornafel v. Pa. P.U.C., 538 A.2d 146, 147 (Pa. Cmwlth. 1988), that "late charges are a form of administrative discipline for payment and, if reasonable in measure, are designed to compensate derivative costs . . . and thus are reasonably imposed on the late-payers." The "derivative costs" mentioned by the court would be the carrying and collection costs discussed in the PUC's UGI Corp. decision quoted above.

As discussed above, however, those costs are no different than the costs attendant to sales of electricity for which payment is received on time: The allowance of the grace period between billing and payment (not to mention the period between the rendition of service and billing) incurs carrying costs, and even bills timely paid incur collection costs, for such activities as meter-reading, record-keeping and billing.[5] Thus, the gross

[5]PP&L's FERC report includes "Customer Accounts Expenses" of $33,992,925, with that account including sub-accounts entitled "Supervision," "Meter Reading Expenses," and "Customer Records and

receipts that PP&L has conceded to be taxable clearly include receipts that are attributable to the recovery of the carrying and collection costs attributable to bills timely paid. There is no reason to treat receipts attributable to the recovery of the same costs attributable to overdue bills differently.

As noted above (supra, p. 6, n. 1), federal courts and other states' courts have determined that charges imposed by public utilities for the late payment of bills constitute rates, and not interest. In doing so, those courts have described the purpose of such charges in terms similar to those employed by the courts of the Commonwealth and the PUC, as just noted. For example, in State ex rel. Ashcroft v. Public Service Commission, supra, the court described the use of late payment charges as follows, in pertinent part:

> The practice in utility rate making of accounting for the expense of delinquent accounts is common and assumes a variety of forms. In some instances it may involve a discount for prompt payment, in others, a gross-net rate differential or, as here, it may take the form of a penalty for tardy payment. In whatever form, however, the charge is attributable to direct costs incurred by the utility on those accounts of customers who fail to make timely payment of their bills. . . .
>
> It necessarily follows that expenses imposed on the utility by customers who pay late will be reflected in the operating costs of the company. As the court observed in State ex rel. Utilities Commission v. North Carolina Consumers Council, Inc., 18 N.C.App. 717, 198 S.E.2d 98 (1973), the cost of

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Collection Expenses," among others. (S/F Exhibit 20-14, RR 215a)

> collecting past due accounts is an operating expense which has an influence on the fair rate of return a company should earn and, in turn, is a factor taken into account in setting rates.

674 S.W.2d at 662. Therefore, based upon the above citations to decisions of the Pennsylvania courts, the PUC, federal courts and other states' courts, it is clear that the residential and nonresidential charges in question in this case constitute rates, as opposed to interest or any other type of receipt.

Further, while rates could be considered charges for any type of public service rendered by PP&L, the facts of the instant case indicate that the rates in question, the residential and nonresidential late charges, are charges for the sale of electric energy. As has already been demonstrated, the residential and nonresidential late charges are authorized by PP&L's tariff and the rate schedules included therein, and are identical in substance and purpose to the other receipts derived from those very same rate schedules, which both the FERC and PP&L consider to be "gross receipts . . . received from . . . the sales of electric energy." And, PP&L does not employ the gross receipts in question any differently than it employs the gross receipts conceded to be taxable; all receipts of PP&L are commingled unless otherwise required by law, with no particular receipts being dedicated to any specific use. (S/F ¶51, RR 18a)

C. PP&L's attacks on the Commonwealth Court's conclusions are not supported by the evidence.

The Commonwealth Court summarized its determination that the gross receipts in question are "received from . . . the sales of electric energy" as follows:

> The additional sum which PP&L charges to and collects from its customers who do not pay their monthly bills in a timely manner is levied upon the price for which electric energy has been sold to PP&L customers. The costs which are incurred by PP&L when customers do not pay their bills in a timely manner and which are recouped by PP&L through the imposition of late charges result directly from PP&L's sales of electric energy to its customers. As such, residential and nonresidential late charges are a part of the price of electric energy sold. We believe that the gross receipts received from the higher rates imposed on late-paying customers constitute payment for the electricity sold as much as do gross receipts derived from rates applicable to timely payments.

PP&L, 668 A.2d at 624. In its brief to this court, PP&L has attacked this conclusion by the Commonwealth Court on three grounds.

First, PP&L contends that the gross receipts in question do not result directly from the sales of electric energy, that, "The only obligation that a purchaser has upon purchasing electricity is to pay the tariffed rates established for that electricity." (PP&L brief, p. 24) As has been demonstrated above, however, the residential and nonresidential late charges in question are tariffed rates. (Supra, pp. 6-9) And, as the Commonwealth Court stated in the above excerpt, the higher rates represented by those residential and nonresidential late charges recoup the costs

incurred by PP&L when bills are not paid in a timely manner, just as the lower rates are designed to compensate PP&L for the same types of costs that are incurred when bills are timely paid.

Second, PP&L contends that the residential and nonresidential late charges cannot be part of the price of electric energy sold, as the Commonwealth Court concluded, "when there is no way to determine whether or not such late charges will be imposed or what the specific late charges might be for a particular sale of electric energy." (PP&L brief, p. 24) This assertion is contrary to the record, for, as demonstrated above (supra, pp. 7-8), the rate schedules in PP&L's tariff indicate that, in the case of nonresidential sales, when the bill is paid by a certain date, the price of the electricity is the "net rate" contained in the schedule, and when the bill is paid after that certain date, the price is the "gross rate," which produces the gross receipts in question, in the same schedule. Thus, the determination of the price to be paid for nonresidential sales of electricity by PP&L, as between the net rate and the gross rate, is based upon the date the bill is paid, regardless of whether the bill is paid by the due date or not. Therefore, a determination that electricity is to be sold at the gross rate, which includes the nonresidential late charges in question, is set at exactly the same time and is based on exactly the same criterion as is a determination that electricity is to be sold at the net rate - that is, the date the bill is paid. Similarly, a determination of which residential rate applies, as between the net rate and the higher rate that includes

the residential late charge, is also based upon the date of payment of the bill. (Supra, pp. 7-8)

Third, PP&L contends that "the late charges do not constitute part of the rate paid for the electric energy." (PP&L brief, p. 25) Beyond being a rehash of the first two contentions noted above, that the residential and nonresidential late charges are not directly related to the sales of electric energy and are not part of the price of electric energy sold, this third contention contradicts holdings of both federal and state courts. As noted above, in Iowa-Illinois Gas & Electric, supra, the court specifically decided that an additional amount charged to a late-paying customer is "a part of the price of electrical energy sold," 66 F.Supp. at 443, and other states' courts and at least two federal courts have determined that charges imposed by public utilities for the late payment of bills constitute rates, (supra, p. 6, n.1).

Therefore, PP&L's objections to the Commonwealth Court's determination that the gross receipts in question are "received from . . . the sales of electric energy" should be dismissed.

D. While asserting that the gross receipts in question are not from the sales of electric energy, PP&L is not clear about what those receipts are from.

Finally, in this regard, it should be noted that, while asserting that the gross receipts in question are not "received from . . . the sales of electric energy," PP&L is far from clear

about what those receipts are received from, if not from the sales of electric energy.

While PP&L asserts that the Internal Revenue Service's determination that a charge assessed by a public utility for the late payment of bills is deductible as interest under Section 163 of the Internal Revenue Code of 1954 supports PP&L's position in this matter, PP&L never actually adopts the position in its brief that the receipts in question constitute interest. (PP&L brief, p. 35) And, PP&L did not report the gross receipts in question as "interest" income on its federal income tax return; instead, those receipts were included within "Gross receipts and sales." (S/F ¶52, RR 18a)

PP&L has, however, apparently re-revised its position as to whether the gross receipts in question constitute finance charges. While PP&L characterized the gross receipts in question as "finance charges" in its petitions for review to the administrative boards and to the Commonwealth Court,[6] PP&L did not follow through with that characterization in its brief to the Commonwealth Court (See: PP&L brief to the Commonwealth Court). Now, apparently in reaction to the dissent to the Commonwealth Court's decision, PP&L characterizes the gross receipts in question as "finance charges" in its brief to this court. (PP&L brief, pp. 23-24)

The dissenting opinion states, in pertinent part:

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[6]S/F ¶¶13, 21, and corresponding Exhibits 3 and 9, RR 8a, 10a, 31A and 52a, and the petition for review filed with the Commonwealth Court stipulated into the record, S/F ¶24, RR 10a.

> If the Utility Gross Receipts Tax can be imposed on finance charges for electric bills because those charges are directly related to the sale of electricity, then that reasoning leads inescapably to the conclusion that the sales tax must be imposed on finance charges imposed on the sale of goods, because those finance charges are directly related to the sale of the goods subject to the sales tax.

PP&L, 668 A.2d at 626. This opinion is mistaken on two counts.

First, the dissent's premise, that the majority determined that the gross receipts in question are taxable because they are "directly related to the sales of electricity" (Ibid.), is erroneous. The majority determined that the gross receipts in question "result directly from PP&L's sales of electricity to its customers," and that "residential and nonresidential late charges are part of the price of electric energy sold." 668 A.2d at 624. (Emphasis added.) Thus, the majority did not decide that the residential and nonresidential late charges are merely "related" to the sale of electricity, as the dissent asserts, but rather, the majority determined that those charges result from those sales and are part of the price of electric energy sold, which makes them taxable under the statute. In the sales tax context, anything that is part of the purchase price, as defined in the Code and regulations, of the item sold would be subject to the tax, while, items only "related" to that sale would not be subject to the tax.

Second, even disregarding the mistaken premise of the dissenting opinion, the dissent's conclusion that "sales tax must be imposed on finance charges imposed on the sale of goods," 668 A.2d at 626 (Emphasis added.), is wrong. In fact, the Department

of Revenue could assess sales tax on interest or finance charges, but it has chosen not to do so.

The sales tax is imposed on sales at retail at a rate of "six percent of the purchase price." 72 P.S. §7202(a). "Purchase price" is defined in the Code as follows, in pertinent part:

> The total value of anything paid or delivered, or promised to be paid or delivered, whether it be money or otherwise, in complete performance of a sale at retail or purchase at retail, as herein defined, without any deduction on account of the value of the property sold, cost or value of transportation, cost or value of labor or service, interest or discount paid or allowed after the sale is consummated . . .

72 P.S. §7201(g). (Emphasis added.) Thus, the Code provides the authority for including interest - and, presumably, finance charges - in the taxable purchase price.

The Department of Revenue, however, has promulgated a regulation that specifically excludes "Reasonable interest or finance amounts charged to the purchaser" from the taxable purchase price. 61 Pa. Code §33.2(b)(4).

Therefore, while the dissent concludes that, if residential and nonresidential late charges are subject to gross receipts tax, finance charges imposed on the sales of goods "must" be subject to sales tax, it is clear that the two matters have no such correlation. The residential and nonresidential late charges are subject to gross receipts tax because they are part of the price for which electricity is sold, while finance charges imposed on the sales of goods are specifically excluded by regulation from the purchase price that is subject to sales tax.

Based on these considerations, it must be concluded that the Commonwealth Court was correct in concluding that the residential and nonresidential late charges in question are "received from . . . the sales of electric energy."

II. PP&L'S RELIANCE ON ITS INTERPRETATION OF THE FERC CHARACTERIZATION OF THE GROSS RECEIPTS IN QUESTION IS MISPLACED.

As noted above, the primary basis for PP&L's position that the gross receipts in question are not "received from . . . the sales of electric energy" is that the FERC's system of accounts includes such receipts in its Account 450, which is not included within the group of accounts that falls under the heading of "Sales of Electricity." As depicted by the excerpts from the FERC regulations in effect in 1987 that are included in the record, the accounts comprising the FERC "Operating Revenue Chart of Accounts" are divided into two categories, "Sales of Electricity" and "Other Operating Revenues"; Account 450, which includes the gross receipts in question, is listed in the latter category. (S/F Exhibit 15, RR 178a)

While it has already been demonstrated that a look at the substance of what the gross receipts in question actually are reveals that they are "received from . . . the sales of electric energy," it appears that even PP&L's reliance on the FERC characterization of these receipts as the basis for its form-over-substance argument is misplaced, on three counts. First, the phrase "Sales of Electricity" is merely a heading, without any

demonstrated substance or relevance. Second, it appears that the federal courts do not support PP&L's interpretation of the FERC characterization. And, third, as PP&L has not demonstrated any correlation between the FERC regulations and the statute in question, the FERC characterization cannot dictate the treatment of the gross receipts in question for state tax purposes.

A. The phrase "Sales of Electricity" is merely a heading for a list of accounts and, as such, cannot control the outcome of this case.

Initially, it should be noted that the term "sales of electric energy" does not even appear anywhere in the current FERC regulations cited by PP&L in this case, as it has been replaced as the heading of a category of accounts by the term "Sales of Electricity." (S/F ¶41, Exhibit 15, RR 178a)[7] PP&L dismisses this discrepancy as being "without import" on the basis that "the account categories under each of these phrases, 'Sales of Electric Energy' and 'Sales of Electricity,' have remained essentially the same." (PP&L brief, p. 16) PP&L is asking this court to determine that the gross receipts in question were not received from "sales of electric energy" based on the FERC regulations, while at the same time asking the court to ignore the FERC's elimination of that

[7]PP&L mistakenly characterizes the accounts numbered 100.600, et seq., with the heading "Sales of Electric Energy," as "still in effect in 1987" (PP&L brief, p. 15), while the parties have stipulated that the accounts in effect in 1987 were those numbered 400, et seq., with the heading "Sales of Electricity." (S/F ¶41, Exhibit 15, RR 178a) PP&L correctly acknowledges this change in other parts of its brief. (PP&L brief, pp. 8, 16)

phrase from those same regulations in effect during the year in question.

At various points throughout its brief, PP&L describes the phrase "sales of electric energy" as having a "well defined and generally understood meaning in the public utility industry" (PP&L brief, p. 14), as being a "clearly defined term of art in the public utility industry" (Ibid., p. 15), and as having "a very clearly defined meaning in the electric utility industry" (Ibid., p. 20). There is, however, no information in the record indicating the industry's understanding of the phrase in question; presumably, PP&L wants the court to infer that understanding from the appearance of the phrase as a heading in the FERC regulations.

Further, neither of these terms, "sales of electric energy" or "sales of electricity," is actually defined in the FERC regulations; rather, the terms have been employed in the regulations only as headings. "The headings prefixed to titles, parts, articles, chapters, sections and other divisions of a statute shall not be considered to control but may be used to aid in the construction thereof." Statutory Construction Act of 1972, 1 Pa.C.S.A. §1924. Contrary to this rule of statutory construction, PP&L is asking that the disposition of this case be controlled by the heading of a category of accounts - and one that is neither defined by any relevant statute or regulation nor currently still in use.

B. PP&L's reliance upon the federal regulation's use of the phrase "Sales of Electricity" is not supported by federal case law.

Beyond the problems with PP&L's reliance upon the FERC regulation's use of the phrase "Sales of Electricity" as a heading just discussed, it appears that federal case law does not support PP&L's position.

As has already been noted, in Iowa-Illinois Gas & Electric, supra, a federal district court concluded that an increased amount required to be paid for electrical energy for the late payment of bills was part of the price for which the electrical energy was sold. In its decision, the court specifically noted the Federal Power Commission's adoption of a uniform system of accounts for public utilities that required the plaintiff in that case to "keep a separate account showing the amount of penalties it has collected which have been imposed by the utility on its customers because of the failure to pay the bills within a specified time." 66 F.Supp. at 442.

The category of "Operating Revenue Accounts" effective in 1946, which would presumably have been part of the original regulation published in 1938, included an account for "Customers' forfeited discounts and penalties" under the sub-heading of "Other Electric Revenues," as with the listing for the year in question in this case. (S/F ¶42, Exhibit 16, RR 186a-187a) Therefore, it appears that the federal district court in that case was faced with substantially the same system of accounts as is involved in the instant case, and determined that the charges attributable to late

payments constituted payment for "electrical energy sold." 66 F.Supp. at 443.

Also, as has already been noted, at least two federal courts have determined that late payment charges constitute rates, as opposed to interest. See: Tennyson v. Gas Service Company, supra, and Ferguson v. Electric Power Board, supra.

C. As PP&L has not demonstrated any correlation between the FERC regulations and the statute, the FERC regulations should not be used to interpret the statute.

Beyond the problems with the use and interpretation of the FERC regulations just discussed, it should also be noted that, while PP&L asserts that "The Uniform System of Accounts is the obvious source of the term 'sales of electric energy,'" (PP&L brief, p. 11), there is no information in the record to support that assertion. That is, there is no indication in the record that the FERC regulations were considered in the drafting of any part of the Tax Reform Code or its predecessor statutes imposing the gross receipts tax, as neither the language of the statute itself nor its available legislative history includes any reference to the FERC system of accounts.

In Tygart Resources, Inc. v. Commonwealth, 578 A.2d 86 (Pa. Cmwlth. 1990), aff'd per curiam, 530 Pa. 199, 607 A.2d 1074 (1992), a case involving the question of a taxpayer's eligibility for Pennsylvania S-corporation status, the courts refused to incorporate the Internal Revenue Code (IRC) determination of what

constitutes "royalties" into the Tax Reform Code for purposes of determining passive investment income, despite that the IRC is a tax statute that is specifically referred to in the Tax Reform Code, and that one statutory requirement for Pennsylvania S-corporation status is analogous status under the IRC. In Tygart Resources, the Commonwealth Court based its determination on this court's decision in Commonwealth v. General Refractories Co., 417 Pa. 153, 207 A.2d 833 (1965), in which the court found that the IRC definition of what constituted a dividend did apply to the Tax Reform Code for corporate net income tax purposes. The differences between the two cases are instructive.

In General Refractories, this court traced the history of the provision of the Tax Reform Code at issue in that case, which provided for an adjustment for dividends received, and discussed how the statutory language had always been based upon corresponding provisions of the IRC, even through a series of changes in the two statutes; the court concluded that the state adjustment for dividends received could "only be explained in terms of the Federal Code," and that the state statute "inextricably ties the deduction to the Federal Code." 207 A.2d at 837. In Tygart Resources, on the other hand, the Commonwealth Court found that the IRC definition of passive investment income was not "'inextricably tied' to Pennsylvania tax principles," as Pennsylvania's statute added a requirement to its test for S corporation status beyond the federal requirements without the "same wholesale incorporation of

tax principles that was found in [General Refractories]." 578 A.2d at 88.[8]

In the instant case, there is simply no history in common between the FERC regulations and the Code or its predecessor taxing statutes, and no statutory basis, implicit or explicit, for incorporating any part of the FERC regulations into the Tax Reform Code. As the Commonwealth Court determined, "there is no evidence that the regulations governing the FERC were inextricably tied to or wholly incorporated into the Tax Reform Code." PP&L, 668 A.2d at 624. Therefore, based on the direction supplied by both Tygart Resources and General Refractories, the FERC regulations are not relevant to the question of the taxability of the gross receipts in question in this case.

Further, as has been stipulated by the parties, the federal regulation of the energy industry authorized by the Federal Power Act, 16 U.S.C.S. §791a, et seq., is explicitly limited by that statute "only to those matters which are not subject to regulation by the States." 16 U.S.C.S. §824(a). (S/F ¶38, RR 15a) A matter of state taxation would clearly not fit within this limited grant of authority; as the Commonwealth Court determined, "taxation on

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[8]Accord, Commonwealth v. Scott Paper Company, 425 Pa. 444, 452-453, 228 A.2d 904 (1967) (". . . the language of the [corporate net income] Act and the history of this language do not evidence a legislative intent to deny to the Commonwealth the right to make its own determination of what constitutes the sale or exchange of a capital asset giving rise to gain allocable as stated by the Act. While this determination may parallel the federal one in most cases, it is not automatically governed thereby but must be based on Pennsylvania's own decision as to what is a capital asset and what is a sale or exchange.")

the 'sales of electric energy' is governed by the Tax Reform Code," PP&L, 668 A.2d at 624.

Based upon these considerations, the Commonwealth Court was correct to conclude that "the taxability of gross receipts from residential and nonresidential late charges is not governed by the FERC regulations," (Ibid.; Footnote omitted.).

D. PP&L's reliance upon PUC regulations is also unavailing.

While the PUC requires utilities to keep their accounts in conformity with the FERC system of accounts (S/F ¶39, RR 15a), that circumstance does not authorize the incorporation of the FERC system of accounts into the Tax Reform Code any more than would be allowed for the FERC system of accounts standing alone, and PP&L does not claim as much. PP&L does, however, assert that PUC practices distinguish between the gross receipts in question and charges for electricity. (PP&L brief, p. 37, et seq.) That assertion, however, consists essentially of the PUC's use of the phrase "late payment charge" on bills and in regulations, which relates to the form-over-substance discussion presented above, and will not be repeated here.

It should be noted, however, that PP&L does not cite any instance in which the PUC regulations employ the term "sales of electric energy," or even "sales of electricity." PP&L does cite the regulation at 52 Pa.Code §56.15, dealing with billing information, apparently to illustrate that "late payment charges" are given a separate category, but even that regulation contains no

category specifically including either "sales of electric energy" or "sales of electricity."

III. THE STATUTORY PROVISION AT ISSUE IN THIS CASE PRESENTS NO AMBIGUITY.

PP&L has also contended that the statute contains an ambiguity that must be resolved against the Commonwealth. (PP&L brief, pp. 31-34) While PP&L does not specify what that alleged ambiguity is, PP&L asserts that the claims it has raised, as discussed above along with two others to be discussed immediately below, together, "all support PP&L's position that, at a minimum, there is an ambiguity involved in the statutory language . . . " (PP&L brief, p. 37). The two additional claims relate to the history of the utilities gross receipts tax and decisions of the Board of Finance and Revenue.

PP&L asserts that the historical development of the utilities gross receipts tax, and the Code itself, indicate that the tax may be imposed only on "gross receipts . . . received from . . . the sales of electric energy," and that the tax may not be imposed upon gross receipts from any broader classifications of activities, such as "business" or "service." (PP&L brief, pp. 27-30) The Commonwealth agrees with that assertion. PP&L has not, however, contended that the gross receipts in question are not properly considered "gross receipts," as that term is used in the statute, and there is nothing in the record to indicate that the bills that

produced the gross receipts in question were for any service or business other than the sales of electric energy.[9]

PP&L also perceives an ambiguity in the statute from what was essentially a lack of unanimity among the various state departments that comprise the administrative boards that hear and determine tax appeals. (Ibid., pp. 31-34)[10] PP&L, however, cites no authority for its position, and there is none.

Instead, in a case involving a review of a decision of the former Board of Review of the Department of Revenue, and an interpretation of what constitutes tangible personal property under the sales and use tax provisions of a prior statute, the Commonwealth Court stated:

> Appellant submitted evidence of prior inconsistent decisions by the Board when ruling upon the similar claims of other taxpayers and asserts these inconsistencies constitute an estoppel against the

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[9]That PP&L is contesting the tax status of only the residential and nonresidential late charges indicates that all other gross receipts determined to be taxable by the Department of Revenue are conceded by PP&L to have been "received from . . . the sales of electric energy."

[10]An analysis of the discrepancy between the Board of Finance and Revenue decisions regarding PP&L's 1986 gross receipts tax and the 1987 tax now in dispute reveals that the different outcomes were the result of one department (the Department of State) changing its position, from considering the gross receipts in question not taxable in determining the 1986 petition, to considering them taxable in the 1987 petition. (S/F Exhibit 10, RR 57a; Exhibit 12, RR 69a) (The Board of Finance and Revenue is composed of representatives from six departments: Revenue, State, General Counsel, Auditor General, Treasurer and Attorney General. 71 P.S. §§115, 732-302.) The position of the Department of Revenue, the agency charged with the interpretation and administration of the Commonwealth's tax statutes, was consistent in both decisions, in considering the gross receipts in question to be taxable. (Ibid.)

> Commonwealth if not a denial of due process. These arguments have no merit.

Commonwealth v. Beck Electric Construction, Inc., 379 A.2d 626, 632 (Pa. Cmwlth. 1977), aff'd in part, rev'd in part on other grounds, 485 Pa. 604, 403 A.2d 553 (1979). In support of that determination, the Commonwealth Court cited a decision of this court that provided that the Commonwealth is not estopped from collecting a tax due by its failure to have collected the tax in the past. Commonwealth v. Western Maryland R.R. Co., 377 Pa. 312, 105 A.2d 336, 340-341 (1954), cert. denied, 348 U.S. 857 (1954).

In the instant case, the Commonwealth Court determined that the Board of Finance and Revenue's change in position did not indicate an ambiguity in the statute, as follows:

> Simply because the Board of Finance and Revenue reached a different conclusion for 1987 than it did for 1986 does not mean that Section 1101(b) of the Tax Reform Code is ambiguous. There is no prohibition which prevents the Board of Finance and Revenue from adopting a new position with respect to a particular issue, where warranted by the circumstances, after further thought and reflection on the issue.

PP&L, 668 A.2d at 625. (Footnote referencing Western Maryland omitted.)

That PP&L disputes the Department of Revenue's interpretation of the statute does not render the statute ambiguous; if it did, every challenge to an action taken by the Department would have to be considered to involve an ambiguity. The courts of the Commonwealth have been called upon to interpret tax statutes for

over one hundred years, and have resisted characterizing every occasion for such an interpretation as an ambiguity.

For example, the courts have decided many cases involving the question of what constitutes "manufacturing" for capital stock and franchise tax purposes, and have done so without characterizing the relevant statutes as ambiguous. In Commonwealth v. Deitsch, 449 Pa. 88, 92, 295 A.2d 834, 837 (1972), this court noted the "element of difficulty" caused by the absence of a statutory definition of "manufacturing" for capital stock tax purposes, and stated, "This definitional vacuum has been filled by a judicial definition of the term." As another example, the Commonwealth Court interpreted the phrase "actually been in existence" and the word "years," as they appear in the Tax Reform Code, without finding either term to be ambiguous. Doyle Equipment Co. v. Commonwealth, 117 Pa.Cmwlth.Ct. 38, 542 A.2d 644 (1988).

"The construction given a statute by those charged with its execution and application is entitled to great weight and should be disregarded or overturned only for cogent reasons and if such construction is clearly erroneous." Com., Pa. Liquor Control Bd. v. Burrell Food, 508 A.2d 1308, 1309 (Pa. Cmwlth. 1986). In the instant case, PP&L is merely asking for an interpretation of the statute that it prefers. The Commonwealth has demonstrated herein that the interpretation PP&L seeks is erroneous.

CONCLUSION

The Commonwealth has demonstrated that the residential and nonresidential late charges are "received from . . . the sales of electric energy," as the statute requires for imposition of the gross receipts tax, and that PP&L's reliance on the characterization of the gross receipts in question by the FERC system of accounts, PP&L's primary basis for asserting that those receipts are not taxable, is misplaced, as the FERC system of accounts is not relevant to the inquiry, and PP&L's interpretation of that characterization is not supported by the courts.

Therefore, the decisions of the Commonwealth Court and the Board of Finance and Revenue should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

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