PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120

Public Meeting Held May 23, 1980

Commissioners Present:

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

Pennsylvania Public Utility Commission, et al.
v.
Metropolitan Edison Company
and
Pennsylvania Electric Company

Docket No.
I-79040308

ORDER

BY THE COMMISSION:

The current proceedings are a continuation of an investigation at this docket which began shortly after the accident at Three Mile Island on March 28, 1979. This order is a sequel to the Commission's order entered June 19, 1979. At issue here are three matters:

First, on September 20, 1979 the Commission ordered Metropolitan Edison Company ("Met Ed") and the Pennsylvania Electric Company ("Penelec") to show cause why the Three Mile Island Power Station, Unit No. 1 ("TMI-1") should be considered used and useful in the public service and why all of the costs associated with TMI-1 should not be removed from their respective base rates. The second matter at issue in these proceedings arises from an order to show cause adopted on November 1, 1979, directed only to Met Ed. After taking notice of recent financial, operational and regulatory difficulties facing Met Ed, the Commission ordered Met Ed to show cause why its certificate of public convenience [1/] should not be revoked. Third, on November 1, 1979 Met Ed filed a petition for modification of the order entered June 19, 1979, seeking a 6.9 mill per kilowatt hour increase in its energy cost rate and an extension of time within which to include as recoverable costs under the energy cost rate the demand or reserve capacity costs associated with purchased power.

1/ For economy of expression, all of the pertinent certificates granting Met Ed its present rights to operate as a public utility are referred to as its "certificate of convenience."

The three matters were consolidated for hearing at this docket. The Commission, sitting en banc, presided at the taking of evidence and rendered this decision without the interjection of a recommended decision of an administrative law judge. After twenty-seven (27) days of hearings, which produced more than 4,000 pages of transcript, the parties were permitted to file briefs and present oral arguments before the Commission.[2/]

Consolidated with the current proceedings are complaints docketed at C-79101682, C-79121754, and C-79121808. This order disposes of these complaints. There are also three complaints which were filed during our initial proceedings which culminated in the order entered June 19, 1979. Those complaints are C-79040831, C-79050907, and C-79050909. The order of June 19, 1979 effectively disposed of all

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2/ The parties to these proceedings are: Respondents, Met Ed and Penelec; Staff; Consumer Advocate; St. Regis Paper Company of York, Airco Speer Carbon Graphite of St. Marys, Autex Corporation of Meadville, Avtex Fibers, Inc. of Lewistown, and P.H. Glatfelter Company of Spring Grove, jointly ("St. Regis, et al."); Patricia Street, Dr. Timothy Percarpio, and Three Mile Island Alert, Inc., jointly ("TMIA, et al."); Senior Power Action Group of York and Louise Riley, jointly ("Senior Power Action Group, et al."); Holly Keck and Deep Run Farm, Inc., jointly ("Holly Keck, et al."); Bethlehem Steel; Standard Steel Division, Titanium Metals Corporation of America ("Standard Steel"); Citibank, N.A. Agent and Chemical Bank N.A. Co-Agent ("Citibank, et al."); Mrs. Patricia Smith; Pennsylvania Foundrymen's Association and Lebanon Steel Foundry of Lebanon, jointly ("Pennsylvania Foundrymen's Association, et al."); Universal Cyclops Corporation, Electralloy Corporation, Erie Malleable Iron Company, Franklin Steel Company, National Forge Company, Proctor & Gamble Paper Products Company, Talon Textron and Welch Foods, Inc., jointly ("Universal Cyclops Corporation, et al."); Lehigh Valley Committee of Concern; Louise Dufour and Limerick Ecology Action (Complaint Docket No. C-79101682); Representative Harold Brown (Complaint Docket No. C-79121754); Joyce Wendler (Complaint Docket No. C-79121808); and the City of Lancaster.

matters raised therein; therefore, we hereby direct that these complaint dockets be marked closed.3/

An initial decision of the presiding commissioners was issued on May 9, 1980. Exceptions were filed by: Respondents; Staff; Consumer Advocate; TMIA, et al.; Senior Power Action Group, et al.; Holly Keck, et al.; Standard Steel; Citibank et al.; Mrs. Patricia Smith; Lehigh Pocono Committee of Concern; Louise Dufour and Limerick Ecology Action; and, by permission, the Pennsylvania Electric Association. The Commission has reviewed and considered each exception. For the most part the exceptions are denied - for the reasons already given for the initial decision. A seriatim discussion of each exception would serve only to reiterate the original text, other than where a specific departure is noted. Therefore, this order, in its entirety, should be treated as the Commission's response to the exceptions.

The current proceedings have presented exceedingly difficult issues for this Commission to resolve. The Commission has had to balance the need to explore and carefully examine Met Ed's continuing, long-term viability against the urgency to act promptly to avoid being overtaken by events. In addition, the Commission has had to resolve the competing concerns of creditors who want assurance of earnings and ratepayers who want equity in allocating the costs associated with the Three Mile Island accident (and who see an inequitable duplication in paying the costs of TMI-1 and the costs of TMI-1 replacement power); and of Respondents who would emphasize their financial needs and other parties seeking a determination based on other economic, social and political principles.

The responsibility presented to the Commission by these concerns is indeed a grave one, and whereas each of the parties may propose solutions, this Commission recognizes one factor which applies solely to

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3/ A request to intervene in the nature of a complaint was received on March 24, 1980 from David D. Trout. Mr. Trout complains of the application of the increase granted to Met Ed on February 8, 1980 to his service. It appears that Mr. Trout was unaware of the Commission's intent to make the increase effective for bills rendered on and after March 1, 1980. Met Ed's energy cost rate was previously changed effective for bills rendered on and after a date certain. The February 8, 1980 action of the Commission was consistent with that practice. Also, it was the Commission's intent to increase Met Ed's rate so as to generate revenues in March and April, 1980 sufficient to obviate increasing the short-term debt limit under the Revolving Credit Agreement until a final order is issued. If the tariff was made effective for service rendered on and after March 1, 1980 there would have been a lag in the collection of revenues in March and April, 1980. Thus, Met Ed was allowed to increase its energy cost rate effective for bills rendered on and after March 1, 1980.

In light of the above discussion, we do not perceive a basis for a complaint by Mr. Trout. The request to intervene filed by David D. Trout on March 24, 1980 is hereby denied without prejudice to Mr. Trout to file a formal complaint.

it -- namely, it does not have the luxury of avoiding responsibility for being wrong.

The basic conclusion of the Commission in this order is that Met Ed should continue to operate as a public utility. The Commission will provide Met Ed the means of financial rehabilitation. However, we will write no blank checks on its ratepayers. We find that TMI-1 is no longer used and useful and that the base rates of both Met Ed and Penelec should be reduced. This order, with its provisions for a fully current recovery of energy costs and an accelerated amortization of deferred energy costs provides an adequate framework for Met Ed's recovery. Respondent must convince its bank creditors that it has the will and the ability to rehabilitate itself.

Above all, Met Ed must demonstrate candor and a willingness to address its problems and the initiative and ability to find solutions to those problems. The very real fears and concerns of its customers and neighbors must be allayed. Met Ed's costs must be reduced through load management and conservation-inducing rate structure change. Met Ed must aggressively pursue the return to service of TMI-1 or an early decision on its conversion to the use of an alternative fuel. If these things are done, the Commission is confident that Met Ed will not only survive but will regain its financial health.

Finally, we emphasize that this order does not end our regulatory concern. The management investigation of the GPU Companies at Docket No. I-79080320 continues. Further, we will continue to closely monitor the operations of Met Ed, Penelec and the GPU Companies to assure the continued provision of safe, adequate and reliable service to Pennsylvania ratepayers at reasonable rates.

Order to Show Cause on Revocation of Met Ed's Certificate of Public Convenience

In the order to show cause adopted November 1, 1979, the Commission concluded, after taking notice of recent financial, operational and regulatory difficulties facing Met Ed:

> "Recognition of [these] matters raises serious questions about the continued ability of Met Ed to provide safe, adequate and reliable electric service at just and reasonable rates. The Commission therefore finds it in the public interest to put at issue in these proceedings the continued viability of Met Ed as a public utility.
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> * * * * * * * * * * * *
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> Therefore, the Commission hereby orders Metropolitan Edison Company to show cause why its certificate of public convenience should not be revoked."

The order to show cause manifests the Commission's concern for the continuing adequacy and reliability of Met Ed's service and for the

continuing ability of Met Ed to provide that service at reasonable rates. The accident at Three Mile Island and subsequent events have placed severe strains on the utility. This Commission would be remiss if it did not formally examine Met Ed's overall condition to ensure that service to Met Ed's customers will continue. That purpose is served by making Met Ed's continuing viability an issue in these proceedings.

We need not here decide the limits of the Commission's authority to revoke the certificate of an electric public utility. But we note in general that although there is no express provision in the Public Utility Code dealing with the subject, the Commission has the same power to revoke a certificate as it has to issue it, upon due cause being shown, and that a utility holding a certificate of public convenience accepts it subject to the statutory provision which permits the certificate to be modified or rescinded for legal cause.

We disagree with Respondents' statement of the law, not finding it relevant to draw distinctions between past and future actions, or between service and rate functions, or that in a proceeding upon motion of the Commission the burden lies with any party other than the respondent-utility.

There is no vested or property right in a certificate of public convenience. Common sense and due process require that a certificated public utility be given notice of its deficiencies and a reasonable opportunity to correct those deficiencies. However, what is paramount to this Commission is the continued provision of safe, adequate and reliable electric service. If the welfare of the public should require an immediate transfer of the right to serve the public, either temporarily or permanently, we would not hesitate to order such action. On the other hand, if the question posed is whether another provider could make the required service available at a lower cost, then the certain benefit of such a change must be clearly and unequivocally established.

We must conclude that based upon this record no modification or revocation of Met Ed's certificate is required at this time because we find no imminent and foreseeable threat to continued provision of adequate and reliable service at reasonable rates. Nor do we find that the record supports the issuance of a complaint. However, in all cases this Commission has continuing jurisdiction over the services, rates, and certificates of public utilities.

The Commission is acutely aware of the substantial, continuing public debate over whether or not radiological dangers exist at Three Mile Island. This record contains many allegations concerning Met Ed's responsibility for the construction, maintenance, operation and clean up of the Three Mile Island nuclear units. To the extent that these allegations relate to the safety of the people of Pennsylvania, this Commission is required to recognize that the Federal government has completely pre-empted the States in the licensing and regulation of the commercial use of nuclear reactors and in the protection of the public from radiological hazards. Northern States Power Company v.

State of Minnesota, 447 F.2d 1143 (8th Cir. 1971), aff'd mem. 405 U.S. 1035 (1972). These allegations also present difficult questions of whether they constitute a sufficient basis for the revocation of the certificate of an electric utility which owns and operates nuclear facilities. If the courts and/or the NRC ultimately conclude that Met Ed has been imprudent or negligent or is incompetent, then this Commission will take notice of such determination and will respond appropriately. For the present, the Commission believes it to be most appropriate to monitor any proceedings before the NRC and the courts.

The Commission will follow the proceedings before the NRC on the restart of TMI-1 and with respect to the clean up of TMI-2. The management consultants engaged to audit the management of the GPU Companies will consider carefully those proceedings. Any finding by the NRC of incompetence or inability by the management of Met Ed to operate the TMI units would be a matter of grave concern to this Commission.

Our management consultants auditing the management of the GPU Companies will carefully and thoroughly examine any proposed management changes. To the extent that other issues relating to the reasonableness or prudence of the management of the GPU Companies remain or arise, they can and should be explored in our investigation at Docket No. I-79080320.

Regretably, the Commission must again decry the failure of the Federal government to respond to the accident at Three Mile Island with financial assistance that is commensurate with its responsibility for the development of nuclear energy. The Federal government has been a keystone in the development of commercial uses of nuclear power. It has insured, promoted and exclusively regulated its development. Duke Power Company v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978). The people of Pennsylvania should not have to bear the entire burden--emotionally or financially -- where that burden properly belongs to all those who have benefited from the development of nuclear energy.

The enactment of the Price-Anderson Act in 1957 reflected Congress's acceptance of the idea that the Federal government should intervene in the event of a major nuclear incident. In discussing the basic approach and underlying principles of the new legislation, the Joint Committee of Atomic Energy commented as follows:

> "The chance that a reactor will run away is too small and the foreseeable possible damages of the reactor are too great to allow the accumulation of a fund which would be adequate. If this unlikely event were to occur, the contributions of the companies protected are likely to be too small by far to protect the public, so Federal action is going to be required anyway."

S. Rep. No. 296, 85th Cong., 1st Sess. reprinted in [1957] U.S. Code Cong. & Ad. News 1810-11.

Moreover in extending the Price-Anderson Act for the second time in 1975, Congress expressly included the concept in the statute itself:

> "Provided, that in the event of a nuclear incident involving damages in excess of the amount of aggregate liability, the Congress will thoroughly review the particular incident and will take whatever action is deemed necessary and appropriate to protect the public from the consequences of a disaster of such magnitude."

42 U.S.C. §2210(e)(Supp. 1979).

Nevertheless, what is painfully clear is that an economic catastrophe has befallen the GPU Companies, and their ratepayers and investors as well. We believe that Congress has a parallel responsibility to act in this situation, noting that when the prospect of a nuclear "incident" seemed remote, Federal willingness to render assistance to the nuclear industry was freeflowing. Now that such a tragedy has become more than a remote possibility, that willingness has dissipated. Never has it been more true that victory has a thousand followers, but that defeat is an orphan.

The only action of the Federal government reflected on this record is contained in the statement of the Respondents at ME/PN Exhibit A-74, that:

> "The DOE has agreed to fund up to $500,000 for certain work relating to radioactive decontamination used at TMI-2. Moreover, a contract is being negotiated with a DOE contractor in which it is anticipated that the DOE will fund up to $1,000,000 of engineering services and health physics work in support of a research program which should be of assistance in the TMI recovery program."

We find the Federal response described in Exhibit A-74 to be woefully inadequate at a time when the owners of the plant, the utility ratepayers, and a consortium of bankers are acting as surrogate insurers of a nuclear accident which may yet threaten to bankrupt three major electric utilities.

The Commission notes with disappointment the failure of President Carter to respond to our letter of March 19. We again urge President Carter and the United States Congress to recognize their responsibility and use their power to minimize the financial burden of this unfortunate accident.

Order to Show Cause on Used and Useful Status of TMI-1

The genesis of this order to show cause was the statement of the Commission, in the order entered June 19, 1979 at this docket that:

"At this time it appears reasonably certain that TMI-1 will return to service. Witness Herman Dieckamp, President of GPU, testified that resumption of generation at TMI-1 could occur as early as August, 1979, and certainly no later than January 1, 1980.

However, the Commission will monitor the status of TMI-1. We will require Met Ed to report to the Commission monthly on the progress in returning TMI-1 to service. If that start-up is delayed beyond January 1, 1980, the Commission will issue an order to show cause why TMI-1 should be considered used and useful in the public service."

TMI-1 did not return to service by January 1, 1980. By September 29, 1979 (when the order to show cause was adopted) it was clear that the resumption of generation at TMI-1 would be delayed substantially, and, at this time, remains uncertain.

The Commission has narrowed the issues somewhat with respect to this matter. In a prehearing order adopted December 21, 1979, the Commission declined to fix a test period for adjusting Respondents' base rates, stating:

"The Commission does not yet have before it the issue of finding just and reasonable rates for Respondents."

The Commission further stated:

"With respect to the motion [of Respondents] for an initial decision on the used and useful status of TMI-1, prior to the presentation of the base rate adjustments associated with the removal of TMI-1 from rate base, the motion is granted. The Commission has no desire to undertake a re-determination of Respondents' base rates as a hypothetical exercise. If this Commission finds TMI-1 no longer used and useful in the public service, then the determination of just and reasonable rates for Respondents will be an issue before us."

As a result of that ruling, the present record was not developed with respect to a current test period determination of Respondents' revenue requirements.

Subsequently, in a prehearing order adopted January 18, 1980, the Commission deferred the intervention of certain customers of Penelec (who wished to address Penelec's rate structure), stating:

"In light of the Commission's decision in its December 21, 1979 prehearing order to grant Respondents' motion for an initial decision on the status of TMI-1 prior to developing the record with respect to any associated changes in Respondents' base rates, it appears that the

concerns of the hospitals will not be addressed until a decision is reached on the matters now being developed on the record."

Thus, the Commission finds that it cannot now determine and fix the just and reasonable base rates to be charged by Respondents. However, the Commission has the authority and discretion, upon the notice given in this proceeding and the record as developed, to determine (a) whether TMI-1 is used and useful in the public service, and whether Respondents' base rates should be adjusted to eliminate the costs associated with TMI-1, and (b) whether to fix temporary rates pending further investigation.

(a) Used and Useful Status of TMI-1

In the order entered June 19, 1979, the Commission concluded with respect to TMI-1 that:

"The parties have raised the issue of the used and useful status of TMI-1; however, the Commission need not reach that issue at this time. Consistent with the principles discussed with respect to TMI-2, TMI-1 is at present only experiencing an outage."

We now have before us the issue of whether TMI-1 is used and useful in the public service.

The decisional principle used to determine that TMI-2 was not used and useful in the public service was succinctly stated in our prior order:

"The length of time which utility plant may be out of service and not be removed from rate base depends upon the nature of the plant, the degree to which the outage can be expected to occur during normal operation of the plant, and the certainty with which resumption of service can be predicted."

The parties were provided ample opportunity to put before us the legal and factual bases that they advocate the Commission adopt in determining the status of TMI-1. In addition to the usual briefs and reply briefs, memoranda of law were requested by the Commission in its prehearing order adopted December 14, 1979.

Before discussing the evidence of record, the Commission should clarify one aspect of the law which appears to trouble the Respondents. In the Respondents' memorandum of law dated January 14, 1980 and their main brief, uncertainty is expressed concerning the Commission's use of the phrase "used and useful" rather than "used or useful," and the possible intent of the Legislature in employing both phrases in the Public Utility Code, 66 Pa.C.S. §101, et seq. The answer to these concerns is quite simple and straightforward.

In our opinion, the Legislature anticipated and intended a difference in these phrases. "Used or useful" has a broader, more inclusive connotation and is employed to define the types of property which are subject to the reporting, accounting and certification requirements. See 66 Pa. C.S. §§1102(a) (3), 1702, and 1703(a). Whereas, "used and useful" has a narrower, less inclusive connotation and is employed to define and describe the types of property which are includable in the utility's rate base for purpose of fixing rates. See 66 Pa. C.S. §§1102(a)(3)(iii), 1307(a), 1310(a), 1310(d) and 1311. Since our present focus is on the status of TMI-1 for ratemaking purposes, the phrase "used and useful" is appropriate. However, our view of the Legislative intent in employing these different phrases is independent of the determination of the substantive content of the phrase "used and useful." The point here is that the scope of the reporting, accounting and certification provisions, with respect to utility property, is broader and more inclusive than the class or classes of property which are includable in the utility's rate base.

It is appropriate at this time to bring into focus the concept of "used and useful" property for rate making purposes. The Commission is in agreement that "used and useful" is a flexible rate making tool whose definition to some extent is shaped by the individual circumstances of each case. Whether property is used and useful in providing service to the customers of a utility is a question which of necessity must be resolved on the basis of a case-by-case analysis. The status of plant cannot be determined through the application of any set formula but should be ascertained in light of all the circumstances.

The Respondents distinguish the present circumstances of TMI-1 and the circumstances of TMI-2 at the time it was determined not to be used and useful in the public service. TMI-1 has been in service for a substantial period of time. Its operating record from September, 1974 until March, 1979 has been excellent. TMI-1's experienced annual capacity factor through 1978 was about seventy-eight percent (78%), well above the national average for nuclear generating units. TMI-1 was not extensively damaged, as was TMI-2, by the accident on March 28, 1979. Respondents maintain it is presently operable, if permitted by the NRC, and that all modifications which it is anticipated the NRC will require should be completed by June, 1980. Finally, Respondents claim that even with the required NRC approval pursuant to the restart hearings at NRC Docket No. 50-289 the plant will return to service by January 1, 1981.

We recognize the plant's past operating history and the fact that TMI-1's unusually high level of operation has inured to the benefit of Respondents' customers. Similarly, the Commission notes that TMI-1, according to Respondents, is physically ready to commence commercial operation, but that the delay of its in-service date is presently due to ongoing Federal investigations. These circumstances materially distinguish the condition of TMI-1 from plant that might have otherwise been excluded from base rates due to obsolesence and operational or structural defects. Although we recognize these apparent distinctions, the Commission is not convinced that these facts should result in ratepayer contribution toward returns on the investments associated with TMI-1.

Notwithstanding the Respondents' contentions, for rate making purposes for classes of property which are to be included or excluded from rate base, we are compelled to draw the line between the operating history and present condition of the plant and the timing and certainty of the return to service. The reasonableness of Respondents' actions in operating and maintaining the plant is not being measured here. Nor will the reasonableness of Federal regulatory action enter into our determination.[4/] For ratemaking purposes our primary issue is the weight that is to be accorded TMI-1's present circumstances and when the plant will return to service.

The Pennsylvania Public Utility Code and various Commission orders that refer to property valuations for ratemaking purposes incorporate the generally accepted principle that a utility is not entitled to include, in the valuation of its rate base, property not actually used and useful in providing its public service. Whether TMI-1 was related to the provision of utility service is not at issue here. The focus with regard to TMI-1's treatment here relates to the length of the plant's present and ongoing outage.

A plant's timely return to public service, so as to be properly included in utility base rates, is an established principle enunciated by the courts. See Schuylkill Valley Lines v. Pennsylvania Public Utility Commission, 165 Pa. Super. Ct. 393, 68 A.2d 448 (1949); Glenwood Light & Water Company v. Glenwood Springs, 98 Colo. 340, 55 P.2d 399 (1936); Office of Consumer's Counsel v. Public Utility Commission, et al., 580 Ohio St. 2d 449, 391 N.E. 2d 311 (1979). The standard by which courts and this Commission have measured a plant's timely return to service has been the plant's imminent or certain use in providing service to the public. Schuylkill Valley Lines, supra.

The Commission's treatment of TMI-1 and TMI-2 in our June 19th order expressed our intent to continue applying "imminence and certainty" as a standard for the determination of a plant's used and useful status.

There our decision not to exclude TMI-1 from the Respondents' base rates was due primarily to the plant's expected return that appeared to be both imminent and certain.

> "At this time it appears reasonably certain that TMI-1 will return to service. Witness Herman Dieckamp, President of GPU, testified that resumption of generation at TMI-1 could occur as early as August, 1979 and certainly no later than January 1, 1980."

From the evidence we have before us, TMI-1 is out of service and, based on Respondents' testimony of an in-service date of approximately January 1, 1981, the unit will have been out of service for nearly two (2) years.

4/ Although the Respondents have contended throughout these proceedings that the Unit No. 1 in-service date is due to unjustified or discriminatory Federal action, the Commission will not attempt to look behind these investigations to determine the reasonableness of those acts.

Also, there exists substantial uncertainty with respect to the return of service of TMI-1. On the last day of hearings, Mr. Robert C. Arnold, GPU Vice President for Generation testified:

> Question: "How would you assess . . . or how would you characterize the track record of the respondent in making representations to the Commission with respect to the restart of TMI-1?"
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> . . .
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> Answer: ". . . I would have to judge that our forecasts have not been accurate in terms of what has actually worked out."
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> Tr. 3998-4000

Dr. Robert B. Parente, a power production and operations planning consultant with Theodore Barry & Associates, testified:

> "We believe that there is a strong probability that significant delays will occur in the restart of TMI-1, currently scheduled for January 1, 1981 for the Company's financial forecasting purposes, and furthermore, the distinct possibility exists that the unit may never be permitted to restart."
> (TB&A Statement No. 2, p. 11-14)

On cross-examination, Dr. Parente testified that mid-1983 was, in his view, a realistic start-up date for TMI-1. Tr. 3448.

Finally, we take notice of an order adopted on March 6, 1980 by the NRC, docketed at CLI-80-5 (In the Matter of Metropolitan Edison Company, Docket No. 50-289), wherein the NRC directed its Atomic Safety and Licensing Board to consider the following issues in the TMI-1 restart proceedings:

> "(1) whether Metropolitan Edison's management is sufficiently staffed, has sufficient resources and is appropriately organized to operate Unit 1 safely; (2) whether facts revealed by the accident at Three Mile Island Unit 2 present questions concerning management competence which must be resolved before Metropolitan Edison can be found competent to operate Unit 1 safely; and (3) whether Metropolitan Edison is capable of operating Unit 1 safely while simultaneously conducting the clean-up operation at Unit 2."

The scope of those issues and the obvious concern of the NRC with the restart of TMI-1 while the clean-up continues at TMI-2 convince the Commission that a substantial uncertainty presently exists with respect

to the resumption of generation at TMI-1.[5/] The implications of an NRC decision to delay the restart of TMI-1 until the clean up of TMI-2 is completed are even more serious in light of the fact that Mr. Robert C. Arnold, GPU Vice President for Generation, has testified that it is now unlikely that the clean up and restoration of TMI-2 will be completed by June, 1983 and that considerably more time will be required. Tr. 741.

Considering the above, the Commission hereby finds that the Three Mile Island Power Station, Unit 1 is not used and useful in the public service.

In the case of Philadelphia Electric Company (PECO) at R-79060865, we disallowed approximately $25 million of PECO's claimed original cost based upon a finding of 748 megawatts of excess generating capacity. There are certain similarities between the issue of excess capacity in the PECO case and the matter of TMI-1 in this investigation; however, there are a number of features which distinguish the issue in the PECO case from the problem of TMI-1 in this proceeding.

The issue in the PECO case was one of excess capacity. The problem which confronts us in this case is one of unusable capacity caused by the outage of a particular generating facility, complicated by the need to purchase energy to replace that capacity. The matter of replacement energy was not at issue in the PECO case and we concluded that a proper method of allocating the risk relating to the excessive generating capacity would be to require the stockholders to forego a return on their investment in that capacity while allowing the company to recover the associated expenses and depreciation from the ratepayers. In this proceeding, while we have not specifically allocated the

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5/ Notwithstanding the Commission's concern with and recognition of the probable effects of NRC proceedings on the restart of TMI-1, in the context of determining the used and useful status of TMI-1, the implications of that specific decision should not be misunderstood by the NRC or the Atomic Safety and Licensing Board which presides over the TMI-1 restart hearings. We understand that Met Ed's financial ability to operate the unit is an issue to be resolved in the restart hearings. No specific implication should be drawn from our determination that TMI-1 is no longer used and useful that Met Ed is therefore financially unable to operate the unit. To do so would be to create a regulatory self-fulfilling prophecy of unfortunate consequences.

The financial capability of Met Ed as the operator of TMI-1 is more appropriately reflected in our overall determination in this order that Met Ed should continue to operate as a public utility and should recover financially.

responsibility for the risk related to the outage of TMI-1, we note that with this order the Respondents' will be permitted full recovery of the reasonable costs of energy needed to replace that unit's capacity. In our opinion it would be inequitable to also permit the Respondents to recover the maintenance and depreciation costs on a plant which should be, but which is not, providing their customers with economical energy.

We further note that our treatment of TMI-1 in this decision does not represent the permanent disposition of this issue. When that facility is permitted to resume commercial operation, the Respondents' right to again earn a return on the investment in that plant and to resume recovery of the costs associated with its operation will be given full consideration by this Commission.

With respect to the recovery of clean up costs through rates, nothing in this order negates the statements of the Commission in the June 19, 1979 order.

(b) Adjustment of Base Rates - Temporary Rates

Inasmuch as the Commission has determined that TMI-1 is not used and useful in the public service, the adjustment of the respective base rates of Met Ed and Penelec, as a matter of ratemaking, is compelled. However, the Commission will not fix new permanent rates.

The issue to be resolved with respect to TMI-1 is whether the Commission should exercise its discretion to set temporary rates for Respondents. The Commission has the authority pursuant to Section 1310(d) of the Public Utility Code to prescribe temporary rates for a period of six (6) months. This Commission has examined the financial data presented on this record, Respondents' recent financial reports to the Commission and to their shareholders, and the orders of the Commission at Docket Nos. R-78060626 and R-78040599. Based on this information, and on its finding that TMI-1 is not used and useful in the public service, the Commission is of the opinion that Respondents' rates are producing a return in excess of a fair return upon the fair value of the utilities' property.

The determination that TMI-1 is not "used and useful" gives rise to an unquestionable need to adjust Respondents' base rates. Based upon recent determinations of the Commission, the annual revenues associated with TMI-1 are approximately $26.9 million for Met Ed (ME/PN Ex. A-16) and $11.7 million for Penelec (ME/PN Ex. A-32). Whatever the proper level if determined today, these are not insignificant or de minimus amounts. The substantial nature of the revenues and return associated with TMI-1 is a consideration in the Commission's exercise of discretion in setting temporary rates.

Also relevant is the determination that Respondents should be granted full recovery of current energy costs. The Commission affirms its conclusion in the June 19th order that ratepayers should not pay both the cost of a generating station which is out of service and the costs of replacement generation where the outage is beyond normal expectations and of uncertain duration. Our allowance of a full recovery

of replacement power, including power purchased and generated to replace TMI-1 generation, necessitates the setting of temporary rates.

Finally, the Commission notes that the return associated with TMI-1 for Met Ed is approximately $15.2 million (ME/PN Ex. A-16) and for Penelec is approximately $7.0 million (ME/PN Ex. A-32). These amounts create excessive returns, in our opinion, on the remaining rate base, given the determination that TMI-1 is not used and useful.

For these reasons, we hereby prescribe temporary base rates at an annual level of $26.9 million less than existing rates for Met Ed and $11.7 million less than existing rates for Penelec. We find that these base rate revenue reductions should be allocated to Respondents' customer classifications according to the contribution of those customer classes to Respondents' total base rate revenue requirement as determined in their most recent rate investigations (R-78060626 and R-78040599 respectively).

If Respondents file a complaint against the temporary rates set by this order and subsequently the Commission determines that the temporary rates were set unreasonably low, an adjustment can be granted through restatement of Respondents' balances of deferred energy costs. However, the inclusion of TMI-1 in Respondents' base rates will not be retroactively restated, even if TMI-1 returns to service as expected by Respondents and is determined by the Commission once again to be used and useful in the public service.

Petition of Met Ed for Modification of Order Entered June 19, 1979

The third matter at issue in these proceedings arises from a petition filed by Met Ed on November 1, 1979 for modification of the order entered June 19, 1979. Met Ed's prayer for relief was a 6.9 mill increase in its levelized energy cost charge, effective January 1, 1980, and an extension of the time within which to include demand or reserve capacity charges associated with purchased power as recoverable costs through the energy cost charge. On February 8, 1980, the Commission granted Met Ed a 6.9 mill increase in its energy cost charge, effective March 1, 1980 and until a final order is issued, subject to the completion of our investigation.

Respondents' request for energy cost relief was broadly stated in their main brief, as follows:

" . . . Met Ed requests that this Commission:

(1) effective June 1, 1980, grant a levelized energy clause increase of 3 mills/kwh;

(2) permit the energy clause in effect prior to this Commission's June 19, 1979 order to resume normal operation, effective January 1, 1981;

(3) extend the permitted inclusion of demand or reserve capacity costs associated with purchased power from January 1, 1980 until TMI-1 returns to service; and

(4) permit the amortization of Met Ed's and Penelec's unrecovered balance of energy costs incurred since TMI-2's accident through a surcharge which will recover such costs over a 14 month period, beginning June 1, 1980."

Respondents' request for a 6.9 mill increase for Met Ed was predicated upon meeting short-term cash needs. However, Met Ed's and Penelec's past, present and projected energy costs, as well as short-term cash and credit needs, have been fully developed on this record. We consider all issues with respect to the proper energy charges for Met Ed and Penelec to have been fully developed and to be properly before us now for decision.

The Commission again finds that Met Ed and Penelec are providing adequate, reliable service in spite of the loss of generation at TMI. We affirm our determination in the order of June 19, 1979, that:

> "Met Ed and Penelec are presently providing reasonable, adequate, reliable electric service. The costs of purchasing power are unquestionably direct, necessary and reasonable costs of providing that utility service. The Commission cannot punish Respondents by denying the recovery of these costs; nor can it create a windfall for the ratepayers of service without payment. The Commission is of the opinion that the recovery of these costs is required by law."

However, the last-quoted sentence requires qualification. The use of that Commission language by some of the parties indicates a misunderstanding of the Commission's intent.

The statement that the recovery of purchased power costs is "required by law" was obviously not intended to mean that some specific element of statutory or case law generally required the recovery of purchased power costs from ratepayers -- regardless of how or why those costs were incurred. In our view, there is no such legal requirement. Rather, the statement must be viewed in its context. The Commission had removed the costs associated with TMI-2 from Respondents' base rates, determined that TMI-1 was only experiencing a normal outage, and determined that the current purchases of power by Respondents were direct and immediate costs of providing service. In that context, those costs were recoverable from ratepayers.

In the current proceedings, the Commission finds that Met Ed and Penelec have similarly incurred additional purchased power costs. This is not, however, a determination that every dollar of purchased power costs recorded on Respondents' books is recoverable from their ratepayers. Those amounts are subject to audit and review by the Com-

mission and to a later determination that specific amounts of energy costs were imprudently or unreasonably incurred. If the courts and/or the NRC should ultimately conclude that Met Ed was imprudent or negligent in its operation or management of Three Mile Island, then this Commission will take notice of such determinations and their relevance to any portion of the replacement power costs for which current recovery is permitted today.

Any subsequent examination of these issues would have to be made with the public's interest in the continued provision of adequate, reliable electric service clearly in mind. This Commission recognizes the close relationship between that public interest and Met Ed's financial viability, and, if necessary, would balance the public's interest in adequate, reliable service against its interest in refunds. We point out that the Pennsylvania Commonwealth Court has affirmed our discretion with respect to the extent of refunds to be made to public utility patrons if good reason is shown for the contrary. Community Central Energy Corporation v. Pennsylvania Public Utility Commission, No. 451 C.D. 1979 (Pa. Cmwlth. Ct., May 6, 1980).

The basic determination in this order is that neither TMI-1 nor TMI-2 is used and useful, that Respondents are providing adequate, reliable service without those generating units, and that the costs of power prudently and reasonably incurred to replace generation lost at TMI-1 are direct costs to serve Respondents' ratepayers. Furthermore, for the reasons stated below, the Commission finds that Respondents should be allowed a full recovery of current energy costs.

First, by this order, the Commission is denying Respondents' recovery of the revenues associated with Three Mile Island. Since the Respondents are providing service through greatly increased costs of purchased power, those energy costs should be promptly recovered from their ratepayers. The determinations that TMI-1 is not "used and useful," and that the revenues associated with TMI-1 should not be recovered through Respondents' base rates, are inseparably interwined with our determination to allow a full and current energy cost recovery. If our determination on TMI-1 were reversed, the recovery of energy costs would have to be modified.

Second, the extreme dependence of Respondents on short-term debt creates an unstable financial condition which potentially threatens the continued provision of utility service to Respondents' customers. The costs of purchasing energy are a major reason for short-term borrowing. A full recovery of current energy costs should lessen the need for short-term debt and facilitate the obtaining of permanent financing by Respondents.

Finally, the continued accrual of deferred energy costs may ultimately prove to be burdensome to Respondents' ratepayers. If not collected now, those amounts will have to be collected later in the form of additional charges. In addition, there is greater equity in requiring the ratepayers of today to pay the costs of service today, rather than requiring tomorrow's ratepayers to pay today's costs.

The Commission therefore finds that a fully current energy cost recovery for the balance of 1980 for Met Ed requires an energy charge of 19.1 mills per kilowatt hour, calculated as follows:

Met Ed Energy Charge Full Cost Recovery
for Period June 1, 1980 through December 31, 1980*

Total System Energy Cost ($ millions)	120.7
Total System Sales (GWH)	4614
Average Mills per KWH of Sales	26.2
Less: energy cost recovery allowed by June 19, 1979 Order, exclusive of gross receipts tax	16.4
(8.0 mills - base rates) (8.4 mills - energy cost rate)	
Required Increase in Energy Charge exclusive of gross receipts tax	9.8**
Plus: Energy Charge allowed by June 19, 1979 Order, exclusive of gross receipts tax	8.4
Required Energy Charge for full cost recovery, exclusive of gross receipts tax	18.2
Required Energy Charge for full cost recovery, including gross receipts tax	19.1

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* Source: ME/PN Exhibit A-89
Includes recovery of demand or reserve capacity charges associated with purchased power.

** Required increase determination essentially affirms interim relief of 6.9 mills granted on February 8, 1980.

The Commission also finds that a fully current energy cost recovery for the balance of 1980 for Penelec requires an energy charge of 8.5 mills per kilowatt hour, calculated as follows:

Penelec Energy Charge Full Cost Recovery
for Period June 1, 1980 through December 31, 1980*

Total System Energy Costs ($ millions)	115.9
Total System Sales (GWH)	6395
Average Mills per KWH of Sales	18.1
Less: energy cost recovery allowed by June 19, 1979 Order, exclusive of gross receipts tax	16.2
(10.0 mills - base rates) (6.2 mills - energy cost rate)	
Required Increase in Energy Charge exclusive of gross receipts tax	1.9
Plus: Energy Charge allowed by June 19, 1979 Order, exclusive of gross receipts tax	6.2
Required Energy Charge for full cost recovery, exclusive of gross receipts tax	8.1
Required Energy Charge for full cost recovery, including gross receipts tax	8.5

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* Source: ME/PN Exhibit A-95
Includes recovery of demand or reserve capacity charges associated with purchased power.

Energy Cost Rate

We will further direct Met Ed and Penelec to file and comment upon proposed tariff revisions, to become effective January 1, 1981, which will replace their energy cost adjustment clause with an energy cost rate. The energy cost rate shall be applicable to customers' bills for one-year periods during the billing period from January through December; provided, however, that such rate may be revised on an interim basis upon approval of the Commission. Upon determination that the effective rate will result in over or under collection, such interim change shall become effective 30 days from the date of filing, unless otherwise ordered by the Commission. Interest shall be computed monthly, at the appropriate rate as provided in Section 1308(d) of the Public Utility Code. Computation of interest shall begin in the month an over collection or under collection occurs, and end in the effective month any over collection is refunded or any under collection is recouped. Customers shall not be liable for interest on net under collections. The intent of the Commission is that this energy cost rate would replace the levelized energy charges presently approved through December 31, 1980.

Recovery of Deferred Energy Balance

The record indicates that by the end of February, 1980 Met Ed's deferred energy balance was $84.6 million. Penelec's deferred energy balance totaled $7.8 million at the same point in time. We hereby find that both companies are entitled to collect the total amount of outstanding deferred energy costs over the next 18 months. The collection will be in the form of a surcharge, to be applied on a KWH (usage) basis.

Yearly Surcharge */

	Met Ed	Penelec
	($ millions)	
Deferred Energy Blance ME/PN Ex. A-91 & A-96	84.6	7.8
Twelve Month Recovery	56.4	5.2
Retail Sales ME/PN Ex. A-89 & A-95	7904 GWH	10461 GWH
Mills per KWH	7.1	.5
Energy charge for full cost recovery, including gross receipts tax (1.047)	7.4	.5

*/ Exact amounts are dependent upon total deferred energy costs at the time temporary rates go into effect as well as the final Commission adjustment to Met Ed's deferred energy balance pursuant to its complaint and investigation at C.21597.

Demand or Reserve Capacity Charges

In the order entered June 19, 1979, the Commission stated, with respect to demand or reserve capacity charges associated with purchased power:

> "As an incentive to Respondents to enter into bulk power purchase arrangements and thereby reduce the energy costs to its ratepayers, the Commission will allow Met Ed and Penelec to include in recoverable costs through the net energy cost rate, the demand or reserve capacity charges incurred from July 1, 1979 until January 1, 1980."

The Respondents and the Consumer Advocate request that the Commission extend the recoverability of these costs to continue to encourage Respondents to keep their energy costs as low as possible.

We find on this record that Respondents' committed purchases of power, which entail demand or reserve capacity charges, have reduced the costs of purchasing power from what would be otherwise incurred. Therefore, the Commission hereby extends the time within which demand or reserve capacity charges associated with purchased power may be included as recoverable costs through Respondents' energy cost charges from Janauary 1, 1980 until TMI-1 returns to service or until further order of the Commission.

Rate Structure

The changes caused by the Three Mile Island accident have drastically altered Met Ed's costs to serve. Purchased power now replaces large amounts of energy which were previously generated internally. Met Ed's rate base has been reduced significantly, and there is a real need to conserve and thereby reduce current expenditures.

These changes compel a re-examination of Met Ed's rate structure. As noted previously in this order, rate structure is an issue which has been excluded from the current proceedings. However, it is a matter which cannot be ignored. If appropriate, a rate investigation will be consolidated with the hearings on temporary rates for Met Ed or with hearings on any general rate increase filing.

Energy Conservation

Our June 19, 1979 Order expressed dismay at Respondents' failure to even consider specific actions that would encourage ratepayers to conserve energy during this crisis. Our statement of intent on this matter was to be a clarification to the Respondents that they were to act immediately to propose rate structure changes as well as to secure low cost sources of generation.

The Respondents have responded by filing tariffs which expand the availability of time of day pricing, reduce stand-by charges for solar power customers and increase incentives to use power on an interruptible service tariff. The Respondents have developed a thirty year Master Plan designed to foster conservation and load management so that new construction can be deferred and reduced. Respondents have also proposed several tariff rule changes designed to encourage conservation of energy by providing for minimum insulation standards as a prerequisite for connecting new service and by permitting under certain conditions the use of renewable energy sources in conjunction with residential rates.

We encourage the Respondents to continue to bring their proposals to the Commission for prompt consideration; however, the proposals so far will have a de minimus effect on ratepayers' bills today. We are extremely concerned about the energy emergency which has followed the TMI-2 accident.

The GPU Companies have had to purchase substantial quantities of energy from 8:00 AM to 8:00 PM daily, except weekends, at greatly increased rates. This high-priced, on-peak expense has exacerbated the financial condition of the companies, and is causing the bills of ratepayers to increase. The Commission urges ratepayers in the strongest terms to attempt to reduce their energy consumpton during those hours, and to try to schedule use of electricity during off-peak hours and on weekends. In addition, the Company must redouble its efforts to reduce its costs.

In particular, we point out that in the June 19, 1979 Order we directed the Respondents to file a plan to implement a credit billing system which would reward conservation through a credit per kilowatt hour saved. The Respondents' reply indicated various reasons why the plan outlined would neither be equitable nor reduce purchased power costs. Respondents chose to evaluate our directive without offering an alternative proposal. We renew our directive to the Respondents to develop a proposal that will reduce today's costs of purchased power as a result of the actions of its customers.

Met Ed has indicated in response to our June 19, 1979 Order that there are many uncertainties associated with a credit billing system. However, during cross-examination Respondents' witness indicated that any reduction in energy consumption would reduce purchases:

> Q: Mr. Carter, if, in fact, Metropolitan Edison were able to reduce by whatever means its total sales to customers, you were able to reduce it by say 10 million KWH, does it necessarily follow that you are going to reduce purchased power?
>
> A: Presently, yes.
>
> Q: Because you are buying so much at all times --
>
> A: I suspect Met Ed is buying around the clock either short-term purchases from an associated company or from the pool. So any reduction in kilowatt hours at this point would be a reduction in purchases at any time, regardless of the time at which the reduction occurred.

(N.T. 4112-4113) (emphasis added).

Therefore, we will again order Met Ed and Penelec to propose a plan, within 90 days after entry of this order, for the implementation of a test program which will measure the effects of conservation-inducing rates on customer kilowatt-hour consumption and on revenues. The objective of the test program is to determine whether or not the offer of a discount or credit to residential, commercial, and industrial ratepayers who achieve a significant reduction in their electric consumption over a comparable period in the preceding year would encourage those customers to further conserve electricity.

All parties should be aware that if cooperation is not forthcoming in this regard, the Commission will be forced to consider imposing on its own motion such conservation measures as curtailments of various kinds, prohibition of new customer connections, ceilings on consumption with penalties for overruns, pricing of consumption above a targeted level at the average cost of purchased power, and/or other similar measures.

Effectivity of Tariffs

Notwithstanding our previous determinations, all rate changes permitted by this order shall be put into effect for service rendered on and after the date specified. The departure from this normal practice in the June 19, 1979 and February 8, 1980 orders was for the Respondents' energy charges only and for the purpose of insuring an immediate increase in cash flow. Here, Respondents' base rates are also being changed, and we do not find at present such urgency to increase Respondents' cash flow as would warrant granting an increase for bills rendered on and after a date specified. The substantial increases granted by this order will, in our opinion, be adequate when recovered for service rendered on and after the date specified.

Inasmuch as all matters properly before the Commission at this time at this docket have been determined; THEREFORE,

IT IS ORDERED:

1. That the order to show cause why the certificates of public convenience of Metropolitan Edison Company should not be revoked, which was adopted on November 1, 1979, is hereby discharged.

2. That the order to show cause why Three Mile Island Power Station, Unit No. 1, should be considered used and useful in the public service and why all of the costs associated with the unit should not be removed from the base rates of Metropolitan Edison Company and Pennsylvania Electric Company, which was adopted September 20, 1979, is hereby made absolute, consistent with this order.

3. That temporary base rates are hereby prescribed for Metropolitan Edison Company and Pennsylvania Electric Company, effective for service rendered on and after June 1, 1980, at the level of rates prescribed herein, to remain in effect until December 1, 1980.

4. That Metropolitan Edison Company and Pennsylvania Electric Company are hereby directed to file appropriate tariffs or tariff supplements in compliance with this order prescribing temporary rates.

5. That Metropolitan Edison Company and Pennsylvania Electric Company are hereby permitted to accelerate the amortization of their deferred energy costs through a surcharge, effective for service rendered on and after June 1, 1980, consistent with this order.

6. That the petition for modification of the order entered June 19, 1979 which was filed by Metropolitan Edison Company on November 1, 1979, is hereby granted, consistent with this order.

7. That Metropolitan Edison Company and Pennsylvania Electric Company are hereby permitted to file tariffs implementing energy cost charges, effective for service rendered on and after June 1, 1980, and levelized at 19.1 mills per KWH and 8.5 mills per KWH respectively, consistent with this order.

8. That Metropolitan Edison Company and Pennsylvania Electric Company may amend their tariffs to include in costs recoverable through their energy cost charges the costs of demand or reserve capacity charges associated with purchased power incurred from January 1, 1980 until Three Mile Island Power Station, Unit No. 1 returns to service or until further order of the Commission, consistent with this order.

9. That Metropolitan Edison Company shall forthwith reduce its deferred energy cost balance in the amount finally determined by the Commission at C.21597, in satisfaction of the refunds ordered by the Commission.

10. That the complaints of the parties consolidated at this docket are hereby sustained to the extent consistent with this order, and are hereby otherwise denied.

11. That the request to intervene filed by David D. Trout, filed on March 24, 1980, is hereby denied without prejudice to Mr. Trout to file a formal complaint.

12. That the complaint dockets C-79040831, C-79050907, C-79050909, C-79101682, C-79121754, and C-79121808 be marked closed.

13. That Metropolitan Edison Company and Pennsylvania Electric Company are hereby directed to propose, within 90 days after entry of this order, a plan for the implementation of a test program which will measure the effects of conservation-inducing rates on customer kilowatt-hour consumption and on revenues, consistent with this order.

14. That Metropolitan Edison Company and Pennsylvania Electric Company are hereby directed to file and comment upon, within 90 days after entry of this order, a proposed energy cost rate tariff to become effective January 1, 1981, consistent with this order.

15. That the exceptions of the parties are hereby granted to the extent consistent with this order and are hereby otherwise denied.

16. That Respondents are hereby directed to serve all parties with copies of all tariffs filed in compliance with this order.

17. That a copy of this order shall be served on all parties.

BY THE COMMISSION,

William P. Thierfelder
Secretary

(Seal)

ORDER ADOPTED: May 23, 1980

ORDER ENTERED: May 23, 1980

CONCURRING OPINION

BY CHAIRMAN SUSAN M. SHANAMAN

RE:

Metropolitan Edison Company

and

Pennsylvania Electric Company

Docket No. I-79040308

May 23, 1980

In response to recent news releases and press conferences by the General Public Utilities Corporation and the Office of Consumer Advocate concerning the Commission's Initial Decision in this case, I think it only proper at this time to express my extreme displeasure at the conduct of some of the parties in the Commission's administrative process, ~~in both parties~~.

I would note that the recent public statements made by Mr. Cohen in particular are not only objectionable to myself and the entire Commission, but also highly unprofessional. Such actions are especially disconcerning in view of the fact that the Consumer Advocate holds a position of public trust and responsibility. As a party in these proceedings the Consumer Advocate is expected to vigorougly and aggressively represent his client. As an officer of the court the Consumer Advocate is expected to abide by the Canons of Ethics and Disciplinary Rules. During the pendence of a proceeding a lawyer should not participate in publicity seeking means to influence the outcome of the merits of such proceedings. The failure of this Commission to adopt the particular course of action suggested by the Consumer Advocate must, of course, be personally disappointing. It should not be utilized as an excuse for demogoguery.

It is also clear that the statements released by GPU, though not as derogatory as those by the Consumer Advocate, can also be considered highly unprofessional. The mere fact that Mr. Kuhns expressed an opinion

which questions both the fairness and the legality of the Commission's proposal to remove TMI Unit #1 from the base rate pending the adoption of our final order today leaves one with an impression of somewhat dubious motives.

I can only hope that in future proceedings before this Commission, both the Office of Consumer Advocate and the General Public Utilities Corporation will restrain from such unprofessional and apparently unethical actions as they have recently displayed at the conclusion of this proceeding. It is the timing and the highly opionated tone of the releases that is of concern. Had they been issued today I would have no problem.

I am concerned that the testimony and the questions concerning the assessment of alternatives with respect to TMI do not become mere dictum in an otherwise lengthy decision. This Commission has stated that

> "Met Ed must aggressively pursue the return to service of TMI #1 or an early decision on its conversion and use of alternative fuel."

That statement is insufficient standing alone. The impact upon the ratepayer of waiting for some sign can be measured in the dollars spent for replacement power. The Commission must determine whether Respondents truly wish to explore the alternatives and their cost or whether there is a mindset to conduct "business as usual."

This Commission, this Commonwealth and indeed this Nation are struggling to gain independence from OPEC and to develop our own resources to the greatest extent possible. One such example within Pennsylvania is the study by Penn State regarding the feasibility of mine mouth electric generation from anthracite through utilization of large open pit mining technology. Clearly a facility of this nature deserves careful consideration.

The viability of the return to service of TMI, its conversion, or the decision to build anew are options that must be critically assessed.

I would therefore direct the Bureau of Conservation, Economics and Energy Planning to recommend to this Commission appropriate reporting requirements, studies, or actions which should be undertaken to ensure the appropriate assessment of the option viability. I would ask the Company to submit its decision-making time schedule to the Commission.

And thus with my concurring statement we reach the denouement -- the final revelation of occurrence which clarifies the nature and outcome of a complex sequence of events. There are no clear-cut victories, nor outright defeats for any of the parties who participated in this democratic process. There is hopefully an indication that the system of democracy in which we are engaged does work.

To quote from a statement by one resident of this area:

"The /members/ of the Public Utility Commission of Pennsylvania have my profound empathy. They have before them a most unenviable task. It has been their job to hear reams of testimony, to come to a decision on what is the right thing to do.

The utility, Met Ed, on the one hand demands compensation for a tragedy, albeit a self-inflicted tragedy. The people of the community serviced by the utility demand morality from a system devised two hundred years ago to dispense justice to its citizens.

The decision, one way or the other, will bear the names of those who effected it. The names of the Legislative body of the Commonwealth of Pennsylvania will not appear even though they are the ones who make the laws wherein the PUC must work. The names of the utility /industry/ and its varied interests will not appear; neither will the names of thousands of the utility's adversaries who protested its actions.

The choice will be a difficult and lasting one."

This Commission is charged by law to balance the competing interests of the ratepayer, the Company and its investors. It is sincerely hoped that our collective wisdom will serve that public interest with equity for all concerned.

This Commission most emphatically takes exception to two letters received by this Commission from Respondents. These letters were attached to the exceptions received by the Commission on May 16, 1980. The first letter is addressed to this Commission from W.G. Kuhns, Chairman, General Public Utilities Corporation. Also enclosed was a letter co-authoried by Robert Gillham, Vice President, Chemical Bank, and Philip C. Kron, Vice President, Citibank. This letter was addressed to the General Public Utilities Corporation and its subsidiaries.

The subject matter of these letters concerns the Respondents' reaction to this Commission's Initial Decision of May 9, 1980. The Respondents expressed their concern over the effect this decision would have on their financial viability. In addition, the bank's reaction was communicated.

Respondents are fully aware that this correspondence cannot be considered as part of formal exceptions filed. Certainly the legal counsel for this Company has had more than sufficient experience before regulatory bodies such as this one that it should be capable of distinguishing between verified facts and opinions. This Commission can only consider evidentiary facts and testimony which are a part of this record in reaching a final decision.

This Commission would be remiss if it did not thoroughly admonish the Respondents for their actions. This conduct comes dangerously close to an ex parte violation of the law, if not the "letter" thereof, then most assuredly the "spirit" of the law.

This Commission is fully aware of the improper nature of this communication by Respondents. We question the intent behind these letters and caution Respondents against any future correspondence of this nature.

Lastly, we want to assure all parties that the contents of the two letters has been totally disregarded by this Commission. The impartial nature of this proceeding has not been adversely affected.

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120

Public Meeting Held May 23, 1980

Commissioners Present:

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

Pennsylvania Public Utility Commission, et al. Docket No.
v. I-79040308
Metropolitan Edison Company
and
Pennsylvania Electric Company

CONCURRING OPINION OF COMMISSIONER CAWLEY

If I had to summarize this unfortunate case in one sentence, some words of Shakespeare would be most appropriate: "There's small choice in rotten apples." By that I think he meant that in cases like this there are no pleasant choices.

What reasonable choices did this Commission have in this proceeding?

We could have bowed to those most vociferous in their demands for retribution and washed our hands of these companies. As to Met Ed, we could revoke its certificates of public convenience. As to both Met Ed and Penelec, we could have permitted the continued undercollection of replacement power costs, the consequent enlargement of the amount constituting the difference between what the companies have paid for replacement power and what they have been allowed to collect from their customers (the so-called deferred energy balance), and we could have removed TMI-I from each company's rate base.

Of course, sooner or later, bankruptcy would ensue. I have no doubts about that whatsoever. And what would this mean? Replacement of those individuals in management who were in charge on March 28, 1979? A takeover of Three Mile Island by the Nuclear Regulatory Commission? Acquisition of one or both companies by another public utility? Maybe.

Or, would bankruptcy mean the takeover of one or both companies by a trustee in bankruptcy? Extended litigation over repayment of creditors? Protracted legal proceedings to determine who should continue to provide service? Delay in the cleanup of TMI-2? Continued purchases of expensive replacement power in lieu of cheaper power being generated at TMI-1 or Oyster Creek? Uncertainty of employment for the rank and file employees of the companies? Slower installation of new service and needed repairs? I believe so.

In my judgment, if any of the former possibilities are worthy goals (and I make no judgments), the price to achieve them which bankruptcy would exact is simply too high for any ratepayer to risk or assume.

The same applies to all public utilities and their customers in Pennsylvania because of the ripple effect bankruptcy would have on the cost of raising much-needed capital from investors, if it could be raised at all.

Such can be raised by convincing investors that investment in a Pennsylvania public utility is a safe and profitable investment, meaning the security won't become worthless, interest or dividends will be reliably paid, and the security may even appreciate in value.

In a very real sense, most of us buying a house, or, for that matter, a car, are faced with the same financial reality - we need the money and must convince someone who has it to loan it to us. Before they do, however, there must be reasonable assurances of repayment.

It is not hard to imagine the deleterious effect bankruptcy (or arbitrary and capricious treatment) of these companies would have to all Pennsylvania utilities and their customers.

Bankruptcy would mean we would have to make do with whatever generating capacity we now have, indefinitely, because no one would loan or otherwise invest their money in Pennsylvania utilities. If they did, the cost of the money would be skyhigh.

So, even if we desired to punish one or both of these companies, we could not do so without dragging down all Pennsylvanians one way or another.

Rejecting bankruptcy, then, we could have taken the opposite tack and given the companies all they wanted - no disenfranchisement, current recovery of replacement power costs, quick (over 14 months) recovery of the built-up unrecovered replacement power costs, and no removal of TMI-1 from rate bases.

MetEd's Franchise

A certificate of public convenience, a "franchise" for short, is a particular privilege conferred by a grant from an agency of government and is vested in an individual or individuals so that they may conduct business for the public good. It is a positive right to do something otherwise legally incompetent, i.e., to operate as a monopoly free of ruinous and uneconomic competition.

MetEd has an accumulation of such franchises, and no party to this proceeding has suggested that the Company has served the public over the years with anything but fidelity. The Company's customers and investors have benefited as a result.

We are now called upon to decide whether these franchises should all be revoked because of an accident at one of the Company's generating facilities. If it were just that, a simple accident, this would be just another case. But the accident occurred at a nuclear facility, a controversial means of generating electricity. And then there are a whole assortment of related matters so commonly known that I won't repeat them.

The simple facts are that an accident happened involving both machine and human error; MetEd's employees and officials did less than an exemplary job of explaining to the public what was happening; much of the reporting of the event emphasized the sensational; and consequently the surrounding populace was thoroughly freightened out of their wits.

We have the authority to revoke a franchise and have done so in lesser instances where safety and reliability have been found lacking.

Here, however, we have neither the expertise nor the legal authority to determine whether or not MetEd has been incompetent in its management of a nuclear facility. The Federal Government, which has both the expertise and the legal authority, will eventually, I assume, provide us with record evidence sufficient for us to make an intelligent, legally competent, decision on this issue. Until then, we cannot do so.

Recovery of Current & Accumulated Replacement Power Costs

With regard to replacement power costs, the most fundamental point is that no person or company can remain in business very long if they are operating at a loss. The inevitable result is bankruptcy, and I've already attempted to explain why <u>everyone</u> under the present circumstances would lose in such an event.

I doubt any thinking person would quarrel with this point, especially since it is a fundamental of the free enterprise system.

What is puzzling to most, however, is why the companies' ratepayers have to pay any more than they were paying before the accident. The common phraseology is, "Why should I have to pay for MetEd's mistake?"

I believe they shouldn't have to. I publicly said so on February 8 while simultaneously voting to increase MetEd's levelized energy charge 6.9 mills, translating into a $55 Million rate increase. And by my vote today that tentatively granted increase is made permanent and about $56 Million more is also authorized in the form of additional recovery of replacement power costs.

So am I trying to talk out of both sides of my mouth, or just the biggest hypocrite around?

Neither, I would hope. I, we all, vote as we do because we perceive no reasonable alternative in the long-term public interest.

If anyone thinks we somehow enjoy making such a decision, or that we are "pro-utility" in doing so, they are badly mistaken. Instead, we have agonized over this decision, particularly this part. And GPU stockholders, whose chances of receiving future (or recouping lost) dividends is significantly impaired by our removal of TMI-1 from the companies' rate bases, will certainly disagree with any "pro-utility" appellation for us.

Where are the funds to come from if service is to be provided? Investors have already put up their money; the banks won't loan any more; current customer rates aren't sufficient; other utilities can't afford to provide replacement power for nothing (although some have been more humane in their charges than others); no other company has expressed an interest in taking over (quite the contrary), and even if another company were to take over, the same situation would exist; and even if the Federal government took over operation of Three Mile Island, it is unlikely that it would run the rest of MetEd or Penelec. That would be left to a Federal bankruptcy judge.

That leaves increased customer rates. Even accepting the benefits which these customers have received by having cheaper power generated at TMI-1 for several years, I believe it fair that they now be required to pay more only if there is a countervailing burden placed on the companies' investors.

I repeat, however, my February 8 statements: that neither ratepayers nor investors deserve to shoulder this burden alone. It would be different if the Federal government, through the NRC and especially its predecessor, the Atomic Energy Commission, was blameless in this.

Sooner or later, replacement power costs, and quite possibly uninsured cleanup costs, are going to become so oppressive that Federal relief will become a necessity. How long, Mr. President and Congress, must we suffer before that relief is finally given? How long?

Only with the greatest reluctance do I subscribe to removal of TMI-1 trom the companies' rate bases. I have already stated why removal is necessary in terms of fairness, but two other reasons make the decision difficult.

Firstly, the possible adverse effect removal may have on Pennsylvania public utilities and their customers when future plant absolutely needs to be built and can only be constructed by public financing. Investors may well percieve greater risk (and therefore the need for a higher rate of return) because of the "regulatory climate" in Pennsylvania (i.e., this Commission and its treatment of TMI-1).

With TMI-1 removed, we seriously jeopardize future dividends for the companies' investors, at least for the immediate future, which is really my second reason: Included within "investors" are the wealthy andthose of modest means.

There are many stockholders of the parent company, GPU, who invested in these companies to educate their children, to provide for modest retirement, to provide for their widows or surviving minors. We adversely affect all of these by our action today, although, by simultaneously requiring ratepayers to pay more, we undeniably impose equally grievous hardships.

I agree with the companies that the"used and useful" test for property includability in the rate base is a flexible regulatory tool allowing us as a matter of discretion to permit longer inclusion of TMI-1 in the rate bases. That same flexibility, however, works both ways. It allows us to determine when property is to be excluded as well as included.

In the final analysis, the imminence of that unit's return

to service within the reasonable future is so in doubt, and the need to allocate the burden between ratepayers and investors is so great, that, in law and in equity, TMI-1 must be excluded from the rate bases, at least for the time being.

I believe we have the legal authority, in fact, the duty, to do so in fulfillment of our overall goal to provide a framework for financial recovery of these companies for the public good. The steps we require today are meant to constitute a measured pace, dictated by the extraordinary uniqueness of this case. For that reason, I earnestly hope that the removal of TMI-1 for the time being will be viewed by the investment community as an isolated necessity.

I believe also that it is in the best interests of investors and ratepayers that this Commission be perceived as a protector of both of them. We must have the public's trust and confidence if we are to be constantly making unpopular, unpleasant decisions (usually occasioned solely by the ravages of inflation). Otherwise, we may fall prey to demagogy and even replacement because we aren't sufficiently "protecting" consumers.

Likewise we must have the trust and confidence of investors, for reasons already mentioned.

All of this depends very much on how the manner, the timing, the humanity, of our actions in this case are perceived. For illustrative purposes only, three newspaper items are appended hereto which speak eloquently of the milieu within which this decision is being made and the public perception of it.

In closing, and while the specter of demagogy is fresh, I regretably must state publicly my disappointment with, and objection to, public statements made this week by Consumer Advocate Walter Cohen concerning this Commission's Initial Decision in this case.

Mr. Cohen is quoted by the Associated Press at a news briefing as having said, "We believe that the decision makes a mockery of due process of law."

He is further quoted as having said, "We think that, contrary to what the Public Utility Commission says, the commission has in fact written a blank check that ratepayers are being asked to pay because of the accident."

Firstly, perhaps more than any other member of this Commission, I feel at complete liberty to make the following responses to Mr. Cohen. The final form of Act 161 of 1976, which created the Office of Consumer Advocate, was personally drafted by me for the members of the Senate Consumer Affairs Committee.

In addition, I was intimately involved with passage of the Act which ensured adequate funding for the Office of Consumer Advocate, and the Act which extended the life of that Office for five additional years.

Act 161 provides that the duty of the Office of Consumer Advocate is "to represent the interest of consumers... before the commission...". The Act defines a "consumer" to include corporations, municipal corporations, and natural persons.

The Act also provides that the Consumer Advocate "may exercise discretion in determining the interests of consumers which will be advocated in any particular proceeding and... (he) shall consider the public interest...".

In order that this discretion not be unbridled, the Act requires the Consumer Advocate, if he chooses to take part in a proceeding, to "issue publicly a written statement..stating concisely the specific interest of consumers to be protected."

Finally, the Act repeats provisions of the Public Utility Code by providing that the Commission is to "take such action with due consideration to the interest of consumers" and it is to "regulate public utilities in the public interest.".

Pursuant to the provisions of Act 161, members of the Office of Consumer Advocate participated admirably in these lenghty proceedings, as they often do in matters before us. In addition, those individuals filed legally proper exceptions to our Initial Decision.

However, the above quotations, if actually said publicly by the Consumer Advocate, not only exceed the bounds of Act 161, but also may well fall within Canon 7 of the Code of Professional Responsibility and Disciplinary Rules of the Supreme Court of Pennsylvania.

Canon 7 is entitled "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law". Disciplinary Rule 7-101 (A) (1) requires that a lawyer avoid "offensive tactics" and "treat with courtesy and consideration all persons involved in the legal process."

More specifically, DR-107 (entitled "Trial Publicity"), subsection (H), provides in pertinent part:

> (H) During the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable

person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to:

(1) Evidence regarding the occurrence or transaction involved.
(2) . . .
(3) . . .
(4) His opinion as to the merits of the claims, defenses, or positions of an interested person.
(5) Any other matter reasonably likely to interfere with a fair hearing.

To me, if the Consumer Advocate's public statements do not fall directly within these provisions, they at least come perilously close.

I am certain, in any event, that such inflammatory and derogatory comments do immeasurable harm to this Commission's efforts to be fair, just, and reasonable to ratepayers, public utilities, and investors alike since we must protect the interests of all concerned, not merely consumers.

The Consumer Advocate knows, or certainly should know, the Commission is fair game for cheap shots and demagogy, the latter being variously defined as the practices of "a leader who obtains power by means of impassioned appeals to the emotions and prejudices of the populace" or of "a speaker who seeks to make capital of social discontent."

Whether we are correct in our decision today or not, I earnestly hope that the overall damage done to our public credibility is not too great, that such overzealous rhetoric will stop, and that the general public will remember the many good things that the hard working employees of this Commission do every day for countless citizens of this Commonwealth.