

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: DUQUESNE LIGHT COMPANY AND PENNSYLVANIA POWER
COMPANY, Appellants V. DAVID M. BARASCH, ET AL.

CASE NO: 87-1160

PLACE: WASHINGTON, D.C.

DATE: November 7, 1988

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IN THE SUPREME COURT OF THE UNITED STATES

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DUQUESNE LIGHT COMPANY AND :
PENNSYLVANIA POWER COMPANY, :
Appellants :

v. :

No. 87-1160

DAVID M. BARASCH, et al. :
-----X

Washington, D.C.

Monday, November 7, 1988

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:00 o'clock a.m.

APPEARANCES:

PETER BUSCEMI, ESQ., Washington, D.C., on behalf of the
Petitioners.

IRWIN A. POPOWSKY, ESQ., Senior Assistant Consumer
Advocate of Pennsylvania, Harrisburg,
Pennsylvania; on behalf of the Respondents.

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P R O C E E D I N G S

(11:00 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-1160, Duquesne Light Company v. David M. Barasch.

Mr. Buscemi, you may proceed whenever you're ready.

ORAL ARGUMENT OF PETER BUSCEMI

ON BEHALF OF THE APPELLANTS

MR. BUSCEMI: Thank you, Mr. Chief Justice, and may it please the Court:

Duquesne Light Company and Pennsylvania Power Company are regulated public utilities in the State of Pennsylvania. They are obliged by statute to provide adequate and reasonably continuous electrical service to their customers. To fulfill their statutory duty to serve, Duquesne and Penn Power are required to anticipate and provide for future energy needs and demands.

During the 1970s, Duquesne and Penn Power spent \$50 million in planning and preparing for the construction of four nuclear power plants. The utilities decided to build these plants in response to extreme pressure from the Pennsylvania Public Utility Commission as well as regulatory authorities in

1 neighboring states.

2 The Commission believed in 1973 when the
3 decision to build was made that additional generating
4 capacity was needed to meet expected demand.
5 Accordingly, Duquesne and Penn Power spent \$50 million
6 for, among other things, architectural and engineering
7 services, surveying, construction planning, supplies,
8 preparation of licensing applications and consulting
9 fees.

10 In January 1980, as a result of unforeseen and
11 unforeseeable changes of circumstances, Duquesne and
12 Penn Power cancelled the four nuclear plants and did not
13 proceed with the actual construction.

14 This case is here on appeal from the Supreme
15 Court of Pennsylvania because the state has sought to
16 deny Duquesne and Penn Power any opportunity at all to
17 recover any portion whatever of the \$50 million the
18 utilities spent in planning for and preparing to build
19 the four cancelled plants.

20 QUESTION: Counsel, the Pennsylvania Supreme
21 Court, I take it, remanded this case to the Pennsylvania
22 Public Utilities Commission for further proceedings.

23 MR. BUSCEMI: Yes, I think that's correct,
24 Justice O'Connor.

25 QUESTION: Is it -- is it possible that the

1 Pennsylvania Public Utilities Commission could increase
2 the risk premium portion of the equity rate to reflect
3 the increased risk on remand? Is there some way that
4 your client could be compensated in a different way on
5 remand?

6 MR. BUSCEMI: Well, Your Honor, we've
7 obviously thought about that, and I'd like to be able to
8 say that the answer to your question is yes. But I
9 honestly think that under the decision of the Supreme
10 Court of Pennsylvania and under its reading of the
11 statute, Section 1315 of the Pennsylvania Public
12 Utilities Code, we would not succeed in that effort on
13 remand.

14 Indeed, I suspect that my adversary here, the
15 Consumer Advocate, would say that that is just a way of
16 accomplishing in one manner what cannot be accomplished
17 in another, and that the Supreme Court of Pennsylvania
18 has said on page 14a of the Appendix to the
19 Jurisdictional Statement this shall not be done in any
20 way whatsoever.

21 QUESTION: Well, it wasn't altogether clear to
22 me, and it was not clear to me whether this then is a
23 final judgment.

24 MR. BUSCEMI: Well, Your Honor, I think that
25 the --

1 QUESTION: That's the real question at this
2 point in my mind also, whether you have a final judgment
3 here.

4 MR. BUSCEMI: I think we do have a final
5 judgment, Your Honor, on the point of whether any
6 portion of this \$50 million of expenses will be
7 recovered in any way whatsoever. I can't imagine the
8 Supreme Court of Pennsylvania using stronger language
9 than it has used in its opinion.

10 QUESTION: You -- you're not interested in
11 recovering expenses. You're -- you're -- you're
12 interested in getting enough money to run a -- a
13 profitable business whether it's done by computing your
14 expenses and then giving you enough over that to do so
15 or whether it's done in some other manner. What do you
16 care whether they allow you the return on this nuclear
17 plant so long as you have a high enough rate of return?
18 Right?

19 MR. BUSCEMI: Oh, I think that's quite
20 correct, Your Honor.

21 QUESTION: So, what if the state, in light of
22 the fact that they have now exposed you to a -- a
23 greater risk than in the past -- that is, you -- you
24 have to build these plants and you can't get -- get that
25 thrown into your rate base unless they're used and

1 useful. What if the state says in light of that added
2 risk, we're going to kick up your rate of return from 18
3 to 25 percent? Would you have been harmed at all?

4 MR. BUSCEMI: In theory I think the answer to
5 that question is no. But as the statute that's at issue
6 here, Section 1315 of the Pennsylvania Public Utilities
7 Code, has been interpreted by the Supreme Court of
8 Pennsylvania, that can't happen because the statute, the
9 critical statutory language, which appears on page 241
10 of the -- of the Appendix says "nor otherwise included
11 in the rates charged." And that is precisely the
12 language on which our opponents relied in the Supreme
13 Court of Pennsylvania to say that there was absolutely
14 nothing that could be done.

15 QUESTION: Well, the hypothetical I gave you
16 does not include the cost of the plant in the rates
17 charged at all. It just gives you higher -- higher
18 return in light of the fact that you are now undergoing
19 a higher risk. That is the risk of not being able to
20 get that included in -- in your rate base if it turns
21 out not to be used and useful.

22 MR. BUSCEMI: Well, Your Honor, I think it's
23 inescapable that if you accept the proposition that you
24 are suggesting, the \$50 million, the prudent expenses
25 that were incurred by Duquesne and Penn Power, would be

1 in some way, whether you call it directly or indirectly,
2 included in the rates charged because there would be a
3 recovery of the sums that were expended. And that's --

4 QUESTION: Well, that's --

5 MR. BUSCEMI: -- your hypothetical that you --

6 QUESTION: That's a very broad reading of that
7 language. Maybe -- maybe it means that. I wouldn't --
8 I wouldn't take it to mean that automatically.

9 MR. BUSCEMI: Well, Your Honor, we've been
10 confronted in this case with a very broad reading of the
11 statutory language. As you know, the Public Utility
12 Commission of Pennsylvania granted 10-year amortization
13 of the \$50 million in expenses that are at issue here.

14 And that ruling, which appears in Appendices C
15 and E of the Appendix, was sustained by the Commonwealth
16 Court of Pennsylvania, both of whom interpreted the
17 statute not to apply to a situation involving cancelled
18 plants, but merely to be a timing measure with respect
19 to the time of recovering the cost of construction work
20 in progress.

21 Both the Commission and the Commonwealth Court
22 said that the statute was only designed to make certain
23 that the Commission understood that its pre-existing
24 practice was not to be changed and that with respect to
25 plants not yet on-line, construction work in progress

1 was not to be included in rates in any way until such
2 time as the plants went into service.

3 But both the Commission and the Commonwealth
4 Court thought that the statute did not apply to the
5 cancelled plant situation or to the plant taken out of
6 service before the costs incurred in building that plant
7 had been completely recovered. Both of those things
8 they said were not covered by the statute.

9 But our opponents disagreed and the
10 Pennsylvania Supreme Court disagreed and said I believe
11 in no uncertain terms that these expenses were simply
12 out of the equation, not to be considered, not to be
13 recovered, to be treated as if they had not been made.
14 And that is what brings us to this Court today because
15 there are several key facts about this dispute -- about
16 this case that, I should say, are not disputed at all.

17 It's common ground that the utilities'
18 decision to begin work on these four plants was a
19 prudent one.

20 It's also accepted that the \$50 million of
21 expenses were prudently incurred. There's no
22 controversy about the amount of money that was actually
23 spent.

24 Finally, everyone agrees that the decisions by
25 the utilities in January 1980 to cancel the plants was

1 prudent under all the circumstances then prevailing.

2 So, the fact of the matter is that at every
3 step along the way, the utilities did just what prudent,
4 well-managed utilities were supposed to do. They
5 behaved just the way the Commission wanted them to
6 behave and they invested their capital not for some
7 frivolous purpose, but for the purpose of providing the
8 electric service to their customers that they must
9 provide under Pennsylvania law.

10 These expenses that we're arguing about today
11 were not wasted in any real sense. The money had to be
12 spent to put the utilities in the position to go forward
13 with construction if the conditions warranted it.

14 QUESTION: Well, I think it's -- it's clearly
15 a frustration to the utility company under the scenario
16 you paint, but under the Hope Gas case, don't we look at
17 the bottom line to whether the economic impact overall
18 can be characterized as confiscatory? And isn't that
19 the bottom line? And how can we look at that bottom
20 line until we know what happens on remand?

21 MR. BUSCEMI: Your Honor, I think the one
22 thing that we do know about what happens on remand --

23 QUESTION: Is that the test under Hope Gas?

24 MR. BUSCEMI: Well, under Hope Gas, there's no
25 question that the --

1 QUESTION: You look at the overall effect to
2 see whether it's confiscatory.

3 MR. BUSCEMI: The Supreme Court in that case
4 used the phrase "end result," a phrase that has been
5 much used by our opponents. And the rate order as a
6 whole must be looked to to see whether it's
7 "confiscatory." Of course, that begs the question of
8 what it means for a rate order to be confiscatory.

9 The first -- Mr. Justice Harlan back in Smyth
10 v. Ames said that the question of how you determine
11 whether a rate order is confiscatory and the necessary
12 elements in that inquiry will always be what he called
13 an embarrassing question. Well, it remains an
14 embarrassing question today because it is not easy to
15 know how one tells whether a rate order is or is not
16 confiscatory.

17 In our view, this rate order is confiscatory
18 within the meaning of Hope Natural Gas simply because
19 \$50 million worth of prudently incurred expenses,
20 expenses incurred for the sole purpose of providing
21 electric service, have been ignored, and on remand, they
22 must continue to be ignored.

23 QUESTION: But one could read Hope Natural Gas
24 as saying that if -- considering all of your clients'
25 investment in the utility business and if the -- if the

1 rate of return allowed on that investment, even after
2 having subtracted this that you say should be included
3 but won't be, if that gives them a reasonable return,
4 that's good enough.

5 MR. BUSCEMI: Your Honor, I agree that Hope
6 can be read that way, but the simple fact of the matter
7 is that the Pennsylvania Public Utility Commission, in
8 setting the rate of return to be permitted on Duquesne
9 and Penn Power's debt, preferred stock and common
10 equity, has done so in a way that does not take account
11 of these expenses.

12 They have fixed a rate of return that they
13 believe is a lowest reasonable rate of return wholly
14 apart from these expenses. So, we know on the basis of
15 what has happened in this case that these expenses have
16 not been taken into account in setting that rate of
17 return.

18 QUESTION: Well, you say then that it's a
19 matter of constitutional dimension. Every time a public
20 utility commission refuses to allow a particular item as
21 -- on which the utility claims return.

22 MR. BUSCEMI: We're saying, Your Honor, that
23 there is a constitutional component of utility rate
24 orders, absolutely, that expenses incurred for the
25 purpose of providing electric service are -- can rise to

1 the level of a constitutional --

2 QUESTION: Well, supposing here we were
3 talking about an expenditure of \$50,000 or some much
4 lesser sum, and it was -- it was much more debatable as
5 to whether this sort of thing really should be included
6 in the capital base, I take it your position would still
7 be that if you could show that it should have been, then
8 it's a constitutional question.

9 MR. BUSCEMI: Well, first of all, in this --
10 just to make sure that we have the facts right, there's
11 no question here about including this -- these
12 expenditures in rate base. This is purely a question of
13 recovery of expenses, cash operating expenses or other
14 expenses that were used for electric service. It's not
15 a question of the rate base on which your return should
16 be earned, at least as the case comes to this Court
17 today.

18 But, yes, Your Honor, I don't think that the
19 specific amount of the expense determines whether or not
20 the Constitution does or does not apply. It may have
21 lots of other practical significance. It may determine
22 whether or not the utilities think the matter is
23 sufficiently important to pursue, of course. But as far
24 as --

25 QUESTION: What -- what if the Utility

1 Commission were to say we think a fair rate of return on
2 Duquesne's investment is 7 percent, but we're going to
3 disallow these expenditures for nuclear plants? Let's
4 -- and then it comes to this Court and we say, well, we
5 don't think they should have disallowed it, but we think
6 a fair rate of return is 6 percent. And so, Duquesne is
7 still getting what it ought to under the Constitution.

8 MR. BUSCEMI: Well, I think in that -- in that
9 event, Your Honor, if the case were to come to the Court
10 in that posture, I don't think the Court would be likely
11 to review the agency's decision with respect to its
12 conclusion on rate of return because that matter simply
13 wouldn't be before the Court --

14 QUESTION: What -- what --

15 MR. BUSCEMI: -- as it's not here.

16 QUESTION: What if -- what if the Respondent
17 cross-petition said we think the -- that the agency is
18 allowing more than the Constitution requires as a rate
19 of return?

20 MR. BUSCEMI: Well, as the -- the
21 Constitution, as this Court's decisions in Natural Gas
22 Pipeline and other cases make clear, does not fix a
23 specific rate of return. It says that a rate of return
24 may not be confiscatory on the low end and it may not be
25 so high as to completely overwhelm the consumers'

1 interest on the other hand so that there is a range.
2 And I think it's generally accepted that public utility
3 commissions, particularly in this era of increasing
4 costs, have attempted to fix utility rates at the lowest
5 reasonable rate, which is the minimum rate that the
6 commission believes is necessary to satisfy
7 constitutional standards. So, I think that's what's --
8 that's what's going on.

9 And I think that with respect to these costs,
10 we're not in the rate of return issue at all because
11 here we're only talking about the amortization of the
12 \$50 million in expenses, not the question of whether a
13 return can be earned on the unamortized balance. That
14 has not been litigated in this case.

15 QUESTION: But the Chief Justice's point still
16 remains that no matter how small the excluded amount, if
17 it is excluded, you think there's a constitutional issue.

18 MR. BUSCEMI: Your Honor, I don't think that
19 anything turns under the Fifth and Fourteenth Amendments
20 on the amount of property that has been taken. I think
21 very small takings of property can rise to a
22 constitutional level in -- in the proper circumstances.

23 QUESTION: Mr. Buscemi, it's nice of you to
24 not ask for it, but -- but -- but really, we shouldn't
25 kid ourselves. If you're right that you're entitled to

1 -- to return of the capital, you'd also be entitled
2 under the Constitution to interest on that capital while
3 it's invested, wouldn't you?

4 MR. BUSCEMI: Well, Your Honor, we come here
5 this morning with two basic submissions. The first is
6 that the Constitution requires a consistent neutral
7 adherence to one method of fixing rates.

8 QUESTION: Are you going to get to the answer
9 to my question?

10 MR. BUSCEMI: Yes, Your Honor.

11 And the reason that that's relevant is because
12 I think under that submission whether the public utility
13 commission chooses the so-called prudent investment
14 route or the -- some version of the so-called fair value
15 method, it should permit a return of prudent costs and a
16 recovery -- and a return on the unrecovered costs. And
17 I think that that is inescapable under any consistent
18 method of regulating utility rates.

19 QUESTION: All right. I -- I just want to be
20 sure you didn't have some -- different constitutional
21 theory that it would somehow permit us to -- to require
22 the state to provide recovery of the investment, but not
23 recovery on the investment as well.

24 MR. BUSCEMI: Now, the second --

25 QUESTION: You don't know of any in particular.

1 MR. BUSCEMI: Well, the second submission,
2 which I was just about to describe, really follows the
3 line that Justice O'Connor suggested a moment ago and
4 relies on Hope Natural Gas and the end result principle.

5 Now, in Hope Natural Gas, it talks about
6 balancing investor and consumer interests. It provides
7 very little guidance for how that balancing is to be
8 done. It doesn't address the question that I mentioned
9 in our first submission, namely, that there should be a
10 consistent, neutral method of ratemaking. It simply
11 says balance and look at the end result.

12 Well, if -- if that's all that the
13 Constitution tells us, if that's the entirety of it,
14 which we don't think it is, but assuming it is, and if
15 all you have is that injunction in Hope to balance, then
16 our submission is in this case that balancing didn't
17 occur because the \$50 million in expenses were simply
18 removed from the equation. There was no opportunity for
19 anybody to balance them.

20 Indeed, we know what happened when the
21 Commission did balance them. The Commission balanced --
22 the administrative law judge who first looked at this
23 balanced, and he said in Appendix H of the -- to the
24 Jurisdictional Statement I think on balance, when I
25 balance the investor and consumer interests, you ought

1 to get your money back over a 10-year period, obviously,
2 already less than the current value of the money or the
3 value of the money when it was invested. I think you
4 ought to amortize your investment over a 10-year period
5 and get it back, but I don't think you ought to get any
6 return on the unamortized balance. That's what he said,
7 and the Commission approved that when they did the
8 balancing.

9 QUESTION: Then the legislature disapproved it.

10 MR. BUSCEMI: Well, the Supreme Court of
11 Pennsylvania, in interpreting a statute that was enacted
12 by the legislature between the time of the
13 administrative law judge's decision and the time of the
14 Public Utility Commission's decision, decided that the
15 legislature had meant not to permit this sort of thing.

16 QUESTION: Why should we favor the -- what you
17 call the Commission's balancing over the legislature's
18 balancing?

19 MR. BUSCEMI: Well, Your Honor, I think it's
20 doubtful whether the legislature did any balancing here
21 at all. That's why we are challenging this statute
22 because we think that the --

23 QUESTION: How does one know whether the
24 legislature did any balancing or not?

25 MR. BUSCEMI: Well, I think when you look at

1 the statute, Your Honor, it simply says that this sort
2 of expense -- that is, expense incurred in building an
3 electric generating plant -- may not be included in the
4 rates charged in any way until the plant is in service.
5 Now, when that's applied to a cancelled plant as in --
6 in this case, it means that there is no balancing. It
7 means that there's --

8 QUESTION: What if the Commission had said
9 after thinking this over for a long time and considering
10 the interests of the consumers and the utility and
11 balancing things as best we can, we conclude, and then
12 they say exactly what the legislature said?

13 MR. BUSCEMI: Well, Your Honor, the fact is
14 that that -- the legislature was not doing that. I
15 mean, the legislature was not looking at the rate order
16 of Duquesne Light Company and Pennsylvania Power
17 Company, the tariffs that were filed by those companies,
18 and reviewing them. That's not what the legislature was
19 doing or purported to be doing.

20 QUESTION: Well, do you think the legislature
21 can't pass a general statute applicable to all utilities
22 such as this?

23 MR. BUSCEMI: Your Honor, all we're saying is
24 that under the second submission that I was making with
25 regard to the Hope Natural Gas balancing test that if

1 all the Constitution requires is that everything be
2 balanced in one proceeding, then that's not what
3 happened here. It didn't happen here because the
4 Pennsylvania legislature removed one important item from
5 the balance, namely, these expenditures. And that's
6 what we don't think Hope permits it to do.

7 QUESTION: Well, you say then a legislature
8 has to leave up to its utility commission, which is
9 presumably almost an agency of the legislature -- it has
10 to leave to the utility decision -- commission all
11 decisions as to how each of these factors is to be
12 brought in. It can't pass a general legislation that
13 would bind the commission.

14 QUESTION: We're saying in our second
15 submission with -- under Hope that the entity, whether
16 it be the legislature or the rate -- or the public
17 utility commission that sets the rates, must have the
18 right to take everything into account which we think is
19 what Hope says.

20 But I return to what I said in response to
21 Justice Scalia's question, which is that our first
22 submission is that under Hope, under Natural Gas
23 Pipeline, under the earlier decisions of this Court as
24 well, there has never been a suggestion by the Court
25 that a ratemaking body, whether it be a state

1 legislature or a public utility commission, can pick and
2 choose among ratemaking methods so that it produces the
3 result that it wants to achieve.

4 This is a case in which the Public Utility
5 Commission follows, generally speaking, the original
6 cost-prudent investment method of fixing rates. But
7 when it comes to cancelled plants, as in this case,
8 suddenly we have a situation in which the used and
9 useful rule is injected into the equation and the \$50
10 million worth of expenses are deleted altogether from
11 the balance.

12 QUESTION: Mr. Buscemi, is that -- is that
13 where the -- where the balancing that Hope referred to
14 occurs? At each individualized decision, will this be
15 included in the rate base, will that be included in the
16 rate base? It seems to me that the balancing occurs at
17 the moment of truth, when the state agency, whatever
18 state agency it is, determines how much money is this
19 utility entitled to get from the ratepayers. And when
20 that judgment occurs, you can balance.

21 For all we know, when that judgment comes
22 before the utility commission, the commission will say,
23 well, gee, now that we have this used and useful rule,
24 the stock of these utilities are going to be a lot less
25 attractive. We're going to have to give a higher -- a

1 higher return on equity. Therefore, whatever the rate
2 base is, we're going to have to apply a higher -- a
3 higher rate of return to it.

4 Now, how do we know that that balancing isn't
5 going to occur at that stage?

6 MR. BUSCEMI: Well, with all respect, Your
7 Honor, I think we know it because the Pennsylvania
8 Supreme Court has told us that it will not occur and it
9 may not occur under the State law of Pennsylvania.

10 QUESTION: You come back to that language that
11 this -- there can be no return on this --

12 MR. BUSCEMI: Your Honor --

13 QUESTION: Is that the language you're
14 referring to? What page was it again?

15 MR. BUSCEMI: Well, there are -- there -- the
16 statutory language appears on page 24L, and the language
17 of the Pennsylvania Supreme Court in interpreting it
18 appears on page 14a.

19 The Pennsylvania Supreme Court says Section
20 1315 "clearly conveys but one meaning: that the cost of
21 uncompleted projects shall not only be excluded from the
22 rate base, but shall not, in any way whatsoever, be
23 included in the rates charged." Well, the only way
24 that the utility obtains revenue is in the rates that it
25 charges, and the rates that it charges must be the rates

1 approved by the Public Utility Commission.

2 QUESTION: But what I'm saying will get
3 reflected in the rates charged is not this particular
4 capital expenditure, but rather the increased -- the
5 increased profits that equity investors are going to
6 demand in order to invest in what is now a higher risk
7 enterprise. I don't see how that bears any relationship
8 to charging the ratepayers for these particular plants.

9 MR. BUSCEMI: Well, Your Honor --

10 QUESTION: They're charging the ratepayers for
11 a higher risk and therefore necessity to pay higher
12 return.

13 MR. BUSCEMI: Your Honor, I wish I could say
14 that I share your confidence in what the Pennsylvania
15 Public Utility Commission --

16 QUESTION: (Inaudible) say I had a whole lot
17 of confidence. I just said that maybe you have to come
18 back at some other time and show us that you're not
19 getting enough of a rate of return.

20 MR. BUSCEMI: Well, I think the Supreme Court
21 of Pennsylvania in its decision interpreting this
22 statute has directed the Public Utility Commission not
23 to build these expenses in in any way, shape or form,
24 not to build them in in a higher rate of return, not to
25 build them in through amortization, not to consider

1 them, to act as if they hadn't been spent.

2 QUESTION: But is it -- has it foreclosed a
3 higher rate of return than you're getting now?

4 MR. BUSCEMI: Excuse me, Your Honor?

5 QUESTION: Does anything in the opinion
6 foreclose a higher rate of return than you are getting
7 now?

8 MR. BUSCEMI: If it's based on -- on these
9 expenditures in any way --

10 QUESTION: No.

11 MR. BUSCEMI: -- I think it does.

12 QUESTION: As an absolute matter, does it
13 foreclose your getting a higher rate of return than
14 you're getting now?

15 MR. BUSCEMI: The issue of the rate of return
16 was not addressed in the opinion, Your Honor. It was
17 not part of what the Consumer Advocate appealed. The
18 Consumer Advocate didn't appeal anything about rate of
19 return. The Consumer Advocate appealed the recovery of
20 \$50 million in expenses through amortization as an
21 expense wholly apart from rate of return. Rate of
22 return is calculated on the rate base, and these
23 expenses were never included in the rate base.

24 QUESTION: May I ask you? It might
25 oversimplify. You're claiming I gather there's a

1 constitutional right to recover all prudently incurred
2 expenses.

3 MR. BUSCEMI: Well, Your Honor, I didn't say
4 that although I think --

5 QUESTION: But doesn't it boil down to that?

6 MR. BUSCEMI: Well, I think that that would be
7 an acceptable way of resolving this case.

8 QUESTION: Well, does -- does your contention
9 boil down to that?

10 MR. BUSCEMI: No, Your Honor. I think we say
11 that there must be a consistent, neutral way of doing --

12 QUESTION: But -- and that it's not consistent
13 if you exclude a category of prudently incurred costs.

14 MR. BUSCEMI: If you -- if with respect to the
15 remainder of the investment you proceed on the prudent
16 investment basis, yes. If the Public Utility
17 Commission, as it has in Pennsylvania, decides to use an
18 original cost-prudent investment method for determining
19 what's included in the rate base and how to calculate
20 rate of return --

21 QUESTION: Then it must include all prudently
22 incurred --

23 MR. BUSCEMI: They should do it across the
24 board and not --

25 QUESTION: No, not they should. The

1 Constitution compels them to.

2 MR. BUSCEMI: Yes, Your Honor.

3 QUESTION: Which would mean under that view
4 that the issue of whether these costs were prudently
5 incurred, if that were to be debated, would be a federal
6 constitutional issue.

7 MR. BUSCEMI: Well, I think it -- it could
8 rise to that level yes. But --

9 QUESTION: Well, it would in every case. It
10 would in every case it seems to me. I don't understand
11 how -- unless you just say it has got to be at least \$50
12 million.

13 MR. BUSCEMI: No, no. It does not depend on
14 the amount of the expenses. I don't turn from that at
15 all.

16 QUESTION: And -- and the issue would be the
17 same if it -- here, of course, it's stipulated they're
18 prudent. But, you know, other cases it might not be.

19 MR. BUSCEMI: Well, that's true, Your Honor.
20 I can't deny that. There's no question that in other
21 cases the issue of prudence may be debated. It's not
22 here.

23 I'd like to reserve the remainder of my time
24 please. Thank you.

25 QUESTION: Thank you, Mr. Buscemi.

1 We'll hear now from you, Mr. Popowsky.

2 ORAL ARGUMENT OF IRWIN A. POPOWSKY

3 ON BEHALF OF THE APPELLEES

4 MR. POPOWSKY: Mr. Chief Justice, and may it
5 please the Court:

6 In our view, the question presented in this
7 appeal is a narrow one. That question is whether a
8 public utility has a constitutional right to charge
9 ratepayers for the cost of any particular investment
10 even where the denial of recovery of that investment is
11 not alleged to have any significant impact on the
12 utility's overall rate level or financial condition.

13 Our proposed response to that question and the
14 framework for my argument today is twofold. First, and
15 most importantly, I will argue that the Court should
16 simply reaffirm the Hope Natural Gas decision and
17 thereby reject the utilities' appeal in this case. Hope
18 and the decisions of this Court which followed it have
19 made it clear that the proper focus of this Court's
20 review is on the overall end result of the rate order
21 not upon the individual components of that order and not
22 upon the methods used to arrive at that result.

23 QUESTION: Mr. Popowsky, what is open to the
24 Utility Commission on remand to do in terms of adjusting
25 the rate of return?

1 MR. POPOWSKY: Your Honor, as you pointed out,
2 this case has not been -- this case has been remanded to
3 the Public Utility Commission.

4 QUESTION: Right.

5 MR. POPOWSKY: The company -- we do not yet
6 know what arguments the company will make.

7 QUESTION: Oh, in your view can the Utilities
8 Commission on remand adjust the rate to take into
9 account the fact that prudent investors apparently now
10 are not going to be allowed any -- even recovery of the
11 costs of prudent investments?

12 MR. POPOWSKY: The company would be --

13 QUESTION: Can the Utilities Commission adjust
14 the rate --

15 MR. POPOWSKY: The company would be --

16 QUESTION: -- to account for that risk?

17 MR. POPOWSKY: The company would be free to
18 make that argument. However, I would point out that
19 what the Pennsylvania Supreme Court held --

20 QUESTION: I'm not asking what the company can
21 argue. I'm asking in your view what the Commission can
22 do.

23 MR. POPOWSKY: Your Honor, if the Commission
24 finds that the risk of investment -- and I'm talking
25 about the risk of investment rather than the costs of

1 these investments -- is increased, then in our view the
2 Commission is free to raise the rate of return on the
3 company's overall investment.

4 What I was going to suggest, Your Honor, is
5 that the more appropriate course would be the one which
6 I believe was indicated in Justice Scalia's question
7 which is what occurred in the State of Ohio; that is, if
8 as a result of this alleged change in the Pennsylvania
9 regulatory system -- and we would contend there has been
10 no change. We would contend that the used and useful
11 principle as held by the Pennsylvania Supreme Court has
12 long been in effect long before this statute occurred.

13 But if there has been an increase in the
14 company's overall risk, then the company is certainly
15 free -- and they have been free for the last several
16 months at least -- to seek a rate increase in which they
17 would allege that the rate of return that has been
18 allowed by the Commission is inadequate to meet their
19 capital needs. And that, Your Honor, is the difference
20 between the risk of loss -- I'm sorry -- between
21 compensation for the loss on these particular
22 investments and compensation for risk.

23 Our argument --

24 QUESTION: If the Commission does not do that,
25 has the company -- and the company comes back to the

1 Pennsylvania Supreme Court and perhaps ultimately to
2 this Court -- has the company preserved all of the
3 arguments that it's making now in your view?

4 MR. POPOWSKY: I believe the company on remand
5 has preserved these issues.

6 QUESTION: If we say that this order is not
7 final or not reviewable or that there's no Hope
8 violation at this point, can the company come back after
9 their rate order is made and make all of the arguments
10 that it's making here today?

11 MR. POPOWSKY: I believe so, Your Honor.

12 And the point is -- and I think you're correct
13 -- that -- that the Hope decision -- if the company had
14 made a proper claim under Hope, if the company had
15 claimed that the overall end result of this rate order
16 was confiscatory, then I would argue that the company's
17 arguments are premature. We can't possibly know what
18 the final end result of this case will be because it's
19 not over.

20 However, the company did not make that
21 argument. And what we're suggesting that the company's
22 not only -- argument is not merely premature, it is
23 simply wrong. The company is contending that they have
24 a -- a constitutional right to recovery of this
25 particular investment. And we suggest that under the

1 Hope Natural Gas case it is absolutely clear that it is
2 the -- it is only if the end result of the rate order is
3 -- is confiscatory that such a result can be reached.

4 QUESTION: Well, that -- that -- to that
5 extent, the judgment is surely final, isn't it?

6 MR. POPOWSKY: To the extent that the Supreme
7 Court of Pennsylvania has ruled that these particular
8 expenses may not be included in the rates, yes, the
9 judgment is final.

10 QUESTION: No matter what the -- no matter --
11 if the -- if the Commission takes some action that
12 reflects those costs, it's -- it's wrong.

13 MR. POPOWSKY: If they take an action that
14 reflects the costs, Your Honor, and rates --

15 QUESTION: Those specific costs.

16 MR. POPOWSKY: But if the Commission is free
17 to take action that reflects the risk of non-recovery of
18 costs. And for that matter, the Commission can and does
19 reflect all risks that are -- that face the utility when
20 it sets the --

21 QUESTION: The rate.

22 MR. POPOWSKY: -- the rate of return in every
23 rate case. And I believe that is what the --

24 QUESTION: Just the rate. Just the rate, not
25 the base.

1 MR. POPOWSKY: The rate of return which is
2 applied to the rate base.

3 QUESTION: Yes.

4 MR. POPOWSKY: That's right, Your Honor.

5 QUESTION: Do you think under Hope Natural Gas
6 a utility commission could say to Duquesne -- the
7 Pennsylvania Utility Commission here -- this has been a
8 bad year for consumers and we know you've prudently
9 spent a million dollars in working some of your plants,
10 but we're just not going to allow that to you this year
11 because the consumers can't afford it?

12 And so, you take -- you claim it as a
13 constitutional violation. And the Commission says,
14 well, look, their overall base is -- figuring on the
15 rate of return is perfectly okay. The fact that there
16 are these individual disallowances doesn't make any
17 difference even if they're for totally unacceptable
18 reasons.

19 MR. POPOWSKY: Well, Your Honor, the -- the --
20 the threshold examination in -- under Hope -- and as --
21 is that the end result of the rate order must satisfy
22 the investor interests in Hope. If those investor
23 interests are satisfied, then the rates are just and
24 reasonable and there is no constitutional violation.

25 QUESTION: No matter how bizarre some of the

1 reasoning of the Commission may be as to why it was
2 disallowing expenses or items in the rate -- rate base?

3 MR. POPOWSKY: Your Honor, there would be no
4 confiscation under that case under Hope. However, the
5 utility, as well as the ratepayers, have other
6 protections under the Constitution under the Due Process
7 Clause. The ratemaking methodology cannot be totally
8 arbitrary.

9 QUESTION: Would you say that would open to
10 review a claim by the utility here that the Commission
11 had been arbitrary in switching from prudently invested
12 to use -- used and useful?

13 MR. POPOWSKY: No, because that's precisely
14 the type of ratemaking methodologies that are within the
15 range of methodologies that have -- that have
16 consistently been used. And Hope states that it is the
17 -- in reviewing a rate order, it is the result reached
18 not the methodology employed.

19 QUESTION: Well, what -- what if the utility
20 could show that in every case where it benefited the
21 consumer the state -- the Commission had adopted one
22 method and in -- and in every case where it might have
23 benefited the utility that it adopted another so that --
24 you know, it ruled against the utility on every single
25 claim it made whether it was used or useful or prudently

1 invested?

2 MR. POPOWSKY: Under the -- under the Hope
3 standard and under the -- the takings jurisprudence of
4 this Court, I believe that there would not be a taking
5 unless there was an overall end result that produced an
6 unjust and unreasonable result. As the Court held --

7 QUESTION: The Chief Justice isn't talking
8 taking. He's talking due process.

9 MR. POPOWSKY: Oh, Your Honor, under the Due
10 Process Clause under procedural due process and under --
11 for example, under the -- the Nebbia decision, if the
12 method used is -- is irrational or unrelated to any
13 valid public purpose, then I would agree that there
14 could be a -- a due process violation.

15 It's my understanding that the company here is
16 claiming that there is -- that this particular rate
17 order is confiscatory. And we are suggesting that as
18 the Court held in FERC v. Pennzoil and in -- in the
19 Texaco case, which were both written by Justice White,
20 that all that is protected against in a constitutional
21 sense is that the rates be set at a level which
22 is higher than confiscatory. That's as to the
23 confiscation --

24 QUESTION: Wouldn't you argue that even under
25 the Due Process Clause you wouldn't have to show a

1 taking, but you'd still have to show a deprivation of --
2 of property which would get you back ultimately to the
3 same kind of inquiries we've been going through,
4 wouldn't it? Wouldn't it ultimately get you back to
5 what -- what is the overall rate of return even under
6 the Due Process Clause?

7 MR. POPOWSKY: Well, we would argue -- it's
8 correct, Your Honor, that at least under Hope and under
9 the cases that have followed it, that what is
10 constitutionally relevant in a rate case, as opposed to
11 perhaps a -- a physical taking of a company's property
12 -- what's constitutionally relevant in a rate case is
13 the overall rate level and that is the investors'
14 interest in ensuring that the utility can operate
15 successfully and attract necessary capital.

16 QUESTION: Is that wholly consistent with --
17 is that wholly consistent with everything that
18 Pennsylvania's Supreme Court said?

19 MR. POPOWSKY: I think that what the Supreme
20 Court did is consistent, yes, with the -- with the
21 overall end result; that is, at least there has been no
22 allegation. Our point here, Your Honor, is that there
23 has been no allegation even as of today that the rate
24 order in this case will have any material adverse
25 impact --

1 QUESTION: Well, I -- I was talking about the
2 Pennsylvania Supreme Court decision. That made it very
3 clear that the constitutional guarantee was limited to a
4 fair return on property that is being used. Wasn't that
5 the whole theory of the Pennsylvania Supreme Court
6 decision? And they say so specifically at page 21a of
7 the Appendix.

8 MR. POPOWSKY: It's correct, Your Honor. If
9 you recall, that -- that case was originally an appeal
10 brought by the Consumer Advocate's Office under -- under
11 statutory grounds. The Consumer Advocate argued that
12 the -- the allowance was unlawful under state law
13 grounds. The companies came back and argued, no, we have
14 a constitutional right to recover these prudently
15 incurred expenses. And it's correct. The -- the
16 Pennsylvania Supreme Court responded, no, you don't have
17 that right per se. And the Pennsylvania Supreme Court
18 based that on the fact that, in fact, these -- these
19 projects were not used and useful.

20 QUESTION: But -- but that's not consistent
21 with Hope, is it?

22 MR. POPOWSKY: Well, Your Honor, in -- in that
23 case the Pennsylvania Supreme Court also cited prior
24 decisions of the -- of that court, including the
25 Pennsylvania Electric case which came to this Court and

1 was dismissed.

2 In that case the court did address the Hope
3 issue. That was a case involving the -- the Three Mile
4 Island incident and whether a utility could recover the
5 costs of the Three Mile Island plant. And in that case
6 the Pennsylvania Supreme Court did address the relative
7 constitutional importance of the Hope investor interests
8 versus the used and useful test.

9 QUESTION: So, they were correct in the cases
10 they cited, but not correct in what they said?

11 MR. POPOWSKY: No, Your Honor, I think they
12 correctly responded to the company's argument that was
13 presented to them. The company did not present the
14 argument. That is, in the Three Mile Island case, the
15 company clearly presented the -- the Hope end result
16 test and suggested that the Commission order in that
17 case violated that test.

18 In this case the companies argued essentially
19 that they have a -- as they've argued here is that their
20 right rests in that individual item of property and the
21 court responded, no, to the extent that you're arguing
22 that you have a right to recover the cost of this
23 property, that is incorrect.

24 QUESTION: Well, but it seems to me the
25 Pennsylvania court does more than just respond to an

1 argument. It adopts a constitutional theory that just
2 compensation is a reasonable return on fair value of the
3 property at the time that it's being used. And that
4 itself is the kind of formulation that we eschewed in
5 Hope it seems to me.

6 MR. POPOWSKY: Your Honor, I would agree that
7 they -- perhaps the court didn't need to reach that
8 issue if they had addressed the -- the Hope issue first;
9 that is, the Hope, in essence, creates a two part
10 examination.

11 First, it is necessary to determine that the
12 overall end result of the order violates the investor
13 interest. That's only the first part of the test in
14 Hope.

15 Second, one must consider whether the
16 violation or failure to satisfy those interests is
17 overcome by some countervailing public and ratepayer
18 concerns.

19 Now, the used and useful principle has
20 traditionally been used as one of those ratepayer
21 concerns, and in certain cases it may, in fact, outweigh
22 the investor interests identified in Hope.

23 So, what I would suggest, Your Honor, is that
24 that is an issue that this Court need not reach because
25 in this case, in coming to this Court, the company has

1 failed to make the necessary threshold argument under
2 Hope, that is, that the disallowance in this case has
3 a --

4 QUESTION: Mr. Popowsky, would you --

5 MR. POPOWSKY: -- (inaudible) effect on the
6 overall rates.

7 QUESTION: Would you agree if -- if the state
8 has, in fact -- and I agree you claim it hasn't, but if
9 it has, in fact, changed from a prudent investment
10 criterion of what goes into the rate base to a used and
11 useful criterion, that the utilities would be entitled
12 to a higher rate of return than what they had under the
13 old system? Would you concede that because if you would
14 concede that, then I think -- then I think maybe Mr.
15 Buscemi has nothing to worry about.

16 (Laughter.)

17 MR. POPOWSKY: Your Honor, I would concede
18 that -- that the proper rate of return established for a
19 public utility in Pennsylvania should reflect all risks
20 that that utility incurs. If at time period A --

21 QUESTION: Well, this is a greater risk, isn't
22 it?

23 MR. POPOWSKY: Yes, yes.

24 If at time period A, the company is operating
25 under a system, which I don't believe ever existed in

1 Pennsylvania -- and our Pennsylvania Supreme Court has
2 so held, but if they operated under a system where all
3 costs that the company spent could be included in rates,
4 no matter whether they happen to produce electricity or
5 not, if that was such a system and people invested under
6 that belief, and then the law was changed, then
7 prospectively -- prospectively you would have to
8 compensate or you should compensate investors for that
9 -- for that higher risk.

10 QUESTION: Your answer is yes I think.

11 MR. POPOWSKY: Yes. Yes, it is.

12 QUESTION: Would it make any difference if the
13 -- if the company had been ordered by the State
14 Commission to make these investments?

15 MR. POPOWSKY: Your Honor, in the -- in the --
16 certainly in the second part of the Hope analysis --
17 that is, in determining the relative balance of investor
18 and consumer interests -- it would -- the nature of the
19 government action would become important and to the
20 extent that by, for example, ordering a utility to build
21 a particular plant and particularly if the Commission
22 also indicated at that time that we were operating under
23 a -- a regulatory regime under which all of those costs
24 would necessarily be included in rates, then that
25 company would have a stronger claim. But the basic

1 structure of the -- of the Hope test --

2 QUESTION: Well, would it have a claim that
3 would win in this case or not?

4 MR. POPOWSKY: Your Honor, initially one would
5 -- the Court should still examine in our view the -- the
6 Hope end result test or as was held in the FERC v.
7 Pennzoil case, all --

8 QUESTION: Even though the company may have
9 opposed making this expenditure at all.

10 MR. POPOWSKY: Your Honor, in that case, it's
11 quite possible that there could be some other protection
12 to the utility. For example, it sounds as if there was
13 almost a contract at that point between the -- the state
14 and the company. We're very far from that in this case.
15 What we have is basically a passive set of regulation
16 where the utility decides what to build and when to
17 build and what to cancel and when to cancel. And the
18 role of the Commission is to -- is to determine what is
19 a just and reasonable rate.

20 If the rates are just and reasonable --

21 QUESTION: So, the extent to which the
22 Commission participated in this initial decision really
23 isn't tantamount to an order to build.

24 MR. POPOWSKY: Certainly not in this case,
25 Your Honor. It was not an order to build. The utility

1 was free to -- to take any steps that it -- that it
2 chose to -- to meet its -- its future needs.

3 The genius of the Hope decision in our view is
4 that it recognized what is truly at stake and therefore
5 what is constitutionally protected in a utility rate
6 case. Hope recognized that investors have a legitimate
7 interest in an overall rate level which permits the
8 utility to operate successfully and to attract necessary
9 capital. But investors have no constitutionally
10 protected interest in whether a particular cost item
11 enters into the ratemaking equation, nor do they have a
12 constitutionally protected interest in the application
13 of any particular ratemaking methodology.

14 It also makes no difference from a
15 constitutional perspective whether a particular rate
16 claim involves the return on an investment or the
17 recovery of that investment. All that is protected
18 against in a constitutional sense is that the rates
19 fixed by the commission be higher than a confiscatory
20 level.

21 Hope held that if the overall rate level
22 cannot be said to be unjust and unreasonable, then
23 investors have no right to complain and judicial review
24 by this Court is at an end. Unless this Court is
25 prepared to overrule Hope, then I would submit that the

1 companies' appeal in this case is at an end as well.

2 But even if the Court were to accept the
3 companies' invitation --

4 QUESTION: What -- what are you urging that we
5 do with this appeal? We -- we should -- should we
6 decide the case and -- and find in your favor, or is
7 your argument that -- that it's not ready to be decided?

8 MR. POPOWSKY: Your Honor, I -- I think that
9 you should decide in our favor the issues raised by the
10 utility. And the case has been remanded already, Your
11 Honor. The case was remanded by the Pennsylvania
12 Supreme Court to the Pennsylvania Public Utility
13 Commission.

14 What we're saying is that this order should be
15 affirmed and that the companies' appeal does not -- has
16 not raised a valid Hope issue, and to the extent that it
17 has attacked a specific item in the ratemaking equation,
18 that is an improper appeal and should be rejected.

19 To the extent that they challenge Section 1315
20 of the Public Utility Code on its face, which I believe
21 they're doing, that should be rejected. There's nothing
22 facially invalid about a -- about a rule which restricts
23 utility rate -- specific rate recovery to individual
24 assets.

25 QUESTION: Well, specifically do you feel

1 there is a final judgment below?

2 MR. POPOWSKY: Yes, Your Honor, to the extent
3 that the company has challenged specific aspects of that
4 -- of that judgment.

5 The only thing that I don't think is final --
6 what I'm trying to suggest is -- going back to Your
7 Honor and Justice O'Connor's original questions, if this
8 case in our view had raised the proper issue -- that is,
9 whether the overall end result was unjust and
10 unreasonable -- then in our view the case would -- that
11 appeal would be -- would be premature in a sense because
12 we don't know what the final end result is.

13 To the extent that the case challenges Section
14 1315 of the Pennsylvania Public Utility Code on its
15 face, that challenge should be rejected.

16 And to the extent that it argues that any
17 individual item in any rate case must be specifically
18 reflected in rates, we would ask that that be rejected
19 as well.

20 QUESTION: Well, if you can take a position
21 that this is not a final judgment, you're home free,
22 aren't you, for the moment?

23 MR. POPOWSKY: For now, Your Honor. Certainly
24 we don't think that the -- that the State Supreme Court
25 has done thing which -- which warrants reversal of this

1 decision.

2 QUESTION: Well, you certainly don't argue it
3 very strenuously in your briefs.

4 MR. POPOWSKY: Duquesne and Penn Power
5 investors were never told by the state that they would
6 be guaranteed recovery of investments which provide no
7 service to ratepayers. The Pennsylvania Supreme Court
8 ruled in this case that the used and useful principle
9 was established as a matter of state law -- a matter of
10 state ratemaking policy long before the enactment of the
11 specific ratemaking provision at issue here.

12 Neither before nor after Hope, has this Court
13 ever ruled that a utility has a constitutional right to
14 charge ratepayers either a return on or a recovery of
15 non-used and useful investment. There is, therefore, no
16 basis upon which the utilities can now claim that their
17 investors were unaware that there was at least a risk
18 that non-used and useful investments would continue to
19 be excluded from the ratemaking equation.

20 The companies' argument would turn nearly
21 every rate disallowance in every rate order into a
22 constitutional issue. The acceptance of the companies'
23 argument would return this Court and all reviewing
24 courts to the pre-Hope era where generous rate increases
25 to financially sound utilities could be attacked as

1 confiscatory because of the failure to approve a
2 specific cost item in a constitutionally proscribed
3 manner. The states would be unable to apply any other
4 economic or policy considerations in determining how to
5 set just and reasonable rates.

6 The companies' argument also fails to
7 recognize that ratemaking is an ongoing, dynamic
8 process. Duquesne Light Company has had five base rate
9 cases just during the pendency of the appeals in this
10 case. In upholding the Federal Power Commission's order
11 in the Hope case, the court recognized that this is not
12 an order for all time and that the doors of the
13 Commission are open for increased allowances that prove
14 to be necessary.

15 Rather than assigning constitutional status to
16 every dollar of every rate claim of every public utility
17 in the United States, we would respectfully ask the
18 Court to reaffirm the Hope decision and deny the
19 companies' appeal in this case.

20 QUESTION: Thank you, Mr. Popowsky.

21 Mr. Buscemi, you have two minutes left.

22 REBUTTAL ARGUMENT OF PETER BUSCEMI

23 MR. BUSCEMI: Thank you, Mr. Chief Justice.

24 My adversary has concentrated a lot on a
25 individual item and says that our claim is a claim for

1 an individual item of investment. Our claim is a claim
2 for a constitutional method of setting rates. If
3 Pennsylvania -- and my opponent has not denied it --
4 fixes rates of return based on prudent investment and a
5 reasonable rate of return, the lowest reasonable rate
6 based on the original cost-prudent investment method,
7 which is what Pennsylvania does under Section 1311 of
8 the Public Utility Code, then Pennsylvania must under
9 the Constitution under the Fifth and the Fourteenth
10 Amendments permit the recovery of prudent expenses
11 incurred for the provision of electric service.

12 If Pennsylvania follows the fair value method,
13 which is what the Pennsylvania Supreme Court suggests,
14 Justice Kennedy, on page 21a of the opinion, but which
15 seems to fly in the face of what the Commission actually
16 does and what Section 1311 says, then the value of the
17 used and useful plants and the rate of return on those
18 plants can be adjusted to take into account expenses
19 prudently incurred but not producing electricity.

20 That is not what happens in Pennsylvania.
21 That's not what happened in this case, and that's why
22 we're here complaining because the \$50 million that Penn
23 Power and Duquesne Light spent will never be recovered.
24 We will never be able to recover on a Mustang the losses
25 that we've incurred on an Edsel. That is the problem

1 that we are bringing to the Court's attention because
2 the Pennsylvania Supreme Court has specifically ruled
3 that Section 1315 precludes that kind of
4 counterbalancing that normally would occur under the
5 fair value regime that was originally envisioned by this
6 Court in Smyth v. Ames. That's not what Pennsylvania
7 does.

8 If the \$50 million -- and you did not hear my
9 opponent say that the rate of return could be increased
10 to take account of these costs. That's contrary to his
11 position, and it's contrary to the position that he
12 would espouse on remand.

13 Thank you.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
15 Buscemi.

16 The case is submitted.

17 (Whereupon, at 11:54 o'clock a.m., the case in
18 the above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 87-1160 - DUQUESNE LIGHT COMPANY AND PENNSYLVANIA POWER COMPANY,

Appellants V. DAVID M. BARASCH, et al.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Judy Freilicher

(REPORTER)

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