



COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

B-176629

DEC 29 1972

Dear Mr. Sampson:

Reference is made to your letter of July 21, 1972, with enclosures, requesting our opinion as to the validity of the Government's claim for reimbursement of \$645,305, representing an alleged overcharge by the Potomac Electric Power Company (PEPCO) as a result of an apparent miscalculation of adjustments for fuel costs during fiscal years 1969 and 1970.

Article 5 of contract No. GS-00F-1595(TP), dated June 21, 1965, between the General Services Administration (GSA) and PEPCO provides that the charge for electrical service " \* \* \* shall be as set forth in the applicable rates of the Contractor from time to time lawfully in force and effect"; and Article 6 of the contract provides that "Service furnished under this agreement shall be subject to rates, regulations and practices prescribed by any Federal, State or local regulatory commission having jurisdiction \* \* \*." Further, it is reported that the applicable rate schedule approved by the Public Service Commission of Maryland and in effect during the period in question includes the following provision:

"ADJUSTMENT FOR CHANGES IN THE COST OF FUEL - The energy charge will be increased or decreased .0010 cent per kilowatt-hour for each one-tenth cent increase or decrease above or below 29.5 cents per million BTU in average cost of fuel as burned in the Company's power plants and charged to its Fuel Expense Account No. 501. This adjustment will be based upon the average cost of fuel during the second month preceding the billing month."  
(Underlining supplied.)

The apparent overcharge came to light during a hearing before the Public Service Commission of Maryland in June 1970 in connection with PEPCO's application for an increase in the rates for electrical service. In this connection, see the testimony by Frank S. Walters, a PEPCO official, pages 53-55 of the transcript, Volume I, Phase II, In the Matter of the Application of Potomac Electric Power Company for an Increase in its Rates for Retail Electric Service, to the effect that the present effective tariff limits adjustment for the cost of fuel to the costs charged to account No. 501, which is basically the cost of

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coal; that the requested change would not so limit the right to adjustment, but would include the costs for all fuels; and that since 1969 PEPCO had been including the costs for other fuels in determining adjustments "even though they do not literally fall within the tariff provision" limiting adjustment to the costs charged to account No. 501.

Subsequent to the hearing, and similar hearings before the appropriate regulatory bodies in the District of Columbia and Virginia, the fuel adjustment clause applicable to the three jurisdictions was revised to include adjustments for charges to fuel expense accounts without limitation as to the account or type of fuel.

After unsuccessful attempts to gain PEPCO's agreement to refund the amount of the claimed overcharge, the contracting officer issued a final decision on May 24, 1971, pursuant to the Disputes Clause of the contract, concluding that PEPCO had overcharged the Government in the amount of \$645,305, and was legally obligated to refund that amount. PEPCO's denial of an overcharge is based upon its position that the adjustment clause was intended to cover all fuels and that this intent should not be frustrated by its minor procedural error in failing to amend the rate schedule adjustment clauses on file with the appropriate regulatory bodies to include account No. 547.

PEPCO timely appealed the decision to the USA Board of Contract Appeals, which on April 17, 1972, granted PEPCO's motion to dismiss on the ground that the Board lacked jurisdiction as the Government's claim is one for "breach of contract which is not redressable under the terms of this contract and therefore does not come within the purview of the Disputes clause."

This Office discussed the matter with the Department of Justice and referred the file to Justice for their review and recommendation. The Justice Department replied by letter dated November 13, 1972, copy enclosed, recommending that the claim should be set off against amounts otherwise due PEPCO by the Government. We agree with this recommendation.

Sincerely yours,

Paul G. Dembling

Comptroller General  
Acting of the United States

Enclosure

The Honorable Arthur F. Sampson  
Acting Administrator, General  
Services Administration