To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Stevens
Justice O'Connor
Justice Kennedy

From: **Justice Scalia**

Circulated: _____

Recirculated: JAN 0 3 1989

STYLISTIC CHANGES THROUGHOUT

~~1st~~ 2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 87-1160

DUQUESNE LIGHT COMPANY AND PENNSYLVANIA POWER COMPANY, APPELLANTS *v.* DAVID M. BARASCH, ETC., ET AL.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT

[January ——, 1989]

JUSTICE SCALIA, with whom JUSTICES WHITE and O'CONNOR join, concurring.

I join the Court in reaffirming our established rule that no single ratemaking methodology is mandated by the Constitution, which looks to the consequences a governmental authority produces rather than the techniques it employs. See, *e. g.*, *FPC* v. *Texaco Inc.*, 417 U. S. 380, 387–390 (1974); *Wisconsin* v. *FPC*, 373 U. S. 294, 309 (1963); *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602 (1944). I think it important to observe, however, that while "prudent investment" (by which I mean capital reasonably expended to meet the utility's legal obligation to assure adequate service), need not be taken into account as such in ratemaking formulas, it may need to be taken into account in assessing the constitutionality of the particular consequences produced by those formulas. We cannot determine whether the payments a utility has been allowed to collect constitute a fair return on investment, and thus whether the government's action is confiscatory, unless we agree upon what the relevant "investment" is. For that purpose, all prudently incurred investment may well have to be counted. As the Court's opinion describes, that question is not presented in the present suit, which challenges techniques rather than consequences.