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December 2, 1997

BY HAND DELIVERY
James McNulty, Acting Secretary
Pennsylvania Public Utility Commission
Room B-20, North Office Building
Harrisburg, PA 17105-3265

ORIGINAL

Re: Application Of PECO Energy Company For Approval Of Its Restructuring Plan Under Section 2806 Of The Public Utility Code,
Docket No. R-00973953;
Petition of Enron Energy Service Power, Inc., Docket No. P-00971265.

Dear Secretary McNulty:

Enclosed for filing with the Commission are an original and two copies of PECO Energy Company's Brief In Support Of The Partial Settlement And In Opposition To The Enron Plan(s). As directed in the Prehearing Order #6 from Administrative Law Judges Chestnut and Rainey, I am also enclosing a diskette containing this document in electronic format.

Also enclosed for filing, as Appendix B to PECO's Brief, is the Motion Of PECO Energy Company To Strike Enron's Late-Filed Exhibit.

Sincerely,

Paul R. Bonney

DOCUMENT FOLDER

Paul R. Bonney

PRB/mbo

w/enclosures
cc: John M. Quain, Chairman (by hand delivery)
David W. Rolka, Commissioner (by hand delivery)
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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA PUBLIC UTILITY COMMISSION	:	
	:	
v.	:	DOCKET NO. R-00973953
	:	
PECO ENERGY COMPANY	:	

BRIEF OF PECO ENERGY COMPANY

In Support Of The Partial Settlement And In Opposition To The Enron Plan(s)

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Dated: December 2, 1997

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I. INTRODUCTION AND SUMMARY OF POSITION

On December 3, 1996, or almost precisely one year ago, Governor Ridge signed into law the Electricity Generation Customer Choice and Competition Act (the "Competition Act") (66 Pa. C.S. §§ 2801 et seq.). The Competition Act fundamentally restructures the provision of retail electric service in order to bring energy savings to industry, small businesses and residents of Pennsylvnaia.

This case presents the opportunity to implement competition for retail electric service in Southeastern Pennsylvania in a responsible manner that not only ensures benefits to customers, but also provides a fair transition for all parties as the Competition Act requires. The Partial Settlement filed on August 27, 1997 achieves these goals by providing significant customer rate reductions in the near-term and meaningful competition in the long-term. The Partial Settlement -- reached after months of long and difficult negotiations among a broad range of parties including not only PECO and the OTS, but advocates for residential customers (OCA and Senator Fumo), commercial customers (OSBA), large industrial customers (PAIEUG), low-income customers (CEPA, Lance Haver and Senator Fumo), retired citizens (AARP) and the U.S. government (Navy) (collectively referred to hereinafter as the "Joint Signatories") -- is in the public interest and should be approved.

As CEPA/Fumo witness Silkman (Tr. 1976) and AARP witness Cooper (Tr. 2007-08) acknowledged, the Partial Settlement is a carefully designed consensus document which reflects compromises on all sides. For example, PECO agreed (1) to reduce rates four months early, (2) to accelerate customer choice by a year for two-thirds of its customer base, (3) to extend the statutorily imposed transmission and distribution rate cap until January 1, 2004, and (4).to expand substantially its universal service programs for low-income customers (hereinafter the "extra-statutory concessions"). In addition, and in return for a Competitive Transition Charge ("CTC") revenue stream which would enable it to recover a reasonable level of stranded costs, PECO assented to writing off $2.0 billion, which is the equivalent of approximately 30% of its investment in existing generating plant.

Residential customers, in turn, made various concessions to ensure rate stability, to protect themselves against future market uncertainties and to obtain the substantial expansion of PECO's universal service programs. Similarly, business customers agreed to forego litigation to guarantee that existing rate offerings which promote economic development remain in place. In short, sacrifices were made, and made knowingly, with the expectation that a settlement mutually agreed to by the parties was preferable to an administrative determination which might not fully reconcile the parties' divergent interests.

The Partial Settlement was initially opposed by the Pennsylvania Electric Competition Coalition ("PECC"), a group consisting of Enron Power Marketing, Inc. ("EPMI"), New Energy Ventures ("NEV") and Conectiv Energy; the Mid-Atlantic Power Supply Association ("MAPSA"); the Environmentalists; and the Municipal Intervenors.[1/] The PECC and MAPSA asserted, at the time, that the Partial Settlement should be rejected principally because its generation rate caps allegedly would preclude other potential competitors from entering the market and because PECO would purportedly overcollect the agreed-upon amount of stranded costs. However, through testimony and cross-examination at hearings held on October 14-16, 1997, the Joint Signatories demonstrated that (1) the opposing parties' market price "evidence," and hence their conclusions regarding the Partial Settlement's generation caps, was so contrived and sophomoric as to be of no probative value; and (2) their analysis of stranded cost overrecovery was critically flawed and, as a consequence, completely meaningless.

If this proceeding had been concluded at that point, tens of thousands of additional low-income customers in Southeastern Pennsylvania would already be receiving the benefits of expanded universal service protection. Unfortunately, on October 7, 1997, another Enron subsidiary, Enron Energy Services Power, Inc. ("EESP") -- a hastily assembled shell corporation with no assets, no employees and no intention of committing resources -- filed the first of what turned out to be multiple restructuring plans (the "First Enron Plan"). In their Answers to the First Enron Plan, PECO and other Joint Signatories observed that

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1/ The specific objections of the Environmentalists and the Municipal Intervenors are addressed in Section II. C.5 of this Brief.

EESP's filing was nothing more than a public relations stunt which would not and could not work. When they submitted responsive testimony two weeks later, the Joint Signatories explained why the First Enron Plan was, indeed, dead on arrival.

After half-heartedly denying that there were any problems with its initial proposal, EESP apparently recognized that the First Enron Plan was listing badly. Consequently, on November 12, 1997 EESP unveiled the Second Enron Plan in which, through testimony, EESP amended its securitization scheme, revised the terms of its recommended supplier tariff and changed virtually all of its unbundled tariff rates.[2/] Although the Second Enron Plan struggled to plug the more obvious holes in the First Enron Plan, other holes went unattended and new leaks began to spring as the November 17-19, 1997 hearings and the surrebuttal testimony of PECO and the consumer parties revealed:

- Numerous glaring statutory violations were either glossed over or simply ignored.
- Critical information regarding EESP's financial backing was not provided.
- The promised "Shortfall Agreement" -- the linchpin of EESP's securitization scheme -- was nowhere to be found.[3/]
- Important consumer protections continued to fall by the wayside.
- EESP's proposed Power Purchase Agreement ("PPA") and MBC Services Agreement, which PECO had indicated it could not execute because of their onerous, ridiculously one-sided and demonstrably unfair terms, were left untouched.

2/ These changes, which EESP euphemistically termed "enhancements", were made possible when EESP jettisoned the transmission and distribution rates to which it had committed in the First Enron Plan and replaced them with figures which, if adopted, would deny PECO the recovery of an additional $1.6 billion in net present value (i.e. over and above the $2.0 billion which PECO agreed to write off as part of the Partial Settlement) (Tr. 1806).

3/ In fact, the Shortfall Agreement did not show up until Wednesday, November 26, 1997, i.e., after the hearings had concluded and as this Brief was being prepared. As a result of EESP's latest ploy, PECO and the other Joint Signatories have been denied any opportunity to review and test the Shortfall Agreement on the record. Its consideration by the Commission would therefore deny the parties' rights to due process and, for that reason, PECO has filed the attached Motion to Strike ("Appendix B").

- Provisions that would stifle the development of long-term competitive markets remained in place.

If the Enron Plan(s) were in the public interest, consumer groups would no doubt have flocked to its defense. But that has not happened. To the contrary, at this stage the sole proponent of the Enron Plan(s) is Enron itself. The reason is simple -- Pennsylvanians, who have the most to gain (or lose) through this process, have recognized that the Enron Plan(s) is nothing more than a "get rich quick" scheme which may win high marks for Enron on the arbitrage circuit but which has little to offer customers.[4/]

As will be explained in the following Sections of this Brief and in the attached proposed Findings of Fact ("FF") and Conclusions of Law ("CL") ("Appendix A"), the Partial Settlement and the Enron Plan(s) stand in stark contrast. The Partial Settlement enjoys the unwavering support of Pennsylvania consumers; its rate reductions are, in fact, guaranteed; and its proposed generation caps ensure that robust competition will develop over the course of the Competition Act's transition period. The Enron Plan(s), on the other hand, is a "pig in a poke" whose essential elements change weekly; whose "savings" are illusory and unachievable; and whose unbundled rates will eliminate competitive opportunities after the first two or three years.

II. THE PARTIAL SETTLEMENT

The Partial Settlement resolves many of the more contentious issues raised by PECO's proposed restructuring plan. At the same time, it carves out other issues which the Commission either will adjudicate here or, alternatively, take up in generic statewide proceedings. In this Section of its Brief, PECO reviews the Partial Settlement and responds to various objections to it; unsettled issues are discussed in Section III.

4/ Unlike PECO, which has agreed to write off $2.0 billion and has made a number of other costly concessions, Enron has structured its Plan(s) so that it can take home $100s of millions without exposing to risk any of its own investment dollars.

A. Summary Of Principal Terms And Conditions

The Joint Signatories have requested that the Commission: (1) approve **without modification** the Partial Settlement of this proceeding as set forth in their August 27, 1997 Joint Petition; (2) permit PECO to file the tariff supplements attached to the Joint Petition to become effective pursuant to the terms set forth therein; and (3) issue a Qualified Rate Order ("QRO") authorizing PECO to securitize up to $4.0 billion of stranded assets and costs. The principal terms and conditions of the Partial Settlement are summarized below. For a complete understanding of the Partial Settlement and the factors which led the individual Joint Signatories to enter into it, the Commission is urged to review the August 27, 1997 Joint Petition and the various Statements in Support appended thereto.

Rate Reductions. On September 1, 1998, PECO will reduce its retail electric rates by 10% across-the-board. Thereafter, rates will remain at or below current levels through at least December 31, 2005. If PECO is unable to securitize (i.e., issue transition bonds) because of a legal impediment, the initial 10% rate decrease would become 7% and the other rate reductions would be adjusted accordingly. For purposes of the Partial Settlement, a "legal impediment" does **not** include PECO's inability to obtain required rulings from the Securities and Exchange Commission ("SEC") or the Internal Revenue Service ("IRS") or more practical "impediments" such as rising capital costs -- these risks are assumed by PECO.[5/]

Unbundling Of Existing Rates. On January 1, 1999, PECO will unbundle its retail electric rates into the following components: (1) distribution charges; (2) transmission charges; (3) a CTC and, if applicable, an Intangible Transition Charge ("ITC"); and (4) a maximum market price for energy and capacity (the "generation rate cap").[6/] The specific charges set forth in the Partial Settlement represent

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5/ In contrast, EESP has defined a "legal impediment" to securitization as "anything that would impair the marketing and/or issuance of the Transition Bonds" (PECO St. 20-E, p. 14). As later discussed, this is simply one of many examples of where EESP has avoided risk and given itself ample "wiggle room" to walk away from the Enron Plan(s).

6/ The Partial Settlement does not attempt to resolve whether metering or billing should be

(continued...)

negotiated values and are a natural outgrowth of the evidence presented by the various Joint Signatories. The Partial Settlement's approach to unbundling differs markedly from that of EESP, which developed its unbundled rates first and then, as an afterthought, retained consultants to defend them (see Section II.C.1, infra).

Securitization. PECO is authorized to securitize up to $4.0 billion of its stranded costs. Consistent with the Competition Act, PECO would have the discretion to determine when and how much to securitize, taking into account market conditions and the impact of securitization on PECO's financial integrity. Under the Partial Settlement, customers are guaranteed the benefits of securitization unless PECO establishes, to the Commission's satisfaction, that there is a "legal impediment" to securitization. The Enron Plan(s), on the other hand, is contingent upon the securitization of $5.4 billion even though that might harm PECO's financial integrity.[7/]

Phase-In Of Customer Choice. The Competition Act anticipates that one-third of a utility's customers will be allowed to choose their generation supplier on January 1, 1999; one-third on January 1, 2000; and the remaining third on January 1, 2001. The Partial Settlement accelerates this process so that two-thirds of PECO's customers will have choice by January 2, 1999 and the remaining third a year later. This is one of the "extra-statutory" concessions to which PECO committed.

6/(...continued)
unbundled for rate purposes or made subject to competition (p. 7). Those issues are, however, addressed in Sections III.B and IV.B.1 of this Brief.

7/ EESP included in the Second Enron Plan a "Contingency Plan" that would kick in if securitizaiton were delayed or impeded. However, as in the case of EESP's securitization proposal, the "additional rate savings" under the Contingency Plan come at the expense of PECO's shareholders through the reallocation of transmission and distribution costs to the generation function. Furthermore, the "Contingency Plan" would auction off customers to multiple providers of last resort ("PLRs"), raising serious consumer protection (i.e., "slamming") issues.

Transfer Of Generation Assets. PECO agrees to transfer the "unstranded" portion of its generating assets to an affiliate at a price of $2.303 billion. This corporate disaggregation is not mandated by the Competition Act and, in that sense, is an additional "extra-statutory" concession.[8/]

Recovery Of Stranded Costs And Associated Write-Offs. PECO has established that its stranded costs will approximate $7.461 billion. Of this amount, the Partial Settlement provides for the recovery of $5.461 billion and requires that PECO write off $2.0 billion (Partial Settlement, p. 16). These terms clearly represent a reasonable compromise, particularly in light of the level of stranded cost recovery that the OTS ($4.784 billion) (OTS St. 1, p. 33) and the OCA ($4.353 billion) (OCA St. 1S, p. 1) would have espoused if this case had been fully litigated.

Universal Service. The Partial Settlement builds on PECO's successful Customer Assistance Program ("CAP") Rate pilot and provides for open enrollment in that program for eligible customers, subject to an initial maximum participation level of 100,000 customers which will be reviewed as this level is approached. As such, PECO's existing customer assistance programs could more than double their enrollment in the next several years. In addition, PECO agrees to establish a LIURP Advisory Committee to periodically review LIURP program design and delivery (Partial Settlement, pp. 20-23).

Consumer Education. The Joint Signatories agree to cooperate with one another in developing a Commission-approved Consumer Education Program. PECO also commits to augment any statewide program with its own initiatives to provide Company-specific information to its customers (Partial Settlement, pp. 24-25 and Appendix G).

8/ EESP's reaction to this provision highlights the failure of its witnesses to do their homework. Contrary to Mr. Kean's assertions (EESP St. 1, p. 20), any such transfer will require the Commission's review and approval (Partial Settlement, p. 15). Similarly, if Enron witness Slater had reviewed Mr. Hill's supplemental rejoinder testimony (PECO St. 1-SRJ, p. 6), he would have realized that the market value assigned to PECO's fossil and hydro units was substantially greater than the sales price received by the New England Electric System upon the recent disposition of certain of its facilities, not less as Mr. Slater erroneously suggested (Enron St. 4-R, p. 16; Tr. 1558-59).

Generation Supply Obligations And Opportunities. PECO agrees to serve as the provider of last resort ("PLR") for all retail electric customers in its service territory through December 31, 2008. PECO will satisfy its obligations by purchasing required amounts of energy and capacity at wholesale and reselling that power at standard market rates not to exceed the rate caps set forth in Appendix C to the Partial Settlement (Partial Settlement, pp. 25-26).[9/]

Transmission And Distribution Planning. PECO will evaluate cost-effective alternatives to distribution improvements that are projected to cost in excess of $10.0 million and to support the Joint Signatories' efforts to add a consumer seat to the Management Committee of the Pennsylvania-Jersey-Maryland ("PJM") Interconnection (Partial Settlement, p. 28).

Renewable Energy Development. PECO will file with the Commission tariff provisions designed to facilitate the development and installation of renewable energy sources including solar, wind, hydro, biomass and methane field generation (Partial Settlement, p. 28).

Withdrawal Of Pending Appeals. Certain parties to the Partial Settlement will withdraw various actions currently pending before the Commonwealth Court which challenge the constitutionality of the Competition Act. If these cases were litigated to conclusion, it is possible that customers would be denied the benefits of competition for years (Partial Settlement, pp. 28-29).

B. The Partial Settlement Is In The Public Interest

The Partial Settlement is fully consistent with the Competition Act and is in the public interest in that it: (1) provides meaningful rate reductions; (2) promotes customer choice; (3) substantially expands upon existing customer assistance programs; (4) requires PECO to implement a meaningful consumer education program; and (5) permits PECO an opportunity to recover a just and reasonable level of stranded

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9/ As discussed later, EESP, in violation of Section 2807(e)(3) of the Competition Act, would charge PLR customers its capped rates even if the prevailing market prices were less (Tr. 1291).

costs. For these and the other reasons set forth below, PECO requests that the Partial Settlement be approved without modification.

Customers Will Receive Significant Generation Rate Reductions. The Partial Settlement provides for a guaranteed 10% across-the-board rate reduction effective September 1, 1998, or four months **prior** to the advent of retail competition in Pennsylvania, and additional CTC reductions during the transition period. PECO believes that such reductions are the largest to which any electric utility in the country has committed in order to advance the transition to competition. Customers will further benefit from PECO's agreement to extend the statutorily-imposed "cap" on its transmission and distribution ("T&D") rates from June 30, 2001 to January 1, 2004 and on its generation rates from December 31, 2005 to January 1, 2009. Since PECO has also committed to remain the PLR through December 31, 2008, customers who continue to purchase their electric generation supply from PECO will enjoy a virtually unprecedented era of rate stability. In fact, on an inflation-adjusted basis, the average per kilowatt-hour ("kWh") capped charge in the year 2008 will be 34% **less** than the corresponding 1990 level (Ex. TPH-28) and customers will have the opportunity to obtain additional savings above these guarantees from the competitive market.

Customer Choice Will Be Accelerated. The Partial Settlement accelerates the transition to competition such that **all** of PECO's customers will have direct access to alternative generation suppliers by the year 2000, **a year earlier than mandated by the Competition Act.**

The Development Of Competitive Markets Will Be Promoted. The generation rate caps set forth in the Partial Settlement will provide alternative electric generation suppliers ("EGSs") sufficient "headroom" and incentive to compete in the first two or three years of the transition period. Thereafter, the gap between the generation cap and the projected market price of energy and capacity widens significantly

such that robust competition is ensured.[10/] Moreover, PECO's agreement to (1) separate its generation functions from its regulated transmission/distribution functions, (2) operate under a Commission-approved Code of Conduct, (3) file tariff provisions to facilitate the installation and operation of renewable energy sources, and (4) augment any statewide consumer education program will promote the development of fair and open competition.

The Funding Of Nuclear Decommissioning Obligations Will Be Assured. The Partial Settlement enables PECO to recover a $234 million deficiency in nuclear decommissioning funds and establishes a tracking mechanism which will ensure that sufficient funds are collected should projected decommissioning cost levels change from current estimates.

Economic Development Will Be Supported. The Partial Settlement keeps in place existing tariff offerings and provides substantial rate relief to industrial customers, thereby stimulating economic development throughout Southeastern Pennsylvania.

Employee Dislocations Will Be Avoided. PECO does not anticipate the need to lay off any employees if the Partial Settlement is approved. The same cannot be said of the Enron Plan(s).

Low-Income Customers Will Be Protected. As discussed previously, the Partial Settlement provides for a very substantial expansion of PECO's universal service programs.

Each of the Joint Signatories had to weigh the costs and benefits of the Partial Settlement against the range of possible outcomes of full litigation. As a result and as CEPA/Fumo witness Silkman observed (Tr. 1976): "The partial settlement agreement is a compromise. It's certainly not a perfect agreement from anybody's perspective but represents a balancing of interests and quite frankly, a balancing of risks ..." That

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10/ The Enron Plan(s) would have the opposite effect because, after the first few years, it would set the generation caps well below projected market prices, thereby driving out any competitors who may have gained a toehold at the outset of the transition period.

equitable balance enjoys the enthusiastic and unified support of **all** of Pennsylvania's principal consumer groups, which alone provides compelling evidence that the Partial Settlement is in the public interest.

C. The Objections To The Partial Settlement Are Without Merit

The principal objections to the Partial Settlement, not surprisingly, were lodged by marketers and independent power producers who fully intend to compete for sales in PECO's service territory. What they proposed, however, would not extend any additional benefits to customers not already provided by the Partial Settlement, but instead was simply designed to create more "headroom" for them to maximize their profit potential. Indeed, it was only through the selective manipulation of terms and conditions which allowed them to claim that customers would be better off if the generation rate caps set forth in the Partial Settlement were **increased**.

1. Generation Rate Caps

PECC witness Mitnick and MAPSA witness Johnstone asserted that the Partial Settlement's generation rate caps understate future market prices and therefore will thwart the development of meaningful competition. Not surprisingly, EESP witness Slater later echoed this theme in an attempt to bolster the different generation caps set forth in the Enron Plan(s). In fact, the opposing parties' criticisms are totally unfounded and the market price "evidence" which they submitted fails even to pass the "blush test."

The Partial Settlement's generation caps are fully supported by the extensive analyses performed by Dr. Hieronymus utilizing the General Electric Multi-Area Production Simulation Program ("GE MAPS").[11/] Indeed, the wholesale price projections developed by Dr. Hieronymus, when translated into retail (i.e., delivered) prices fall **below** the Partial Settlement's generation caps in virtually all years of the transition

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11/ GE MAPS is a highly regarded and extremely sophisticated transmission and generation dispatch model that simulates the central dispatch of a region, in this case the PJM, and flows into and out of it from adjacent regions, taking into account any transmission limitations that may arise from economic dispatch (PECO St. 6, p. 4).

period for the most probable load factor aggregations (PECO St. 6-RJ, pp. 5-6). Moreover, the reasonableness of the Partial Settlement's generation caps is established by a variety of independent sources. For example, Dr. Hieronymus' findings fall well within the range of expected values submitted by other Pennsylvania utilities as part of their restructuring plans (PECO St. 1-RJ; Ex. TPH-29). In addition, and as noted by Mr. Freeman in his rejoinder and additional direct testimony (PECO Sts. 26-RJ and 26-E, respectively), data available from the Pennsylvania retail access pilot programs currently in place confirm that EGSs are actively marketing power at prices substantially below the "capped" prices.[12/] In short, competition has already begun to flourish.

In an effort to refute the obvious, the opposing parties presented five witnesses to challenge the Partial Settlement's generation caps. Remarkably, however, not one purported to have actually conducted any analysis of future market conditions in the PJM:

- PECC witness Mitnick took Dr. Hieronymus' wholesale prices and made a number of unsupported load factor and cost allocation adjustments to them (PECO St. 6-RJ, pp. 4-10). His resulting generation credits were later abandoned by EESP witness Kean (Tr. 1340).

- PECC witness Hull acknowledged that she had no experience in conducting market transactions or modelling future market conditions and/or prices. In addition, her market price "evidence" was essentially based on her personal "feel" for what the market must be, as confirmed by little more than the product of several telephone calls her assistant placed the day her testimony was due (Tr. 786-91). In fact, Ms. Hull indicated that she was not aware of any actual market transactions which supported her proposed prices (Tr. 804).

- PECC witness Douglass' claim that capacity in the PJM was not available and should therefore be assigned an extraordinarily high value was similarly based on several random telephone calls. Subsequent telephone calls by Mr. Douglass established that capacity was, in fact, available. Indeed, Mr. Douglass admitted, on cross-examination, that Conectiv had been able to purchase capacity in the interim at a considerably lower price (Tr. 631-43).

- MAPSA witness Johnstone is an electrical engineer whose primary work experience has been as a consultant on cost of service and cost allocation issues, and who has no economics education or experience in energy or capacity markets (Tr. 675-77). Mr. Johnstone acknowledged that he performed no analysis to project the price of energy and capacity in the

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12/ Notably, the generation credits offered in the pilot and the rate discounts offered in the early years of the Partial Settlement are virtually identical (PECO St. 1-RJ, pp. 11-13; Ex. TPH-30).

PJM area during the period encompassed by the Partial Settlement (Tr. 677-78) and that the generation credits proposed by MAPSA were not based on any such projections (Tr. 687-90). In fact, Mr. Johnstone admitted that actual market prices could be less than MAPSA's proposed credits (Tr. 683).

- EESP witness Slater's wholesale market prices were based entirely on the long-run marginal cost of a new combined cycle unit.[13/] However, Mr. Slater explained that he "never intended this Long-Run Marginal Cost of Generation to be any more than an approximation," and he was unable to document any of his underlying assumptions as they all came from conversations Mr. Slater allegedly had with his independent power producer clients (EESP St. 4-R, p. 7; Tr. 1546-49). In fact, Mr. Slater acknowledged that he "performed no study, analysis, or estimate of wholesale or retail prices or avoided costs within PJM for purposes of this case" (Tr. 1543).[14/]

Even though the opposing parties were quick to criticize the Partial Settlement's generation rate caps, the alternative figures which they propose are off the radar screen in terms of the objective evidence which has been submitted during the course of this case. For example, and as depicted by the chart on the following page, the 3.48¢/kWh first year (1999) generation price proposed in the Second Enron Plan is 39% higher than the 2.51¢/kWh price developed from Dr. Hieronymus' analysis and 22% higher than the Pilot credit of 2.85¢/kWh. Further, the 1999 Enron price is 20% higher than the 2.90¢/kWh price contained in the OCA's final litigation position. Incredibly, the numbers sponsored by MAPSA (4.01¢/kWh) and the PECC (3.83¢/kwh) are even greater.

Perhaps even more troublesome is that none of the foregoing "evidence" was even considered by EESP or MAPSA in developing their proposed generation caps. In Enron's case, as Mr. Kean revealed on cross-examination (Tr. 1344-54), another Enron employee, Ms. Lopez, was advised in early September by personnel working under Mr. Kean's direction as to what market prices should be utilized to "produce the effect intended by Enron in its Choice Plan" (Tr. 1350). That, of course, was well before the five opposing

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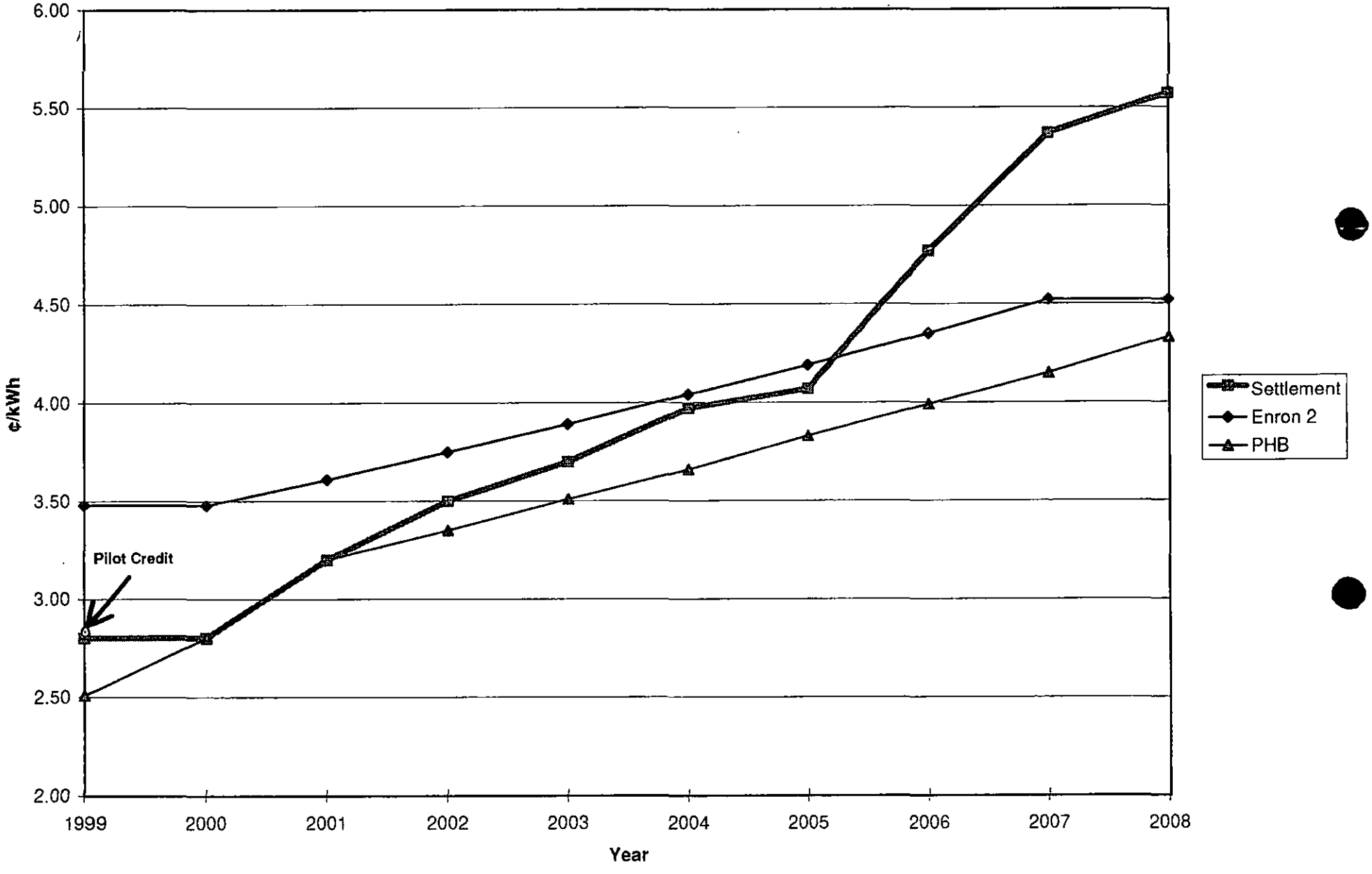
13/ Dr. Hieronymus explained why this was an inappropriate benchmark, particularly in the first few years of the transition period when available excess capacity will continue to depress prices (PECO St. 6-E, pp. 4-5). MAPSA witness Johnstone agreed that excess capacity will depress market prices below the capacity cost of a new generating unit (Tr. 683, 690-92).

14/ Mr. Slater did not even attempt to perform the type of detailed computer analysis of market prices that he regularly conducts (Tr. 1543-46).

Comparison of Generation Caps and PHB Retail Market Price Forecast



party witnesses identified above prepared their testimony and, in Mr. Slater's case, was even retained. Furthermore, no EESP witness explained how the market prices provided to Ms. Lopez were converted into the generation caps in the Enron Plan(s). Likewise, as Mr. Johnstone volunteered, the MAPSA proposal "is very much results oriented" (Tr. 689). In fact, it was not even prepared by Mr. Johnstone, but rather is "a counterproposal prepared by MAPSA and proffered by them which I have put in the record for this testimony" (Tr. 688).

Apart from their complete lack of evidentiary support, the Enron Plan(s) generation caps would create an artificial incentive for customers to switch in the early years (i.e., the caps are far too high) and to return to EESP as the PLR shortly thereafter. This scenario is troublesome in two important respects. First, under the Enron Plan(s), customers who cannot switch or elect not to do so will be charged above-market rates (Tr. 1371). As Dr. Silkman observed (CEPA/Fumo St. 2, p. 9), the lower generation caps contained in the Partial Settlement represent a "critical insurance policy" for customers. Second, in the latter years, competitors will quickly be driven out of the market and EESP enthroned as a quasi-monopoly provider. In contrast, the Partial Settlement ensures that competition will take hold and remain in place at the end of the transition period, as Dr. Hieronymus explained (PECO St. 6-E, pp. 10-11):

> In the early years, with Caps that closely track expected market prices, customers will be protected from paying above market prices. As I explained in my rejoinder testimony, if prices are above the forecast, customers do not pay any more and stranded cost is not over-recovered since the higher price received by PECO's generation is offset by PECO's higher purchase cost as a PLR. If actual retail prices are lower, customers will pay less and stranded costs will be under-recovered. I accept that these tight price caps will make it harder to compete for customers than if Caps were higher. However, as Mr. Freeman's testimony concerning experience with the pilots in Pennsylvania and elsewhere demonstrates, competition should still occur. As the Partial Settlement Caps become more generous, entry into retailing will become still more attractive.
>
> In the last three years of the Partial Settlement Caps, the "headroom" between the market price and cap becomes quite large. This can be thought of as providing insurance that retail competition will remain viable even if wholesale prices prove significantly higher than expected. Alternatively, if prices are at the forecast level, the size of the headroom virtually assures that

> the competitive market will clear at prices below the cap. This will mean that the present value of generation payments will be below the sum of the CTC/ITC and the Energy and Capacity Cap. It also will mean that, by the end of the transition period, the substantial majority of customers will have moved to retailers willing to sell at a price lower than the Cap. It is particularly important that competition is vigorous at the end of the transition period, since only vigorous competition will assure that the benefit of terminating the CTC/ITC payment will go to customers rather than their suppliers.

Finally, it should be recalled that, three years ago, Enron came before the Commission and vowed that it could bring substantial benefits to customers in the form of (1) lower cost bulk power, (2) lower supplier costs and (3) the bundling of other goods and services (PECO St. 1-RJ, pp. 25-26). Today, EESP complains that it cannot possibly compete unless it is allowed to charge above-market rates in the near term **and** PECO is required to forego recovery of $3.6 billion of its sunk costs (i.e. the $2.0 billion write-off to which it agreed and the $1.6 billion "reallocation" of T&D costs). Enron's story does not hold together.

2. Alleged Overrecovery Of Stranded Costs

Enron witnesses Mitnick and Oliver have alleged that the Partial Settlement will enable PECO to recover substantially more than the stranded cost figure stated therein. However, each of these witnesses made fundamental factual and conceptual errors in his calculations. Indeed, Mr. Hill presented a comprehensive analysis of the Partial Settlement that clearly shows PECO will not "overrecover" its stranded costs (FF II.C.2 (1-12)). As Mr. Hill explained, the Partial Settlement must be viewed as an "integrated package of rights and responsibilities" in which PECO agreed to undertake substantial, costly obligations which could not otherwise have been imposed upon it (PECO St. 1-E, pp. 16-17; see also PECO St. 3-RJ, pp. 8-10).

Mr. Mitnick's calculations proved so unreliable that even EESP abandoned them, as evidenced by its subsequent presentation of Mr. Oliver's analysis (EESP St. 2-R, p. 4).[15/] Mr. Mitnick's more egregious

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15/ Mr. Mitnick's claim that PECO is not entitled to a return on, as well as a return of, its stranded costs (Tr. 837) is also contrary to the position Enron is advocating in Oregon to support

(continued...)

errors included: (1) comparing CTC revenue to the book value of PECO's stranded costs rather than the revenue requirement imposed over the ten-year recovery period (a $600 million mistake); (2) imputing non-existent tax benefits (a $500 million mistake); (3) overstating PECO's sales level (a $400 million mistake); (4) discounting the CTC revenue stream to January 1, 1999 instead of September 1, 1998, when PECO's rate reductions would begin (a $175 million mistake); (5) ignoring the economic impact of PECO agreeing to early rate reductions, an extended cap on its T&D rates, an expansion of its universal service programs and the elimination of certain charges under its Large Interruptible Load Rider and Economic Efficiency Rider ("EER") (an approximate $450 to $660 million mistake); and (6) vastly overstating the economic benefits of securitization.

Unlike Mr. Mitnick, Mr. Oliver agreed with PECO that the present value of the CTC revenue stream should be compared to the present value of the revenue requirement (including a return on the unamortized balance) associated with the $5.461 billion of stranded costs to be recovered over the transition period under the Enron Plan(s). Like Mr. Mitnick, however, Mr. Oliver was able to conclude that PECO could overrecover its stranded costs by ignoring the costs of the extra-statutory concessions that PECO agreed to bear. This error alone accounts for approximately $500 million of Mr. Oliver's alleged overrecovery (PECO St. 1-E, pp. 17-18).

Significantly, Mr. Oliver did not contest Mr. Hill's quantification of the cost of PECO's extra-statutory concessions. Rather, he claimed that such costs simply should be disregarded because the Competition Act does not explicitly provide for their recovery (EESP St. 2-R, pp. 15-16). This argument is circular and non-sensical. The Competition Act does not reference these costs because they represent obligations the Competition Act does not require a utility to bear. The economic impact of those obligations

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15/(...continued)
the recovery of stranded costs by its subsidiary, Portland General Electric Company (Tr. 955 and 1011-12).

is real and substantial, and, accordingly, they are properly recognized as transition costs. In short, and as Dr. Cooper noted (AARP St. 2, p. 8), there are no "hidden benefits" to PECO:

> If one recognizes the reality of the case, there are no hidden benefits. PECO is not overcompensated. There was an exchange of values. Consumers took near term gains in the form of rate reductions and gave PECO the opportunity to earn back part of the write-off depending on market conditions.

3. Reconciliation And Sales Levels

Mr. Oliver also claimed that PECO will experience an overrecovery because: (1) the Partial Settlement provides that projected and actual CTC revenue will not be subject to annual "true-up;" and (2) PECO's future sales levels will be higher than those assumed by the Joint Signatories. For purposes of his analysis, Mr. Oliver purported to use sales figures from the Company's Annual Resource Planning Report ("ARPR"), which, he asserted, produced CTC revenues $700 million higher, on a present value basis, than PECO estimated. However, Mr. Oliver's analysis is riddled with errors and false assumptions:

- **Calculation errors**: For each year of his analysis, Mr. Oliver totaled the sales for all customer classes and also added the calendar year itself. For example, in the year 2008, sales levels are overstated by 2008 gigawatt hours (Tr. 1898). Accordingly, EESP Exhibit A-R overstates PECO's sales levels.

- **Use of an outdated forecast**: Mr. Oliver relied upon an ARPR that is more than two years out of date and no longer reflects PECO's expectations (PECO St. 3-RJ, p. 6). PECO's sales levels for the last ten years have been flat despite a strong economy (Ex. ABC-11). Moreover, PECO's own projections assume annual sales 2% higher than its actual 1996 sales level (PECO St. 3-RJ, p. 6). Consequently, PECO's own calculations may already overstate its CTC revenues.

- **Imputing price elasticity that is not supported by empirical data**: Mr. Oliver's claim that reductions in the price of electricity under the Partial Settlement will encourage increased use is directly contradicted by empirical data. Despite the fact that the real (i.e., inflation adjusted) price of electricity in PECO's service territory declined significantly over the past ten years, retail sales remained flat (PECO St. 1-E, p. 18; Ex. TPH-36).

- **Ignoring the sales reducing effect of energy efficiency services**: Mr. Oliver repeatedly acknowledged that the onset of competition will produce a substantial increase in energy efficiency and energy management services offered by EGSs and others (Tr. 1585-86, 1599, 1602-03, 1611). In fact, Enron has already secured a highly publicized agreement with

> Philadelphia area hospitals in which it agreed to reduce their electric bills by 20% through conservation and energy management services alone (Tr. 1600). The potential for these kinds of services to actually reduce PECO's sales levels was ignored by Mr. Oliver. In contrast, the Joint Signatories saw future sales reductions as not only possible, but highly likely (Tr. 1975-76).[16/]

The Partial Settlement has also come under attack because it embodies the Joint Signatories' agreement to forego the annual "true-up" of actual and projected CTC revenues. As witnesses for the consumer parties made clear, this provision is in the Partial Settlement at their insistence because they firmly believe there is substantial value in the rate certainty to be derived from requiring PECO to bear the risk of variations in future sales (Partial Settlement, p. 11) (Tr. 1989-91). As AARP witness Cooper noted: "The negotiators won a non-reconcilable CTC with an extended freeze on transmission/distribution rates" (AARP St. 2, p. 20). Dr. Silkman also emphasized the importance to consumers of ensuring rate stability and rate certainty (CEPA/Fumo St. 3, p. 15):

> The original consumer parties to the negotiations that resulted in the Partial Settlement Agreement established as an important objective the creation of near-term certain rate reductions for ratepayers. These parties sought guarantees from PECO that retail rates would be fixed at levels below current rates. This certainty could only be accomplished by allocating the risk of reconciliation adjustments to PECO, that is, by holding ratepayers harmless to changes in revenue requirements resulting from changes in either the total or relative mix of billing units. By shifting sales risks to PECO, the consumer parties acknowledged that PECO could receive a larger or a smaller amount of total transition costs than the amount identified as "expected" in the actual Partial Settlement Agreement. This was a conscious decision that made rate reduction levels certain, and at the same time eliminated ratepayer exposure to higher rates that would otherwise result from sales declines. The consumer parties deliberately sought to avoid both of these consequences and were successful in their negotiations of such an agreement.

16/ Mr. Schoengold's and Mr. Mitnick's allegations of overrecovery reflect the same defects as Mr. Oliver's analyses, including: (1) erroneously comparing the present value of CTC revenues to the book value of PECO's stranded costs; (2) ignoring the costs associated with the extra-statutory concessions PECO agreed to assume under the Partial Settlement; and (3) assuming annual sales growth for which no evidentiary support exists.

The risk of declining sales is real and not imagined as other parties might suggest. Indeed, in his rebuttal testimony (CEPA/Fumo St. 2, pp. 7-8), Dr. Silkman identified a number of factors that are likely to contribute to negative sales growth over the next ten years, including technological advances, distributed generation and municipalization. Moreover, the "bundling" of energy efficiency services with the sale of generation will be a significant component of future competitive offerings (Tr. 1991). The likelihood of future sales reductions from these and other causes would erode the economic benefit of the Partial Settlement to consumers and negate consumers' conservation efforts if annual "true-ups" were required (Tr. 2008).

Finally, it has been argued that the Partial Settlement violates the reconciliation provisions of Section 2808(f) of the Competition Act. However, Section 2808(f) does not preclude settling parties from agreeing to a reasonable allocation of the risks of over or under recovery through means other than annual "true-ups." In fact, Section 2808(f) states that the Commission's procedures for the annual CTC review shall be "consistent with section 1307(e)" which, in turn, provides that the Commission may require refunding or recoupment "absent good reason being shown to the contrary." This language has consistently been interpreted as affording the Commission discretion whether to allow refunding or recoupment of annual "true-up" adjustments. Community Central Energy Corp. v. Pa. P.U.C., 413 A.2d 1197 (1980).[17/] Clearly, the "good reason" contemplated by Sections 1307(e) and 2808(f) exists where settling parties make a deliberate and informed "exchange of values" (Tr. 1991) such that PECO gives up the right to increase the CTC if sales decline and the other parties give up the right to have the CTC reduced if sales increase.

17/ In addition, the Commission-approved Nuclear Performance Factor in PECO's Energy Cost Rate, which was in effect from 1989 to 1996, included a provision for non-reconciliation of energy costs in order to provide penalties or incentives for nuclear power plant performance that was below or above a predetermined industry standard. It has never been suggested that this non-reconciliation feature violated Section 1307(e).

4. Transmission And Distribution ("T&D") Rates

The T&D rates set forth in the Partial Settlement are fully supported by the cost of service study prepared by PECO witness Clemmer (FF II.C.4 (1)). They were derived from 1996 cost data and, yet, under the Partial Settlement, cannot be increased until January 1, 2004. As such, the Partial Settlement's proposed T&D rates represent extremely conservative values. As Mr. Cohn explained (PECO St. 3-RJ, p. 8), PECO's T&D costs increased by approximately 20% during a period (1990-1996) when PECO was aggressively reducing costs.

EPMI witness Reising, who also later appeared on behalf of PECC and EESP, claimed that PECO's T&D rates were overstated because: (1) PECO should have allocated more administrative and general ("A&G") and common and intangible plant costs to the generation function; (2) PECO should have allocated some uncollectible accounts expense to the generation function; and (3) PECO should have removed all "sales expense" from the costs used to develop its T&D rates. Mr. Reising's objections are without merit and should be rejected for the reasons set forth below.[18/] Moreover, and as Mr. Hill noted (PECO St. 1-RJ, pp. 13-14), the T&D charges proposed by the Partial Settlement were carefully reviewed and accepted by the representatives of the consumers who will pay them regardless of whom they select as a generation supplier.

As explained by Mr. Clemmer, PECO included in its proposed T&D rates only those A&G and common and intangible plant costs that PECO will continue to incur as an EDC following the transition to competition (FF II.C.4 (2-3)). To identify those costs, PECO undertook an extensive analysis to determine whether, and to what extent, it could actually avoid such costs once its generation function was deregulated. In contrast, Mr. Reising would arbitrarily allocate all such costs to the generation function. However, such

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18/ The First Enron Plan adopted PECO's proposed T&D rates without objection or modification (FF II.C.3 (12)). On November 12, 1997, however, EESP, in order to free up enough dollars to support its fallacious securitization scheme, suddenly reallocated approximately $250 million of **annual** T&D costs to the generation function.

generalized allocations only make sense in today's bundled rates environment where customers must bear all such costs whether they are distribution-related or not (FF II.C.4 (2)).[19/]

Uncollectibles expenses are the costs PECO incurs to fund special payment agreements, to fund the CAP Rate program and to cover the cost of non-payment by certain other customers (FF II.C.4 (4)). Mr. Reising's proposed allocation of a substantial portion of these costs to the generation function ignores the reality that PECO, as the EDC, will continue to incur these expenses at or near current levels.[20/] When PECO does the customer billing, PECO will bear all of the uncollectible expense risk (FF II.C.4 (5)). Even if an EGS could do all of the billing -- that is, for its services and for PECO's regulated services -- PECO's uncollectibles expense would not decrease by any appreciable amount. The customers most likely to generate the majority of uncollectible accounts expense are those with poor credit histories, who EGSs, in all likelihood, will refuse to serve, and customers who fail to pay their bills from EGSs and are forced to return to PLR service. Because PECO, as the PLR, will be required to serve both categories of customers, PECO, not competitive EGSs, will bear all of the uncollectible accounts expense attributable to these customers (FF II.C.4 (6-7)).[21/]

Finally, and as Dr. Hieronymus observed, EESP's proposed allocation of additional overheads to the generation function by definition decreases the value of PECO's generating facilities and increases PECO's stranded generation costs (FF II.C.4 (11)). Accordingly, had PECO accepted Mr. Reising's proposed T&D

19/ The Commission has long recognized that competitive operations must only cover their long-run incremental costs, which do not include traditional allocations of overheads. Haley v. Philadelphia Electric Company, Docket No. C-913540 (June 23, 1994), *aff'd mem.*, No. 2108/C.D. 1994 (November 21, 1995) (unpublished).

20/ As explained by Mr. Clemmer, PECO, as the EDC, will also continue to incur the "sales expense" which Mr. Reising would also allocate to the generation function (FF II.C.4 (7)).

21/ This is true also under the Enron Plan(s). Even though EGSs would assume full billing and collection responsibility for their customers, EGSs could jettison customers who do not pay to default service, and could also avoid serving customers with poor credit histories (FF II.C.4 (8-9)). Notably, EESP's proposed MBC Services Agreement would impose on PECO the full uncollectible accounts risk caused by these default PLR customers.

rates as part of the Partial Settlement, it would have insisted that the corresponding CTCs increase by a commensurate amount.

5. Miscellaneous Objections

Street Lighting Rates. The Municipal Intervenors complain that the street lighting rates set forth in the Partial Settlement are excessive. In fact, however, the Municipal Intervenors seriously miscalculated the effect of the Partial Settlement on their bills. As Mr. Hill noted (PECO St. 1-RJ, p. 18), Rate SL-E customers will receive an approximate 32% decrease in their per unit charges during the transition period.

Nuclear Decommissioning. The Environmentalists' witness, Mr. Biewald, proposed that procedures be established to address possible decreases in the funding of decommissioning expenses and to restrict the use of such funds. PECO has no objections to either concept and is willing to work with the Environmentalists to develop such procedures, subject to Commission approval (PECO St. 1-RJ, p. 2). In addition, Mr. Biewald proposed that a request to increase decommissioning cost recovery should trigger a "cost-benefit analysis" by PECO of the possible shutdown of the affected nuclear units. Such an automatic "trigger" is neither necessary nor appropriate as intervening parties are always free to raise cost-benefit issues they believe are relevant (PECO St. 1-RJ, p. 3).

Spent Nuclear Fuel. Mr. Biewald further recommended that the costs of temporary and permanent disposal of spent nuclear fuel be recovered through market revenues and not as part of nuclear decommissioning costs. That approach is already incorporated in the Partial Settlement. Mr. Biewald's additional proposal that PECO create a separate spent fuel fund is not necessary, because the costs of spent fuel disposal are already remitted directly to the Department of Energy as nuclear fuel is consumed (PECO St. 1-RJ, p. 3).

Low-Level Radioactive Waste. Mr. Biewald erroneously assumed that the cost of low-level radioactive waste disposal would be recovered as a component of PECO's T&D rates. In fact, such costs will be included as part of PECO's overall decommissioning obligation (PECO St. 1-RJ, p. 4).

Environmental Disclosure. The Environmentalists propose that EGSs be directed to disclose the environmental make-up of their generation portfolio. However, the Environmentalists have cited no statutory authority which would empower the Commission to impose such a requirement and have failed to present sufficient information explaining how such a disclosure program would operate (FF II.C.5 (12-15)). In addition, this is the type of issue which should be addressed, if at all, on a generic statewide basis.

Jurisdictional Allocation. Environmentalists witness Schoengold argued that PECO did not properly determine the jurisdictional allocation of stranded costs in its restructuring plan; that the same alleged problem affects the Partial Settlement; and, therefore, 3.8% of stranded cost responsibility should be assigned to wholesale sales (Environmentalists St. 1-S, pp. 29-30). The errors in Mr. Schoengold's calculations were addressed in detail by Mr. Cohn (PECO St. 3-R, pp. 35-36) and include: (1) "discounting" and "levelizing" the jurisdictional allocation, which is unprecedented and unrealistically assumes that generating capacity can be added instantaneously in increments precisely matching load; (2) ignoring the fact that retail sales have priority over wholesale sales; and (3) proposing an allocation method that departs dramatically from the approach that this Commission has consistently used and approved in base rate proceedings for PECO and other electric utilities. Additionally, Mr. Schoengold's entire argument overlooks the fact that the Partial Settlement did not employ any specific jurisdictional allocation method to determine stranded cost recovery. Rather, the agreed level of recovery is the product of arms' length negotiations.[22/]

22/ Based on a study of the Wisconsin electric market, Mr. Schoengold also proposed that the allocation of costs to the retail function should reflect approximately 1200 MW of reduced demand that he claims is achievable through demand side management programs. As PECO witness Bustard explained (PECO St. 4-R, pp. 31-32), Mr. Schoengold's proposal is completely unrealistic and ignores the very substantial costs (i.e., $1.0 billion) which such a program would impose on PECO.

III. ISSUES NOT ADDRESSED BY THE PARTIAL SETTLEMENT

A. Issues That The Commission Directed The Parties To Address After The Partial Settlement Was Submitted

1. FERC Jurisdictional Issues

In its October 2, 1997 Tentative Order, the Commission directed the parties to address certain FERC jurisdictional issues not resolved by the Partial Settlement. In particular, the Commission sought assurance that PECO would not assess additional charges for FERC jurisdictional "ancillary services" and, in addition, requested that the parties discuss the procedures necessary to obtain direct access. In response, Mr. Hill explained that PECO would not assess additional charges for ancillary services, but instead would recover its ancillary services costs either through its capped generation charges or through its capped distribution charges (FF III.A.1). Mr. Hill also noted that if the PJM had the necessary systems in place by January 1, 1999, eligible customers would be able to obtain transmission service directly from the PJM. If an EGS obtains transmission directly from PJM, then PECO would not charge the EGS' customers for transmission service -- the EGS would do so. Similarly, if an end-use customer obtains service directly from the PJM, that end-use customer would not pay PECO an unbundled transmission rate either (FF III.A.2).

With regard to procedures to ensure direct access, PECO has proposed that the Commission use rules developed in the context of PECO's Pilot proceeding as a starting point. For its Pilot, PECO put together a comprehensive set of procedures entitled "Customer Choice Pilot Policies and Procedures" that both EGSs participating in PECO's Pilot and PECO must abide by. As required, PECO will amend these rules to accommodate evolving PJM rules and procedures and other changing circumstances (FF III.A.3).

2. Employee Impacts

Even though the Partial Settlement would require PECO to write off $2.0 billion, PECO believes that restructuring will not have a material adverse effect on its workforce (PECO St. 1-E, p. 15). The same cannot be said of the Enron Plan(s) because (1) it would leave PECO in a severely weakened financial condition and (2) the proposed MBC Services Agreement, under which PECO would provide metering,

billing and collections services to EESP, only runs for five years and could easily be terminated by EESP before that date (FF III.A.4). Moreover, PECO seriously questions EESP's commitment to avoid employee disruptions in light of the following comments reportedly offered by Enron President, Jeffrey Skilling, this past Spring: "You must cut costs by 50 or 60 percent. Depopulate. Get rid of people. They gum up the works." (PECO St. 1-E, p. 16).

B. Generic Issues

In its October 2, 1997 Tentative Order, the Commission also determined that certain issues not addressed by the Partial Settlement, e.g., Code of Conduct and the unbundling of billing and metering, would best be resolved in actual and anticipated Commission rulemaking dockets (FF III.B.2). In its November 7, 1997 Final Order, the Commission elaborated, stating that Code of Conduct issues would be the subject of a rulemaking proceeding to be initiated before the end of the year (FF III.B.6). The Commission, however, directed that the specific structural and operational relationships between PECO and its affiliates be examined in this case. The Commission also restated its position with respect to billing and metering, noting that the legal issue of whether an entity other than PECO should be permitted to provide such services could be addressed here (FF III.B.5).

As set forth in the Partial Settlement (pp. 25-27) and Mr. Cucchi's rebuttal testimony (PECO St. 15-R, pp. 18-19), PECO's plans and obligations to separate its competitive businesses from its regulated electric distribution company operations are clear. Specifically, PECO will reorganize into a regulated wires segment and two separately constituted competitive segments, a Merchant Group and a Ventures Group (FF III.B.8). PECO will have sufficient structural and operational separations between its EDC functions and its competitive functions to ensure the development of customer choice and competition (FF III.A.8-10). In addition, and as explained in Section IV. B.1 of this Brief, the Competition Act is clear that EDCs shall continue to provide all customer service functions with the sole exception that an EGS may separately bill for its supply of generation. Even if the Commission had the authority to deregulate billing and metering, there are compelling policy reasons why that authority should not be exercised in this proceeding (PECO

St. 29-E, pp. 5-10). Indeed, deregulating metering and billing service may actually inhibit direct access which obviously would be contrary to the Competition Act.[23/]

IV. THE ENRON PLAN(S)

A. The First Enron Plan Was So Critically Flawed That It Had To Be Abandoned

The First Enron Plan was fatally flawed in a number of key respects. Perhaps most fundamentally, EESP's proposed securitization scheme could not work for basically two reasons. First, the series of transactions envisioned by EESP would not provide PECO the fair value of its Intangible Transition Property ("ITP") because a significant portion of that value -- approximately $1.0 billion -- would be siphoned off to Enron through its acquisition, at no cost, of the Class B Securities (PECO St. 20-E; PECO St. 27-E). As a consequence, PECO's mortgage trustee could not release its lien on the ITP (PECO St. 28-E). Second, EESP's proposed ITCs were insufficient to enable PECO or its special purpose entity to pay interest and principal on the transition bonds when due (i.e., the numbers simply did not add up). Because of these and any number of other problems, the First Enron Plan was, for all practical purposes, abandoned when EESP filed its rebuttal testimony on November 12, 1997.

B. The Second Enron Plan, Like The First, Cannot And Will Not Work

To plug some of the more obvious holes in the First Enron Plan, EESP took approximately $1.6 billion (net present value) of T&D charges from PECO and reclassified it as either generation credits or

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23/ For example, if customers were required to switch meters every time they switch to a different EGS, customers may be tied to long-term arrangements (PECO St. 15-R, pp. 4-5). In addition, the Commission would have to establish some mechanism, presumably available to all of Pennsylvania's electric utilities, which provides for the recovery of the stranded costs associated with the unbundling of billing and metering (PECO St. 13-E, pp. 39-40; PECO St. 15-R, p. 11). Accordingly, if the Commission believes that deregulating billing and metering should be explored, it should initiate a statewide proceeding, gather and study data and, as appropriate, propose the necessary enabling legislation.

ITCs.[24/] In other words, and as became apparent during the OSBA's cross-examination of EESP witness Kean (Tr. 1399-1408), the Second Enron Plan finances its purported "savings" by lifting dollars from the pockets of PECO's shareholders under the guise of an eleventh-hour "reallocation" of costs. As discussed above in Section II. C.4 of this Brief, there is no evidentiary support for EESP's revised T&D charges. Moreover, the Second Enron Plan cannot be implemented for a number of additional reasons: (1) it would require the Commission to violate the Competition Act; (2) it is incomplete; (3) it is anti-consumer and anti-competitive and hence not in the public interest; and (4) it would require the review and approval of numerous other regulatory entities.

Each of these deficiencies will be explored in some depth. However, the Commission must understand, at the outset, that, notwithstanding all of the hype, EESP's promised rate "savings" are anything but guaranteed. To the contrary, the Second Enron Plan is replete with conditions which, if not satisfied, allow EESP to walk:

- The transition bonds must be issued at an above-market interest rate of 9.31% and obtain the "Required Rating"[25/] (Tr. 1257-58).
- There must be no "legal impediment" to securitization (as noted previously, EESP would broadly define this phrase to encompass "anything" that could impair securitization) (Tr. 1254-55).
- There must not occur any "material adverse change" in PECO's business, financial position or prospects (another new term which EESP witness Kean was unable or unwilling to define) (Tr. 1250-51; Tr. 1364-65).
- The Commission may not modify or amend the Enron Plan(s) or its underlying contractual arrangements in a manner "unacceptable to Enron" (EESP St. 1-R, p. 40).

24/ In her direct testimony, EESP witness Lopez noted (EESP St. 7, p. 10): "For purposes of the Choice Plan, Enron has agreed to accept PECO's transmission and distribution rates." To free up additional dollars, EESP reversed course in the Second Enron Plan and suddenly dropped the per unit T& D charge from 3.11¢ per kWh to 2.37¢.

25/ This condition was added during the rebuttal phase of the case and would preclude securitization if the transition bonds failed to achieve the equivalent of a "AAA" rating. There is no comparable requirement in the Partial Settlement.

The conditional and uncertain nature of the Enron Plan(s) was perhaps best captured by CEPA/Fumo witness Silkman when he observed (CEPA/Fumo St. 3, p. 16):

> Stripped of all its rhetoric and complex contingencies, the Enron Choice Plan and Enron's defense of that plan are long on promises but remarkably short on results. As the Commission reviews the Choice Plan and the Partial Settlement Agreement, it should understand that Enron is asking ratepayers to gaze into a pool and drop the bone they have in their mouth for the illusion of a larger and more tasty one in the reflection.

1. Numerous Legal Impediments Preclude The Implementation Of The Enron Plan(s)

a. The Commission Lacks The Authority To Require PECO To Securitize, To Enter Into The PPA And MBC Services Agreement Or To Designate Enron As The Provider Of Last Resort

The Enron Plan(s) is contingent upon the Commission directing PECO to undertake a series of actions. Many of those proposed actions, however, are simply beyond the scope of the Commission's authority to order. First, the Commission does not have the power to order PECO to securitize all or any portion of its stranded assets. As Mr. Mitchell's testimony makes clear, securitization has a mixed effect on a company's financial integrity and "more" securitization is not necessarily "better". The Competition Act recognizes this by specifically providing that securitization is at the sole discretion of the utility: (1) a QRO may be adopted by the Commission "only upon the application of an electric utility;" and (2) once a QRO is issued, the utility retains "sole discretion" of whether to issue bonds under that QRO (66 Pa. C.S. § 2812(A)(1)). The Enron Plan(s) violates both of these provisions because it asks for the issuance of a QRO on the application of EESP, not PECO, and requires PECO to issue transition bonds under that QRO.

Likewise, the Commission has no authority to require PECO to enter into either the PPA or the MBC Services Agreement. Inasmuch as the FERC has jurisdiction over all sales of energy for resale by public utilities, the Commission can no more direct that PECO agree to the PPA than it can approve its terms and conditions. See Pacific Gas and Electric Company et al., 77 FERC ¶ 61,265 (1966) (stating that neither

California's public utility commission nor its legislature had authority to mandate the use of the Power Exchange because of the wholesale nature of transactions that would occur therein). As to the second agreement, PECO notes that this Commission is not a "super board of directors" for the pubic utilities it regulates, Bell Telephone Company of Pennsylvania v. Driscoll, 343 Pa. 109, 21 A.2d 912 (1941), and thus has no authority to interfere with the lawful managerial decisions of PECO, absent an abuse of discretion by PECO adversely affecting the public interest. See Metropolitan Edison Co. v. Pennsylvania Public Utility Commission, 62 Pa. Cmwlth. 460, 437 A.2d 76 (1981). Nor does PECO's status as a public utility deprive it from fully enjoying and exercising all of the rights, powers and privileges it has. See Abington Electric Co. v. Pennsylvania Public Utility Commission, 131 Pa. Super. 200, 198 A. 906 (1938). Thus, it is up to PECO to decide whether or not to enter into private contracts such as the MBC Services Agreement.

The Enron Plan(s) also requires the Commission to replace PECO as PLR in 1998 and turn those responsibilities over to EESP. This is directly contrary to the provisions of Section 2807(e) of the Competition Act, which states, in part, that as long as a utility is collecting either a CTC or ITC, it "shall continue to have the full obligation to serve." Moreover, the law is clear that the Commission is to define any revisions to that obligation to serve through regulations -- that is, through a statewide proceeding with equal application to all service territories -- and not through company-specific litigation. That rulemaking is to occur "at the end of the transition period" (66 Pa. C.S. § 2807(e)(2)). EESP's attempt to short-circuit these protections runs directly contrary to the Competition Act.

EESP has responded to the claim that it is asking the Commission to exceed its authority with a kind of "quid pro quo" argument -- EESP repeatedly argues that, while the Commission may not be able to order PECO to do certain things, it should make stranded investment recovery conditional on PECO "voluntarily" taking these steps. This is irresponsible. There is no difference between ordering such an action and threatening to harm someone if they do not "voluntarily" take that action. To avoid any confusion on this issue, Mr. Hill testified that PECO will not enter into the PPA or MBC Services Agreement (Tr. 1811); the Company also will not voluntarily engage in the EESP securitization proposal.

b. EESP's Proposed Securitization Scheme Cannot Be Achieved Under The Terms of PECO's Mortgage, Would Make It Impossible For PECO To Receive A Favorable Tax Ruling From The IRS And Would Violate The Terms Of The QRO Issued By The Commission Earlier This Year

Three problems each act as a complete bar to implementation of EESP's securitization plan. First, as noted previously, the EESP securitization plan cannot be achieved under the terms of PECO's mortgage. Because EESP proposes to skim off $100s of millions through the acquisition by Enron of the Class B securities and keep that money for itself, its plan does not provide sufficient value to the mortgage trustee, First Union, to release the mortgage lien against the ITP that would be created by its QRO. Without the release, no transition bonds could be issued (FF IV.B.1.b (1-4)). In its rebuttal testimony, EESP argued that it was providing PECO value beyond cash value. As Mr. Mitchell pointed out, however, EESP's assertions of additional value are irrelevant because the additional value must flow to the mortgage trustee and bondholders, something that EESP does not even claim to be the case. EESP also suggested that this issue could be avoided if PECO were to "defease" its mortgage -- which would require PECO to pay of all of its existing first mortgage bonds. Mr. Mitchell concluded that such an action would have disastrous consequences for the Company's financial integrity and would be a taxable exchange for PECO and its bondholders (FF IV.B.1.b (5)).

The second bar to implementation is that, under the Enron Plan(s), it would not be possible for PECO to receive a favorable tax ruling from the IRS that the transition constitutes a financing and not a sale of the ITP. As a result, EESP's proposal would expose PECO to a $2.25 billion tax liability that would make the securitization economically unfeasible (FF IV.B.1.b (10)). EESP essentially admitted that the First Enron Plan did not meet the technical requirements for a favorable tax ruling; indeed, many of the changes that EESP proposed in the Second Enron Plan were intended to resolve these tax issues. The Second Enron Plan did not solve the underlying problem -- that the disparity between the issue price and the

fair market value of the transition bonds would cause the IRS to view the transition as a sale of the ITP by PECO. As such, a favorable IRS ruling is extremely unlikely (FF IV.B.1.b (9)).[26/]

The third bar to implementation is that the Enron Plan(s) would violate the QRO that the Commission issued to PECO in May, 1997. Briefly, the May QRO gave PECO an irrevocable property right to issue transition bonds for $1.098 billion under terms and conditions which differ markedly from the QRO now proposed by EESP. Indeed, even under the Partial Settlement, it is necessary for PECO to relinquish its rights in the May QRO in order to avoid a similar problem. Even though PECO filed a letter with the Commission nearly two months ago resolving this issue for purposes of the Partial Settlement, EESP did not address this issue anywhere in its filing or testimony (FFIV.B.1.b (11)).

c. EESP's Proposed Unbundled Charges Would Violate The Rate Cap Provisions Of The Competition Act

The EESP Tariff is structured so that EGSs do all customer billing (FF IV.B.1.c (1)). As such, PECO would send bills to EGSs for the T&D service provided to the EGSs' customers, but EGSs would not be required to separately state end-use customers' unbundled T&D charges on their bills (FF IV.B.1.c (2)). EESP witness Kingerski admitted that the T&D portion of "end-use" customers' bills from EGSs would be determined "by contract" (FF IV.B.1.c (2)). However, these provisions clearly violate the non-generation rate cap provisions set forth in Section 2804(4)(i)(B) of the Competition Act. Contrary to EESP's position that this rate cap only applies to default service customers, the Competition Act provides that "customers who purchase generation from a supplier other than the utility" are also entitled to its protections (66 Pa. C.S. § 2804(4)(i)(B)).

26/ As noted previously, on Wednesday, November 26, 1997, EESP submitted a draft ITC Shortfall Agreement. As noted in PECO's Motion to Strike (Appendix B), if the ITC Shortfall Agreement had been submitted in compliance with the procedural schedule, PECO would have presented evidence that it creates further tax problems and makes it even more unlikely that a favorable tax ruling could be received.

d. Default Customers Would Be Denied Market-Based Rates In Violation Of Section 2807(e) Of The Competition Act

The Competition Act requires that, to serve default customers, the PLR must acquire energy at "prevailing market prices" and recover only "all reasonable costs" incurred to serve such customers (66 Pa.C.S. §2807(e)(3)). EESP witness Kean admitted, however, that under the Enron Plan(s), default customers would be charged the rates set forth in EESP's proposed tariff even if the prevailing market price for energy and capacity was lower than those prices (FF IV.B.1.d (1)). This feature of the Enron Plan(s) not only violates the unambiguous mandate of the Competition Act, but also denies default service customers important benefits provided by the Partial Settlement. A significant number of default service customers are likely to be low income customers who have trouble paying their bills and may not have the opportunity to switch EGSs, and senior citizens who do not wish to choose another supplier (FF IV.B.1.d (2)). In contrast to the Partial Settlement (p. 27), the Enron Plan(s) would deny these default customers the potential benefits of competition by charging them above-market rates.

e. PECO's First Amendment Rights Would Be Violated If It Were Stripped Of The Use Of Its Name And/Or Logo In Marketing Electricity

EESP's proposed ban on PECO's use of its name and logo in marketing electricity violates the First Amendment. Brand names are not essential facilities and the choice of brand name is a form of commercial speech which is constitutionally protected (FF IV.B.1.e (2)). Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 563 (1980). To restrict PECO's First Amendment rights, the Commission would have to establish not only that the potential harm addressed is both real and serious, but also that the proposed restrictions appropriately remedy that harm. Edenfield v. Fane, 507 U.S. 761, 768-777 (1993). No harm flows from PECO's use of its name and logo; to the contrary, brand identification aids consumers in differentiating among alternative suppliers (FF IV.B.1.e (3)). EESP's proposed ban, in contrast, would restrict the flow of accurate and factual information to consumers, thus hindering consumer choice and unfairly advantaging competitors such as EESP and its Enron affiliates who are spending tremendous amounts to develop national brand-name recognition (FF IV.B.1.e (4)).

f. Enron Would Become A Public Utility Or, At A Minimum, An Affiliate Of A Public Utility For Pennsylvania Regulatory Purposes

As the PLR, EESP would have an exclusive franchise to "furnish" electric service to all default customers in PECO's service territory. To satisfy its obligations, EESP would effectively operate jurisdictional "facilities" comprised of, among other things, its intangible property rights under the PPA and MBC Services Agreement (see the definition of "facilities" at 66 Pa. C.S. § 102). Indeed, EESP has characterized its proposal as having the effect of "stepping into PECO's shoes." Under the circumstances, EESP would be a "public utility" under Section 102 of the Code (66 Pa. C.S. § 102), a status which EESP has made clear it is unwilling to accept.[27/]

Even if it were determined that EESP, as PLR, were not a "public utility", it certainly would qualify as an "affiliate" of PECO because it would exercise a "substantial influence over [PECO's] policies and actions" (66 Pa. C.S. § 2101(a)(6)) through the operation of the PPA and MBC Services Agreement. As such, all transactions between PECO and EESP would have to comply with the provisions of Chapter 21 of the Code. In addition, EESP would need Commission approval to transfer or assign any tangible or intangible property used or useful in the public service (66 Pa. C.S. § 1102(a)(3)).

g. Customers' Due Process Rights Would Be Violated Because EESP Failed To Provide Adequate Notice Of Its Plan

The Commission has the duty to ensure that the public receives proper notice of rate-related proceedings before the Commission. Barasch v. Pa. PUC, 119 Pa. Cmwlth, 81, 546 A.2d 1296 (1989), *petition for allowance of appeal denied*, 523 Pa. 652, 567 A.2d 655 (1989) ("Milesburg"). When the Joint Signatories filed the Partial Settlement, PECO ensured that customers' due process rights were observed: news releases were issued, a bill insert was sent to customers and public input hearings were held

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27/ There are at least two reasons for EESP's reluctance, neither of which is in the public interest. First, Mr. Kean expressed his view that certain provisions of the Code "would not be appropriate to EESP" (Tr. 1314). Second, and left unsaid, Enron Corp.'s exemption from most provisions of the Public Utility Holding Company Act of 1935 ("PUHCA") would be lost if EESP were found to be a Pennsylvania public utility (see discussion below regarding SEC approvals required in connection with the Enron Plan(s)).

(FF IV.B.1 (2)). Despite proposing a wholesale restatement of PECO's rates and terms and conditions of service and a $5.461 billion irrevocable QRO, EESP made no formal attempt to notify customers of what it has recommended. This glaring deficiency cannot be remedied.

h. The Enron Plan(s) Would Effect An Unconstitutional Taking Of PECO's Property

The Enron Plan(s) would confiscate PECO's property by prematurely terminating PECO's electric service franchise; holding PECO's generation assets hostage without full compensation for the value of those assets; and impressing PECO's physical and human resources into serving Enron's objectives through contracts of adhesion. In short, EESP's proposal would result in a taking of PECO's property in violation of PECO's rights under the U.S. and Pennsylvania Constitutions.

i. The Unbundling And Deregulation Of Customer Service Functions Is Not Permitted Under the Competition Act

The Competition Act expressly states that the EDC will continue to provide customer service functions, including meter reading, complaint resolution and collection (66 Pa. C.S. § 2807(d)). In the case of billing, the Act creates two options: "[subject] to the right of an end-use customer to choose to receive separate bills from its electric generation supplier, the electric distribution company may be responsible for billing" (66 Pa. C.S. § 2807(c)). The rules of statutory construction provide that a statute is to be interpreted to effectuate the intent of the General Assembly and that when the "words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit" (1 Pa. C.S.A. § 1921(b)). Because implementation of the Enron Plan(s) would violate these unambiguous provisions of the Competition Act, it must be rejected.

2. The Enron Plan(s) Is Incomplete As Key Elements Either Have Not Been Provided Or Have Not Been Tested On The Record

a. No Information Has Been Submitted Regarding The Necessary Financial Backing of EESP

The Enron Plan(s) proposes that the ultimate responsibility for serving default customers be undertaken not by Enron Corp., the multi-billion dollar conglomerate, or even by Enron Power Marketing, Inc. (the original intervenor in this proceeding), which has some experience in power markets, but instead by an entity that has no employees, no assets, minimal capitalization, no business address in Pennsylvania and, at this stage, no recourse against any of its corporate affiliates (Tr. 1319-31) (FF IV.B.2.a (1-2)). In his direct testimony (EESP St. 1, p. 23), Mr. Kean claimed that the Commission need not be concerned about EESP's accountability because Enron would cooperate with the Commission to obtain "appropriate financial backing from Enron Corp." for EESP. To PECO's knowledge, no such information has been provided, either on the record in this proceeding or through other filings to the Commission and has refused to make any financial commitments (PECO St. 1-E, pp. 13-14; Tr. 1328-29). The Commission is thus asked to approve a plan that admittedly puts PLR responsibilities in the hands of an empty shell corporation.[28/]

b. The "Shortfall Agreement" – The Linchpin To EESP's Securitization Proposal – Was Not Even Submitted Until After Evidentiary Hearings Had Been Completed

A critical aspect of the Enron Plan(s) is the method EESP proposes to cap the level of rates paid by customers notwithstanding the "true-up" of ITC collections. In a nutshell, EESP proposes that PECO reimburse customers for any overcollections, and that PECO itself be reimbursed by a third-party guarantor. The agreement that would govern this reimbursement would be known as the "ITC Shortfall Agreement." There was extensive testimony and cross-examination in this case which made clear that the ultimate terms

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28/ EESP's "promise" to meet with the Commission in the future to discuss capitalization and financial arrangements provides little comfort to customers. Indeed, it is clear from the record in this proceeding that EESP has no intention of fully standing behind its PLR responsibilities; it has refused to accept public utility status, even if granted the role of PLR, and has stated that it would only agree to be subject to the requirements of Chapter 56 insofar as those regulations are applied to other EGSs.

and conditions of the ITC Shortfall Agreement could critically affect such matters as whether a favorable tax ruling could be received from the IRS (FF IV.B.2.b (1)). Notwithstanding the importance of the ITC Shortfall Agreement, EESP did not submit it with its initial Petition, in response to discovery requests or with any of its testimony. Instead, EESP waited until after the evidentiary hearings had been completed to provide a form of the Shortfall Agreement, thereby denying the other parties any opportunity to analyze it, cross-examine witnesses regarding its terms or respond to it in rebuttal testimony.[29/] This lackadaisical and indifferent attitude towards providing key elements of its Plan(s) is, in and of itself, sufficient reason to reject EESP's proposals.

c. In Sharp Contrast With the Partial Settlement, EESP Has Made No Commitment To Honor EER and Rule 4.6 Contracts

EESP witness Kingerski admitted that even the Second Enron Plan does not provide its promised discounts to customers with existing EER and Rule 4.6 contracts (FF IV.B.2.c (1)). Instead, Mr. Kingerski claimed that EESP needed more time and information to determine "how much money it's going to cost [EESP]" (Tr. 1732) to extend rate discounts to EER and Rule 4.6 customers. As a consequence of EESP's hedging its bets, there is no way of knowing what the implications of the Enron Plan(s) are in terms of economic development.

d. EESP Leaves Unanswered Critical Questions Regarding How It Would Administer Its Proposed Electric Delivery Service Tariff

EESP has structured its proposed tariff so that the EGS is the middleman between the "end-use" customer and PECO as the EDC. In fact, Enron witness Kingerski testified that, with one limited exception, EGSs would be the sole point of contact for end-use customers (FF IV.B.2.d (2)). Mr. Kingerski then

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29/ PECO has today filed a separate Motion to Strike the ITC Shortfall Agreement. In an affidavit appended to that Motion, PECO avers that, if given the opportunity to present evidence on the ITC Shortfall Agreement, it would have offered evidence that the Agreement exacerbates the tax problems identified elsewhere in this Brief and makes it even more likely that a favorable tax ruling could not be received from the IRS. Further, the ITC Shortfall Agreement provides that overcollections will be used to reimburse the guarantor for payments made under the agreement and, therefore, may not be returned to customers as promised by the Enron Plan(s).

suggested that notwithstanding the language of Enron's proposed Rule 21.7, a customer could, in fact, choose to come directly to PECO for certain distribution-related services without getting permission from the customer's EGS (FF IV.B.2.d (3)). Mr. Kingerski added, however, that to ascertain which distribution-related services PECO could provide directly to customers, the Commission would have to examine each tariff provision to determine whether the service provided constitutes construction of distribution-related facilities (FF IV.B.2.d (3, 5)). In addition, Kingerski testified that, under certain circumstances, EGSs *could request* that PECO shut off service to their customers, but he failed to specify what those circumstances were.

3. The Enron Plan(s) Is Not In The Public Interest

a. The Plan is Anti-Consumer

Lack of Rate Certainty. The Enron Plan(s) exposes customers to the risk that the market price of energy and capacity will exceed projected levels. Unlike the Partial Settlement, the Enron Plan(s) contains no absolute protections for customers, but rather permits EESP to pass through to certain default customers its actual costs in the event they are greater than the "generation credits" proposed by EESP. Consequently, any savings customers might experience in the first few years under the Enron Plan(s) could easily erode or disappear entirely (PECO St. 1-E, p. 9).[30/]

Stranded Cost Recovery is Backloaded. Under the Enron Plan(s), the recovery of stranded costs trends upward. This backloading of the recovery of stranded costs is against customers' best interests. Indeed, the consumer groups that entered into the Partial Settlement insisted that past investments be paid

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30/ In his rebuttal testimony, Mr. Kean observed that this could only occur if PECO defaulted on the PPA. Inasmuch as Mr. Hill has indicated that PECO will not execute the PPA, this point is moot. It should be noted, however, that Mr. Hill's reason for rejecting the PPA was that it was anti-competitive, demonstrably unfair to PECO and, not surprisingly, considerably less generous than the power sales agreements which Enron itself demands when selling power (Tr. 1811; Tr. 1643-45).

off earlier rather than later to reflect the transition to competition, which explains why the CTCs set forth in the Partial Settlement decline over time.

PECO's Financial Integrity Would Be Destroyed And, As A Consequence, System Reliability Would Be Compromised. Mr. Mitchell testified that, under the Enron Plan(s), PECO's financial integrity would be crippled. The Company's bond ratings would be reduced to junk bond status throughout the transition period. The Company would have cumulative negative net cash flow of $4.7 billion through 2005; earnings per share would be severely depressed. As a result, PECO's access to the long-term and short-term debt markets, as well as the equity market, would be destroyed. In short, PECO would lack the financial integrity to fund capital expenditures for the wires business at either the transmission or distribution levels, nor could it fund any needed capital expenditures to support generation system reliability (FF IV.B.3.a (7-8)).

Even though EESP had ample opportunity to analyze the potential effects of its proposal on PECO in the weeks preceding and following the filing of the First Enron Plan, it did not submit any evidence on the subject until Mr. Mitchell had laid bare the disastrous consequences which its plan would have. At that point, and only after initially claiming that it lacked the necessary information to perform such an analysis, EESP presented testimony, authored by its investment banker, Mr. Kinney, which essentially confirmed Mr. Mitchell's assessment.[31/]

31/ Although Mr. Kinney took issue with certain of Mr. Mitchell's assumptions, his analysis shows that, under those assumptions, the Enron Plan(s) would reduce PECO's bond ratings to junk bond status and destroy its financial integrity. EESP and other parties may complain that PECO refused to release sufficient information. However, the information in question is highly sensitive, proprietary and privileged data, including PECO's projections of future earnings and cash flow, and has never been disclosed to outsiders in the history of the Company. In any event, the extensive data which PECO did divulge, subject to a confidentiality agreement, was in fact sufficient for EESP's expert to evaluate Mr. Mitchell's claims. Finally, it should be noted that EESP, NEV and Conectiv were made aware that PECO's financial integrity was an issue in September when they deposed Messrs. Mitchell and Hill for two days and requested, and were provided, the underlying assumptions used by PECO in its analysis. Rather than further pursuing the matter through discovery, the opposing parties let the matter drop and only brought it up

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Important Consumer Protections Would Be Lost. As described in detail by Mr. Sundermeir, the EESP Tariff would deprive consumers of a staggering number of critical protections that consumers currently enjoy with respect to their regulated services (FF IV.B.3.a (9-20)). For example, service could be terminated on only 5 days notice; significant consumer credit protections would be eliminated; and various rate offerings would be deleted (PECO St. 13-E, pp. 2-21).

EESP's Proposed Credit For Non-Wires Services Would Harm Consumers. As explained earlier, PECO objects on both policy and legal grounds to the unbundling of so-called non-wires services. The details of EESP's proposed unbundling proposal, however, are worth brief mention nonetheless, as they reveal yet another example of the anti-consumer impact of the Enron Plan(s). First, as thoroughly explained by Mr. Sundermeir, Enron's proposed T&D credit is grossly overstated, thereby assuring that PECO will significantly underrecover its costs throughout the period in which the T&D rate cap applies and guaranteeing that PECO will have to seek an upward rate adjustment when the T&D rate cap expires.[32/] Second, EESP witness Reising proposes an energy-based credit, which will motivate EGSs to serve relatively large users of energy who will generate credits that exceed their actual costs and to spurn smaller customers with usage levels that would provide a credit equal to or less than their actual costs (FF IV.B.3.a (21-34)).

Extrastatutory Concessions Would Be Sacrificed. There are several important benefits of the Partial Settlement which cannot be realized absent PECO's consent. They include: (1) the 10% rate reduction on September 1, 1998; (2) the acceleration of customer choice; and (3) the extension of the T&D

31/(...continued)
again after it became apparent that the Enron Plan(s) would cripple PECO financially.

32/ This would be true even if PECO were to be paid the same overstated credit when it renders MBC Services under the MBC Services Agreement, as PECO could never shed costs in direct proportion to the number of customers that switch EGSs (FF IV.B.3.a (31)). Thus, the amount PECO would be paid for providing non-wires services for default service customers would be far less than the amount avoided by customers switching to EGSs (FF IV.B.3.a (22-24)).

and generation rate caps. Those benefits, as well as PECO's commitment to expand significantly its existing universal service programs and the agreement by other Joint Signatories to withdraw certain pending appeals, would be lost if the Partial Settlement is not approved without modification.

b. The Plan Is Anti-Competitive

The Proposed Generation Credits Would Preclude Any EGS From Competing After A Few Years. Under the Enron Plan(s), it would be virtually impossible for **any** EGS to compete with EESP after the first few years of the transition period. As noted previously, this is because the proposed generation credits in later years, in addition to being wholly unsupported, are set well below the levels which every other market price witness, including EPMI's own expert, Mr. Mitnick, has utilized (Ex. TPH-34). Consequently, customers would have a tremendous incentive to eventually return to their "default" provider and EESP, having locked up PECO's generation at below-market prices, would be in a position to welcome them back to the exclusion of other competitors (PECO St. 6-E, pp. 10-11).

PECO Would Be Effectively Eliminated As A Competitor, Thereby Depriving Customers Of Valuable Choices. As explained by PECO witness Sidak, the Enron Plan(s) includes several unreasonable provisions that unfairly handicap PECO as a viable competitor in retail electric generation markets (FF IV.B.3.b (1-7)). In particular, EESP's proposed Code of Conduct would prohibit PECO's competitive retail generation operations from using PECO's trade name and logo, and from engaging in certain joint marketing activities, even if such activities were not cross-subsidized be PECO's regulated customers (FF IV.B.3.b (3)).[33/]

As Mr. Sidak explained, such prohibitions are completely unnecessary to protect the competitive process, as they ignore important safeguards that already exist. These include not only the force of

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33/ The Enron Plan(s) also provides that PECO may only compete through separate corporate affiliates. This feature of the plan plainly violates the Competition Act, which provides that the Commission "shall not require, an electric utility to divest itself of facilities or to reorganize its structure." 66 Pa.C.S. §2804(5).

competition itself from dozens of very large, powerful, resource-rich entrants that face minimal barriers to entry, but also the federal antitrust laws, which Pennsylvania and federal enforcement authorities stand ready to enforce (FF IV.B.3.b (4)). EESP's proposed additional restrictions would therefore impose unnecessary costs and burdens on PECO's competitive operations, which would seriously hamper PECO's ability to compete (FF IV.B.3.b (7)). It makes no sense to handicap PECO with these unnecessary restrictions, as doing so would eliminate at least one choice that consumers may wish to make (FF IV.B.3.b (6)). The better course is to reject EESP's extreme, anti-competitive approach and adopt the Code developed by the Commission's Competitive Safeguards Working Group, which ensures that PECO will not be able to use its continued monopoly control of the "wires" to unfairly advantage its competitive generation operations (FF IV.B.3.b (8)). The fact that a broad consensus of stakeholders, including future EGSs and consumer advocates, endorsed the Competitive Safeguards Working Group Code, and rejected various recommendations advanced by Enron, is itself powerful evidence that EESP's proposal is unreasonable (FF IV.B.3.b (8)).[34/]

The Enron's Plan(s) is anti-competitive for the additional reason that its proposed PPA would effectively give EESP a "call" on PECO's generation, while imposing no obligation on EESP to purchase power beyond the level needed to serve transitional default customers. Even though EESP witness Kean initially sought to characterize the PPA as a "full requirements" contract, he later admitted that it was not (Tr. 1360-62).

EESP Would Have PECO Abide By Code of Conduct Rules That It Is Unwilling To Impose On Itself As PLR. EESP has repeatedly stressed that PECO's position as the incumbent utility gives PECO a competitive advantage that a Code of Conduct must eliminate to enable robust competition to develop (FF IV.B.3.b (9)). Yet, as the new "incumbent" PLR under its proposed plan, EESP has taken a different view

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34/ PECO notes that CNG Energy Services Corporation, a licensed EGS, has objected to the Enron Plan(s) in part on the ground that it is inappropriate to deprive PECO's competitive generation operations from using its name and logo (CNG Answer to Enron Petition, p. 3, item 6).

and would permit its competitive EGSs to use its name and logos. The Commission should not countenance this intellectually dishonest and disingenuous gamesmanship. EESP cannot have its cake and eat it too -- if PECO is to be banned from using its name, EESP should also be so banned. In fact, because EESP would be the PLR in name and PECO would be relegated to the role of EESP's nameless subcontractor, under EESP's logic only EESP should be barred from using its name.

4. The Plan Could Not Be Implemented Without The Review And Approval Of A Host Of Other Regulatory Entities

Apart from being unlawful, incomplete and contrary to the public interest, the Enron Plan(s) could not be implemented until it was reviewed and approved by a number of different regulatory agencies, including the SEC, the FERC, the Nuclear Regulatory Commission ("NRC") and the IRS. In addition, PECO believes that the Enron Plan(s) runs afoul of established antitrust and consumer protection principles and ultimately would be rejected on those grounds alone. In any event, the required reviews would delay the introduction of competition in Southeastern Pennsylvania for months or even years.

SEC Concerns. PECO believes that before EESP can engage in the activities proposed under the Enron Plan(s), EESP's ultimate parent, Enron Corp., must obtain approval under Section 9(a)(2) of PUHCA to acquire EESP. Enron Corp. is a "holding company" and currently claims an "intrastate exemption" under Section 3(a)(1) of PUHCA. This exempts Enron Corp. from all of the provisions of PUHCA except Section 9(a)(2). Section 9(a)(2) of PUHCA requires any company that owns 5% or more of the voting securities of one or more "public utility companies" to obtain SEC approval before it directly or indirectly acquires 5% or more of the voting securities of another "public utility company."[35/]

If EESP becomes the PLR in PECO's service territory, it will be an "electric utility company" and a "public utility company" under Sections 2(a)(3) and 2(a)(5) of PUHCA. Moreover, EESP would clearly

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35/ Enron Corp. currently owns 100% of the outstanding voting securities of one public utility company, i.e., Portland General Electric Company, which operates primarily in Oregon.

exercise a "controlling influence" over the management and policies of PECO through its proposed contractual arrangements. This arguably would make EESP a "holding company" of PECO under Section 2(a)(7) of PUHCA. EESP's status as a "holding company" over PECO, a public utility operating in Pennsylvania, in turn raises serious questions about Enron Corp.'s continued eligibility for an "intrastate exemption."[36/]

FERC Concerns. Under Section 203 of the Federal Power Act, FERC is obligated to determine whether dispositions and mergers of public utility property used to sell wholesale electric energy in interstate commerce and to transmit electric energy in interstate commerce are in the public interest. 16 U.S.C. § 824b. FERC's Section 203 jurisdiction extends not only to transfers and mergers of physical facilities, but also to intangible facilities such as contracts, accounts, and records. See, e.g., Enova Corp., 79 FERC ¶ 61,107 at 61,489 (1997). Any disposition that will "impede or tend to impede" the coordination of FERC jurisdictional facilities requires Section 203 approval. Id. at 61,490.

Given the broad scope of the PPA, which gives EESP the right, but not the obligation, to call on PECO's generation to serve standard default service customers, PECO's ability to utilize its FERC-jurisdictional facilities will be held captive to EESP's needs. In addition, PECO's ability to compete for customers outside the bounds of the Enron Plan(s) (except perhaps in the non-firm market) will be greatly hindered. As such, the Enron Plan(s) will not only impede the coordination of FERC-jurisdictional facilities, but will also reduce wholesale competition, all of which could trigger FERC review.

Antitrust Concerns. The proposed PPA and MBC Services Agreement would give EESP a considerable degree of operational and economic control over PECO's generation assets (FF IV.B.4 (3-7)). Such transference of decision-making control ordinarily is subject to prior review under the antitrust laws because it raises significant antitrust issues. See Section 7 of the Clayton Act (15 U.S.C. § 18), which

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36/ PECO has filed a letter with the SEC requesting that its staff express its concurrence with the foregoing analysis. A copy of that letter is attached as Appendix C.

proscribes those acquisitions of assets that "may be substantially to lessen competition, or tend to create a monopoly." To give full effect to the remedial purposes of Section 7, the courts have considered an acquisition of assets as having taken place whenever one person obtains significant economic or decision-making control over the property of another person. See United States v. Columbia Pictures Corp., 189 F.Supp 153, 181-82 (S.D.N.Y. 1960); McTamney v. Stolt Tankers and Terminals, 678 F.Supp. 118 (E.D.Pa. 1987); Nelson v. Pacific Southwest Airlines, 399 F.Supp. 1025 (S.D.Cal. 1975).

EESP's acquisition of decision-making control over PECO generation through the operation of the PPA would effectively consolidate control over the energy provided by PECO's generation assets together with the energy that Enron would import into Southeastern Pennsylvania from other sources. Such a consolidation may result in market power in the sale of electricity to consumers in PECO's historic service territory, precisely the kind of adverse effect that the Clayton Act proscribes.

NRC Concerns. PECO currently holds a number of licenses issued by the NRC authorizing it to own and operate nuclear power plants. Under Section 184 of the Atomic Energy Act of 1954, as amended (AEA), and 10 C.F.R. § 50.80, control over an NRC license cannot be transferred directly, or indirectly, without the prior consent of the NRC. EESP's proposed control over the operation and dispatch of PECO's generating plants pursuant to the PPA could be construed as an indirect transfer of control of PECO's existing NRC licenses requiring prior NRC review and approval.[37/]

IRS Concerns. For the reasons given by Mr. Sharpe in his direct and surrebuttal testimony and by Mr. Mitchell in the affidavit attached to PECO's Motion to Strike, EESP's proposed securitization scheme

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37/ Notably, the NRC recently expressed concern over the growing involvement of non-licensees in the management and operation of nuclear power plants and the need for prior NRC review and consent to contracts giving non-licensees control over licensed activities. See, e.g., Final Policy Statement on Restructuring and Economic Deregulation of the Electric Utility Industry, 62 Fed. Reg. 44071, 44077 (Aug. 19, 1997).

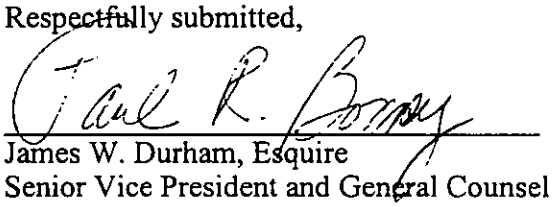
would not likely pass muster with the IRS and, at a minimum, would require the Service's careful review (FF IV.B.4 (12)).

Consumer Protection Concerns. If the Commission were to approve the Enron Plan(s), it would be permitting and, worse, endorsing acts that violate established consumer protection principles. In particular, EESP's proposal (as well as an auction proposal belatedly advanced by the Environmentalists) would automatically change consumers' electricity supplier without consumers' prior knowledge and informed consent.[38/] The Pennsylvania Unfair Trade Practices and Consumer Protection Law prohibits "unfair or deceptive acts or practices." 73 P.S. § 201-1 et seq.

V. CONCLUSION

WHEREFORE, for the reasons set forth above, PECO Energy Company requests that the Commission approve the Partial Settlement without modification.

Respectfully submitted,



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38/ This practice, known as "slamming" consistently has been deemed unfair or deceptive.

APPENDIX A

Proposed Findings Of Fact And Conclusions Of Law

PECO ENERGY COMPANY'S
PROPOSED FINDINGS OF FACT

II. THE PARTIAL SETTLEMENT

A. Summary Of Principal Terms

1. **Rate Reductions.** On September 1, 1998, PECO will reduce its retail electric rates by 10% across-the-board. Thereafter, rates will remain below current levels through at least December 31, 2003. If PECO is unable to securitize (i.e., issue transition bonds) because of a legal impediment, the initial 10% rate decrease would become 7% and the other rate reductions would be adjusted accordingly (Partial Settlement ¶¶8-11)

2. **Unbundling Of Existing Rates.** On January 1, 1999, PECO will unbundle its retail electric rates into the following components: (1) distribution charges; (2) transmission charges; (3) a Competitive Transition Charge ("CTC") and, if applicable, an Intangible Transition Charge ("ITC"); and (4) a maximum market price for energy and capacity (the "generation rate cap"). The specific charges set forth in the Partial Settlement represent negotiated values and are a natural outgrowth of the evidence presented by the various Joint Signatories (Partial Settlement ¶9 and Appendix C).

3. **Securitization.** PECO is authorized to securitize up to $4.0 billion of its stranded costs. Consistent with the Competition Act, PECO would have the discretion to determine when and how much to securitize, taking into account market conditions and the impact of securitization on PECO's financial integrity. Under the Partial Settlement, customers are

guaranteed the benefits of securitization unless PECO establishes, to the Commission's satisfaction, that there is a "legal impediment" to securitization (Partial Settlement ¶ 10 and Appendix D).

4. **Phase-In Of Customer Choice.** The Competition Act anticipates that one-third of a utility's customers will be allowed to choose their generation supplier on January 1, 1999; one-third on January 1, 2000; and the remaining third on January 1, 2001. The Partial Settlement accelerates this process so that two-thirds of PECO's customers will have choice by January 2, 1999 and the remaining third a year later. This is one of the "extra-statutory" concessions to which PECO committed (Partial Settlement ¶15).

5. **Transfer Of Generation Assets.** PECO agrees to transfer the "unstranded" portion of its generating assets to an affiliate at a price of $2.303 billion. This corporate disaggregation is not mandated by the Competition Act and, in that sense, is an additional "extra-statutory" concession (Partial Settlement ¶16).

6. **Recovery Of Stranded Costs And Associated Write-Offs.** PECO has established that its stranded costs will approximate $7.461 billion (PECO St. 1-R, pp. 19-22; PECO St. 4-R, pp. 5-12; PECO St. 1, pp. 9-16; PECO Sts. 3, 4, 5 and 6; PECO Sts. 3-R, 4-R, 5-R and 6-R). Of this amount, the Partial Settlement provides for the recovery of $5.461 billion and requires that PECO write off $2.0 billion (Partial Settlement ¶¶17). These terms clearly represent a reasonable compromise, particularly in light of the litigation positions

espoused by the OTS ($4.784 billion) (OTS St. 1, p. 33) and the OCA ($4.353 billion) (OCA St. 1S, p. 1).

7. **Universal Service.** The Partial Settlement builds on PECO's successful Customer Assistance Program ("CAP") Rate pilot and provides for open enrollment in that program for eligible customers, subject to an initial maximum participation level of 100,000 customers which will be reviewed as this level is approached. As such, PECO's existing customer assistance programs could more than double their enrollment in the next several years. In addition, PECO agrees to establish a LIURP Advisory Committee to periodically review LIURP program design and delivery (Partial Settlement ¶¶ 22-28).

8. **Consumer Education.** The Joint Signatories agree to cooperate with one another in developing a Commission-approved Consumer Education Program. PECO also commits to augment any statewide program with its own initiatives to provide Company-specific information to its customers (Partial Settlement ¶¶29-32 and Appendix G).

9. **Generation Supply Obligations And Opportunities.** PECO agrees to serve as the provider of last resort ("PLR") for all retail electric customers in its service territory through December 31, 2008. PECO will satisfy its obligations by purchasing required amounts of energy and capacity at wholesale and reselling that power at standard market rates not to exceed the rate caps set forth in Appendix C to the Partial Settlement (Partial Settlement ¶¶ 33-35).

10. **Transmission And Distribution Planning.** PECO will evaluate cost-effective alternatives to distribution improvements that are projected to cost in excess of $10.0 million and to support the Joint Signatories' efforts to add a consumer seat to the Management Committee of the Pennsylvania-Jersey-Maryland ("PJM") Interconnection (Partial Settlement ¶¶38-39).

11. **Renewable Energy Development.** PECO will file with the Commission tariff provisions designed to facilitate the development and installation of renewable energy sources including solar, wind, hydro, biomass and methane field generation (Partial Settlement ¶40).

12. **Withdrawal Of Pending Appeals.** Certain parties to the Partial Settlement will withdraw various actions currently pending before the Commonwealth Court which challenge the constitutionality of the Competition Act. If these cases were litigated to conclusion, it is possible that customers would be denied the benefits of competition for years (Partial Settlement ¶41).

B. The Partial Settlement Is In The Public Interest

1. **Customers Will Receive Significant Generation Rate Reductions.** The Partial Settlement provides for a guaranteed 10% across-the-board rate reduction effective September 1, 1998, or four months **prior** to the advent of retail competition in Pennsylvania, and additional CTC reductions during the transition period (Partial Settlement ¶¶8-11). Such reductions are the largest to which any electric utility in the

country has committed in order to advance the transition to competition. Customers further benefit from PECO's agreement to extend the statutorily-imposed "cap" on its transmission and distribution rates from June 30, 2001 to January 1, 2004 (Partial Settlement ¶14) and on its generation rates from December 31, 2005 to January 1, 2009 (Partial Settlement ¶9), customers who continue to purchase their electric generation supply from PECO will enjoy a virtually unprecedented era of rate stability. In fact, on an inflation-adjusted basis, the average per kilowatt-hour ("kwh") capped charge in the year 2008 will be 34% **less** than the corresponding 1990 level (Ex. TPH-28) and customers will have the opportunity to obtain additional savings above these guarantees from the competitive market.

2. **Customer Choice Will Be Accelerated.** The Partial Settlement accelerates the transition to competition such that **all** of PECO's customers will have direct access to alternative generation suppliers by the year 2000, **a year earlier than mandated by the Competition Act** (Partial Settlement ¶15).

3. **The Development Of Competitive Markets Will Be Promoted.** The generation rate caps set forth in the Partial Settlement will provide alternative electric generation suppliers ("EGSs") sufficient "headroom" and incentive to compete in the first two or three years of the transition period (PECO St. 1-RJ; PECO St. 6-RJ; PECO St. 6-E). Thereafter, the gap between the generation cap and the projected market price of energy and capacity widens significantly such that robust competition is ensured. Moreover, PECO's agreement to (1) separate its generation functions from its regulated

transmission/distribution functions (Partial Settlement ¶16), (2) operate under a Commission-approved Code of Conduct (Partial Settlement ¶37), (3) file tariff provisions to facilitate the installation and operation of renewable energy sources (Partial Settlement ¶40), and (4) augment any statewide consumer education program (Partial Settlement ¶¶29-31)will promote the development of fair and open competition.

4. **The Funding Of Nuclear Decommissioning Obligations Will Be Assured.** The Partial Settlement enables PECO to recover a $234 million deficiency in nuclear decommissioning funds and establishes a tracking mechanism which will ensure that sufficient funds are collected should projected decommissioning cost levels change from current estimates (Partial Settlement ¶20).

5. **Economic Development Will Be Supported.** The Partial Settlement keeps in place existing tariff offerings and provides substantial rate relief to industrial customers, thereby stimulating economic development throughout Southeastern Pennsylvania (Partial Settlement ¶12).

6. **Employee Dislocations Will Be Avoided.** PECO does not anticipate the need to lay off any employees if the Partial Settlement is approved. The same cannot be said of the Enron Plan(s) (PECO St. 1-E, pp. 15-16).

7. **Low-Income Customers Will Be Protected.** The Partial Settlement provides for a very substantial expansion of PECO's universal service programs (Partial Settlement ¶¶22-28).

8. Each of the Joint Signatories had to weigh the costs and benefits of the Partial Settlement against the range of possible outcomes of full litigation (Tr. 1976, 2007-2008).

9. The outcome of the negotiations among the Joint Signatories was accurately and reasonably summarized by CEPA/Fumo witness Silkman, who observed (Tr. 1976): "The partial settlement agreement is a compromise. It's certainly not a perfect agreement from anybody's perspective but represents a balancing of interests and quite frankly, a balancing of risks ..."

10. The Partial Settlement has the unified support of **all** of Pennsylvania's principal consumer groups, which provides compelling evidence that the Partial Settlement is in the public interest.

11. PECO has mitigated its generation-related transition or stranded costs by appropriate means in a manner that is reasonable under all of the circumstances and, prior to the enactment of the Competition Act, made reasonable efforts to reduce or to mitigate customer rate levels while maintaining safe, reliable and efficient operations.

12. The level of the CTCs/ITCs set forth in the Partial Settlement is just and reasonable.

13. The tariff sheets set forth in Appendices A and B to the Partial Settlement and the rates set forth therein are just, reasonable and non-discriminatory.

14. The Partial Settlement is in the public interest and should be approved.

C. The Objections To The Partial Settlement Are Without Merit

1. Generation Rate Caps

1. The generation rate caps set forth in the Partial Settlement are fully supported by extensive analyses utilizing the General Electric Multi-Area Production Simulation Program (PECO St. 6-RJ).

2. The wholesale price projections developed by PECO's expert witness, Dr. Heironymus, when translated into retail (i.e., delivered) prices fall below the Partial Settlement's generation caps in virtually all years of the transition period for all probable load factor aggregations (PECO St. 6-RJ, pp. 5-6).

3. Dr. Heironymus' findings fall well within the range of expected values submitted by other Pennsylvania utilities as part of their restructuring plans (PECO St. 1-RJ; PECO Exh TPH-29).

4. Data available from the Pennsylvania retail pilot program confirm that EGSs are actively marketing power at prices substantially below the "capped" prices (PECO St. 26-RJ and PECO St. 26-E).

5. Evidence of market prices was no the basis for, nor was it even considered, by Enron in developing the generation caps set forth in the Enron Plan(s) (Tr. 1344-54). No Enron witness explained how the generation credits relate, if at all, to market prices.

6. The Enron Plan's generation credits would create an artificial incentive for customers to switch to alternative suppliers in the early years of the plan (when the caps are too high) and to return to EESP as the PLR shortly thereafter (PECO St. 6-E, pp. 10-11). This poses two significant problems. First, customers who cannot or elect not to switch will be charges above-market rates (because EESP plans to charge the generation credit even if market prices are less than the credit) (Tr. 1371). Second, competitors will quickly be driven out of the market as the credits decline and EESP will obtain near monopoly power at the same time that the transition period is drawing to a close (PECO St. 6-E, pp. 10-11).

7. Customers are better off under the Partial Settlement because it ensures that, after an orderly transition period, competition will be in place and remain in place as the transition period ends (Tr. 1984; PECO St. 6-E, p. 11).

2. Alleged Overrecovery Of Stranded Costs

1. The Partial Settlement will not result in PECO recovering more than the value of stranded costs stated in the Joint Petition (PECO St. 3-RJ, pp. 1 and 8-10; PECO St. 1-E, pp. 16-19).

2. The value of the Partial Settlement to PECO must be assessed by comparing the present value of the CTC revenue stream to the present value of the revenue requirement associated with the stipulated stranded costs and PECO's extra-statutory concessions (PECO St. 3-RJ, pp. 1, 7-8; PECO St. 1-E, p. 17).

3. The present value of the revenue requirement associated with the stipulated stranded costs exceeds the book value of such assets because:

   a. the stipulated stranded costs consist largely of assets upon which PECO is entitled to earn a return under traditional utility regulation;

   b. under the Partial Settlement, these costs will be recovered over a 10-year period;

   c. the revenue requirement associated with a 10-year recovery of stranded costs includes a return on investment (i.e., the unamortized balance of stranded costs) at a pre-tax level (i.e., what has to be collected to recover return and associated income taxes);

   d. the present value of the revenue requirement must be discounted at an after-tax rate of return to reflect the portion of the revenue requirement paid to the state and federal government in income taxes.

(PECO St. 3-RJ, pp. 3 and 8-9; Tr. 954-56)

4. The CTC revenue is subject to gross receipts tax and, therefore, gross receipts tax must be taken into account either as a reduction in net CTC revenue or as a component of the revenue requirement associated with the stranded costs (PECO St. 1-E, p. 17).

5. The extra-statutory concessions assumed by PECO under the Partial Settlement include (1) expansion of the CAP rate for universal service; (2) elimination of certain EER and

LILR-related charges; and (3) a two and one-half year extension of the T&D rate cap (PECO St. 3-RJ, pp. 9-10).

6. The present value of the revenue requirement associated with the 10-year recovery of the stipulated stranded costs is $6.301 (inclusive of gross receipts tax), while the present value of the CTC revenues under the Partial Settlement is $6.164 (without a deduction for gross receipts tax payable on those revenues). This results in an **underreovery** of approximately $136 million (PECO St. 1-E, p. 17; PECO Exh. TPH-35).

7. The extra-statutory concessions impose an additional revenue requirement of between $469 million and $661 million on a present value basis (inclusive of gross receipts tax liability). Reflecting these additional costs, PECO's **underrecovery** is between $605 and $797 (PECO St. 1-E, pp. 17-18; PECO Exh. TPH-35).

8. If PECO could securitize as much as $4.0 million, the **maximum** reduction in its revenue requirement that could thereby be realized is $628 million (PECO St. 1-E, p. 17; PECO Exh. TPH-35). However, it is much more likely that PECO would securitize materially less than $4.0 billion (PECO St. 1-RJ, p. 17).

9. PECC witness Mitnick's calculations purporting to show that PECO would recover more than the stipulated stranded costs contain numerous, fatal errors including the following:

a. comparing CTC revenue to the book value of PECO's stranded costs rather than the revenue requirement imposed by the 10-year recovery period (PECO St. 3-RJ, pp. 1 and 7-8);

b. imputing non-existent tax benefits by, for example, assuming that a tax deduction can be taken for a "book" write-down when elementary income tax principles make it clear than no such deduction is allowable (PECO St. 3-RJ, pp. 3-4; PECO St. 9-RJ);

c. overstating PECO's sales levels (PECO St. 3-RJ, p. 6; PECO St. 1-RJ, p. 16; PECO St. 1-E, pp. 17-18);

d. discounting the CTC revenue stream to January 1, 1999 instead of September 1, 1998 (PECO St. 3-RJ, pp. 6-7);

e. ignoring the economic impact of the extra-statutory concessions (PECO St. 1-RJ, pp. 15-16; PECO St. 1-E, pp. 16-17; PECO St. 3-RJ, pp. 2, 7-8); and

f. overstating the economic benefits to PECO of securitization (PECO St. 3-RJ, pp. 2, 4-5).

10. Enron witness Oliver agrees with PECO that the present value of the CTC revenue stream should be compared to the present value of the revenue requirement (including a return on the unamortized balance) associated with the stipulated stranded costs (Enron St. 2-R, pp. 15-16).

11. Mr. Oliver's claim of alleged overrecovery derives from his failure to factor into his calculations the cost of PECO's extra-statutory concessions and his use of sales levels that are far higher than anything PECO will actually experience (PECO St. 1-E, pp. 17-18).

12. Mr. Oliver acknowledged that the extra-statutory concessions would impose substantial costs on PECO and did not dispute PECO's quantification of those costs (Enron St. 2-R, pp. 15-16).

3. Reconciliation And Sales Levels

1. The projected future sales levels used by Mr. Oliver are inappropriate and his calculations based thereon are wrong, for the following principal reasons:

   a. Sales data in Mr. Oliver's Exhibit A-R (Revised) incorporate a mathematical error (in each year, the year itself was added to the total sales figure) (Tr. 1898);

   b. The Annual Resource Planning Report Mr. Oliver relied upon is out of date, does not reflect current actual sales data and does not reflect PECO's current expectations (PECO St. 1-RJ, p. 16; PECO St. 3-RJ, p. 6).

   c. PECO's actual sale have been flat for the last 10 years (PECO St. 3-RJ, p. 6; PECO Exh. ABC-11);

d. Mr. Oliver imputes price elasticity that is not supported by empirical data and amounts to a mere guess on his part as to the potential future effects of rate reductions (PECO St. 1-E, p. 18; PECO Exh. TPH-36); and

e. Mr. Oliver acknowledged that energy efficiency and energy management services would increasing be offered by competitive suppliers and others as a means of providing value added services and lowering customers costs. He nonetheless ignored the effect such services would have in **reducing** PECO's sales levels (Tr. 1585-86, 1599, 1602-03, 1611). In contrast, the consumer party witness saw future sales reductions as highly likely as a result of, inter alia, energy conservation and energy efficiency services being sold by competitive suppliers and others (Tr. 1975-76).

2. The Environmentalists witness, Mr. Schoengold, also alleged that PECO would overrecover its stranded costs under the Partial Settlement on the basis of the same errors committed by Messrs. Mitnick and Oliver, including: (a) erroneously comparing the present value of CTC revenue to the book value of stranded costs; ignoring the costs of PECO's extra-statutory concessions; and (c) assuming annual sales growth for which no evidentiary support exists (PECO St. 3-RJ; PECO St. 1-RJ, pp. 15-17; PECO St. 1-E, pp. 17-19).

3. The provision of the Partial Settlement foregoing annual "true-up" of actual and projected CTC revenue was included at the insistence of the consumer parties because they believe

there is substantial value in the rate certainty provided by having PECO bear the risk of future sales variations (Tr. 1989-1991).

4. The Joint Signatories, and the consumer parties in particular, believe that sale of energy conservation, energy management and energy efficiency services will increase substantially in a de-regulated environment for generation and, as a result, it is more likely than not that PECO's sales levels will decline (Tr. 1991 and 2008).

5. The likelihood of future sales decreases would erode the economic benefit of the Partial Settlement to consumers and negate their conservation efforts if annual "true-ups" were permitted (Tr. 2008).

6. The Joint Signatories agreed to a reasonable allocation of the risks of over or underrecovery through means other than annual "true-up" of the CTC. Specifically, the Joint Signatories made a deliberate and informed "exchange of values" such that PECO gives up the right to increase the CTC if sale decline and the other Joint Signatories give up the right to have the CTC reduced if sales increase (Tr. 1991)

4. Transmission And Distribution Rate Levels

1. The transmission and distribution rate levels contained in the Partial Settlement and reflected in the Tariff sheets attached as Appendix C to the Partial Settlement are fully supported by PECO's cost-of-service study (PECO St. 12-R; Exhibit RAC-10).

2. The correct way to determine the administrative and general ("A&G"), common and intangible plant costs to include in PECO's distribution rates is to analyze PECO's A&G functions and common plant expenses to determine which costs PECO would continue to incur when all customers can choose their electricity supplier and PECO has become a regulated electric distribution company. Traditional allocations of A&G and common plant costs should not be used to functionalize such costs between the generation, distribution, and transmission functions, because such allocations only make sense in a fully-regulated, "bundled" rates environment in which there is no question that ratepayers must bear all such prudently incurred costs regardless of how they are functionalized (PECO St. 12-R, pp. 2-11; PECO St. 12-RJ, pp. 2-3).

3. PECO included in the costs to be recovered through its transmission and distribution rates only an amount of A&G and common plant costs that PECO would continue to incur when all customers can choose their electricity supplier (PECO St. 12-R, pp. 2-9; PECO St. 12-RJ, pp. 2-3).

4. PECO incurs uncollectible accounts expense to: (1) fund long-term payment agreements required by Chapter 56; (2) fund the Customer Assistance Program ("CAP") (i.e., write-offs of the difference between what CAP customers pay under the discounted CAP rates and what they would have otherwise paid under the full base rates); and (3) cover the cost associated with non-payment by customers without payment agreements, customers who violate the terms of payment agreements, and all other non-CAP customers (PECO St. 12-R, pp. 11-13; PECO St. 13-E, p. 33).

5. For customers for whom PECO does all of the billing (i.e., for its charges for regulated services and for a supplier's charges), PECO will continue to incur all uncollectible accounts expense (PECO St. 12-R, p. 12).

6. Most uncollectible accounts expense will be caused by those customers with poor credit histories (whom suppliers are less likely to serve and who will therefore remain with the provider of last resort) and customers who otherwise do not pay their bills after selecting an EGS (PECO St. 13-E, p 33).

7. Under the Partial Settlement, even if suppliers were permitted to do all customer billing for customers they serve, PECO would continue to incur the vast majority of uncollectible accounts expense because, in its role as provider of last resort, it will have to serve the customers who are most likely to generate uncollectibles (PECO St. 12-R, p. 12; PECO St. 13-E, p. 33).

8. The Electric Delivery Service Tariff that is part of the Enron Plan provides that EGSs will do all of the billing for all services rendered by PECO and the EGS to the end-use customer, and requires EGSs to pay PECO for all charges for regulated services even if the end-use customer does not pay the EGS (Enron St. 5, Exhibit A, p. 33, Rule 17.2(a)). The Enron Electric Delivery Service Tariff, however, also allows EGSs to jettison customers with five days notice (Enron St. 5, Exhibit A, p. 33, Rule 18.1). This combination of rules will allows EGSs to avoid uncollectible expense, as they can avoid

having to bear the risk of uncollectibles by terminating customers as soon as they stop paying their bills (PECO St. 13-E, pp 33-34).

9. The proposed Enron MBC Services Agreement would impose on PECO the full uncollectible accounts expense caused by default and provider-of-last resort customers (PECO St. 13-E, p. 34; PECO St. 29-E, p. 13).

10. The expenses PECO books to Sales Expense Accounts under FERC's Uniform System of Accounts are not associated with marketing functions, and PECO therefore would not avoid such costs even after all customers can choose their electricity supplier. Moreover, these expenses are not associated with what are called "non-wires services" under the Enron Plan (PECO St. 12-RJ, p. 5; PECO St. 13-E, p. 36).

11. Inappropriately allocating additional overheads to PECO's generation function in the manner Enron proposes will increase PECO's stranded generation costs (MAPSA St. 1-S, p. 6; PECO St. 6-RJ, pp. 12-14).

12. Enron's First Choice Plan adopted the transmission and distribution rate levels in the Partial Settlement without qualification (Enron St. 6, p. 10).

5. Miscellaneous Objections

(Street Lighting Rates)

1. Under the Partial Settlement, effective September 1, 1998, SL-E customers would receive the same ten percent total bill reduction available to PECO's other customers (PECO St. 1-RJ p. 18).

2. Effective January 1, 1999, the Company would reduce the location charge 23% from $10.01 per light to $7.66 (PECO St. 1-RJ p. 18).

3. Over the term of the Partial Settlement, the charge would be reduced further to $6.81 for a total reduction of 32% (PECO St. 1-RJ p. 18).

4. Mr. Hopkins' calculations of the location charges Newtown Township would pay under SL-E are erroneous because he did not consistently base his calculations on the correct number of lights (PECO St. 1-RJ p. 19).

5. Issues concerning the design of rate SL-E should not be decided in this proceeding (PECO St. 13-R, p. 12).

6. Because electricity is supplied to street lights via distribution facilities (i.e. wires, poles, and transformers) a share of the costs for such facilities is appropriately allocated to Rate SL-E (Exhibit WFS-7).

7. Shifting cost responsibility to other rate classes, such as Rate HT and R which are below system average, would violate the rate cap (Exhibit WFS-7).

(Nuclear Decommissioning; Spent Fuel; Low-Level Radioactive Waste)

8. The Partial Settlement contemplates that rates will track decreases as well as increased in nuclear decommissioning expenses and that decommissioning funds will be used only for decommissioning costs (PECO St. 1-SRH, p. 2).

9. "Cost-benefit analyses" of shut-down alternatives are neither necessary not appropriate for filing with each and every request to increase decommissioning cost recovery (PECO St. 1-RJ, p. 3).

10. The Partial Settlement provided that costs for spent nuclear fuel disposal will be recovered as a part of market revenue and not as a part of nuclear decommissioning costs. A separate spent fuel fund is not needed because the costs of spent fuel disposal are remitted to the Department of Energy regularly on the basis of nuclear fuel consumed (PECO St. 1-RJ, p. 3).

11. The cost of low-level radioactive waste disposal will be included as part of PECO's overall decommissioning obligation and not recovered as a component of T&D rates as the Environmentalists erroneously assumes (PECO St. 1-RJ, p. 4)

(Environmental Disclosure)

12. The Environmentalists offered no evidence of the costs and competitive impact of their environmental disclosure proposal (PECO St. 21-R, pp. 26 and 28; Environmentalists St. 3 at 9-17).

13. Environmental labeling of energy transactions could occur naturally through the operation of market forces (PECO St. 21-R, p. 26).

14. The Environmentalists do not provide sufficient information on how an Independent System Operator would monitor suppliers' satisfaction of environmental disclosure requirements (PECO St. 21-R, p. 27).

15. The Competition Act nowhere states that any particular generation source or fuel mix should be given preferential treatment by being highlighted in consumer education materials (PECO St. 17-R, pp. 11-13).

(Jurisdictional Allocation)

16. PECO properly allocated costs and revenues between wholesale and resale service (PECO St. 3-R, pp. 35-36).

17. The Environmentalists' proposal to allocate 3.8% of stranded cost responsibility to the wholesale function is based on a series of fundamental errors including (a) improperly "discounting" and "levelizing" the jurisdictional allocation; (b) unrealistically assuming

that capacity can be added instantaneously in increments precisely matching load; and (c) ignoring the approach previously used and approved by the Commission in base rate proceedings for PECO and other utilities (PECO St. 3-R, pp. 35-37)

18. The Environmentalists' proposal to reduce the allocation of costs to the retail function by reflecting 1200 MW of retail demand reduction allegedly achievable from demand side management is unrealistic, unworkable and would not reduce stranded costs, in any event. The Wisconsin study on which the Environmentalists based their proposal has no demonstrated application to Pennsylvania or the PJM market. The proposal erroneously assumes that 1200 MW of demand side management could be achieved overnight. Also, the Environmentalist ignore the cost of such programs, which would be over $1.0 billion and would totally offset the "savings" the Environmentalists claimed for their proposal (PECO St. 4-R, pp. 31-32).

III. ISSUES NOT ADDRESSED BY THE PARTIAL SETTLEMENT

A. Issues That The Commission Directed The Parties To Address After The Partial Settlement Was Submitted

1. **Ancillary Services.** If the Partial Settlement is approved, PECO will not assess additional charges for ancillary services. PECO will recover its ancillary services costs either through its capped energy and capacity charges or through its capped distribution charges (PECO St. 1-RJ, p. 21).

2. **Transmission Service Terms and Conditions.** Under the Partial Settlement, if the Pennsylvania-New Jersey-Maryland Interconnection (PJM) has the necessary systems in place by January 1, 1999, when the first phase of full direct access begins, competitive EGSs and larger, eligible customers will be able to obtain necessary transmission service directly from PJM. If an EGS obtains transmission directly from PJM, then PECO would not charge the EGS' customers for transmission service (the EGS would do so). Similarly, if an end-use customer obtains service directly from PJM, that end-use customer would not pay PECO an unbundled transmission rate either. If the PJM systems are not in place, PECO will continue to act as agent for EGSs, as it has done during PECO's Pilot Program, and will develop and submit for FERC approval an appropriate agency agreement that deals with the situation as it exists at that time (PECO St. 1-RJ, pp. 22-23).

3. **Procedures For Direct Access.** The appropriate way to deal with direct access is to develop a set of policies and procedures that cover all necessary aspects of the supply administration process, and require PECO (as the EDC) and EGSs to contractually commit to such procedures. Retail tariffs need only require the EGS and the EDC to enter into such contractual arrangements. The Commission has followed this procedure in the context of PECO's Pilot Program (PECO St. 1-RJ, p. 24, Exhibit TPH-32; PECO St. 21-E, pp. 40-43).

4. **Employee Impacts.** Implementation of the Partial Settlement will not have a material adverse impact on PECO's workforce. If changes in staffing levels are necessary, they

can be accomplished through attrition and intra-company transfers (PECO St. 1-E, p. 15). The Enron Plan would create serious risk of triggering severe employee impacts, because (a) it would leave PECO in a financially weakened condition; and (2) the MBC Services Agreement only runs for five year and could easily be terminated by EESP before that date (PECO St. 20-E; PECO St. 20-ERJ; PECO St. 1-E, p. 16).

B. Generic Issues

1. The Partial Settlement will resolve the majority of issues in the Company's restructuring proceeding. A few issues (competitive metering and billing, code of conduct, FERC/PUC jurisdictional matters, reliability standards, environmental issues, bill formats, customer service and interaction with supplier issues) were not addressed in the Partial Settlement.

2. On August 25, 1997 certain parties filed a Petition to Suspend Consideration of Certain Issues Pending a Commission Determination of Proper Forum ("Petition to Suspend"). The Petition to Suspend requested the Commission to defer the issues not addressed in the Partial Settlement and address them in generic, statewide proceedings.

3. On October 2, 1997, the Commission issued a Tentative Order on the Petition to Suspend agreeing that the majority of the issues identified in the Petition are generic in nature, may be best resolved in actual and anticipated Commission rulemaking dockets, and need not be resolved in PECO's restructuring proceeding. The Commission determined that three issues needed to be addressed in PECO's restructuring proceeding: (1) which

ancillary services in support of transmission have been designated as being under Commission jurisdiction; (2) procedures for ensuring direct access to all licensed electric generation suppliers; and (3) the impact of the Partial Settlement on PECO's employees.

4. On October 6, 1997, comments to the October 2, 1997 Tentative Order were filed with the Commission.

5. On November, 6, 1997, the Commission issued another Order on the Petition to Suspend. The Commission held that the specific issue of whether an entity other than a utility can perform metering and billing services could be addressed in this proceeding. It also held that this issue entailed an interpretation of the Competition Act and that record evidence need not be presented.

6. The Commission held that the Code of Conduct is a generic issue and would be the subject of a rulemaking proceeding to be initiated before the end of the year. The specific structural and operation relationships between PECO and its affiliates should be examined on the record in this proceeding.

7. PECO submitted a Code of Conduct which is the same as the Consensus Code of Conduct developed by the Commission's Competitive Safeguards Working Group ("Consensus Code"), except that PECO added a paragraph containing cross-subsidization protections and guidelines for the appropriate nature and degree of functional separation between PECO's competitive generation and regulated distribution functions.

8. PECO will separate its competitive businesses from its regulated electric distribution company operations. PECO's competitive groups will be the Venture Group and the Merchant Group. The Venture Group will, at the outset, include PECO Energy Company's competitive telecommunications businesses and Horizon Energy Company ("Horizon"). Horizon is a PECO affiliate and an electric generation supplier. The Merchant Group will contain all other non-nuclear competitive businesses PECO will conduct (PECO St. 15-R, pp. 18-19).

9. As part of the reorganization into a regulated wires segment and two separately constituted competitive segments, the "sales" and "marketing" functions previously performed by employees of PECO will be functions that are transferred to the Merchant or Venture Groups (PECO St. 15-R, p. 19).

10. Horizon will have its own leadership and staff, and will occupy separate offices. Horizon will be physically removed from those PECO facilities where electric distribution company functions are coordinated and carried out. Horizon employees will not have access to PECO's computer systems and databases accessed by EDC employees (PECO St. 15-R, p. 20).

IV. THE ENRON "CHOICE" PLANS

A. The First "Choice" Plan Was So Critically Flawed That It Had To Be Abandoned

B. The Second "Choice" Plan, Like The First, Cannot And Will Not Work

1. Numerous Legal Impediments Preclude The Implementation Of The Enron Plan

a. The Commission Lacks The Authority To Require PECO To Securitize, To Enter Into The Power Sale And MBC Agreements Or To Turn Over Provider Of Last Resort Responsibilities At This Time

1. Securitization has a mixed effect on a company's financial health. Some factors, such as earnings per share are improved, while other factors such as cash flow, are harmed. As a result, the optimal level of securitization for a company may not be the maximum amount of securitization (PECO St. 27-E, pp. 9-11).

2. Section 2812 (a)(1) states, in pertinent part, that: (a) "A qualified rate order may be adopted by the commission only upon the application of an electric utility . . ;" and (b) "After the issuance of a qualified rate order, the electric utility retains sole discretion regarding whether to assign, sell or otherwise transfer intangible transition property or to cause the transition bonds to be issued, . . ."

3. The Enron Plan would require PECO to abdicate its role as provider of last resort and turn over those responsibilities to EESP (PECO St. 1-E, pp. 12-14) .

4. Section 2807(e)(1) of the Competition Act states in pertinent part:

> While an electric distribution company collects either a competitive transition charge or an intangible transition charge or until 100% of its customers have choice, whichever is longer, the electric distribution company shall continue to have the full obligation to serve, including the connection of customers, the delivery of electric energy and the production or acquisition of electricity energy for customers.

5. Section 2808(e)(2) of the Competition Act states:

> At the end of the transition period, the commission shall promulgate regulations to define the electric distribution company's obligation to connect and deliver and acquire electricity under paragraph (3) that will exist at the end of the phase-in period.

6. PECO will not enter into the PPA or the MBC Agreements and will not voluntarily engage in the EESP securitization proposal (Tr. 1811).

b. Enron's Proposed Securitization Scheme Cannot Be Achieved Under The Terms Of PECO's Mortgage, Would Make It Impossible For PECO To Obtain A Required Tax Ruling From the Internal Revenue Service And Would Violate The Terms Of The Qualified Rate Order Issued By The Commission Earlier This Year

1. In the event the Commission issues a Qualified Rate Order ("QRO") in this proceeding, the Intangible Transition Property ("ITP") created by such order will be mortgaged property subject to PECO's First Mortgage Indenture (PECO St. 28-E, pp. 2-3; PECO St. 20-E, p. 16).

2. The PECO First Mortgage provides that mortgaged property cannot be released from the lien of mortgage unless the trustee receives cash or other property of equal value to the property to be released from the mortgage (PECO St. 28-E, p. 3; PECO St. 20-E, p. 16).

3. Transition bonds cannot be issued unless the ITP has been released from the First Mortgage lien (PECO St. 20-E, p. 19; PECO St. 27-E, pp. 5-7).

4. Enron's Second "Choice" Plan does not provide sufficient value to the mortgage holder in exchange for the ITP to permit the release of the first mortgage lien against the ITP. The "non-cash value" Enron alleges it is providing is illusory and, in any event, does not run to the mortgage trustee and, therefore, cannot satisfy the trustee's fiduciary responsibility to the First Mortgage bondholders to obtain property of equal value to that from which the lien of mortgage is to be released (PECO St. 20-ERJ, p. 13).

5. The forced recapitaliztion that would result from a defeasance of PECO's First Mortgage Bonds would have disastrous consequences for the Company (PECO St. ERJ, p. 14).

6. Defeasance of PECO's First Mortgage Bonds would be considered a taxable exchange for PECO's bondholders.(PECO St. 20-ERJ, p. 14).

7. There are numerous factors in Enron's first "Choice" Plan that would have resulted in an unfavorable tax ruling on securitization (PECO St. 23-E, pp. 1-15).

8. Enron admitted that its first "Choice" Plan would have resulted in an unfavorable tax ruling and changed in plan in an attempt to address the tax issue (Enron St. 1-R; Enron St. 8-R; Tr. 2209-2216).

9. Enron's second "Choice" Plan, notwithstanding the changes made to it, would still not be able to obtain a favorable tax ruling because: (a) the remaining portions of the Enron Plan, including the PPA, the MBC Services Agreement and the role of Enron as provider of last resort, give Enron too great a role to be considered a mere debtholder; (b) the continued disparity between market interest rates and the much higher interest rates Enron would charge for the transition bonds lead to the conclusion that Enron would be purchasing an equity interest in the ITP, rather than simply acting as a debtor of PECO; (c) Enron has itself characterized the transaction, in its press releases, as a purchase of the ITP and not as a mere financing; and (d) the payment by Enron of a guarantee fee to cover the Shortfall Agreement's obligations has been characterized by Enron as bearing the sales decline risk, which is a substantial characteristic of ownership of the ITP and not a characteristic of a mere secured lender (PECO St. 23-E; PECO St. 23-EJR, pp. 1-6; Tr. 2235-36).

10. The absence of a favorable tax ruling from the IRS makes securitization economically unfeasible (PECO St. 23-E, p.15; PECO St. 23-ERJ, p. 6).

11. PECO filed a letter with the Commission in which it conditionally relinquished its rights under the May 1997 QRO pending Commission approval of the Partial Settlement and

the issuance of a QRO thereunder. PECO will not relinquish its rights under the May 1997 QRO to permit the Enron securitization plan to be implemented.

c. Enron's Proposed Unbundled Charges Would Violate The Rate Cap Provisions Of The Competition Act

1. Under the Enron Tariff, EGSs are solely responsible for all "end-use" customer billing, while PECO's only billing will be to EGSs (except, pursuant to the MBC Services Agreement, PECO will be responsible for billing on behalf of Enron, and in its name, to Default Service Customers). Under the Enron Tariff, EGSs would be permitted to rebundle PECO's charges for regulated distribution services with their energy charges, and would not have to separately state such regulated charges (Enron St. 5, Exhibit "A," p. 32 (Rule 17); Tr. 1686-90; PECO St. 13-E, pp. 6-7).

2. The Enron Tariff would allow EGSs to charge for regulated distribution services an amount determined by contract with the customer that need not be equal to the amount the EGS pays PECO for such service. Combined with the EGS' right to rebundle, this feature of the Enron Tariff would allow an EGS to charge more for PECO's non-generation services than is reflected in PECO's bundled rates as of December 31, 1996 (PECO St. 13-E, p. 7; Tr. 1690).

d. Default Customers Would Be Denied Market-Based Rates In Violation Of Section 2807(e) Of The Competition Act

1. Under the Enron Plan, Default Service Customers would pay an energy price equal to the generation credits contained in the Enron Tariff. Such Default Service Customers would not have the opportunity to pay Enron as the provider-of-last resort the actual retail market price even if retail market prices are lower than Enron's tariffed generation credits (Tr. 1291; PECO St. 13-E, p. 10).

2. Many Default Service Customers, such as low income customers, will not have the opportunity to obtain their energy supply from competitive EGSs, as they will not be attractive to competitive EGSs. The same is true of customers who do not pay, or cannot pay, their bills, and customers with poor credit histories (Tr. 1294-95, 1605).

3. Under the Partial Settlement, even Default Service Customers can receive the benefits of competition, as they will pay PECO the lower of the actual prevailing retail market and the Energy and Capacity Caps contained in PECO's proposed tariff sheets attached as Appendix C to the Partial Settlement (Joint Petition, ¶33)

e. PECO's First Amendment Rights Would Be Violated If It Were Stripped Of The Use Of Its Name And/Or Logo In Marketing Electricity

1. A brand name is not an essential facility and its use does not restrict a competitor's entry into the market (PECO St. 10-R p. 31).

2. Choice of brand name is a form of constitutionally-protected commercial speech (PECO St. 10-R pp. 31-32).

3. Brand names embody information valuable to consumers in choosing an EGS (PECO St. 10-R p. 31).

4. Banning PECO's use of its name harms consumers by removing valuable information from the marketplace and hampering customers' choices (PECO St. 10-R p. 31).

f. Enron Would Become A Public Utility Or, At A Minimum, An Affiliate Of A Public Utility For Pennsylvania Regulatory Purposes

1. Under its Choice Plan:

   a. Enron would "step into PECO's shoes" and assume responsibility for supplying the electric energy needs of all default service customers in PECO's service territory (Enron Petition, ¶¶ 6 and 7);

   b. Default service would be automatically provided to anyone not being served by an alternative supplier (Enron Petition, ¶ 6);

   c. Enron would be the exclusive default service provider for PECO's service territory (Enron Petition, ¶¶ 6-7); and

d. Enron would enter into two contracts with PECO, which by Enron's own admission would be essential in the performance of its responsibilities as Provider of Last Resort (Enron Petition, ¶¶ 8-10)

2. Enron has conditioned the effectiveness of its Choice Plan on the Commission's finding that it is not a public utility within the meaning of 66 Pa.C.S. § 102 (Enron Petition, ¶ 30).

3. The various conditions imposed by Enron increase the risk that Enron would be unaccountable to the Commission (PECO St. 21-E).

4. Together, the Power Purchase Agreement and the MBC Services Agreement would allow Enron to exercise substantial influence over the policies and actions of PECO.

g. Customers' Due Process Rights Would Be Violated Because Enron Failed To Provide Adequate Notice Of Its Plan

1. Enron's Plan(s) would effect a massive restatement of the rates, terms and conditions under which PECO provides service to customers (PECO St. 1-E; PECO St. 13-E).

2. Enron has not given notice to customers of the massive changes proposed in PECO's tariffs.

h. The Enron Plan Would Effect An Unconstitutional Taking Of PECO's Property

1. The Enron Plan(s) would prematurely terminate PECO's service franchise, impose an uncompensated "call" on PECO's generation; impress PECO's resources to serve Enron's objectives through contracts that do not provide adequate or fair compensation and require PECO to transfer ITP and related ITC revenue for less than fair value (PECO St. 1-E; PECO St. 21-E; PECO St. 20-E; PECO St. 23, p. 14)

2. The Enron Plan(s) Is Incomplete As Key Elements Either Have Not Been Provided Or Have Not Been Tested On The Record

a. No Information Has Been Submitted Regarding The Necessary Financial Backing Of EESP

1. EESP has no employees assigned to work on retail matters in Pennsylvania, no capitalization, no assets and no presence or experience in Pennsylvania retail electric matters (Tr. 1319-31).

2. No capitalization information was provided concerning EESP as of the close of the record (Tr. 1320-21).

3. Enron has refused to accept public utility status for EESP, even in its proposed role as PLR (Enron Petition, ¶30).

4. Enron has stated that EESP would only agree to follow Chapter 56 of the Commission's regulations insofar as those regulations are applied to EGSs generally, notwithstanding EESP's role as PLR (PPA §3.3; PECO St. 21-E, p. 29).

b. The "Shortfall" Agreement -- The Linchpin To EESP's Securitization Proposal -- Was Not Even Submitted Until After Evidentiary Hearings Had Been Completed

1. The terms and conditions of the ITC Shortfall Agreement could critically affect such matters as whether PECO could obtain a favorable tax ruling from the IRS (PECO St. 23-E, p. 11; Tr. 2254-55).

2. Enron did not submit the ITC Shortfall Agreement with its Petition, in response to discovery requests or with either its direct or rebuttal testimony (Enron St. 8-R, p. 13).

3. Enron waited until after the evidentiary hearings had concluded to submit its proposed ITC Shortfall Agreement (Enron Supplemental Exh. 1 to Enron St. 8-R (submitted November 26, 1997)).

c. In Sharp Contrast With The Partial Settlement, EESP Has Made No Commitment To Honor EER and Rule 4.6 Contracts

1. Under the Enron Plan, EER and Rule 4.6 contract customers with discounts from the Rate HT capacity charge and first two energy blocks of Rate HT would not receive the proposed rate discounts contained in the Enron Plan (Tr. 1729-1730, 1744).

2. Under the Partial Settlement, EER and Rule 4.6 contract customers with discounts from the Rate HT capacity charge and first two energy blocks of Rate HT would receive the proposed rate discounts contained in the Partial Settlement (Tr. 1731-1733; Joint Petition, ¶12).

d. EESP Leaves Unanswered Critical Questions Regarding How It Would Administer Its Proposed Electric Delivery Service Tariff

1. Enron's initial position with regard to the first "Choice" Plan was that a distribution tariff containing final "rules of the road" should be approved in the context of PECO's restructuring proceeding to avoid confusion (Enron St. 5, p. 3).

2. Under the Enron Tariff as written, with one limited exception, EGSs will be the single point of contact for "end-use" customers (Enron St. 5, Exhibit "A," pp. 34-35 (Enron Rule 22); Tr. 1788).

3. Enron Tariff Rule 21.7 provides that "when requested by the EGS," PECO may provide other services for a charge. Enron witness Kingerski testified on cross-examination,

however, that notwithstanding this language in Enron Rule 21.7, an end-use customer could directly contact PECO to obtain other services for a charge without violating the Enron Tariff (Tr. 1791).

3. Enron witness Kingerski also admitted on cross-examination that under the Enron Tariff, end-use customers could directly obtain from PECO any construction-related services PECO would provide under the Tariff without obtaining the permission of the customer's EGS (Tr. 1796).

4. Enron witness Kingerski also admitted on cross-examination that notwithstanding the unambiguous language in Enron Rule 18.1, which provides that EGSs may "not disconnect" service, an EGS could request that PECO physically shut-off an end-use customer (Tr. 1699-1700).

5. The Enron Tariff will generate the confusion that Enron claims it was designed to avoid. Customers, EGSs, and PECO will be hard pressed to determine from whom customers should seek assistance to obtain the myriad of distribution-related services PECO currently offers directly to customers, or what certain of its key provisions actually mean in practice (Enron St. 5, Exhibit "A"; Tr. 1699-1700, 1788, 1791, 1796).

3. The Enron Plan(s) Is Not In The Public Interest

a. The Plan is Anti-Consumer

(Lack of Rate Certainty)

1. Under the PPA, Enron retain the right to charge default customers generation prices above the generation cap if it is unable to obtain energy and capacity from PECO (PECO St. 1-E, p. 8).

2. Any savings that customers might experience in the first few years could easily erode or disappear entirely (PECO St. 1-E, p. 8).

(Stranded Cost Recovery is Backloaded)

3. Under the Enron Plan(s) the recovery of stranded costs trends upward (PECO St. 1-E, pp. 8-9).

4. The backend loading of stranded cost recovery is not in customers' best interests. Consumer groups that executed the Partial Settlement insisted that past investments be paid off earlier rather than later to reflect the transition to competition, which explains why the CTCs in the Partial Settlement decline over time (PECO St. 1-E, pp. 8-9).

5. CTCs that trend downward over the transition period thereby increasing the generation credit and related "headroom" for competitive suppliers in the later years of the transition

period will enhance competition when it is most important that vigorous competition exists, namely, when the transition period is over (PECO St. 6-E, p. 11).

(System Reliability Would Be Compromised)

6. Under the Enron Plan, virtually all of the work required to ensure customers receive high quality electric service would continue to be performed by PECO (PECO St. 1-E, p. 9; PECO St. 21-E).

7. The net effect of Enron's proposals would be to paralyze PECO's generation function for the reasons discussed in detail in PECO Statement 21-E and, as explained in PECO Statement Nos. 20-E and 20-ERJ, to cripple the Company financially by, for example, reducing PECO's debt rating to"junk bond" status, triggering indenture provisions that would preclude PECO's issuing additional First Mortgage Bonds and potentially triggering defaults (or, at a minimum, precluding additional borrowing) under bank credit facilities (PECO St. 1-E, p. 9).

8. Under the Enron Plan(s) PECO's ability to maintain system reliability, including the reliability of its T&D network, and to provide customers high quality service -- i.e., the core values of the Competition Act -- would be severely compromised (PECO St. 1-E, p. 9).

(Important Consumer Protections Would Be Lost)

9. Under the Enron Tariff, EGSs would be able to rebundle PECO's regulated non-generation related charges and effectively charge whatever the market will bear, thus subverting the Competition Act's non-generation charge rate caps and violating the Act's intent (PECO St. 13-E, p. 7, Exhibit WFS-16; Enron St. 5, Exhibit "A", p. 32 (Rule 17.2(b)); Tr. 1686).

10. Under the Enron Tariff, EGSs would be able to charge end-users more than the late payment charges contained in PECO's current tariff (PECO St. 13-E, p. 8; Enron St. 5-R, p. 3).

11. Under the Enron Tariff, EGSs would take away customers' right to choose among available rate schedules under which customers would take distribution service and the corollary assistance PECO provides upon request to help customers select the most favorable distribution rate classification (PECO St. 13-E, pp. 12-14; Exhibit WFS-16).

12. Under the Enron Tariff, EGSs apparently could discontinue service on five days notice and jettison the customer to Default Service provided by the provider of last resort (PECO St. 13-E, pp. 9-10; Enron St. 5, Exhibit "A," p. 33 (Rule 18.1).

13. Under the Enron Tariff, Default Service options would be substantially limited for industrial customers (PECO St. 13-E, p. 10, Exhibit WFS-16).

14. Under the Enron Tariff, Enron would remove important load management and conservation provisions such as the Cooling Thermal Storage Service Rider, and the Electric Vehicle Charging Rider (PECO St. 13-E, pp. 17-18).

15. Under the Enron Tariff, Enron would deny PENN DOT and the City of Philadelphia the current benefits they receive through the "outage allowance" on their street lighting bill by eliminating that provision as at exists in the current PECO Tariff (PECO St. 13-E, p. 16; Tr. 1786-87).

16. Under the Enron Tariff, Enron would limit the application of the Employment and Economic Recovery Rider, which encourages businesses to increase employment and promote economic development (PECO St. 13-E, p. 17; Enron St. 5, Exhibit A, Proposed Treatment of Miscellaneous Riders, p. 2 of 4).

17. Under the Enron Tariff, Enron would limit the residential Solar tariff option by eliminating the Company's ability to charge for a metering option (PECO St. 13-E, pp. 18-19).

18. Under the Enron Tariff, Enron would eliminate the Transformer Rental, Curtailment HT, and Off Peak Riders, thus not only restricting customer choice, but also causing significant increases in customers' bills or investments (PECO St. 13-E, pp. 18, 20).

19. Under the Enron Tariff, Enron would eliminate PECO's ability to sell supplementary, back-up and maintenance power to self-generators, thus not only limiting customer choice but also violating provisions of federal law (PECO St. 13-E, p. 19).

20. Under the Enron Tariff, Enron would remove benefits that PECO customers currently enjoy under the Night Service Riders, the Temporary Service Rider, and Capacity Reservation Rider (PECO St. 13-E, p. 20).

(EESP's Proposed Credit For Non-Wires Service Would Harm Customers)

21. Enron's cost basis for its non-wires services credit is not based on PECO's actual non-wires services costs, and is nearly four times higher than it should be (PECO St. 13-E, pp. 30-37).

22. With regard to metering and meter reading, these costs include all of the costs PECO currently incurs to acquire, install, maintain, and read all 1.5 million meters in use on its system. As PECO would still have to stand ready to perform all of those functions for default service customers, it would likely continue to incur the overwhelming majority of these capital and operating and maintenance costs even if EGSs were allowed to perform all or some of them on a competitive basis. This is true because under the Enron Plan: (1) EGSs could terminate customers on five days notice for any reason (including the EGS' belief that serving the customer is no longer profitable), or customers could return to default service on their own at any time.; (2) an EGS with many metering customers could suddenly go out of business, requiring PECO to perform the services, once again

on very short notice; (3) even if the number of customers for whom PECO must provide metering and meter reading eventually settles at a stabilized, lower level, PECO would still incur a cost per customer much higher than would currently be required (for example, in the case of meter reading, installation, and maintenance, PECO would still have to cover the same area, as default service customers could be scattered throughout the entire service territory); and (4) the number of customers whose meters PECO would have to install, maintain, and read in a particular area could suddenly jump dramatically. Accordingly, to ensure timely and accurate meter reads and provision of complete billing data, PECO would have to maintain a relatively large group of meter technicians and readers in a number of locations dispersed around its service territory. PECO would also have to have a correspondingly higher number of meters in inventory at any time, as it would have to replace an EGS' meter on very short notice whenever an EGS' customer returns to default service. Therefore, only a fraction of the metering and meter reading costs used by Enron witness Reising should be used to design any credit for non-wires services (PECO St. 13-E, pp. 31-32).

23. An appropriate level for metering and meter reading costs to use for the development of a non-wires services credit is $34,387,000 (PECO St. 13-E, Exhibit WFS-15).

24. With regard to billing, under the Enron Plan, Enron's proposed level of costs used for the development of a non-wires services credit is overstated. Under the Enron Plan, PECO would have to prepare and provide to EGSs bills containing the same level of detail as those PECO would have provided directly to customers. These bills to EGSs not only

would contain this same level of detail, but also would cover the same number of customers. Accordingly, there is no basis for the assumption that as EGSs gain customers, PECO's billing costs would decrease proportionately. PECO's billing costs would probably remain the same, or perhaps even increase, as PECO would have to upgrade its billing and computer systems to replace direct customer billing with EGS billing (PECO St. 13-E, pp. 34-35).

25. With respect to collection, under the Enron Plan, Enron's proposed level of costs used for the development of a non-wires services credit is overstated. Under the Enron Plan, as EGSs add customers, PECO would not increasingly avoid the collection expense it currently incurs. Under the Enron Plan, when a customer fails to pay an EGS, the EGS may terminate the customer on five days notice with the probable result the customer will return to default service. As PECO is responsible under the MBC Services Agreement for collection expense associated with default service customers, PECO will almost certainly continue to incur these collection costs. Nor is there any guarantee that under the Enron Plan EGSs would pose no collection risk or cost to PECO. Rather, PECO probably would continue to incur substantial costs to pursue EGSs that do not pay their bills to PECO (PECO St. 13-E, p. 35).

26. An appropriate level of billing and collection costs to use for the development of a non-wires services credit is $18,989,000 (PECO St. 13-E, Exhibit WFS-15).

27. With regard to customer service and information costs, under the Enron Plan, Enron's proposed level of costs used for the development of a non-wires services credit is overstated. PECO would have to stand ready to provide these services, on short notice, to a considerable number of additional customers it would not serve regularly. PECO would have to have available a substantial workforce, and technical capability – i.e., phone lines, computer systems, etc. – to ensure its ability to handle a large volume of calls and service inquiries (PECO St. 13-E, pp. 35-36).

28. An appropriate level of customer service and information costs to use for the development of a non-wires services credit is $21,706,000 (PECO St. 13-E, Exhibit WFS-15).

29. There is no basis for including street lighting expense in the cost basis for the development of a non-wires services credit, as these expenses are totally unrelated to the non-wires services that EGSs would provide under Enron's plan: metering, meter reading, billing, collection, and customer and information services. The costs PECO incurs in connection with street lights are appropriately included in its street lighting rates, and would continue to be included in those rates under the Enron Plan. PECO would not avoid them if an EGS were to provide non-wires services, and therefore they should not be included in any credit for such services (PECO St. 13-E, pp. 36-37).

30. There is no basis for including uncollectible accounts expense or sales expense in the cost basis for the development of a non-wires services credit (See Findings of Fact under Section II.C.3. Nos.4-10)

31. Any non-wires services credit should not be "symmetrical" with the payment PECO would receive from Enron under Enron's proposed MBC Services Agreement as PECO would not avoid an amount of cost in direct proportion to number of customers it sheds, and would not recover an amount equal to its actual avoided costs through payments made by Enron for PECO-provided MBC services to Default Service Customers. For example, with respect to uncollectible accounts expense, essentially all uncollectible risk would remain with PECO as Enron's subconctractor for default service. The EGSs, regardless of the number of customers served, would bear a de minimus amount of such risk; they will retain those customers who pay and jettison the non-paying customers to default service. Therefore, although PECO in theory has an uncollectible revenue stream to make the Company whole regarding uncollectible accounts, under Mr. Reising's pro-rata, "symmetrical" credit, most of that stream would be allocated to EGSs while PECO would retain virtually all the uncollectible risk (Tr. 1764; PECO St. 13-E, pp. 30-31).

32. Even if the Commission were ever to design a non-wires services credit using PECO's proposed cost basis, the resulted would be additional stranded costs, as PECO would not actually avoid many of these costs (PECO St. 13-E, pp. 39-40).

33. An energy-based non-wires services credit would encourage EGSs providing non-wires services to cherry-pick relatively higher use customers, as EGSs would receive credits that are far greater than their actual costs them to provide the services. Under such circumstrances, EGSs would not offer non-wires services to lower use customers, many of whom are low income customers (PECO St. 13-E, pp. 40-42)

34. If Enron's proposed cost basis and energy-based design for a non-wires services credit were adopted, PECO would significantly under-recove costs properly recoverable through its distribution rates, meaning that as soon as the non-generation charges expires.

(Extra-Statutory Concessions Would Be Sacrified)

35. There are several important benefits of the Partial Settlement that cannot be realized absent PECO's consent: (1) the 10% rate reduction commencing September 1, 1998; (2) the acceleration of customer choice; (3) the extension of the transmission and distribution and generation rate caps (PECO St. 1-E, p. 10).

36. The foregoing benefits as well as PECO's commitment to expand it existing universal service programs and the ageement by other Joint Signatories to withdraw certain pending appeals would be lost if the Partial Settlment is not approved (PECO St. 1-E, p. 10).

b. The Plan Is Anti-Competitive

(The Proposed Generation Credits Would Preclude Any EGS From Competing After A Few Years)

1. The generation credits proposed under the Enron Plan are high in the first few years and then decline to below current projections of market price (PECO St. 6-E, pp. 9-10).

2. As a consequence of the generation caps falling to well below market prices after the first few years, any competition that was established during the period of the very generous generation caps will ultimately fail. Competitive retailers would exit the market and most customers would return to the default service of the PLR (EESP under the Enron Plan) (PECO St. 6-E, pp. 10-11).

(PECO Would Be Effectively Eliminated As A Competitor, Thereby Depriving Customers Of Valuable Choices)

3. The competitive safeguards proposed by Enron would prohibit PECO's competitive generation operations from using the name, logo, service mark, trademark, or trade name of the Company. It would also prohibit joint marketing even if (Enron St 5, Exhibit "A", p. 36 (Rules 23.5, 23.10)).

4. Enron's proposed restrictions on use of the PECO name and on joint marketing constitute severe "overkill," because they ignore important competitive safeguards that already exist. These include the force of competition itself from dozens of very large, powerful, resource rich entrants that face minimal barriers to entry, and the federal antitrust laws,

which Pennsylvania and federal enforcement authorities stand ready to enforce (PECO St. 10-R, amended pages 11-12; PECO St. 10-E, pp. 11-12; Tr. 1500-1501).

5. Enron's witness in support of the competitive safeguards contained in the Enron Plan – Mr. Michael D. Dirmeier -- is not an economist. Mr. Dirmeier could not identify the discipline within economics that is concerned with the study of competition and market performance. The majority of the testimony Mr. Dirmeier has presented in the approximately 100 proceedings in which he has testified concerns traditional regulated ratemaking issues such as revenue requirements and energy adjustment clauses (Tr. 1479-1480).

6. Adoption of Enron's prohibition on the use of the PECO name, logos, and trademarks would, eliminate at least one choice that consumers may wish to make. Enron's competitive safeguards witness agreed with this view (PECO St. 10-E, pp. 5, 11; Tr. 1485).

7. Enron's proposed additional restrictions would impose unnecessary costs and burdens on PECO's competitive operations, which would seriously hamper PECO as a competitor (PECO St. 15-R, pp. 18, 21-22).

8. The Competitive Safeguards Working Group ("CSWG") Code of Conduct would ensure that PECO will not be able to use its continued monopoly control of the "wires" to unfairly advantage its competitive generation operations. The CSWG Code of Conduct

has been endorsed by a broad consensus of stakeholders (PECO St. 29-E, pp. 4-5; PECO St. 13-E, pp. 10-11)

(EESP Would Have PECO Abide By Code Of Conduct Rules That It Is Unwilling To Impose On elf As PLR)

8. Enron's position is that the fact of incumbency provides PECO with inherent advantages that a Code of Conduct should eliminate to enable robust competition (Enron St. 10-R; pp. 3-4; Tr. 1481-85).

9. Under the Enron Plan, Enron, as the PLR, would not be subject to the same Code of Conduct restrictions to which PECO would be subject. In particular, Enron's competitive EGSs would be allowed to use the Enron name and logos, whereas PECO's competitive EGSs would not be allowed to use the PECO name and logos (Tr. 1387-88).

4. The Plan Could Not Be Implemented Without The Review And Approval Of A Host Of Other Regulatory Entities

(SEC Concerns)

1. Under the matrix of rights and responsibilities that would be created by the Enron Plan(s), including the PPA, the MBC Services Agreement and the designation of EESP as PLR, EESP would be offering and furnishing electric service to the public for compensation (Enron Petition; Enron St. 1, pp. 19-23, 27-29; Enron St. 1, pp. 35-36 and 39; Tr. 1393).

(FERC Concerns)

2. Under the PPA, EESP would take title to the electricity at the point of delivery to the end-use customer, prior to the actual use of such electricity by the customer (PPA ¶6.3 at p. 5; PECO St. 21-E, p. 6). In turn, Enron proposes that EESP would resell the energy and capacity purchased from PECO to end-use customers and, as a result, EESP would be engaged in the purchase and resale of electricity (Enron St. 1, p. 20).

(Antitrust Concerns)

3. The Enron Plan would require that the Commission order PECO involuntarily to enter into the Power Purchase Agreement with Enron (Tr. 1240 and 1394).

4. The PPA calls for PECO to be obligated at all times to deliver energy irrespective of whether PECO can supply the energy from its own generation resources (PPA § 4.3, "Delivery of Contract Quantity").

5. Under the PPA, PECO would be required to supply all of the energy requirements of all customers that choose not to choose an alternate supplier (PPA (Definitions of "Mandatory Requirements of Buyer," "All Requirements of Buyer;" "Transitional Default Service Customers;" PPA § 4.1, "Contract Quantity").

6. Under the PPA, PECO would be required to stand ready to supply, at Enron's option, the energy requirements of customers that return to default status after first choosing an alternate supplier (PPA, Definitions of "Optional Requirements of Buyer;" "All

Requirements of Buyer," "Standard Default Service Customers;" PPA § 4.1, "Contract Quantity").

7. Under the PPA, PECO must provide, on behalf of Enron, any capacity and other services necessary to fulfill PJM requirements (PPA § 4.1, "Contract Quantity;" § 4.4, "PJM Capacity Obligations").

8. Under the Enron Plan, the PPA would be in effect for 10 (ten) years (PPA, Section 3.2, "Delivery Term," as amended by Enron St. 1-R, p. 20).

9. Section 7 of the Clayton Act states that it is unlawful for a company to acquire: "the whole or any part of the assets of another person" where interstate commerce is affected and where the effect of the acquisition "may be substantially to lessen competition, or tend to create a monopoly" (15 U.S.C. §18).

10. Appellate courts have held that, in order to give full effect to the purposes of Section 7 of the Clayton Act, the words "acquisition" and "assets" must be interpreted broadly. United States v. Columbia Pictures Corp., 189 F. Supp 153, 181-82 (S.D.N.Y. 1960).

(NRC Concerns)

11. Under the matrix of rights and responsibilities that would be created by the Enron Plan(s), including the PPA, the MBC Services Agreement and the designation of EESP as PLR, EESP and its parent, Enron, would obtain considerable functional and operational control

over PECO's generation assets, including nuclear units fro which PECO holds NRC-issued operating licenses (PECO St. 1-E; PECO St. 21-E).

(IRS Concerns)

12. Under the Enron Plan(s), the proposed issuance of Transition Bonds bearing an interest rate far above market rates for similar instruments and the proposed Shortfall Agreement, whereby Enron will guarantee or obtain a guarantee of PECO's electric sales revenues, lodge in Enron significant indicia of equity ownership of the ITP and associated ITC revenue. Consequently, it would be a virtual certainty that the IRS would view the issuance of the Transition Bonds as a sale of the ITP and associated ITC revenue to Enron (a tax recognition event for PECO) and not as a debt financing by PECO (a non-tax recognition event) and, therefore, it is highly unlikely the IRS would issue a favorable tax ruling on the Enron-proposed securitization plan (PECO St. 23-E; PECO St. 23-ERJ; Affidavit accompanying PECO's Motion To Strike from the record the Enron Shortfall Agreement; Tr. 2235-36, 2264-65).

13. Enron's proposed securitization plan is so significantly different in a number of material respects from both the California utilities' proposed securitization plan and the securitization plan proposed by PECO, that the IRS would have to start an entirely new of the Enron proposal, which would virtually assure that no IRS ruling could be obtained prior to the deadlines imposed by Enron for the implementation or withdrawal of its Plan(s) (PECO St. 23-E).

(Consumer Protection Concerns)

14. The Pennsylvania Unfair Trade Practices and Consumer Protection Law and Section 5 of the Federal Trade Commission Act prohibit "unfair or deceptive acts or practices." 73 P.S. §201-1 et seq.; 15 U.S.C. §45.

15 The Enron Plan(s) forces all default customers to "choose" EESP as their electric generation supplier. Those customers who "choose not to choose" an alternative supplier would be switched to EESP automatically and without their consent (Enron Petition, p. 6).

16. The Enron Plan(s) makes no provision for advising customers of the transfer of service to EESP, obtaining customers' consent for the transfer of such service or educating customers about what will happen to them or about EESP.

17. Changing a customer's service provider without the customer's express consent is known as "slamming." This practice has consistently been deemed unfair and deceptive. See "Four Attorneys General Reach $380,000 Settlement With Communications Telesystems International," National Association Of Attorneys General, Consumer Protection Report ("NAAG Report") (October/November 1996).

18. Once default customers have been automatically switched to EESP's service, the Enron Plan(s) would require consumers to make an affirmative act to maintain the status quo (i.e., retain PECO service) (Enron Petition, pp. 6-7).

19. Requiring an affirmative act by consumers to retain an existing service provide is considered a "negative option" and has consistently been challenged as an unfair or deceptive marketing arrangement. See "Twenty Attorneys General Sign Agreement With America Online," NAAG Report (January 1997) (Multi-state consent agreement with AOL to prevent use of negative option to change Internet access provider.)

20. The Enron Plan(s) would make it extremely difficult if not impossible for customers to switch back to PECO because the Plan would mandate that PECO's affiliated EGS could not use PECO's name or service mark (Enron Petition, p. 7 and Exh. 3 thereto at ¶2.5).

PECO ENERGY COMPANY'S
PROPOSED CONCLUSIONS OF LAW

II. THE PARTIAL SETTLEMENT

B. The Partial Settlement Is In The Public Interest

1. The Partial Settlement satisfies the standards for restructuring set forth in Section 2804 of the Competition Act and is consistent with the public policy set forth in Section 2802 of the Competition Act.

2. PECO has satisified all of the legal requirements imposed by the Competition Act for the recovery of stranded costs as provided for by the CTCs/ITCs set forth in the Partial Settlement.

3. The level of the CTCs/ITCs set forth in the Partial Settlement is just, reasonable and lawful, and PECO has established its entitlement to charge such CTCs/ITCs.

4. The issuance of the QROin the form attached to the Joint Petition for Partial Settlement as Appendix D is in the public interest, and PECO is entitled to the issuance of such a QRO.

5. The tariff sheets attached as Appendices B and C properly unbundle PECO's rates and are lawful, just, reasonable and non-discriminatory.

6. The Partial Settlement is in the public interest and should be approved without modification.

C. The Objections To The Partial Settlement Are Without Merit

1. The provisions of the Partial Settlement foregoing annual "true-up" adjustments to the CTC do not violate Section 2808(f) of the Competition Act. That Section incorporates by reference the "good reason" exception to annual adjustments set forth in Section 1307(e), which has been consistently interpreted to grant the Commission discretion to make, or not to make, such annual adjustments, as the Commonwealth Court held in Community Central Energy Corp. v. Pa. P.U.C., 413 A.2d 1197 (1980).

2. The Joint Signatories agreement to forego annual adjustments to the CTC irrespective of whether such adjustments would increase or decrease the CTC represents a reasonable allocation of risks of over or underrecovery between PECO and its customers and, therefore, consistutes "good reason" as defined by Section 1307(e) as incorporated in Section 2808(f) to forego annual "true-up" adjustments of the CTC.

IV. THE ENRON PLAN(S)

B. The Second "Choice" Plan, Like The First, Cannot and Will Not Work

1. Numerous Legal Impediments Preclude The Implementation Of The Enron Plan

1. A Qualified Rate Order ("QRO") may only be adopted upon application of an electric utility. 66 Pa. C.S. §2812(a)(1).

2. Once a QRO is issued, the utility retains sole discretion as to whether to issue bonds under the QRO. 66 Pa. C.S. §2812(a)(1).

3. Issuance of the QRO proposed by Enron would violate the terms and conditions of the QRO issued by the Commission to PECO in May 1997 and, thus, Enron's plan would violate the provisions of the Competition Act that make the May 1997 QRO irrevocable. 66 Pa. C.S. §2812. Pa. P.U.C. v. PECO Energy Co. Docket No. R-00973877 (May 22, 1997).

4. The incumbent utility is required to fulfill the full obligation to serve as long as it is collecting either a CTC or ITC. 66 Pa. C.S. §2807(e)(1).

5. Changes to the incumbent utility's obligations as a provider of last resort must be defined through a Commission rulemaking at the end of the transition period. 66 Pa. C.S. §2807(e)(1).

6. The Commission does not have the authority under the Competition Act to order PECO to securitize its stranded costs, to sell Intangible Transition Property ("ITP") at less than fair value or to enter into the PPA or the MBC Services Agreement.

7. The Enron Tariff violates the rate cap on non-generation charges imposed by Section 2804(4)(i)(A) by permitting EGSs to rebundle and resell such services at rates that exceed the utility's rate cap.

8. The Enron Tariff violates Section 2807(e), which provides that default customers should be charged market-based generation prices not to exceed that applicable rate caps. Under the Enron Plan(s), default customers would always be charged the "generation credit" irrespective of whether market-based generation prices are less than such credit.

9. Enron's proposal to prohibit PECO's use of its brand name, logo and other trade dress would constitute a violation of PECO's constitutionally-protected rights to commercial speech. Central Hudson Gas & Electric Corp. v. P.S.C. of New York, 447 U.S. 557, 563 (1980); Edenfield v. Fane, 507 U.S. 761, 768-777 (1993).

10. The Section 102 of the Public Utility Code defines a public utility as "[a]ny person or corporation now or hereafter owning or operating in this Commonwealth equipment or facilities for: (i) [p]roducing, generating, transmitting, distributing or furnishing . . . electricity . . . for the production of light, heat or power to or for the public for compensation." 66 Pa. Cons. Stat. Ann. § 102.

11. The Public Utility Code defines "facilities" to encompass "[a]ll the plant and equipment of a public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with, the business of any public utility." 66 Pa. Cons. Stat. Ann. § 102.

12. Under Pennsylvania law, the nature of the service offered is the pivotal question in determining whether an entity is a public utility. Waltman v. Pa PUC, 596 A.2d 1221 (Pa. Commw. 1991), app. granted, 600 A.2d 1260 (1992); Pa. Chautauqua v. Public Service Commission, 105 Pa. Sup. Ct. 160, 164 (1932). Typically, public utility service is service supplies a prime necessity of life. Furthermore, the business of a public utility must be affected with a public interest or otherwise dedicated to a public use. "The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite or unrestricted quality that gives it its public character." White v. Smith, 189 Pa. 222, 228, 42 A. 125, 126.

13. Private enterprises that have provided essential services to the public at large routinely have been deemed to be public utilities. See Pa. Chautauqua (private company supplying water to all inhabitants in borough at uniform rates deemed to be public utility despite absence of charter).

14. The PPA, the MBC Services Agreement and the grant of PECO's PLR status to EESP would all qualify as intangible property falling within the definition of "facilities" under

the Public Utility Code. The two proposed agreements would further allow Enron to exercise functional and economic indirect control over facilities owned by PECO.

15. The supply of energy and capacity to default service customers in PECO's service territory is a public utility function.

16. By assuming the PLR role in PECO's service territory, Enron would be assuming the role of a public utility.

17. The Commission's jurisdiction over public utilities is statutorily conferred. The Commission cannot abdicate its responsibilities to protect the public interest by overseeing the service and rates of entities that meet the definition of a public utility and which are providing public utility service. City of Philadelphia v. Philadelphia Electric Co., 504 Pa. 312, 473 A.2d 997 (1984).

18. It would violate the public policy of Pennsylvania not to regulate a PLR as a public utility subject to the jurisdiction of the Commission.

19. The Public Utility Code's definition of "affiliate" includes any person or corporation that the Commission determines "after investigation and hearing is actually exercising such substantial influence over the policies and actions of such public utility . . . that . . . they are affiliated with such public utility within the meaning of this section . . ." 66 Pa. Cons. Stat. § 2101(a)(7).

20. The matrix of rights that would be vested in EESP and Enron under the Enron Plan(s), including, without limitation, the PPA, the MBC Services Agreement, the PLR status of EESP, the forced sale of ITP to Enron and the forced issuance of bonds by PECO to Enron would constitute "substantial influence" by Enron and EESP over PECO as to render both entities "affiliates" of PECO.

21. Enron's failure to notify customers of the massive changes proposed to PECO's tariff would result in a violation of customers' due process rights if the Enron Plan were adopted. Barasch v. Pa. P.U.C., 119 Pa. Cmwlth. 81, 546 A.2d 1296 (1989) *petition for allowance of appeal denied,* 523 Pa. 652, 567 A.2d 655 (1989) (the "Milesburg" case).

22. The Enron Plan(s) would effect an unconstituitonal "taking" of PECO's property by prematurely terminating PECO's service franchise; imposing an uncompensated "call" on PECO's generation; impressing PECO's resources to serve Enron's objectives through contracts that do not provide for fair compensation; and requiring PECO to transfer ITP at less than fair value.

23. The Commission does not have authority under the Competition Act to "unbundle" and to "deregulate" meter reading, complaint resolution and collections. 66 Pa. C.S.. §§2807(c) and (d).

4. The Plan Cannot Be Implemented Without The Review And Approval Of A Host Of Other Regulatory Entities

1. Establishing EESP as the PLR in PECO's service territory, as proposed under the Enron Plan(s) would implicate issues under Section 9(a)(2), 2(a)(3), 2(a)(5), 2(a)(7) and 3(a)(1) of the Public Utility Holding Company Act, the resolution of which by the Securities and Exchange Commission may affect the viability of the Enron Plan and EESP's ability to obtain and maintain PLR status.

2. The Federal Energy Regulatory Commission ("FERC") has exclusive jurisdiction over wholesale transactions under the Federal Power Act ("FPA"). Moreover, the Public Utility Code specifically denied the Commission jurisdiction over transactions in interstate commerce. See 66 Pa. Cons. Stat. Ann. § 104.

3. The FPA defines a wholesale transaction as a sale of energy for resale.

4. Inasmuch as Enron would be purchasing energy and capacity under the PPA for resale to end-use customers, the terms and conditions of the PPA are matters within the exclusive jurisdiction of the FERC and are subject to FERC review and approval.

5. Under Section 203 of the FPA, the FERC is obligated to determine whether dispostions and mergers of public utility property used to sell wholesale electric energy and to transmit electric energy in interstate commerce are in the public interest. 16 U.S.C. §824b.

6. FERC's Section 203 jurisdiction extends to contracts, accounts and records. Enova Corp., 79 FERC ¶61,107 at 61,489 (1997).

7. Given the terms of the PPA and its implications for PECO's wholesale service, the Enron Plan would "impede or tend to impede" the coordination of FERC jurisdictional facilities and, therefore, could trigger the necessity for Section 203 review and approval by FERC.

8. Section 7 of the Clayton Act proscribes the acquisition of "the whole or any part of the assets of another person" where interstate commerce is affected and where the effect of the acquisition "may be substantially to lessen competition, or tend to create a monopoly." 15 U.S.C. §18.

9. To give full effect to the purposes of Section 7 of the Clayton Act, the words "acquisition" and "assets" must be considered broadly. United States v. Columbia Pictures Corp., 189 F. Supp 153, 181-82 (S.D.N.Y. 1960).

10. An acquisition of assets takes place, within the meaning of Section 7 of the Clayton Act, whenever one person obtains significant economic or decision-making control over the property of another person in a way that implicates the remedial purposes of the statute. McTamney v. Stolt Tankers and Terminals, 678 F.Supp. 118 (E.D.Pa. 1987); Nelson v. Pacific Southwest Airlines, 399 F.Supp. 1025 (S.D.Cal. 1975).

11. In the context of Section 7 of the Clayton Act, the potential competitive significance of a transaction determines whether there has been an acquisition of assets. Mr. Frank, Inc. v.

Waste Management, Inc., 591 F.Supp. 859, 866 (N.D. Ill. 1984) ("The economic significance of the relationship, rather than its size or form, is the relevant inquiry.")

12. The operation of the PPA would constitute an acquisition of PECO's generation assets within the meaning of Section 7 of the Clayton Act. McTamney v. Stolt Tankers and Terminals, 678 F.Supp. 118 (E.D.Pa. 1987); Nelson v. Pacific Southwest Airlines, 399 F.Supp. 1025 (S.D.Cal. 1975).

13. The Commission could undertake an antitrust review of the PPA by (1) seeking an opinion from the U.S. Department of Justice Antitrust Division through its Business Review Letter process, (2) seeking an opinion from the Office of the Pennsylvania Attorney General, and (3) initiating its own investigation. 66 Pa.C.S. §2811; 28 C.F.R. §50.6 .

14. Establishing EESP as the PLR in PECO's service territory, as proposed under the Enron Plan(s) would implicate compliance issues under Section 184 of the Atomic Power Act of 1954, as amended, and may require the prior review and consent of the Nuclear Regulatory Commission.

15. The Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. §201-1 et seq. which prohibits "unfair methods of competition" and "unfair or deceptive acts or practices" applies to the subject matter of this proceeding.

16. An act or practice is "deceptive" if it involves a material representation, omission or practice that is likely to mislead a consumer acting reasonably under the circumstances. FTC Policy Statement on Deception, 4 Trade Reg. Rep. (CCH) ¶13,205 (Oct. 14, 1983); Cliffdale Assoc., 103 FTC 110 (1984).

17. It is an unfair or deceptive practice to bill a customer for a new form of electric service when the customer has not expressly accepted that service and the customer must take an affirmative act to switch back to his or her current form of service.

18. It is an unfair or deceptive practice to omit any material fact in any offer to sell electric service. Creamer v. Monumental Properties, Inc., 329 A.2d 812, 829 (Pa. 1974).

19. The Enron Plan involves a deceptive practice by requiring an affirmative act for customers to maintain their status quo.

20. The Enron Plan's requirement that PECO be prohibited from using its trade name in offering generation service compounds the deception created by the Plan's reliance upon a "negative option" for customers to retain existing PECO service.

APPENDIX B

Motion Of PECO Energy Company To Strike Enron's Late-Filed Exhibit

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA PUBLIC UTILITY COMMISSION	:	
v.	:	DOCKET NO. R-00973953
	:	DOCKET NO. R-00971265
PECO ENERGY COMPANY	:	

MOTION OF PECO ENERGY COMPANY TO STRIKE ENRON'S LATE-FILED EXHIBIT

TO THE HONORABLE CHAIRMAN JOHN QUAIN AND THE HONORABLE PUBLIC UTILITY COMMISSIONERS:

PECO Energy Company ("PECO" or the "Company"), pursuant to 52 Pa. Code §§ 1.15, 5.103 and 5.402, hereby submits this Motion To Strike Enron's Late-Filed Exhibit, and in support thereof states as follows:

OVERVIEW

On Wednesday, November 26, after the final date for all testimony and exhibits to be submitted in this proceeding, PECO received from Enron a document styled as the "Supplemental Exhibit No. 1 to the Rebuttal Testimony of Andrew Fastow." That same day, PECO filed a letter motion to strike with the Adminstrative Law Judges (ALJs) (attached). The ALJs have informed PECO that its motion is denied, and that a written Order to that effect will be issued on Tuesday, December 2, 1997.

102969

The Exhibit in question is a draft document from Enron known as the "ITC Shortfall Agreement." This document is critical to the operation of Enron's Choice Plan and, in particular, its securitization proposal. PECO and other parties repeatedly requested – in both discovery and cross-examination -- that the ITC Shortfall Agreement be provided so that they could analyze the document, challenge it on cross-examination, and offer rebuttal to it. Enron, however, did not provide the ITC Shortfall Agreement in a timely fashion so that it could be analyzed. Instead, it waited until after the hearings had ended -- and indeed, until such time as there was no possibility of any meaningful response on the record -- to provide this key document to the other parties.

As demonstrated in the attached affidavit from Mr. Barry Mitchell, PECO's Vice-President and Treasurer, there are numerous issues raised by the ITC Shortfall Agreement that further demonstrate the unworkability and unfairness of the Enron Plan and that could only be identified after review of the actual form of the ITC Shortfall Agreement. By choosing its own filing date for filing this exhibit, Enron has effectively precluded PECO and the other parties from analyzing the document on the record. This violates the due process rights of PECO and the other parties and guarantees that, if the Commission were to consider the Enron Plan, it would be doing so without full knowledge of the effects or workability of that plan.

By letter response of December 1, Enron responded to PECO's original letter motion, claiming that the ITC Shortfall Agreement "speaks for itself and needs no further elaboration," that PECO had "every opportunity to question Mr. Fastow" regarding the ITC Shortfall Agreement, and that the Exhibit was submitted "with all parties knowledge and apparent

consent" (attached). As discussed in more detail below, this claim is spurious. The ITC Shortfall Agreement was a matter of serious and obvious contention during the hearings and in the testimony; questions at hearing regarding the ITC Shortfall Agreement were repeatedly deflected with the claim that it had not been drafted and therefore the questions could not be answered. And bluntly, as to Enron's conclusion that the late submission of this exhibit was with PECO's "apparent consent," the most charitable thing that can be said is that it demonstrates a complete lack of understanding of key issues in this proceeding.

Specific Averments

A. The Filing of The ITC Shortfall Agreement

1. By order of the ALJs, the final day for submitting written testimony in this proceeding was Friday, November 21. Only testimony that related to the original litigation positions of parties was to be filed on that date. The last date for filing written testimony in support of the Enron Choice Plan was November 12, 1997. The final day on which evidentiary hearings were actually held was Wednesday, November 19, and the last day on which hearings potentially could be held was Tuesday, November 25.

2. Enron served the ITC Shortfall Agreement, styled as the "Supplemental Exhibit No. 1 to the Rebuttal Testimony of Andrew Fastow," on Wednesday, November 26, 1997 -- after hearings had been concluded.[1]

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1 In its letter of Dec. 1Enron claims that the ITC Shortfall Agreement was filed on Tuesday, November 25. However, the Exhibit was not served on PECO until Wednesday, November 26. In addition, the Exhibit has apparently not been

3. The Commission's regulations require that, in order to late-file a document, a party must seek permission to do so in writing, that it must seek that permission prior to the passing of the original filing deadline, and that such requests should be granted only upon a showing of good cause. 52 Pa.Code §1.15 (Extensions of time.)

4. To date, Enron has not requested an extension of time to file testimony or exhibits. Nor has Enron attempted to plead good cause for its late filing, despite the fact that it has responded in writing to PECO's letter motion to strike.

B. The Importance of The ITC Shortfall Agreement To The Enron Plan

5. The ITC Shortfall Agreement deals with the question of how PECO will be reimbursed by the third-party guarantor, once PECO reimburses customers for any over-collections of Intangible Transition Charge revenues.

6. The specific terms and conditions of the ITC Shortfall Agreement, as now filed by Enron, raise numerous substantive issues. As discussed in the attached affidavit from Barry Mitchell, if the ITC Shortfall agreement had been filed in a timely fashion, PECO would have investigated and potentially presented testimony on numerous areas of concern in the ITC Shortfall Agreement, including whether the ITC Shortfall Agreement would make it less likely that Enron's securitization proposal would receive a favorable tax ruling from the IRS. See Affidavit of J. Barry Mitchell (attached).

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served on other parties even as late as December 1, 1997. See Letter of Small Business Advocate supporting Motion to Strike, December 1, 1997 (attached).

7. At the hearings, Enron's Senior Vice-President Mr. Fastow agreed that the ITC Shortfall Agreement was important to determining whether a favorable tax ruling could be achieved, as well as whether all of the securities issued under the Qualified Rate Order would achieve a AAA rating. Tr. 2197-98 (Cross-examination of Andrew Fastow).

8. PECO submitted testimony that the terms and conditions of the ITC Shortfall Agreement could affect such critical items as whether the Company receives a favorable tax ruling (PECO St. No. 23-E, Testimony of James W. Sharpe), Tr. at 2235-36 (oral rejoinder testimony of Mr. Sharpe).

C. Enron Was Aware Of The Parties' Interest In This Agreement But Refused To Provide A Copy Of The Agreement In A Timely Fashion

9. The ITC Shortfall Agreement is first discussed in the Enron filing itself, made some months ago.

10. Since that time, several parties including PECO and Senator Fumo requested copies of the ITC Shortfall Agreement in discovery or testimony.

11. In his written rebuttal testimony filed on November 12, Mr. Fastow acknowledged the interest that had been exhibited in the ITC Shortfall Agreement and testified that he would submit the agreement as an exhibit to his testimony. EESP St. No. 8-R, pp. 12-13. Notwithstanding this promise, Mr. Fastow did not submit the Agreement prior to his appearance at hearings.

12. Under cross-examination on November 19, Mr. Fastow repeatedly refused to give specific information about the ITC Shortfall Agreement on the grounds that it had not yet been drafted. Perhaps the most telling example of this tendency is found in the following statement from Mr. Fastow: "Well, for the third time, we haven't drafted the ITC shortfall agreement and I cannot give you the specific mechanics how it works." Tr. 2203.

The Enron Response

13. On December 1, 1997, Enron filed a written response to PECO's letter motion in which it sets forth its views on whether the ITC Shortfall Agreement should be admitted into evidence.

14. In the December 1 letter, Enron stated in part that: "The Supplemental Exhibit was submitted prior to the close of the record in order to give all the parties the opportunity to review its terms and conditions and in this regard the ITC Agreement speaks for itself and needs no further elaboration."

15. In point of fact, the manner in which Enron submitted the document virtually guaranteed that no party would have the opportunity to review its terms and conditions. The ITC Shortfall Agreement was submitted to one party (PECO) on the day before the Thanksgiving holidays, after the final deadline for filing of testimony and exhibits, without any prior call informing it that the Exhibit would be coming, and in the midst of an extremely tight briefing schedule. To PECO's knowledge, other parties were not served with the ITC Shortfall Agreement until December 1. Enron simply should not be believed when it says that it submitted the ITC Shortfall Agreement "in order to give all the parties the opportunity to review its terms and conditions." It

is quite clear that it was submitted so late that there was no time whatsoever to review the document or place evidence on the record about it.

16. It is also clear, from the affidavit of Mr. Mitchell, that it is untrue that the ITC Shortfall Agreement "speaks for itself and needs no further elaboration." To the contrary, the document as filed leaves important questions unanswered, confirms that Enron has left in place in the Agreement fatal defects that would make the Enron Plan unworkable, and in other ways needs substantial elaboration. And, as noted above, Enron has been well aware for some time that the other parties were taking that position. It should not be allowed to choose its own filing date and thereby escape the tight analysis that litigation is supposed to engender.

17. In its December 1, 1997 letter, Enron also states that: " Mr. Fastow stated in response to a question from Mr. Steinmetz that the Supplemental Exhibit would be prepared and submitted for the record although he could not identify precisely the date it would be submitted. Tr. at 2182. All the parties clearly understood that the Supplemental Exhibit would be submitted for the record and none of the parties objected to its submission at that time. . . . Simply put, the Supplemental Exhibit No. 1 was submitted with all parties knowledge and apparent consent and the ITC Shortfall Agreement is being offered as a proposed agreement and nothing more. "

18. This argument cannot be accepted. Enron knew full well that the other parties, including PECO, viewed the ITC Shortfall Agreement as a key document and were interested in analyzing the ITC Shortfall Agreement, cross-examining Enron witnesses about it, and putting on responsive testimony about it. Enron's claim that the parties somehow consented to late

admission of the ITC Shortfall Agreement, without cross-examination or rebuttal, has no basis at all in the record or common sense. If it needs to be said, the act of asking that a document be provided for analysis in no way agrees to the admission of that document into evidence, especially admission after the hearings have closed. Moreover, Enron was aware of this fact when it wrote the December 1 letter. Not only was Enron already in receipt of PECO's letter motion to strike, a November 26 phone call between counsel for PECO and counsel for Enron left absolutely no doubt as to PECO's position on whether it had consented to late admission of this document.

19. So that there is no mistake, PECO did not ever consent to the late filing of the ITC Shortfall Agreement. When it repeatedly asked for a copy of the ITC Shortfall Agreement, cross-examined Enron's witnesses as to whether they could describe the terms and conditions of that Agreement, and put in testimony criticizing the Agreement insofar as its terms and conditions were known, it intended to put the terms and conditions of that Agreement squarely at issue. It was not, as Enron now appears to be claiming, simply stating that it would be nice if the ITC Shortfall Agreement could be shown to the Commission at some point. In addition, it made that position known to Enron before Enron filed its December 1 letter. Moreover, the Office of Small Business Advocate and the Pennsylvania Area Industrial Energy Users Group both filed letters in which they agreed that the Exhibit should be stricken, thus overcoming Enron's supposition that the other parties had consented. (Both letters are attached.) Finally, PECO has been authorized by counsel for CEPA and counsel for Senator Fumo to state that they also never consented to the late-filing of the ITC Shortfall Agreement and that they support the motion to strike it.

20. In its December 1, 1997 letter, Enron also states: "In addition, both OCA and PECO extensively questioned Mr. Fastow regarding the concept and mechanics of the ITC Shortfall Agreement. Tr. at 2187 and 2201-02. Mr. Smith had every opportunity to question Mr. Fastow regarding the sources of funds for the guarantee for the ITC Shortfall Agreement regardless of whether the agreement was part of the record at that time."

21. It is true that questions were asked about the ITC Shortfall Agreement. As noted previously, however, the consistent answer from Mr. Fastow was that he could not answer such questions because the document did not yet exist. Enron cannot now claim that this was a meaningful cross-examination that should somehow justify admission of the ITC Shortfall Agreement.[2] In addition, the issues identified in Mr. Mitchell's affidavit are raised for the first time by the terms and conditions of the ITC Shortfall Agreement. How could PECO have known to cross-examine on terms and conditions of a document that did not exist?

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2 In its December 1. 1997 letterEnron also states that This ITC Shortfall Agreement was the subject of cross-examination . . . ." (emphasis added). Not to put too fine a point on it, but there was no cross-examination of "this" agreement, because "this" agreement had not been given to the other parties at the time of the cross-examination and reportedly did not exist at the time.

CONCLUSION

The ITC Shortfall Agreement is a key document of the Enron Plan. This late attempt to introduce into the record without analysis, cross-examination, or rebuttal, should be rejected. The Commission should also view with particular skepticism Enron's claims that this late filing was done with the apparent consent of other parties. WHEREFORE, for the reasons set forth herein, PECO's Motion To Strike should be granted.

Respectfully submitted,

Ward L. Smith

Paul R. Bonney
Ward L. Smith
Counsel for PECO Energy Company

Dated: December 2, 1997

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission	:	
		: Docket No. R-00973953
v.	:	
		: Docket No. R-00971265
PECO Energy Company	:	

AFFIDAVIT OF J. BARRY MITCHELL

Vice President, Finance and Treasurer
PECO Energy Company

County of Philadelphia	)	
	)	ss.
Commonwealth of Pennsylvania	)	

J. Barry Mitchell, being duly sworn, deposes and says:

1. I am Vice President, Finance and Treasurer of PECO Energy Company.

2. I have reviewed Supplemental Exhibit No. 1 to Rebuttal Testimony of Andrew S. Fastow on behalf of Enron Energy Services Power, Inc. concerning Various Aspects of Securitization, specifically the Form of ITC Shortfall Insurance and Reimbursement Agreement (the "ITC Shortfall Agreement").

3. If I had received the ITC Shortfall Agreement in a timely manner and been able to address the issues it raises in testimony, I would have investigated and presented the issues in this affidavit. I was not able to present these issues without a review of the actual form of the ITC Shortfall Agreement.

4. Both the obligation of Enron to reimburse the Guarantor for payments made by the Guarantor to PECO Energy and the right of Enron to be reimbursed from Excess Collections of Intangible Transition Charges for such payments affirms Mr. Sharpe's testimony (Transcript at 2236) that the Enron securitization would be precluded from receiving a favorable tax ruling from the Internal Revenue Service.

5. The right of the Guarantor and/or Enron to be reimbursed from Excess Collections of Intangible Transition Charges as defined in the ITC Shortfall Agreement means that customers may bear the costs of declines in load contrary to the Direct Testimony of Mr.

Fastow (Enron St. No. 8 at 7). This may also give the Guarantor recourse to the Special Purpose Entity established by PECO Energy, which would be contrary to Mr. Fastow's Direct Testimony (Enron St. No. 8 at 10).

6. The possibility that Excess Collections of Intangible Transition Charges may be used to reimburse amounts which are not Qualified Transition Expenses may be inconsistent with the Competition Act.

7. The conditions precedent to the issuance of the ITC Shortfall Agreement specified in Section 2.2 of the ITC Shortfall Agreement create additional uncertainty as to whether the Enron securitization is achievable. The conditions precedent are designed for the protection of the Guarantor as a creditor to be paid from Excess Collections. Since the only other right the Guarantor will have to repayment of amounts paid under the ITC Shortfall Agreement is from Enron, an entity with no assets, the Guarantor must be relying primarily on the Excess Collections and will have to be satisfied as to the legality and adequacy of those payments.

8. The ITC Shortfall Amount may not be adequate in the case of substantial fluctuations in load since it is not reinstated for amounts paid from Excess Collections. It is unclear whether customers or PECO Energy bears the risk if the ITC Shortfall Amount is not sufficient to cover increases in the ITC Rate.

9. PECO Energy is uncertain why it is a party to the ITC Shortfall Agreement and whether, by being a party to the ITC Shortfall Agreement, it may give the Guarantor recourse to PECO Energy for a breach of representation contrary to Mr. Fastow's Direct Testimony (Enron St. No. 8 at 10).

10. PECO Energy is uncertain whether the definition of "Insured Amounts" on page 1 of the Shortfall Insurance Bond attached as Exhibit I to the ITC Shortfall Agreement will adequately compensate PECO Energy for reductions in rates resulting from multiple increases in the ITC Rate.

11. The ITC Shortfall Agreement lacks two very critical pieces of information: (1) the Fee Letter which will contain the Premium Amount to be paid to the Guarantor for issuing the Shortfall Insurance Bond (Section 2.3 of the ITC Agreement);

and (2) the limit on the aggregate amount payable by the Guarantor under the Shortfall Insurance Bond on account of the difference between the aggregate ITC shortfalls (i.e., excess ITC Collections payable following an ITC Rate increase and the aggregate amount of ITC Collections that would have been payable absent such ITC Rate Increase) (Exhibit 1 to the ITC Agreement - definition of "Insured Amount" on page 1). The absence of this information makes it impossible to determine whether it would be feasible for Enron to induce an insurer with the requisite credit rating to serve as the Guarantor under the ITC Shortfall Agreement.

J. Barry Mitchell

Subscribed and sworn to
before me on this 1st day
of December, 1997

Notary Public

NOTARIAL SEAL
DEBORAH A DOMAN, Notary Public
City of Philadelphia, Phila. County
My Commission Expires March 13, 2000

PECO ENERGY

Legal Department

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Direct Dial: 215 841 6863

November 26, 1997

By Fax and First Class Mail

Honorable Marlane R. Chestnut
Honorable Charles E. Rainey, Jr.
Administrative Law Judges
1302 Philadelphia State Office Building
1400 West Spring Garden Street
Philadelphia, PA 19130

Re: Application Of PECO Energy Company For Approval Of Its Restructuring Plan Under Section 2806 Of The Public Utility Code,
Docket No. R-00973953;
Petition of Enron Energy Service Power, Inc., Docket No. P-00971265.

Dear Judge Chestnut and Judge Rainey:

At about 11:30 this morning, PECO Energy received by first class mail additional exhibits, filed by Enron, styled as "Supplemental Exhibit No. 1 to Rebuttal Testimony of Andrew S. Fastow." In substance, the Exhibit is the "Form of ITC Shortfall Insurance and Reimbursement Agreement." The purpose of this letter is to move to strike this exhibit.

During the hearings at this proceeding, PECO Energy cross-examined Mr. Fastow at length about the ITC Shortfall Agreement, which is critical to the success of Enron's securitization plan. Mr. Fastow essentially testified that he could not answer PECO Energy's questions because the document had not been drafted.

If this exhibit had been offered prior to the hearings, PECO Energy would have cross-examined Mr. Fastow about the document. By way of example, and without limitation, Mr. Fastow would have been asked about the source of funds for the guarantee involved with the ITC Shortfall Agreement. If Mr. Fastow had responded that Enron would be the source of that guarantee, PECO Energy would argue that this harms the likelihood of a favorable tax ruling. On the other hand, if Mr. Fastow had responded that PECO Energy would be the source of the guarantee payment, PECO Energy would make arguments about fairness and cost-shifting.

By filing the ITC Shortfall Exhibit after the opportunity for cross-examination and responsive testimony have passed, Enron has basically assured that there will be no challenge to the ITC Shortfall Agreement itself in the record. Given the importance of that Agreement to the Enron Choice Plan, and given that up to this point PECO Energy

has filed extensive testimony that every plan or document filed by Enron has been rife with errors and could not operate, the inclusion of this document in the record at this time would be extremely prejudicial to PECO Energy and would add nothing to the Commission's understanding of whether the Enron plan is achievable.

For these reasons. we request that the ITC Shortfall Agreement not be allowed into the record in this proceeding.

Sincerely,

Ward L. Smith

WLS/mtg

cc: Certificate of Service

COMMONWEALTH OF PENNSYLVANIA

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Bernard A. Ryan, Jr.
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December 1, 1997

VIA FAX

Hon. Marlane R. Chestnut
Hon. Charles E. Rainey, Jr.
Administrative Law Judges
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Broad and Spring Garden Streets
Philadelphia, PA 19130

Re: Application of PECO Energy Company For Approval of its Restructuring Plan Under Section 2806 of the Public Utility Code; Docket No. R-00973953
Petition of Enron Energy Service Power, Inc.; Docket No. P-00971265

Dear Judges Chestnut and Rainey:

Upon returning to my office this morning I saw a copy of the letter from Ward Smith to you dated November 26, 1997 about yet another last minute evidentiary filing by Enron. Realizing that I may already be too late, I would like to note my support for Mr. Smith's request that the proposed ITC Shortfall Agreement that has just been made available to the parties not be allowed into the record that you will certify to the Commission tomorrow.

I have not yet even seen "Supplemental Exhibit No. 1 to Rebuttal Testimony of Andrew S. Fastow" to which Mr. Smith objected in his letter last Friday. If our Office had been opened Friday, perhaps it would have been delivered to us that day. But whatever that supplemental submission may say, I find it distressing that any party to this already complex and time-constrained proceeding would serve additional documentary evidence only a day or so before the record must be certified to the Commission. Frankly, the OSBA might not have cross-examined Mr. Fastow at all about the ITC Shortfall Agreement, a document that I had understood from the testimony at the final hearings had not yet been drafted because it was too early to do so. I certainly believe, however, that we and the other parties should have been given an opportunity to review that newly created document to decide if any of us had reason to question or object to its provisions.

Sincerely yours,

Bernard A. Ryan, Jr.
Small Business Advocate

cc: Per Service List

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December 1, 1997

VIA FAX

Honorable Marlane R. Chestnut
Honorable Charles E. Rainey, Jr.
Administrative Law Judges
Pennsylvania Public Utility Commission
1302 Philadelphia State Office Building
1400 West Spring Garden Street
Philadelphia, PA 19130

Re: Pennsylvania Public Utility Commission v. PECO Energy Company - Application of PECO Energy Company for Approval of its Restructuring Plan under Section 2806 of the Public Utility Code; Docket No. R-00973953;
Petition of Enron Energy Service Power, Inc., Docket No. P-00971265

Dear Judges Chestnut and Rainey:

The Philadelphia Area Industrial Energy Users Group ("PAIEUG") agrees in principle with PECO Energy Company's letter dated November 26, 1997, regarding Enron's Supplemental Exhibit No. 1 to Rebuttal Testimony of Andrew S. Fastow. Submitting the ITC Shortfall Agreement at this late date without affording any parties the opportunity to cross-examine witnesses with respect to the detail of that Agreement is unconscionable and highly inappropriate. Therefore, PAIEUG supports PECO's Motion to Strike this Exhibit.

Very truly yours,

McNEES, WALLACE & NURICK

By David M. Kleppinger
David M. Kleppinger

DMK/dt
Enclosures
c: Ward L. Smith, Esq. /PECO Energy Company (Via Fax)
John Klauberg, Esq./LeBoeuf Lamb (Via Fax)
Certificate of Service

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LOS ANGELES
NEWARK
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PORTLAND, OR
SALT LAKE CITY
SAN FRANCISCO
BRUSSELS
MOSCOW
ALMATY
LONDON
(A LONDON-BASED MULTINATIONAL PARTNERSHIP)

November 26, 1997

The Honorable Marlane R. Chestnut
The Honorable Charles E. Rainey, Jr.
Pennsylvania Public Utility Commission
1302 Philadelphia State Office Building
Broad and Spring Garden Streets
Philadelphia, PA 19130

Re: Pennsylvania Public Utility Commission v. PECO Energy Company
Docket No. R-00973953

Petition of Enron Energy Services Power, Inc.
Docket No. P-00971265

Dear Judges Chestnut and Rainey:

On November 25, 1997, Enron Energy Services Power, Inc. ("EESPI") filed Supplemental Exhibit No. 1 to the Rebuttal Testimony of its witness Mr. Andrew Fastow (Statement No. 8-R). This Supplemental Exhibit consists of the proposed ITC Shortfall Agreement between the ITC Shortfall Provider and PECO Energy Company ("PECO"). This ITC Shortfall Agreement was the subject of cross-examination by Mr. Steinmetz of the Office of Consumer Advocate ("OCA") and Mr. Ward Smith of PECO.

It has come to our attention by way of correspondence from Mr. Smith that he objects to the entry of Supplemental Exhibit No. 1 on the record on the grounds that Mr. Fastow could not answer PECO's questions regarding this exhibit and that PECO will be prejudiced by not having been afforded the opportunity to cross-examine Mr. Fastow concerning the details of the exhibit. Mr. Smith cites as an illustration that he would have asked Mr. Fastow about the source of funds for the guarantee involved with the ITC Shortfall Agreement.

EESPI believes Mr. Smith's objections and motion are without merit. The Supplemental Exhibit was submitted prior to the close of the record in order to give all the parties the opportunity to review its terms and conditions and in this regard the ITC Agreement speaks for itself and needs no further elaboration. Mr Fastow stated in response to a question from Mr. Steinmetz that the Supplemental Exhibit would be prepared and submitted for the record although he could not identify precisely the date it would be submitted. Tr. at 2182.

All the parties clearly understood that the Supplemental Exhibit would be submitted for the record and none of the parties objected to its submission at that time. In addition, both the OCA and PECO extensively questioned Mr. Fastow regarding the concept and mechanics of the ITC Shortfall Agreement. Tr. at 2187 and 2201-2202. Mr. Smith had every opportunity to question Mr. Fastow regarding the sources of funds for the guarantee for the ITC Shortfall Agreement regardless of whether the agreement was part of the record at that time.

Simply put, the Supplemental Exhibit No. 1 was submitted with all parties knowledge and apparent consent and the ITC Shortfall Agreement is being offered as a proposed agreement and nothing more. Based on the foregoing reasons and the Commissions directive to develop a full and complete record it is clear that PECO is not prejudiced by its admission and its Motion to Strike should be denied. EESPI formally requests that Supplemental Exhibit No. 1 to the Rebuttal Testimony of Mr. Andrew Fastow (Statement No. 8-R) be admitted on the record and if the record has been closed, even though the Supplemental Exhibit was filed on November 25, 1997, then EESPI requests that the record be reopened to allow its admission.

Sincerely,

John J. Gallagher

JJG/jrh
cc: All parties on Certificate of Service
Ward Smith, Esquire *(via Facsimile and Federal Express)*

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission	:	
	:	
v.	:	Docket No. R-00973953
	:	
PECO Energy Company	:	
Petition of Enron Energy Services Power, Inc.	:	Docket No. P-00971265
	:	

CERTIFICATE OF SERVICE

I hereby certify that I have on this 26th day of November, 1997, served a true copy of the foregoing document on behalf of Enron Energy Services Power, Inc. upon the participants, listed below, in accordance with the requirements of 52 Pa.Code § 1.54:

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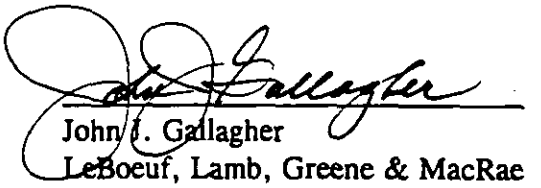

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Attorney for Enron Energy
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APPENDIX C

December 1, 1997 Letter To The Securities And Exchange Commission

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Morgan, Lewis
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COUNSELORS AT LAW

Bruce A. Grabow
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December 1, 1997

Public Utility Holding Company Act of 1935/
Section 2(a)(3); Section 2(a)(7);
Section 9(a)(2)

VIA HAND DELIVERY

Catherine A. Fisher
Assistant Director
Office of Public Utility Regulation
Division of Investment Management
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Dear Ms. Fisher:

On behalf of our client, PECO Energy Company ("PECO"), we hereby request that the Staff of the Securities and Exchange Commission ("SEC" or "Commission") concur in our opinion, for the reasons set forth below, that Enron Energy Services Power, Inc. ("Enron Energy"), an indirect wholly-owned subsidiary of Enron Corporation ("Enron Corp."), will, by virtue of its engagement in the activities contemplated in the petition that Enron Energy recently filed with the Pennsylvania Public Utility Commission ("PPUC"),[1/] (a) be an "electric utility company" within the meaning of Section 2(a)(3) of the Public Utility Holding Company Act of 1935, as amended (the "Act"), and (b) exercise a "controlling influence," within the meaning of Section 2(a)(7) of the Act, over the management and policies of PECO with respect to the conduct of PECO's electric utility operations in Pennsylvania. In addition, we request the Staff's concurrence in our opinion that Enron Corp. will be required to obtain the approval

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1/ Petition Of Enron Energy Services Power, Inc. For Approval Of An Electric Competition And Customer Choice Plan And For Authority Pursuant To Section 2807(e)(3) Of The Public Utility Code To Serve As The Provider Of Last Resort In The Service Territory Of PECO Energy Company, dated Oct. 7, 1997, (the "Enron Petition" or "Enron Plan"). A copy of the Enron Petition is contained in Appendix A to this request.

of the Commission under Section 9(a)(2) in connection with its establishment and "acquisition" of Enron Energy before Enron Energy engages in such activities.

As explained in greater detail below, Enron Energy has filed a proposal with the PPUC pursuant to the Electric Generation Customer Choice Act (the "Competition Act")[2/] under which Enron Energy seeks to become the "Provider of Last Resort" ("PLR") in PECO's service territory. Specifically, Enron Energy proposes:

> to replace PECO as the PLR in PECO's service territory . . . that is, as the supplier for customers who do not choose an electric generation supplier ("EGS") other than the PLR or who return, for whatever reason, voluntarily or otherwise, to the electric service of the PLR ("Default Customers").[3/]

According to Enron Energy, the relief it requests:

> certainly is far reaching and would authorize Enron Energy to "step into PECO's shoes" in many respects relating to the provision of electric service to PECO's customers, not only in fulfilling the PLR obligation, but also in financing PECO's authorized stranded costs.[4/]

The PLR essentially is a backstop to ensure that universal electric generation service is available to all customers. The PLR is charged with ensuring the "availability of universal electric service in [the] Commonwealth unless another provider of last resort is approved by the [PPUC]."[5/] The Pennsylvania legislature included a PLR provision in the Competition Act because it has determined that "universal" electric service is a public purpose.[6/] To fulfill this responsibility, the PPUC may designate a PLR other than the incumbent public utility.[7/]

2/ 66 Pa. C.S. § 2801 et seq.

3/ Enron Petition at 6 (footnote omitted).

4/ Id. at 7.

5/ 66 Pa. C.S. § 2802(16).

6/ Id. § 2802(17).

7/ Id. § 2802(16).

PECO is vigorously opposing the Enron Plan and Enron Energy's request that the PPUC designate it as the PLR in PECO's service territory. It is PECO's position that (a) the Enron Plan is deficient and inferior to PECO's own restructuring plan, and (b) the PPUC does not have the authority to designate a PLR other than the incumbent utility until after the retail competition transition period contemplated in the Competition Act has expired.[8/]

Nevertheless, Enron Energy proposes to act in the statutory and public interest role as the named default service provider in PECO's service territory to ensure that all customers have reliable electric service available to them. In our opinion, the role Enron Energy proposes to undertake is clearly one of an "electric utility company" within the meaning of Section 2(a)(3) of the Act.

The views of the SEC Staff on these issues are of vital importance to PECO because (a) Enron Energy has implicitly, if not explicitly, indicated to the PPUC that its proposed activities in Pennsylvania will be permissible under other federal statutes applicable to the regulation of the public utility industry, such as the Act,[9/] (b) it is our understanding based on statements made by representatives of Enron Energy during the PPUC proceeding related to the Enron Petition that neither Enron Energy nor Enron Corp. has sought SEC authorization to engage in the activities it proposes to undertake in Pennsylvania, and (c) if the Enron Plan is implemented and Enron Energy is a "public utility company" under the Act and/or exercises a "controlling influence" over PECO within the meaning of the Act, PECO's own status and obligations under the Act, as well as its compliance with certain covenants in its borrowing arrangements, could be significantly impacted. The following information is presented in support of this request:

8/ See, e.g., 66 Pa. C.S. § 2808(e)(1).

9/ For example, Enron Energy recently obtained an order from the Federal Energy Regulatory Commission ("FERC") authorizing it to sell generation at market-based rates. Enron Energy Services Power, Inc., FERC Docket No. ER98-13-000, Nov. 25, 1997. In its petition to the FERC, Enron Energy referred to the no-action letter which the SEC Staff issued to another subsidiary of Enron Corp. in which the Staff indicated that it would not recommend enforcement action against Enron Capital & Trade Resources Corporation as an "electric utility company" under the Act in connection with the retail activities it proposed to undertake as a power marketer. Enron Capital & Trade Resources Corp., SEC No-Action Letter, 1997 SEC No-Act. LEXIS 287 (Feb. 13, 1997). It is our understanding that this no-action letter is not applicable to Enron Energy.

1. BACKGROUND INFORMATION CONCERNING PECO, ENRON CORP., AND ENRON ENERGY

PECO is an exempt holding company under Section 3(a)(2) of the Act engaged in the generation, transmission, distribution, and sale of electricity in Pennsylvania. PECO is a Pennsylvania public utility presently responsible for serving approximately 1.4 million retail customers in its service territory in southeastern Pennsylvania.

Enron Corp. is an Oregon corporation and a "holding company" within the meaning of Section 2(a)(7) of the Act which claims an exemption from all of the provisions of the Act, except Section 9(a)(2), as an "intrastate" holding company under Section 3(a)(1) of the Act pursuant to Rule 2 of the SEC regulations implementing the Act.[10/] Enron Corp.'s wholly-owned subsidiary, Portland General Electric Company ("PGE"), is a major "electric utility company" engaged in the generation, transmission, distribution and sale of electricity in Oregon. PGE's service territory is located primarily in the northwest and north central part of Oregon. PGE owns transmission lines within Oregon and, with Puget Sound Power & Light Company, PacifiCorp, and the Washington Water Power Company, jointly owns a transmission line across eastern Montana which supports transmission of power from Montana to Portland, Oregon. PGE also owns a portion of the Pacific Northwest-Pacific Southwest AC Intertie, and has scheduling rights to the Pacific Northwest-Pacific Southwest DC Intertie.

Enron Corp. and its other subsidiaries are engaged in the exploration, production, gathering, transportation, and wholesale marketing of natural gas and crude oil in the United States and internationally, and the production, purchase, transportation, and worldwide marketing of natural gas liquids and petroleum products. Enron Corp. indirectly owns and operates interstate and intrastate natural gas pipelines, storage facilities, and processing facilities. Enron Corp. also indirectly owns equity interests in various companies that own and/or operate electric generating facilities in the United States and overseas which are exempt from regulation under the Act by virtue of their status as "exempt wholesale generators" under Section 32 of the Act, "foreign utility companies" under Section 33 of the Act, or "qualifying facilities" under Section 201 of the Public Utility Regulatory Policies Act of 1978.

Enron Corp. is the direct parent company of Enron Capital & Trade Resources Corporation ("Enron Capital"). Enron Capital and its affiliated companies market natural gas, natural gas liquids, electricity, and other energy products to local distribution companies, electric utilities, cogenerators, and commercial and industrial end-users. Enron Capital is the

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10/ See 17 C.F.R. § 250.2.

direct parent company of Enron Power Marketing Inc. ("EPMI"), a company engaged in wholesale and retail electric power marketing activities. EPMI holds a license issued by the PPUC to sell power at retail in Pennsylvania as an EGS under Pennsylvania law.[11/]

Enron Energy is a newly-formed Delaware corporation and a wholly-owned subsidiary of Enron Energy Services, Inc., which, in turn, is a wholly-owned subsidiary of Enron Corp.[12/] Enron Energy has applied for a PPUC license to sell power at retail in Pennsylvania as an EGS. Enron Energy also proposes to engage in the electric utility activities in Pennsylvania set forth in the Enron Petition. Enron Energy's proposed activities under the Enron Petition are described in greater detail in Section 2 of this request.

2. DESCRIPTION OF ENRON ENERGY'S PROPOSED ELECTRIC UTILITY ACTIVITIES IN PENNSYLVANIA

On December 3, 1996, Pennsylvania Governor Tom Ridge signed the Competition Act into law. Among other things, the Competition Act requires each electric utility in Pennsylvania to make non-discriminatory transmission and distribution service available to all retail customers in the state, and provides for full customer choice to be implemented in three stages, on January 1, 1999, 2000, and 2001. 66 Pa. C.S. §§ 2804, 2806(a). In accordance with the requirements imposed under the Competition Act, PECO is in the midst of a restructuring proceeding before the PPUC. Pennsylvania Public Utility Commission v. PECO Energy Company, PPUC Docket No. R-00973953. After months of negotiations with various consumer and public interest groups and other parties, on August 25, 1997, PECO and these other parties submitted a Joint Petition for Partial Settlement which, if adopted by the PPUC, will, among other things, result in a substantial rate reduction for PECO customers, accelerate the introduction of "customer choice" of electricity suppliers in advance of the deadlines established in the Competition Act and authorize PECO to recover "stranded costs" of approximately $5.461 billion.

11/ Application number A-110017.

12/ See Response of Enron Energy to PECO's data request PECO-X-1 (Supplement) in the pending restructuring proceedings before the PPUC attached hereto in Appendix B. This response appears to be inconsistent with the representation Enron Corp. recently made to the SEC in its Form S-3 filed on October 20, 1997, at page 5, in which it stated that "ECT [Enron Capital] recently established Enron Energy Services." The response provided to PECO's data request does not list Enron Capital as a direct or indirect parent of Enron Energy. The respective page from the Form S-3 also is attached in Appendix B.

The Competition Act also provides that PPUC jurisdictional electric utilities, such as PECO, will "continue to be the provider of last resort in order to ensure the availability of universal electric service unless another provider of last resort is approved by the [PPUC]."[13/] The Enron Plan appears to be premised on the assumption that this provision gives the PPUC authority to designate a new PLR prior to the expiration of the retail competition transition period and the commencement of full scale retail competition in Pennsylvania. Under the Enron Plan, Enron Energy would, in Enron Energy's own words, "step into PECO's shoes" and become the PLR in PECO's service territory at the outset of the transition period. Petition of Enron Energy Services Power Inc., Docket No. P-00971265.[14/] As the PLR, Enron Energy states that it will assume the obligation and responsibility to provide reliable electric service to retail customers in PECO's service territory that do not choose an alternate supplier of electricity.

Under the terms of the Enron Plan, Enron Energy proposes to: (a) finance PECO's stranded costs of $5.461 billion through the issuance of securities by a special purpose affiliate of PECO under terms mandated by Enron Energy, and (b) enter into a series of contracts and arrangements with PECO that will enable Enron Energy to perform its obligations as the PLR in PECO's service territory. These proposed contracts and arrangements include: (a) a Firm Energy and Capacity Purchase and Sale Agreement with PECO under which PECO would be required to provide Enron Energy with the electricity necessary to serve as the PLR, and effectively give Enron Energy "first call" on electricity generated by PECO to serve certain types of Default Customers, (b) an amended version of PECO's Electric Delivery Service Tariff under which PECO would be required to provide transmission and distribution services necessary to deliver electricity to Enron Energy's PLR customers, and (c) an MBC Services Agreement with PECO under which PECO would be required to provide Enron Energy with the metering, billing, collection, and other services necessary to service the PLR customers.[15/]

PECO disagrees with Enron Energy that the PPUC has the legal authority to designate a new PLR at the outset of the transition to retail competition in Pennsylvania. It is PECO's position that the Competition Act gives the PPUC authority to designate a new PLR only after

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13/ 66 Pa. C.S. § 2802(16).

14/ The PPUC proceeding initiated by the Enron Petition was consolidated with the pending PECO restructuring docket.

15/ Copies of the proposed Firm Energy and Capacity Purchase and Sale Agreement, the amended PECO Electric Delivery Service Tariff, and MBC Services Agreement which Enron Energy filed with the PPUC are contained in Appendix C of this request.

the transition period has expired. PECO also has informed the PPUC that it will not voluntarily execute Enron Energy's proposed contracts with PECO described above.

3. ENRON ENERGY WILL BE AN "ELECTRIC UTILITY COMPANY" UNDER SECTION 2(a)(3) OF THE ACT

Under Section 2(a)(3) of the Act, an "electric utility company" is defined, in pertinent part, as "any company which owns or operates facilities for the generation, transmission, or distribution of electric energy for sale . . . ." We are cognizant of the fact that, over the past three years, the SEC Staff has issued a series of no-action letters indicating that it would not recommend enforcement action to the Commission under the Act, including Section 2(a)(3), against power marketing companies that enter into contracts for the purchase and resale of electricity and transmission capacity.[16/] EPMI, another subsidiary of Enron Corp., was among the first power marketers to obtain such a no-action letter. In its request for a no-action letter, EPMI argued

> EPMI will not be an "electric utility company" . . . by virtue of entering into contracts and engaging in the transactions described below because such activities by EPMI do not constitute the ownership or operation of "facilities used for the generation, transmission, or distribution of electric energy for sale" with [the] meaning of [section 2(a)(3)].[17/]

EPMI described the types of transactions in which it would engage as follows:

16/ See, e.g., Sunoco Power Marketing, L.L.C., SEC No-Action Letter, 1997 SEC No-Act. LEXIS 785 (July 24, 1997); Enron Capital & Trade Resources Corp., SEC No-Action Letter, 1997 SEC No-Act. LEXIS 287 (Feb. 13, 1997); Eastex Power Marketing, Inc., SEC No-Action Letter, 1996 SEC No-Act. LEXIS 536 (Apr. 30, 1996); LG&E Power Marketing, Inc., SEC No-Action Letter, 1996 SEC No-Act. LEXIS 510 (Apr. 26, 1996); Coral Power, L.L.C., SEC No-Action Letter, 1996 SEC No-Act. LEXIS 314 (Feb. 22, 1996); AIG Trading Corp., SEC No-Action Letter, 1995 SEC No-Act. LEXIS 195 (Jan. 20, 1995); Inter-Coast Power Marketing Co., SEC No-Action Letter, 1994 SEC No-Act. LEXIS 886 (Dec. 6, 1994); Electric Clearinghouse, Inc., SEC No-Action Letter, 1994; SEC No-Act. LEXIS 452 (Apr. 13, 1994); CRSS Power Marketing, Inc., SEC No-Action Letter, 1994 SEC No-Act. LEXIS 431 (Mar. 31, 1994).

17/ Enron Power Marketing, Inc., SEC No-Action Letter, 1994 SEC No-Act. LEXIS 42, at *2 (Jan. 5, 1994).

> [A] *typical* transaction might involve the purchase of power from a utility or non-utility generator and the resale of that power to a utility or an end user. To facilitate this type of transaction it will also be necessary for EPMI or its supplier or customer to contract for transmission capacity with an electric utility.[18/]

In some of its more recent no-action letters, the SEC Staff has indicated that it would not recommend enforcement action against power marketers that engage in an even more expansive array of utility-related activities. For example, in its request for a no-action letter, Coral Power indicated that it intended to: "purchase and sell electric power and electric transmission services, broker electric power and electric transmission services, as well as arrange for the sale of related goods and services, such as derivatives and other risk management products and services, consulting services, financing or financing services, fuel supplies, and emission allowances."[19/]

Similarly, Enron Capital, in its request for a no-action letter, stated that a "natural growth opportunity for energy marketers will be to provide additional retail services beyond physical delivery of energy efficiently and competitively to customers."[20/] Enron Capital argued that "it [and its affiliates] can bring the same level of innovation and reliability to such retail activities that it has brought to the wholesale energy marketing field."[21/] These "additional activities" include installation and ownership of electricity demand monitoring devices, including meters ("generally, the [Enron Capital] monitoring device will be installed downstream of an incumbent franchised utility's revenue meter") and installation and ownership of short segments of electric wiring to connect a single user to the local utility's distribution system.[22/] Enron Capital argued that any such equipment that Enron Capital owns in connection with its additional retail services would not constitute facilities for distribution of electricity within the meaning of section 2(a)(3).

18/ Id. at *5 (emphasis added).

19/ Coral Power, L.L.C., SEC No-Action Letter, 1996 SEC No-Act. LEXIS 314, at *2 (Feb. 22, 1996).

20/ Enron Capital & Trade Resources Corp., SEC No-Action Letter, 1997 WL 58873, *4 (S.E.C.) (Feb. 13, 1997).

21/ Id.

22/ Id.

The types of activities in which Enron Energy proposes to engage in Pennsylvania go well beyond even this expansive view of permissible power marketing activities. Enron Energy should not be permitted to avoid characterization as an "electric utility company" under the guise of being a mere power marketer. Enron Energy proposes to undertake the public interest and statutory role of ensuring that all customers in PECO's service territory have electric service available to them. Although it proposes to enter into contractual arrangements to satisfy its statutory obligation, in our opinion, these activities will clearly "cross the line" established by the SEC Staff in prior no-action letters and constitute "electric utility company" activities, thereby making Enron Energy an "electric utility company" under Section 2(a)(3) of the Act. In determining whether Enron Energy will be an "electric utility company" it is appropriate to assess the totality of the facts and circumstances surrounding the Enron Plan and the roles, responsibilities, and activities that Enron Energy proposes to undertake. The principal roles, responsibilities, and activities of Enron Energy identified in the Enron Plan, and the ways in which they differ from those of a typical power marketer, can be summarized as follows:

a. Enron Energy will replace PECO as the PLR in PECO's own service territory as the supplier for customers who are not served by an alternate energy supplier other than the PLR. As mentioned above, by statute, the PLR will undertake the public interest and statutory role of ensuring that all customers in PECO's service territory have electric service available to them. Enron Energy will have an affirmative obligation to serve. Indeed, if there is a power outage or some other interruption in service, end-users will contact Enron Energy. This is the role typically assigned to an "electric utility company" as that term is used in Section 2(a)(3) of the Act.

A typical power marketer at retail serves as an alternative electric generation supplier seeking to draw away the incumbent utility's customers. For example, Enron Capital in its request for a no-action letter explained to the Staff of the SEC that marketing of electric energy at wholesale is no different than marketing at retail because "[a]s a marketer or supplier of energy on the retail level, [Enron Capital] enters into contracts with customers to supply their energy needs just as EPMI enters into contracts with customers in connection with wholesale marketing."[23/] However, if the customers are not served by an alternate supplier, the customers remains with the incumbent utility.

23/ Enron Capital & Trade Resources Corp., SEC No-Action Letter, 1997 WL 58873, *5 (S.E.C.) (Feb. 13, 1997) (emphasis added).

The Enron Plan would turn this concept on its head, going well beyond the "mere marketing of electric energy."[24/] Indeed, Enron Energy will act as the named default service provider for customers who do not choose to be served by an alternate generation supplier, and PECO will be relegated to the status of an independent contractor providing generation and other services to Enron Energy.

b. Enron Energy will purchase power from PECO to fulfill its PLR obligations and have "first call" on PECO's generating facilities under its proposed Firm Energy and Capacity Purchase and Sale Agreement with PECO to serve certain of its PLR customers.[25/] Typical power marketer activities involve supplying power obtained in the spot market from sources other than the incumbent utility, not from resources owned by the incumbent utility devoted to the needs of the markets on a continuing basis. Moreover, the Firm Energy and Capacity Purchase and Sale Agreement is for a ten year term, which is well beyond the term of similar contracts, further demonstrating that what Enron Energy proposes to do is different from typical power marketing activity.

c. Enron Energy will purchase billing, metering, and other services from PECO under the MBC Services Agreement with PECO and make arrangements for PECO to provide transmission and distribution service for its customers under PECO's Electric Delivery Service Tariff, as proposed to be amended by Enron Energy, in order to

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24/ See Sunoco Power Marketing, L.L.C., SEC No-Action Letter, 1997 SEC No-Act. LEXIS 785 (July 24, 1997).

25/ Enron Energy proposes to place Default Customers in two categories: "Transitional Default Service Customers" (consumers who elect not to choose a service provider or who choose an alternative provider and return to the PLR for a period of at least 12 months) and "Standard Default Service Customers" (consumers that return to the PLR but not under an agreement for at least 12 months). To satisfy the power needs of these customers, Enron Energy proposes to "purchase power from PECO to satisfy Enron Energy's obligation as PLR, as well as to retain PECO to perform certain metering, billing and collection functions." Enron Petition at 6. Enron Energy would be obligated to purchase power from PECO to serve the loads of Transitional Default Service Customers, but not Standard Default Service Customers. See Definitions of Mandatory Requirements of Buyer, Optional Requirements of Buyer, Standard Default Service Customers, and Transitional Default Service Customers in § 1.1 of the Firm Energy and Capacity Purchase and Sale Agreement in Appendix C.

enable it to perform its PLR functions throughout PECO's service territory. Typical power marketers have only engaged in such activities on a limited basis in the past.

d. Enron Energy proposes to finance $5.461 billion of PECO's stranded costs resulting from retail restructuring. Under the Enron Plan, a special purpose affiliate of PECO will br required to issue securities to recover these stranded costs under terms mandated by Enron Energy. These bonds will be paid with revenues collected from PECO's existing ratepayers for electric utility services rendered by Enron Energy. Unlike a typical power marketer, Enron Energy will engage in functions similar to those of an equity owner and investor in an electric utility or electric utility facilities.

We know of no instance in which a power marketer has received "no-action" assurance from the SEC Staff for such activities. In Louis Dreyfus Electric Power,[26/] Louis Dreyfus Electric Power ("LDEP"), as a power marketer, proposed to manage the power supply for the City of Dover, Delaware. LDEP argued that its role as agent for Dover with regard to the operation and maintenance of Dover's generating facilities or with regard to the dispatch of those facilities pursuant to any current or future requirements of the Pennsylvania-New Jersey-Maryland Power Pool should not make it an "electric utility company" because Dover "is a municipal corporation exempt from the Act under Section 2(c)." The SEC Staff agreed that it would not recommend any enforcement action based on the municipal exemption. However, in our view, if that specific exemption were not applicable, LDEP's activities, like Enron Energy's proposed activities here, would go well beyond typical power marketer activities, and constitute "electric utility" activities within the meaning of the Act. Alternatively, if PECO were relegated to the role of an independent contractor providing services to Enron Energy, its role would be analogous to that of LDEP acting as agent for the entity that bears ultimate responsibility for the electric utility service (i.e., the City of Dover). However, unlike the City of Dover, Enron Energy would not be entitled to a municipal exemption.[27/]

26/ Louis Dreyfus Electric Power, SEC No-Action Letter, 1996 SEC No-Act. LEXIS 499 (Apr. 8, 1996).

27/ The SEC Staff has indicated that it would not recommend enforcement action against a power marketer affiliate of an exempt holding company that engages in retail sales if the retail power marketing activities are confined to participation in state-approved programs and the power marketer's ownership of electric generating or transmission facilities is limited to exempt wholesale generators ("EWGs"), qualified facilities ("QFs"), and foreign utility companies ("FUCOs"). See LG&E Power Marketing, Inc., SEC No-Action Letter, 1996 SEC No-Act Lexis 510 (Apr. 26, 1996). Power marketing affiliates of registered holding companies

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In summary, the totality of the facts and circumstances surrounding the Enron Plan, and the pervasive nature of the electric utility activities which Enron Energy proposes to engage in or assume the responsibility for, lead to the inescapable conclusion that Enron Energy will be an "electric utility company" under Section 2(a)(3) of the Act. Although Enron Energy proposes to use PECO as a service contractor to perform many of the functions normally associated with the retail electric utility business, Enron Energy proposes to act as the default service provider. As such, Enron Energy will be the company with the obligation to serve default customers and provide reliable electric service in this service territory. In our opinion, this makes Enron Energy an "electric utility company" as that term is commonly understood throughout the electric utility industry and within the meaning of Section 2(a)(3) of the Act.[28/] Any other interpretation of Section 2(a)(3) would render this definition meaningless and

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27/(...continued)
may also engage in retail power marketing pursuant to a state authorized program. See UNITIL Corp., Holding Company Act Release No. 35-26527, 61 SEC Docket 220 (May 31, 1996); New England Electric System, Holding Company Act Release No. 35-26520, 61 SEC Docket 2472 (May 23, 1996); Eastern Utils. Assoc., Holding Co. Act Release No. 35-26519, 61 SEC Docket 2472 (May 23, 1996). The SEC recently authorized retail marketing of both electric power and natural gas on a nationwide basis, subject to compliance with applicable state law. UNITIL Corp., Holding Company Act Release No. 35-26650, 63 SEC Docket 1743 (Jan. 21, 1997). The Enron Plan and Enron Energy's proposed role as PLR go well beyond these limitations.

28/ Moreover, Enron Energy will clearly be considered an electric utility and a public utility under Pennsylvania law by virtue of the public service it will provide as the PLR. See, e.g., Borough of Ambridge v. Public Serv. Comm'n, 165 A. 47, 48 (1933) ("In Pennsylvania, the *service* subject to regulation is defined by the [Public Service Act] to include 'any and all acts done, rendered or performed, and any and all things furnished or supplied, . . . by public service companies to their patrons, employees, and the public. . . . '") (citation omitted) (emphasis added); H. Hassan Builder, Inc. v. Philadelphia Elec. Co., 73 Pa. PUC 219 (1990) (same); Waltman v. Pennsylvania Pub. Util. Comm'n, 596 A.2d 1221, 1223 (Pa.Cmwlth 1991) (reiterating "the test for determining whether utility services are being offered 'for the public' is 'whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or *to any portion of it* . . . .'") (citation omitted) (emphasis in original).

undermine the purposes for the Act and the credibility of the regulatory agency tasked by Congress to uphold and administer the Act.[29/]

4. ENRON ENERGY WILL EXERCISE A "CONTROLLING INFLUENCE" OVER PECO WITHIN THE MEANING OF SECTION 2(a)(7) OF THE ACT

Under Section 2(a)(7) of the Act, a "holding company" is defined as

(A) any company which directly or indirectly owns, controls, or holds into power to vote, 10 per centum or more of the outstanding voting securities of a public-utility company or of a company which is a holding company by virtue of this clause or clause (B) . . . ; and

(B) any person which the Commission determines, after notice and opportunity for hearing, directly or indirectly to exercise (either alone or pursuant to an arrangement or understanding with one or more other persons) such a controlling influence over the management or policies of any public-utility or holding company as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be subject to the obligations, duties, and liabilities imposed in this title upon holding companies . . . . (emphasis added).

Under Section 2(a)(1) of the Act, a "person" means an individual or a company and, under Section 2(a)(5) of the Act a "public utility company" means an electric utility company or a gas utility company. As noted previously, PECO is an "electric utility company" and therefore a "public utility company," as well as a "holding company." Accordingly, any company that directly or indirectly exercises a "controlling influence" over PECO within the meaning of Section 2(a)(7) of the Act should be considered a "holding company" subject to the requirements imposed on holding companies under the Act.

The legislative history of the Act indicates that Section 2(a)(7)(B) was added to provide the flexibility that "is necessary in order that [the Act] can meet the varied and subtle forms which corporate interrelationships have in the past and will in the future take."[30/] The presence

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29/ See, e.g., City of New Orleans v. SEC, 969 F.2d 1163 (D. C. Cir. 1992); Wisconsin's Environmental Decade, Inc. v. SEC, 882 F.2d 523 (D. C. Cir. 1989).

30/ H. Rep. No. 1318, 74th Cong., 1st Sess., at 9 (1935); see also International Paper and

(continued...)

or absence of a "controlling influence" over a public utility or holding company depends upon the evaluation of a number of factors and has to be determined on a case-by-case basis.[31/] "Controlling influence" does not have to be actual or continuous, rather the mere latent power or ability to exercise such influence may be all that is required.[32/] A "controlling influence" can be shown by "intercorporate relationships based upon historical, traditional, or contractual associations,"[33/] and is not dependent upon the possession of a majority of the voting stock of a company.[34/] A "controlling influence" involves "the act or process, or power of producing an effect which . . . is effective in checking or preventing free action."[35/] Finally, the Commission has held that "the form in which a 'controlling influence' is exercised in unimportant; it is the fact of 'controlling influence' rather than the device employed to achieve that end that is important."[36/] Indeed, Section 2(a)(7) of the Act requires the Commission to determine a company is not a holding company only if it "does not, . . . directly or indirectly control a public-utility . . . by any means or device whatsoever."

30/(...continued)
Power Co., 2 S.E.C. 274, 277-78 (1937) ("control" should be determined by realities rather than legal abstractions), vacated on other grounds sub nom., Lawless v. SEC., 105 F.2d 574 (1st Cir. 1939).

31/ See American Gas & Elec. Co. v. SEC, 134 F.2d 633, 642 (D. C. Cir.), cert. denied, 319 U.S. 763 (1943) ("controlling influence" is a "factual determination to be ascertained in the Commission's expert judgment by the weighing of circumstantial evidence and the drawing of reasonable inferences therefrom").

32/ See Kaneb Pipe Line Co., 43 S.E.C. 976, 979 (1968); Koppers United Co., 12 S.E.C. 184, 191 (1942), aff'd, 138 F.2d 577 (D.C. Cir. 1943).

33/ See John Hancock Mutual Life Insurance Co., S.E.C. No-Action Letter, Fed. Sec. L. Rep. (CCH) ¶78, 348 at p. 77, 112 (June 23, 1986) (emphasis added); Hartford Gas Co. v. SEC, 129 F.2d 794, 796-97 (2nd Cir. 1942).

34/ See H. M. Byllesby & Co., 6 S.E.C. 639, 651 (1940).

35/ Detroit Edison Co. v. SEC, 119 F.2d 730, 739, cert. denied, 314 U.S. 618 (1941) (emphasis added)..

36/ See id.

If Enron Energy engages in the activities contemplated in the Enron Plan, (a) Enron Energy will dictate the terms of over $5 billion worth of securities issued in connection with the securitization of PECO's stranded costs, (b) Enron Energy will obtain an economic interest in a substantial portion of these securities without any payment to PECO, and (c) Enron Energy will enter into contractual and tariff arrangements with PECO that will require PECO to involuntarily provide Enron Energy with "first call" on PECO's generating facilities to provide electricity for certain types of default PLR customers, and provide all of the transmission, distribution, marketing, billing, and other services necessary to enable Enron Energy to be the PLR in PECO's service territory. Although PECO has informed the PPUC that it will not voluntarily execute Enron Energy's proposed contracts with PECO, these contracts would require PECO to stand ready to sell to Enron Energy power that Enron Energy needs to serve Standard Default Customers in PECO's service territory who are not being served by an alternate energy suppler. However, as explained above, under the terms of these contracts Enron Energy would not be required to purchase that energy from PECO and could obtain the necessary energy from other sources. Thus, PECO's ability to sell firm power is controlled by Enron Energy's whim to call upon PECO under the contracts. Likewise, PECO's ability to sell capacity on, and/or schedule use of, its transmission and distribution facilities also will be subject to Enron Energy's desire to call upon PECO's generation. PECO also would be required to provide metering, billing and other services to Enron Energy under these contracts. The magnitude of Enron Energy's financial interest in PECO and these types of contractual and tariff arrangements will clearly give Enron Energy a high degree of control over the "management and policies" of PECO.

Accordingly, in our opinion, if Enron Energy engages in these activities, Enron Energy will directly exercise a "controlling influence" over PECO within the meaning of Section 2(a)(7) of the Act and as this term is commonly understood throughout the business and financial community.[37/] Any other interpretation of the "controlling influence" standard would render this provision of the Act meaningless.

Further, it will be "necessary or appropriate in the public interest or for the protection of investors or consumers," as specified in Section 2(a)(7) of the Act, that the Commission determine that Enron Energy will exercise a "controlling influence" over PECO. The Commission has held that it need not find that any of the "evils enumerated in Section 1 of the

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37/ In addition, Enron Corp., as the ultimate parent company of Enron Energy, will indirectly exercise such a "controlling influence" over PECO.

Act are present" to find a "controlling influence."[38/] Rather, because the purpose of the Act is to *prevent* these evils from occurring, "if the 'controlling influence' is sufficiently extensive to embrace the power to bring about the evils that the Act is designed to guard against, the statutory standard" is satisfied.[39/] If Enron Energy engages in the proposed activities identified in the Enron Plan, which will clearly result in "prevent[ing] [the] free action"[40/] of PECO, the Commission must act to prevent this "restraint of free and independent competition" as specified in Section 1(b)(2) of the Act.

5. ENRON CORP. WILL BE REQUIRED TO OBTAIN COMMISSION APPROVAL UNDER SECTION 9(A)(2) BEFORE ENRON ENERGY CAN ENGAGE IN THE ACTIVITIES IDENTIFIED IN THE ENRON PLAN

As discussed previously, Enron Corp. currently has an "intrastate" exemption under Section 3(a)(1) of the Act that exempts Enron Corp. from all the provisions of the Act except Section 9(a)(2). Section 9(a)(2) states, in pertinent part:

> (a) Unless the acquisition has been approved by the Commission under Section 10, it shall be unlawful - (2) for any person . . . to acquire, directly, or indirectly, any security of any public utility company, if such person is an affiliate, under clause (A) of paragraph (11) of subsection (a) of Section 2, of such company and of any other public utility company, or will by virtue of such acquisition become such an affiliate.

An "affiliate" of a specified company under "clause (A) of paragraph (11) of subsection (a) of Section 2" of the Act is "any person that directly owns, controls, or holds with power to vote, 5 per centum or more of the voting securities of such specified company." As a practical matter, Section 9(a)(2) requires any company that owns 5% or more of the voting securities of one or more public utility companies to obtain SEC approval before it directly or indirectly

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38/ Manchester Gas Co., 7 S.E.C. 57, 62 (1940).

39/ Id. Although these statements were made in the context of determining whether "controlling influence" exists for purposes of Section 2(a)(8) of the Act, such determinations are equally useful for determining what constitutes "controlling influence" under Section 2(a)(7) of the Act.

40/ Detroit Edison Co. v. SEC, 119 F.2d 730, 739 (1941).

acquires 5% or more of the voting securities of another public utility company.[41/] Enron Corp. currently owns 100% of the outstanding voting securities of one public utility company, i.e., PGE. Under Section 9(a)(2), prior SEC approval would clearly be required before Enron Corp. could acquire 5% or more of the voting securities of another public utility company. Moreover, prior SEC approval under Section 9(a)(2) would be required in connection with the formation of a new public utility subsidiary that would be directly or indirectly owned by Enron Corp.[42/]

Inasmuch an Enron Energy has already been formed, and Enron Corp. has apparently not yet sought or obtained SEC approval for its acquisition of the voting securities of Enron Energy under Section 9(a)(2), it is our opinion that Enron Corp. must obtain prior SEC approval under Section 9(a)(2) before Enron Energy engages in any activities that would make it an electric utility company, and therefore a public utility company, under the Act.[43/] Any other interpretation of Section 9(a)(2) would create an enormous loophole that would enable exempt holding companies, and others, to circumvent the clear intent of Section 9(a)(2), and the prior Commission decisions and SEC Staff guidance on Section 9(a)(2).[44/]

41/ See, e.g., MCN Corporation Memorandum Opinion and Order Authorizing Acquisition of Interests in Nonassociate Public-Utility Company, Holding Company Act Release No. 35-26576, 1996 SEC LEXIS 2502 *15 n.12 (Sept. 17, 1996).

42/ See, e.g., David J. Corrsin, Esq., SEC Staff No-Action Letter, 1988 WL 234456 (SEC) (June 14, 1988) (formation of a new public utility subsidiary by an exempt holding company to construct new utility facilities or acquire existing utility assets requires prior SEC approval under Section 9(a)(2)); see also ESI Energy, Inc., SEC Staff No-Action Letter, 1991 WL 176926 (July 30, 1991) (Section 9(a)(2) approval not required in connection with formation of new subsidiary of exempt holding company to develop QF and IPP projects, provided that the subsidiary reduces its interest to that of a passive investor before any IPP project makes its first sale of test power and engages in the activities of a public utility company).

43/ As discussed above, it is our opinion that this would occur when Enron Energy engages in the electric utility activities contemplated in the Enron Plan.

44/ Although we are not here seeking the concurrence of the SEC Staff with respect to our opinion on the merits of any application that Enron Corp. may subsequently file, or any SEC proceeding that may ultimately be conducted under Section 9(a)(2) with respect to Enron Corp.'s "acquisition" of Enron Energy, it is difficult to imagine how such an application could ever meet the applicable substantive criteria for utility acquisitions set forth in Section 10. In

(continued...)

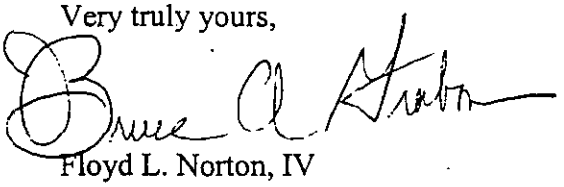
6. CONCLUSION

For all the foregoing reasons, we respectfully request that the Staff concur in our opinion that Enron Energy, by virtue of its engagement in the activities contemplated in the Enron Petition and Enron Plan, (a) will be an "electric utility company" within the meaning of Section 2(a)(3) of the Act and (b) will exercise a "controlling influence," within the meaning of Section 2(a)(7) of the Act, over the management and policies of PECO with respect to the conduct of its electric utility operations in Pennsylvania. Further, we request the Staff's concurrence in our opinion that Enron Corp. will be required to obtain the approval of the Commission under Section 9(a)(2) of the Act before Enron Energy engages in such activities.

44/(...continued)
order to do so, Enron Corp. would have to demonstrate, *inter alia*, that the acquisition "will serve the public interest by tending toward the economical and efficient development of an integrated public utility system" in accordance with Section 10(c)(2) and that the acquisition will be consistent with the "single integrated public utility system" requirement imposed on registered holding companies under Section 11(b)(1). In this regard, the definition of "integrated public utility system" in Section 2(a)(29) focuses on whether the utility assets of the system are "physically interconnected or capable of interconnection" and may under normal conditions "be economically operated as a single interconnected and coordinated system" confined to a single region or area, and whether the system is so large as to impair the benefits of localized management or regulation. See, e.g., Wisconsin Environmental Decade v. SEC, 888 F.2d 523 (D.C. Cir. 1989); Union Elec. Co., 45 S.E.C. 489, 494 (1974). It is unclear how Enron Energy's proposed electric utility operations in Pennsylvania could ever be considered to be part of a "single integrated public utility system" with PGE's existing utility operations in Oregon, regardless of whether Enron Corp. attempted to retain its existing intrastate exemption under Section 3(a)(1) or instead attempted to become a registered holding company. In any case, because Enron Energy is not organized in Oregon and would clearly not be conducting its Pennsylvania utility business in Oregon, Enron Corp. would no longer appear to be eligible for an "intrastate" exemption under Section 3(a)(1). See, e.g., United Gas Improvement Co., et al., 13 S.E.C. 311 (1943) (holding that "[t]he difficulty of finding that [the section 10(c)(2)] standards are met where the existing interests of the affiliate is in a public utility in Oklahoma and the interests proposed to be acquired is in Connecticut is apparent.").

PECO has provided a copy of this request to Enron Energy and intends to include a copy with its post-hearing brief to be filed on December 2, 1997 in the PECO restructuring proceeding pending before the PPUC.

Very truly yours,



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Certificate of Service

I hereby certify that I have this day served the foregoing document on the following in the matter of Pennsylvania Public Utility Commission v. PECO Energy Company Pa. PUC Docket No. R-00973953.

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