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December 2, 1997

James McNulty, Prothonotary  
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P.O. Box 3265  
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Re: Application of PECO Energy Company for Approval of its Restructuring Plan Under Section 2806 of the Public Utility Code, Docket No. R-00973953

Dear Mr. McNulty:

Enclosed please find two (2) hard copies and one 3.5" diskette of the Brief to be filed in the above mentioned docket on behalf of the American Association of Retired Persons.

If you have any questions regarding this filing, please do not hesitate to contact me.

Very truly yours,

*Linda C. Smith*

Linda C. Smith, Esquire

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ORIGINAL

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

APPLICATION OF PECO ENERGY :  
COMPANY FOR APPROVAL OF ITS :  
RESTRUCTURING PLAN UNDER : DOCKET NO.  
SECTION 2806 OF THE PUBLIC : R-00973953  
UTILITY CODE :

PETITION OF ENRON ENERGY :  
SERVICES POWER, INC. FOR :  
APPROVAL OF AN ELECTRIC : DOCKET NO.  
COMPETITION AND CUSTOMER : P-00971265  
CHOICE PLAN :

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MAIN BRIEF OF  
THE AMERICAN ASSOCIATION OF RETIRED PERSONS

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## I. INTRODUCTION

The American Association of Retired Persons, ("AARP") is a private, non-profit membership organization incorporated in the District of Columbia. AARP is committed to serving its members through education, advocacy and community service. AARP has over 1,740,000 members in Pennsylvania, many thousands of whom will be effected by the PECO restructuring. AARP is concerned about PECO's restructuring because PECO's electric rates are among the highest in Pennsylvania and this proceeding presents an opportunity to achieve lower rates for consumers through the restructuring of that company pursuant to the newly enacted Electricity Generation Competition and Customer Choice Act ("Choice Act"). 66 Pa.C.S. §§2801 et seq.

In an effort to help achieve lower rates for its membership residing in the PECO market territory, AARP, through its expert witness, reviewed and analyzed the PECO restructuring proposal, the Enron Choice Plan and the positions of other parties to this proceeding. Subsequent to that review and analysis, the written testimony of Dr. Mark Cooper<sup>1</sup>, identified as AARP St. 1 and AARP St. 2, was prepared and entered into the record in this proceeding. Tr. 1986-2008.

AARP participated in the settlement process as well as in the litigative process and helped to negotiate the Joint Petition for Partial Settlement. AARP continues to support that petition as

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<sup>1</sup>Dr. Cooper is President of Citizen's Research and Director of Research of the Consumer Federation of America. Dr. Cooper has an extensive background in consumer issues within regulatory markets and, most notably, he has presented testimony and conducted major studies on universal service and lifeline. AARP St. 1 at 1-4.

being in the public interest and in the interest of the membership of AARP.

In this brief, AARP will address the reasons the Commission should approve the Joint Petition for Partial Settlement as being just and reasonable and lawful noting in particular the lawfulness of a non-reconcilable Competitive Transition Charge ("CTC")<sup>2</sup>; the critical flaws inherent in the Enron Choice Plan and the negative balloting proposal presented by the Environmentalist will be addressed; and AARP's litigative position will be briefed as well.

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<sup>2</sup>A competitive transition charge is non-bypassable mechanism for collecting stranded cost. 66 Pa.C.S.A. §2803.

## II. THE JOINT PETITION FOR PARTIAL SETTLEMENT

On August 27, 1997, AARP joined with others in a petition for a partial settlement of the PECO restructuring case. On September 2, 1997, AARP filed a statement in support of that settlement. For the reasons stated therein, and for the reasons set forth below, AARP continues to support the Partial Settlement.

### A. The Partial Settlement Guarantees A Ten Percent Reduction in Rates for All Ratepayers Effective September 1998.

The Electricity Generation Customer Choice and Competition Act, 66 Pa. C.S.A. § 2801 et seq., citing high rates for electricity in Pennsylvania and the need to provide that essential service to the public at reasonable terms and conditions for the benefit of the health and safety of Pennsylvania's residents, required monopoly electric utilities to unbundle their rates and services and provide open access to their transmission and distribution system to allow competitive suppliers to generate and sell electricity directly to consumers. 66 Pa.C.S.A. §§2802 (4), (9), and (14). It is plainly the intent of the Choice Act to reduce the cost of electricity in Pennsylvania for the benefit of its residents and businesses through the introduction of competition while maintaining reliable service, conservation, and low income assistance. 66 Pa.C.S.A. §2802.

Of the electric utilities in Pennsylvania, PECO Energy has the highest rates. In the Partial Settlement, PECO has agreed to reduce existing rates of all customer classes by ten percent, with such reduction guaranteed until December 31, 2000. Joint

Petition for Partial Settlement of PECO Energy Company's Proposed Restructuring Plan and Application for Qualified Rate Order, dated August 27, 1997, para 8, p. 6; Table A ("Partial Settlement"). The rate reduction is to take effect in September 1998, thus predating the beginning of customer choice, which is not scheduled to begin until January 1, 1999. Id. 6-7. Without the Partial Settlement, only those customers participating in the company's pilot program will have the opportunity to "shop" for lower rates or receive lower rates from PECO.

By reducing the cost of electricity for customers in the PECO territory sooner, rather than later, and by reducing the cost of electricity for all customers, rather than just for those selected for the pilot programs, one of the primary goals of the Choice Act is being fulfilled in an expedited manner - rates are being lowered.

**B. The Partial Settlement Accelerates The Availability of Choice for More Customers.**

The Choice Act mandates that one-third of PECO's customers will be choosing their generation supplier by January 1, 1999. 66 Pa.C.S.A § 2806 (b). A second third is required to have retail access by January 1, 2000, and the remaining third will be given retail access by January 1, 2001. Id. The Partial Settlement significantly accelerates the timetable by providing choice to two-thirds of PECO's customers on January 2, 1999, a full year earlier than the statute mandates. Similarly, the remaining third will be offered retail access by January 2, 2000 under the Partial Settlement. Partial Settlement, para. 15 at 14. Thus, the

market will be open to competition to a greater number of customers much sooner than mandated by the Act.

**C. Stranded Costs are Reduced by the Partial Settlement.**

Under the PECO restructuring proposal, PECO requested that it be permitted to recover \$6.8 billion in stranded generation investment. This figure was updated several times with the most recent figure being \$7.461 billion.

The Partial Settlement calls for a \$2.0 billion write-off by PECO Energy Company ("PECO") of assets included in PECO's estimate of its stranded investment. Partial Settlement at p. 3, para. 17 at 16. This write-off is consistent with that proposed in AARP's pre-filed written testimony. AARP St. 1 at 23, 75. AARP's litigation position was to allow no more than 50% recovery of stranded investment. The reduction from \$6.7 billion to \$5.4 billion with an accompanying \$2 billion dollar write-off achieves approximately the same result.

**D. Universal Service is Greatly Expanded by the Partial Settlement.**

The Public Utility Code, as amended by the Choice Act, now imposes a "mandate for universal service and energy conservation policies, programs and protections." Final Order RE:Guidelines for Universal Service and Energy Conservation Programs Made Pursuant to 66 Pa.C.S. §2803, §2802(17), 2804(8) and 2804(9), Docket No. M-00960890F0010, (Order entered July 11, 1997) ("Guidelines"), at 6; Appendix B at 28. The Choice Act requires each electric distribution company to submit a comprehensive and multi-year universal service and energy

conservation plan as part of its restructuring filing. 66 Pa.C.S.A. § 2804 (15). The Commission established guidelines to assist parties in preparing positions for universal service by setting forth the Commission's views. Guidelines at 2. The guidelines do not prescribe any precise requirements that must be met as part of restructuring. Id. at 2. The Commission identified existing universal service and energy conservation policies, protections and services and noted that the "first stage of developing a universal service and energy conservation plan to be included in each utility restructuring plan must be to compile a detailed itemization of all existing policies, protections and services." Id. at 29-30.

The Commission noted that for the most part, existing universal service and energy conservation policies, services and programs can meet the mandates of the Act. Id. at 30. However, the Commission took note of three areas that require additional efforts : a) Provider of Last Resort; b) Renewable Resources; and c) Consumer Education. As required by the Choice Act, the Partial Settlement builds upon the existing CAP programs and provides for expansion of LIURP and for the establishment of a LIURP Advisory Committee. Partial Settlement at para. 26 and 27, at 23.

PECO's current customer assistance program was the subject of a negotiated settlement in November of 1996 following a filing to introduce a pilot "CAP rate" program the previous November. PECO St. 16 at 9-10, Exh. MCK 3. That program provided for 10,000 persons to be enrolled in the CAP rate pilot, while

35,000 continued in the original pilot known as CAP I. PECO Exh MCK 3. at 3. PECO's restructuring plan stated PECO's intention to expand the ongoing CAP program, but it stopped short of committing to a specific customer level. PECO St. 16 at 12. It is AARP's position that since 250,000 people in the PECO service territory qualify for CAP enrollment on an income basis, PECO St. 15 at 11, providing an adequate CAP program is critical to the public interest.

It is AARP's position that an adequate CAP program is one which meets or exceeds the guidelines established by the Commission for universal service. AARP further contends that the statutory requirements for universal service must be met or exceeded and the program must maintain sufficient flexibility to allow it to continue to expand or adjust to changing conditions so that it continues to meet those requirements as time passes. In AARP's opinion, PECO's original restructuring plan was inadequate in two areas relative to universal service- eligibility for benefits and the funding mechanism. AARP St. 1. at 75.

Dr. Cooper's position is consistent with the Choice Act which establishes a minimum level of universal service which the Commission and the utilities are free to surpass. The Choice Act states:

The Commonwealth must, at a minimum, continue the protections, policies and services that now assist customers who are low income to afford electric service.

66 Pa.C.S.A. §2802(10) emphasis added. As Dr. Cooper testified:

The Commission and the companies could certainly propose more vigorous programs than the minimum. I suggest that the minimum is not sufficient to accomplish the purposes of the new law. When legislators state that this is the minimum that should be done, they clearly contemplate the fact that the regulators would find that more is necessary. The floor should not be assumed to also be the ceiling.

AARP St. 1 at 50.

The eligibility requirements proposed in PECO's restructuring plan were problematic because a customer with an income low enough to participate will not be eligible unless he or she misses five out of his or her last six payments. PECO St. 15 at 11.

This encourages low income customers to avoid paying their bills. Dr. Cooper proposed a program which relies solely on income as a criteria, and does not require that payments be missed before one becomes eligible to participate. Dr. Cooper stated: "I propose a program, similar to that recently adopted for telecommunications at the federal level, which relies solely on income as a criteria."

AARP St. 1 at 53.

Dr. Cooper also challenged PECO on the funding mechanism for universal service. PECO proposed that the funding come solely from the residential class. AARP believes that funding for universal service should come from all classes because "the benefits of universal service accrue to all citizens in Pennsylvania". AARP St. 1 at 53. For this reason, Dr. Cooper proposed a Kwh charge for the recovery of universal service. Such a charge would ensure compliance with the requirement that all customer classes participate:

All customer classes should share in providing funding of universal service consistent with sound rate design principles and in accordance with the Act's prohibitions against the interclass and intraclass cost transfer and the Act's rate cap.

Guidelines for Universal Service § G.4. at 40.

Although the Partial Settlement was not identical to Dr. Cooper's program, it improved significantly upon the program offered by the company in the restructuring proposal. The Partial Settlement provides for a significant expansion of PECO's existing Customer Assistance Program ("CAP"). The Partial Settlement calls for an initial participation limit of 100,000 customers, which more than doubles the existing participation in PECO's CAP programs. Such an expansion will go far toward assisting those AARP members who have difficulty paying their existing electric bills and may be most at risk for negative health consequences during extreme weather conditions should power be turned off. The Partial Settlement provides for a mechanism for expanding participation beyond the initial 100,000 customers should such expansion be necessary, and provides for additional funding beyond the initial allocation of \$50 million.

While the first \$50 million is presumed to be recovered in existing rates, the source of any additional funding has not been determined. The issue of whether all classes will contribute to universal service is reserved until it is necessary to recover universal service funding in excess of \$50 million. Partial Settlement, para. 25 at 22.

Besides expanding the enrollment in the CAP, the Partial Settlement provides for a broader definition of "payment troubled" than that originally proposed by PECO. While PECO asked that participation in the CAP be limited to those who missed at least five payments resulting in a substantial arrearage, the Partial Settlement provides for participation by those who have missed but two payments, and defines a missed payment as including late or partial payments. Partial Settlement, para. 23 p. 21. While AARP originally advocated for a definition that did not require missed payments, the agreement represents a compromise. The income threshold is the same as that proposed in the Commission's Guidelines at 150% of poverty. Id. The Partial Settlement also promotes the involvement of community based agencies as encouraged by the Choice Act. 66 Pa.C.S.A 2804(9).

**E. The Partial Settlement Provides Portability for Universal Service Benefits Thereby Benefiting Consumers and Competition.**

Those AARP members who are eligible for Universal Service participation are further protected because the Partial Settlement calls for universal service benefits to be portable. Partial Settlement at 22, para. 24. This allows persons with low incomes to be able to elect to use a supplier other than PECO yet continue to receive the benefits of the Universal Service program. This proposal will go far toward alleviating the concerns of AARP and other consumer groups that low-income customers and other high-risk groups would be closed out of the competitive market due to an inability to transfer their Universal Service benefits to a new

supplier. This particular provision of the Partial Settlement serves customers and competition alike. The original restructuring proposal submitted by PECO did not provide for portable benefits for universal service. Allowing universal service benefits to be portable serves the public interest and is consistent with the universal service guidelines and the statute. 66 Pa.C.S. §§ 2802 (17), 2804 (9); Guidelines at 20, 39.

**F. The Partial Settlement Provides for PECO to be the Provider of Last Resort.**

The Partial Settlement clearly establishes that PECO will be the Provider of Last Resort. Partial Settlement, para. 33 at 25. In that capacity PECO intends to make purchases of supply at wholesale from other suppliers, including its own affiliate, and to resell that capacity at or below the rate cap set forth in Appendix C of the Partial Settlement. Id. Customers that leave the PECO generation system and return later are guaranteed their rate will not exceed the published generation market rate or the generation rate cap set forth in the Partial Settlement provided they sign a 12 month contract. 66 Pa.C.S.A. § 2803 (16). PECO's assumption as the provider of last resort is consistent with its statutory obligation to serve. 66 Pa.C.S.A. § 2807 (e).

**G. The Partial Settlement Provides for Renewable Resources.**

The Partial Settlement clearly provides that PECO will prepare and file tariff provisions for renewable energy services. Partial Settlement at para. 40, at 28. These tariff sheets will allow any customer to install and operate renewable energy generation under 10kw. Renewable energy includes solar, wind,

hydro, biomass, and methane field generation. Id. This provision of the Partial Settlement is consistent with the Choice Act at 66 Pa. C.S.A. § 2803.

**H. Consumer Education is Encouraged by the Partial Settlement.**

It is AARP's position that full participation in the new competitive environment by a wide range of customers will only occur if the customers are aware of the range of options available. Consumer education and awareness is a major concern which has not adequately occurred to date. The Commission recognized the need for more consumer education when it extended the date for pilot program supplier selections. The Partial Settlement provides for consumer education in part by implementing a program and allocating \$25 million towards the PECO effort in the PECO service territory. This is of particular importance to AARP and other consumer groups, as residential customers are less likely to participate than are industrial customers absent proper education.

To properly separate education from marketing, the Partial Settlement calls for statewide standards to apply if such standards are developed, and provides for joint control over any education program developed by PECO and the other Joint Petitioners. Partial Settlement, para 29 at 24.

**I. PECO Bears The Risk For Full Recovery of the CTC Under the Partial Settlement.**

The Partial Settlement appropriately allocates the risks and rewards of the settlement between the various parties to the proceeding. One example of the just and reasonable allocation of

risk lies with the manner in which the Partial Settlement treats CTC charges. The statute states that a competitive transition charge shall be included on bills to customers for a period not to exceed nine years from the effective date of the chapter unless an alternative payment methodology is mutually agreed upon by the customer and the utility, or unless the Commission, in its discretion, and for good cause shown, orders an alternative payment period. 66 Pa.C.S.A. §2808 (b). The statute further holds that the Commission has some discretion in determining the level of stranded costs that may be recovered through the CTC and shall consider mitigation efforts in determining an appropriate CTC level. 66 Pa.C.S.A §2808 (c) (3) and (4). This level of discretion recognizes that establishing the value of stranded investment and corresponding CTC for any company is not an absolute, but is a process of estimates and evaluations. Clearly, the statute was written to "provide each electric utility with an opportunity to recover its transition or stranded costs". 66 Pa.C.S.A. §2808 (a). The statute does not guarantee full recovery of every CTC dollar.

Not only does the statute clearly describe the exercise of judgement by this Commission in establishing a CTC, it continues to provide that the reconciliation of the CTC will be performed consistent with section 1307(e), allowing for an annual adjustment for under or over recoveries. 66 Pa.C.S.A. §2808(f). Section 1307(e) allows for good cause to be shown why an automatic adjustment to reconcile charges, or in this case the CTC, on an annual basis should not be done.

The Partial Settlement provides good cause to avoid an annual reconciliation of the CTC in favor of a fixed CTC. First, a non-reconcilable CTC shifts the risk of stranded cost recovery to the company. AARP St. 2 at 12. As Dr. Cooper explained in his testimony at hearing, there was an exchange of values in the settlement generally and in regard to the CTC in particular. Tr. 1991. Dr. Cooper stated:

We are making an exchange of values. We have exchanged the right to true-up to reduce their recovery under some circumstances in exchange for their . . . giving up the right to increase our CTC in other circumstances. So we have made an exchange of values in this agreement.

Tr. 1991. Dr. Cooper elaborated by explaining the risk PECO bears that it might underrecover stranded costs at the levels agreed to in the Partial Settlement.

If you look . . . at reconciliation, PECO , in fact, bears the risk of a recession seven years into an expansion phase, in the event you may or may not, that's a significant risk they have on their side! The risk of recession here in Philadelphia in the next year they will not be able to come back and recalculate on the basis of a shortfall in demand. And they will not be able to increase my CTC as a result of that.

So I get the benefit of being insulated against a shortfall in demand. I have also got the benefit of the kind of market behavior that we have seen that Enron is engaging in.

Tr. 1999.

The non-reconcilable CTC also balances against the provision in the Partial Settlement that allows industrial customers to pay their CTC charges in a lump sum. Partial

Settlement, para. 12 at 13. If this provision were included in the settlement, but the CTC was reconcilable, PECO would have an incentive to negotiate poorly on the amount required as a lump sum from any given industrial customer. If shortfalls occurred because of these negotiations, the residential and commercial classes may have been expected to compensate PECO for those shortfalls.

Similarly, PECO bears some risk in regard to the market prices for energy and capacity. Paragraphs 9 and 11 establish this risk. Partial Settlement, para. 9 at 7, para 11 at 11. As Dr. Cooper noted:

Section 9 established maximum market price for energy and capacity. Once established, any time I can purchase energy at a lower price, they are at risk of not being able to collect that stream of revenue and I have a reward for being able to beat that price.

Tr. 2006-2007.

In exchange for these risks borne by PECO that they will not recover every stranded dollar through its CTC or that the actual market price will be lower than their estimated market price, the customers, including AARP members and others agreed to a level of stranded investment. After all, it was AARP's litigation position that no stranded recovery should be permitted only on a 50/50 sharing basis. AARP St. 1 at 23. AARP did not get the elimination of "payment troubled" as a criteria in the Partial Settlement. Tr. 2007. However, the Partial Settlement did include an expanded low income program, a guaranteed price reduction to begin in September 1998 rather than later, and the possibility of larger price reductions later on as the market

competition develops. Tr. 2008. The non-reconcilable CTC also rewards energy conservation by not allowing PECO to recover additional dollars for every kwh of energy conserved. Tr. 2009.

The Partial Settlement very clearly balances the interests of the various parties in a manner that is consistent with the public interest and the public good. For this reason, it should be approved by the Commission without modification.

**J. The Partial Settlement Encourages The Proper Development of Competition.**

The Partial Settlement provides for a reasonable and timely transition to a competitive market. It accomplishes this in several ways. First, the Partial Settlement establishes market rates for generation that can be matched at the present time by suppliers with surplus generation. Tr. 1993. Since this generation is the first capacity that should be used in a competitive market, it is reasonable to use existing surplus generation as the guidepost rather than using new plant. Id. New plant would not be built in a purely competitive market at higher cost as long as a surplus exists. As Dr. Cooper testified:

I don't say there would be no competition. The short term competition will be driven by people with excess capacity that they can bring to the market. ENRON's analysis focused on the price of building new generating capacity. They didn't look at the question of is a market in surplus likely to be competing without attracting new generation.

I don't think competition is being delayed. One class of competitors may be delayed. People who say I can't build a new plant against that market price.

Tr. 1993. Dr. Cooper adds:

. . that is the way markets actually work and are supposed to work. People don't build new plants when they see excess capacity in the market.

Tr. 1993-1994.

Yet, the Partial Settlement provides for a competitive market by establishing generation rates that are sufficiently high to protect new entrants while competition develops. The generation rates contained in the Partial Settlement are higher than those originally proposed by PECO, and thus provide for a greater amount of participation in the nascent competitive market by new entrants, although those new entrants will not be those building new plant.

Competition is also protected by a Universal Service program that is portable, enabling those with low incomes to participate in the market as well rather than being captive customers of PECO. As discussed above, this is an important component of the Partial Settlement.

The original PECO proposal established rates that were more friendly to market competition in the first few years with high generation rates and then backloaded the rates so that it would impede competition in the later years. Because competition is being phased in, only one-third of residential customers were able to shop in 1999, followed by an additional third in each subsequent year under PECO's original plan. The best rates offered for competitive reasons were established for the years when competition could take place for many customers because they were not yet permitted to shop. Competition is discouraged when the market is not open to everyone. Dr. Cooper testified that:

The Settlement is structured in such a way as to give consumers the best chance of increasing their gains because stranded cost recovery is highest when the market is softest and in the early years then consumers are least likely to be effective shoppers. The high CTC would be offset by low market prices in the early years. In the later years when supply and demand are more likely to be in balance in the marketplace, the CTC is smallest. That is when shopping will be most beneficial and the competitive market structures best developed.

AARP St. 2 at 13. Also, see Attachment MNC-2. It should be remembered that the phase-in of customers to purchase from suppliers is more quickly accomplished under the Partial Settlement.

**K. The Partial Settlement Properly Protects Residential Customers From Undue Risk for Nuclear Decommissioning Costs.**

The terms of the Partial Settlement also provide for proper allocation and collection of nuclear decommissioning costs. Partial Settlement. para. 49 at 32. Increases in these costs are to be paid by the generation entity which will be, pursuant to the terms of the agreement, a separate subsidiary from the regulated transmission and distribution company. Only if the generation entity is absolutely unable to pay these costs will the regulated entity be permitted to seek recovery from its distribution customers, in excess of the CTC collected, through a section 1307(a) proceeding. Partial Settlement, para. 20 at 17-18. This is a vast improvement over the PECO proposal which allowed PECO to recover all nuclear related costs from ratepayers.

**L. The Partial Settlement Allows for the Further Development of Generic Issues Such As Consumer Education and Codes of Conduct.**

Finally, the Partial Settlement leaves a number of issues open for future consideration by the Commission in generic proceedings. Among these issues are a statewide education program and the implementation of a Code of Conduct governing PECO's relationship with its affiliates. By leaving these issues out of the agreement, the Partial Settlement provides for full and fair consideration of these important issues on a generic basis, allowing all local distribution utilities to be similarly treated.

**III. ENRON'S CHOICE PLAN IS NOT IN THE PUBLIC INTEREST AND MUST NOT BE APPROVED.**

**A. Enron Will Not Truly Serve As the Provider of Last Resort.**

Enron's Choice Plan proudly proclaims that "Enron has the ability to fulfill the PLR role." Petition of Enron Energy Services Power, Inc. For Approval of An Electric Competition and Cusotmer 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 October 7, 1997 ("Enron Choice Plan") at 25. Enron goes on to state that:

Indeed, the Choice Plan, including the contracts and service agreements by which Enron will procure energy and capacity and metering, billing and collection services, will enable Enron to maintain the level of performance PECO customers currently receive.

Enron Choice Plan at 25.

At first glance such a statement looks like the proposal may have some merit worthy of consideration. However, reading further into the Enron Choice Plan it becomes apparent that Enron's proposal is a facade. Enron does not plan on providing the services of last resort. Instead, it plans on forcing PECO into the position of a subcontractor and have PECO provide the services just as it does today and would do under the Partial Settlement. Enron plans on getting PECO to provide both generation supply and billing and metering services as a subcontractor. Enron readily admits: "Enron, therefore, would be procuring these services from PECO, using PECO's facilities and employees." Enron Choice Plan at

25. In other words, Enron would not be providing those services at all.

Forcing PECO into the position of a subcontractor raises many concerns from the consumers' perspective. First of all, the public will be duped into believing that its services are coming from Enron when all along they will be receiving service from the same place they always have - PECO. The big difference being that this time they will not know it. The default customers will not know who is actually providing their service and to whom they should address their complaints or concerns. Given the nature of the arrangement proposed by Enron, that is requiring a competitor to provide service pursuant to a forced contract under the name of its competitor rather than its own, many complaints relating to service should be expected. What incentive would PECO have to perform well knowing that every service it is offering is being credited to its competitor - Enron.

Dr. Cooper addressed this concern in his testimony. AARP St. 2 at 18-19. There he makes note of two critical facts: 1) Enron failed to put any resources at risk in its proposal to be the provider of last resort and simply offered to talk about putting up some money, id. at 19; 2) Enron is removing PECO as the utility and has not put itself into the role of a utility. Id. By eliminating PECO from the role of a utility and by failing to accept that responsibility itself, Enron has thrown "the relationship between customers and electricity suppliers into a contractual mode" rather than one subject to "utility protections embodied in current law

and regulation." Id. at 19. Dr. Cooper said: "The entity that is ultimately my provider of last resort has to be responsible to me. That is the point. I don't want to have to reach through the contract to the next subcontractor as the responsible entity." Tr. 2010. Although it is clear that the Commission continues to have jurisdiction over PECO as the provider of electric distribution, it is not at all clear what authority the Commission has over PECO as a subcontractor to a provider of last resort, or what authority the Commission has over Enron, an electric generation supplier who also serves as the provider of last resort through a subcontractor.

The provider of last resort should provide everything necessary to make the lights stay on in a home - wires and generation supply. Tr. 2010. Enron is not prepared to provide this service, it will rely exclusively on PECO to provide these services on its behalf, it has offered no financial support to demonstrate its ability to fulfill the role of provider of last resort, and ultimately leaves the consumer at risk of non-performance of a contractual obligation between PECO and Enron over which this Commission will have uncertain authority at best. Such an arrangement cannot possibly be in the public interest at this point in time.

Enron claims that its plan will "bring real competition" into the PECO service territory. Enron Choice Plan at 25. This cannot possibly be true since PECO will still be providing all the service and Enron will simply be a shell profiting from the

arrangement. There will not be true competition created by the Enron Choice Plan since Enron itself will not be providing any services. The illusion of competition, however, may actually damage any opportunity for the development of true competition.

**B. The Enron Choice Plan Reduction in Rates is Based on Successful Securitization of All Stranded Costs.**

It is of great concern to AARP that the rate reductions in the Enron Choice Plan are dependent on securitization of the entire proposed stranded investment amount of \$5.461 billion, rather than securitization of \$4.0 billion as proposed in the Partial Settlement. AARP St. 2 p. 10. Steven Kean on behalf of Enron testified that using the 9.66% interest rate as the cost of capital, as described by Enron witness Mr. Fastow in his testimony, will allow Enron to 1) significantly reduce the aggregate CTC/ITC charges reflected in the Partial Settlement and 2) double the rate reductions offered by PECO in the Partial Settlement. Enron St. 1 at 15.

For this reason, the price cuts in the Enron proposal are not guaranteed. Even if \$4 billion was the amount securitized, there is no certainty that reduction would take place. The reductions are, in fact, entirely dependent on securitization of the entire stranded cost dollar amount. AARP St. 2 at 9. This results in a shift to ratepayers of additional risk. Dr. Cooper addressed this point in his testimony when he stated:

If any legal, regulatory, or tax problems arise with securitization, then the price reductions are put on hold. Enron has shifted all the risk of securitization to ratepayers because, under its proposal, it would become

the ultimate holder of the bonds.

AARP St. 2 at 9-10. The likelihood that there would be tremendous difficulty in securitizing bonds as proposed by Enron is great. Certainly far greater than PECO securitizing its own bonds. The additional impediments impose risks on ratepayers that they will not see reductions in prices for electricity. A prime goal of the Choice Act will not be met. For this reason, the Enron proposal must not be approved by this Commission.

**C. The Enron Choice Plan Rate Reductions Are Contingent on Stranded Cost Securitization.**

One of the primary problems with the Enron Choice Plan is that it takes for granted that the concessions agreed to by PECO, and other parties in the Partial Settlement, will remain agreeable to PECO, and those other parties, when corresponding trade-offs are lost. For example, PECO agreed to a stranded cost dollar amount of \$5.461 billion for settlement purposes. Of this amount, \$4.0 billion was to be securitized. This is not, however, PECO's litigation position, nor the litigation position of other parties. There is no reason to believe that PECO will honor that number for any purpose other than to support the Partial Settlement. PECO's revised claim for stranded costs is in excess of \$7 billion. Other parties believe that PECO should receive no compensation for stranded costs, or very little. After determining a stranded cost level, the amount that should be securitized is also a question with a different answer depending on circumstances. PECO would like it all securitized. Certain other parties may find full securitization undesirable inasmuch as that process shifts

responsibility to ratepayers. The parties that joined in the Partial Settlement agreed to \$5.461 billion of stranded investment with \$4 billion of that amount being securitized. Without the trade-offs, or exchange of values that accompanied the Partial Settlement, there is no reason to expect that any party, particularly PECO will continue to support these numbers.

This means that the stranded cost dollar amount, and the corresponding securitization amount, will likely face litigation - litigation that will all but make certain that consumers never see the Enron promised rate reductions. One need only read the Enron Choice Plan to know that the promise of reduced rates is inextricably tied to securitization of \$5.461 billion in stranded costs. In section IV of the Enron Choice Plan, the conditions and contingencies are set forth. There, in section (g) on page 29, Enron states that its Choice Plan is expressly conditioned on the fact "[t]hat there arises no legal impediment to the issuance of transition bonds pursuant to section 2812 of the Act." Enron cannot seriously expect, nor can this Commission seriously expect, that there will be no impediment to the issuance of transition bonds in the manner described in Enron's Choice Plan where Enron would be the named holder of PECO's bonds.

**D. Stranded Cost Issues Notwithstanding, Rate Reductions Are Still At Risk.**

The rate reductions promised by Enron may never materialize regardless of the securitization process. Enron clearly stated that if PECO fails to deliver on its contracts, the default customers are at risk for whatever the market price will

be. Enron will attempt to recover excess costs from PECO, but the money will come out of the budgets of ratepayers first. The relevant statement in the Enron proposal is:

If PECO fails to perform under the terms of the Power Purchase Agreement, Enron will be entitled to obtain alternative energy supplies at market prices and to collect the cost of such supplies from Default Customers under the Distribution Tariff for the duration of PECO's non performance (subject to a subsequent credit, rebate or other true-up to reflect the recovery of any cover or other damages from PECO).

Enron Choice Plan at 21. In other words, if PECO does not have the supply to provide to Enron, Enron, the purported provider of last resort, will charge customers whatever it must to be made whole for having to purchase supply on the open market. Any additional cost will be passed on to its customers. If Enron ultimately recovers any damages from PECO, those damages will be reconciled with overcharges paid by customers. The problem is that there is no incentive for PECO to cooperate with Enron under the Enron Choice Plan, and there is no jurisdiction of this Commission over what Enron will charge its customers given that it is not a utility. Further, there will be no incentive for Enron to aggressively seek damages since it is made whole by its agreement at the expense of the ratepayers.

The risk is borne by the ratepayers and the ratepayers alone. At least in the Partial Settlement the risks and rewards are allocated reasonably between customers of all classes and PECO. With the Enron Choice Plan all the risk is borne by the default customers. The risk to ratepayers is reaffirmed under Section VI

where the terms and conditions of the Enron Choice Plan are set forth.

Enron's promise to provide service at rates reflected in the Distribution Tariff, which rates reflect the 20% rate reductions for the period September 1, 1998 through December 31, 2000, the 10% rate reduction for calendar year 2001 and the 4% rate reductions for calendar year 2002, is contingent on PECO's adherence to the maximum rate caps for transmission and distribution services as set forth in the Partial Settlement; provided that if PECO seeks and obtains from the Commission an increase in said charges so as to increase the rate cap established by the Act or otherwise fails to perform its obligations under the Choice Plan, Enron reserves the right to increase the rates charged to Default Customers accordingly.

Enron Choice Plan at 21. The fact is that the Enron Choice Plan is replete with language that protects Enron and puts the risk on the ratepayer.

**E. Consumers Lose the Benefit of the Non-Reconcilable CTC and the Freeze on Transmission and Distribution Rates.**

The benefits of the non-reconcilable CTC have been addressed at length above. The Enron Choice Plan eliminates that benefit which was negotiated for good cause. Enron claims that PECO will overcollect on the CTC due to load growth because there is no reconciliation provision in the Partial Settlement and because the securitized cost of money is less than the companies' cost of capital. Enron Choice Plan at 15-16. However, Enron has failed to acknowledge that under the Partial Settlement PECO is at risk for the market price of energy. With a non-reconcilable CTC the company is at risk of underrecovery. If sales volume is below that assumed, PECO will not recover what it anticipated. If the

market price clears at a lower price of generation than assumed in the Partial Settlement, or if there is a recession, PECO will recover less of its stranded costs based on the fact that the CTC is non-reconcilable. PECO can never recover more than its full stranded costs, however, because by definition stranded costs reflect those costs that are uneconomic in the market. If the market price rises too high, it will meet the price for the generation from the "stranded plant" which will no longer be stranded but able to produce generation at a marketable rate.

Further, the Partial Settlement provides for a cap or a freeze on PECO's distribution and transmission charges until January 1, 2004. The Enron proposal does not capture this benefit either.

**F. The Universal Service Program Is Uncertain Under the Enron Choice Plan.**

As discussed above, the expanded universal service program was one of the most important aspects of the Partial Settlement and is certainly in the public interest. The fate of that proposal is unclear at best in the Enron Choice Plan. Although Enron assumes that PECO's agreement to expand the program will be preserved in its Choice Plan, Enron has added nothing to that program and has placed the negotiated gains at risk given that the litigation positions of all parties are now on the table, including PECO's litigation proposal concerning universal service. AARP St. 2 at 16.

Enron seems to have missed the fact that the Partial Settlement did not establish the funding for the increase in the

universal service enrollment from the 80,000 level to the 100,000 level. The parties to the Partial Settlement deliberately left that question open to further negotiation while funding for all other enrollment was to come out of distribution rates. AARP St. 2 at 17. Doing so allowed for the opportunity to bring the contribution for universal service in line with the Commission's guidelines.

Enron's Choice Plan threatens universal service not only because it subjected it to risk of litigation, but because it does not provide for a means to collect revenues from competitive suppliers if benefits are portable. "Enron would fund universal service from distribution rates, which fall predominantly on residential ratepayers. Under Enron's proposal, energy suppliers make no contribution to universal service whatsoever." AARP St. 2 at 17. Given that the Enron proposal is intent upon taking 50% of the market share from PECO, it is critical that other suppliers contribute to universal service. This issue was addressed on cross examination by Dr. Cooper:

The question, I mean, is equally who's going to pay for that universal service proposal? That is the - if you have taken away 50 percent market share from PECO do you still intend to collect the 50 or \$75 million of universal service charges from PECO which is what happens under the joint proposal?

You have taken away half the market share. I will like to have seen you say that everyone who's awarded a customer by default has to contribute their share of the market to the cost of the funds or in other words support their own universal service customers.

Tr. 1999.

Enron has essentially assumed that PECO would agree to the same universal service terms and conditions set forth in the Partial Settlement while foregoing all the benefits that settlement offered PECO. This is not likely to happen and in fact PECO is not bound to do so. In addition, Enron devoted no time or consideration to how it would coordinate the conflicts that exist between its Choice Plan and the universal service obligations in the Partial Settlement which it purports to adopt.

**G. The Legal Barriers To The Enron Proposal Are Monumental.**

The Enron Choice Plan raises innumerable legal questions many of first impression, which will cause substantial delay and harm. The transition to competition is sufficiently confusing to ratepayers without adding the legal complications of a proposal such as that made by Enron. In reality, Enron's proposal will not make it the provider of last resort for default customers. It will not result in Enron providing services at a 20% reduction off PECO's current rates. It will not result in Enron providing universal service to low income persons who otherwise would have their lives threatened by extreme heat or cold.

In reality, Enron's proposal allows it to require PECO to provide all of those services at the reduced rates and to force PECO to put the Enron label on the services so provided. It requires PECO to accept a one time payment on \$5.461 billion dollars as payment for its stranded costs and then allows the securitized bonds to be to be sold to Enron at the stated interest rate of 9.66%. For purchasing all the securitized bonds at the

rate of 9.66%, Enron stands to gain a windfall of approximately a billion dollars. This money represents the difference between the 9.66% rate at which the bonds will be issued under Enron's plan and the market rate for such bonds which is at 6.5%. PECO St. No. 23-E. Virtually all of the benefit of securitization which was intended for the ratepayers and which was being relied upon to reduce rates is being assigned to Enron in its plan. This injustice must not be allowed. The Commission cannot condone holding ratepayers hostage by securitization while the predominant benefit inures to a single supplier.

Further, the law sets forth the manner in which an electric utility is to obtain qualified rate orders and transition bonds. 66 Pa.C.S.A. § 2812. There is no indication in that statute that the ability of utility company to issue transition bonds is dependent upon a competitor's proposal. To the contrary, the language clearly states that "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, including the right to defer or postpone such assignment, sale, transfer or issuance. 66 Pa.C.S.A. § 2812. The Enron Choice Plan is, therefor, inconsistent with law.

It is recognized that this Commission has the authority to vary, reform and revise contracts. 66 Pa.C.S.A. §508. But, the Public Utility Code cannot force a utility into a contract with a competitor. Deregulation of electric generation cannot possibly be interpreted in a manner that would allow this Commission to require

a contract between a utility and a competitor when the utility does not agree to the terms and conditions of the contract.

Lastly, Enron is not likely to achieve its objective without objectives without approval from other administrative agencies, including the Federal Energy Regulatory Commission and the Securities and Exchange Commission. For this reason, any rate reductions which may be present in the Enron plan are seriously jeopardized.

**IV. THE NEGATIVE OPTION BALLOTING PROPOSAL OF THE ENVIRONMENTALISTS SHOULD BE REJECTED.**

After the late submission of the Enron Choice Plan, the Environmentalists submitted their proposal which they called the "Better Choice Plan". The Environmentalists did not support the Partial Settlement or the Enron Proposal. Instead they put forth their own proposal. One provision that bears specific mention by AARP is the negative balloting proposal included in the testimony of Roger Colton. Under this proposal, all the consumers that fail to select a supplier would be assigned to one.

AARP opposes negative balloting. Negative balloting requires no action on the part of the consumer to receive a consequence. In other words, a customer can be switched by not casting a ballot. Dr. Cooper has had extensive experience in the field of consumer social science and he has never supported a negative ballot. First, Dr. Cooper explains that the people he represents in this proceeding are older Americans and that as a group those people are risk averse. He states:

We call them different things. Sometimes they are late adopters. I can have nice words. I can have scientific words. But they are risk averse. They are likely not to vote or likely not to vote because they don't want to change and it's a substantial concern to us that they get changed when they really didn't want to.

Tr. 1987.

The fact is that AARP's members, senior citizens, are not likely to vote in a ballot but that does not mean that someone else should vote for them by assigning them to an unknown supplier as the Environmentalists suggest. Such an assignment can cost them

money or confusion or loss of service if they are assigned to an operator that goes bankrupt. Tr. 1998.

**V. THE COMMISSION'S DATA REQUESTS ARE NOT AN APPROPRIATE BASIS FOR A DECISION IN THIS PROCEEDING.**

The Commission issued several sets of data requests in this proceeding. The last set asked parties to comment on an analysis staff had done based on assumptions which staff had made. Those assumptions were not in the record, were not tested by cross examination or supported by the submission of work papers and other data in the record. This type of analysis is reminiscent of the time the Commission hired its own expert in the Universal Service Investigation. In Re: Formal Investigation to Examine and Establish Updated Universal Service Principles and Policies for Telecommunications Services in the Commonwealth, Docket No. I-00940035. That expert produced numbers that were not able to be duplicated by any party and which did not rely on any specific cost model but rather on a mixing of two such studies. Due process concerns were raised in regard to the Commission's use or reliance on that expert's untested opinion. The same problem arises here. This type of participation by Commission staff raises concerns under the Lyness decision and questions over the role of staff as advisory or prosecutory. See, Lyness v. State Board of Medicine, 529 Pa. 535, 605 A.2d 1204 (1992) If prosecutory, full disclosure of that fact and an opportunity to cross examine the analysis of the staff is required for meaningful due process. If advisory, their participation through "data requests" which includes extensive analysis without supporting workpapers and without an

opportunity to cross examine far exceeds an advisory function.

Because the final set of data requests was issued after hearings concluded, the due process rights of all litigants, including AARP, were violated as the parties were unable to challenge the assumptions contained in the data request through cross examination. Section 332 of the Public Utility Code mandates that every party be entitled to:

present his case or defense by oral or documentary evidence, to submit rebuttal evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

66 Pa.C.S. §332(c).

While the Commission is not required to provide oral hearings to decide questions of law or policy, hearings and the opportunity to cross-examine witnesses are required to resolve contested factual issues such as the hotly contested assumptions contained in the data request. Pennsylvania Coal Mining Ass'n v. Insurance Dept., 370 A.2d 685 (Pa. 1977); Barasch v. Pennsylvania Public Utility Comm'n, 546 A.2d 1296 (Pa. Cmwlth. 1988). In addition, the Administrative Agency Law requires that all Commonwealth agencies permit "reasonable examination and cross examination." 2 Pa.C.S. §505. Pursuant to the Administrative Agency Law, no adjudicatory action may be taken except upon a hearing wherein each party has the opportunity to, inter alia, cross-examine witnesses and make argument. Callahan v. Pennsylvania State Police, 431 A.2d 946 (Pa. 1981).

The Commission is not at liberty to make assumptions and rely upon them when determining the future of electric restructuring, the rates to be paid by consumers, and the property rights of the utility. The Commission must rely on evidence of record, the law, and its own expert judgement and not on assumptions that have not been subject to cross examination. Further, it is AARP's belief that the Partial Settlement produces more benefit for consumers than either the originally filed restructuring plan offered by PECO and the Enron Choice Plan.

By way of further addressing this issue, AARP incorporates by reference the response of the Office of Consumer Advocate to the data request Set III, Number 4 of the Commission staff.

## **VI. AARP'S LITIGATION POSITION.**

### **A. Introduction.**

The time constraints that have been imposed on the litigation of this proceeding have become unreasonable during the later part of the process. The primary reason behind the unreasonable schedule was the late submission of a proposal by Enron, a proposal that should have been submitted in June when everyone else filed their positions, or in reasonable proximity thereto. The PECO restructuring is the first in Pennsylvania and a critical restructuring process nationally. The issues raised by the restructuring are many and any one of those issues could substantially impact on the consumers, a subset of consumers or on PECO. Failure to provide adequate opportunity to address the issues raised and to contemplate a thoughtful decision jeopardizes restructuring in Pennsylvania. Briefs in this case are limited to 45 pages with no reply and are being filed as additional testimony continued to be submitted just two business days before and after hearings have ended. Unfortunately, the result of the process is that parties must brief both their litigation positions and their settlement positions simultaneously.

AARP's litigation position is set forth in AARP St. 1 and will be summarized below. AARP addressed three issues in its litigation testimony: stranded costs, universal service for low income consumers, and consumer safeguards. The consumer safeguards issue is suitable to being addressed on a generic basis since the rules developed should apply to all electric utilities in the state

and not just PECO. AARP agrees with this approach and will not, therefore, address consumer safeguards separately in this brief. However, AARP does believe that Consumer Education must be addressed and adopts the position of the Office of Consumer Advocate in that regard.

**B. Stranded Cost Recovery.**

In regard to stranded cost, AARP believes that PECO should not be permitted to use the rate cap provision in the Choice Act as a rate floor essentially guaranteeing PECO full recovery of utility costs the same as it would have had under the preexisting regulatory process. AARP St. 1 at 64. PECO's restructuring proposal provided for PECO to recover every penny of capital cost and expense for its uneconomic assets. Only after that is achieved is the market allowed to start operating. Id. Under the PECO proposal, competitors would have to beat an efficient market clearing price by 25 percent or more would actually be able to sell electricity. PECO, however, would be able to sell its power even though it is produced at woefully uneconomic levels. Id. It is necessary, therefore, that PECO not be permitted to charge its proposed level of stranded cost. As stated earlier in this brief, AARP proposes that only 50% of stranded costs should be recovered from ratepayers, the stockholders should be responsible for the remaining 50%. AARP St. 1 at 23, 73. PECO should also be required to write off a substantial amount of its assets to bring its costs into line with efficient production. Id. at 70, Exh. MNC-5, Appendix A.

AARP proposes that a disallowance of the full value of stranded generation assets, as supported by the most efficient utility or producer analysis (\$3.8 billion or \$380 million per year), would lower PECO's interest coverage to about 1.8. This is in the range where bond covenants begin to restrain the utility's ability to float new debt. Over time, however constraint would ease. If the state-wide average is used, a disallowance of \$2.04 billion (\$204 million per year), would result in an interest coverage in the range of 2.3. At least \$2 billion dollars in regulatory assets should be disallowed. Id. at 73.

Stranded cost recovery should be shared among the various classes. This can be accomplished effectively with a kwh charge such as that proposed by Dr. Cooper.

**C. Universal Service.**

PECO's proposal on Universal Service is inadequate in two ways. The funding mechanism places extensive burdens on the residential class in contrast to the Guidelines proposed by this Commission and the Choice Act itself. Society as a whole benefits from universal service and all customer classes accordingly. Therefore, all classes should participate in the funding of universal service. The second way PECO's proposal on Universal Service is inadequate is the manner in which it determines eligibility for benefits. The requirement for bill payment problems for participation is counterproductive and results in large arrearages. Lifeline programs in Pennsylvania tend to cover the variable cost of service and make a contribution to fixed costs.

This means that all ratepayers and the utility are better off with a broad based lifeline program that reduces uncollectibles than with a limited program that requires large arrearages to develop as a prerequisite. AARP St. 1 at 75.

## VII. CONCLUSION.

The legal impediments to the Enron Choice Plan alone are sufficient for it to be rejected by this Commission. On the economic merits, the Enron proposal looks even worse inasmuch as it does not provide for competition, but for a hostile takeover of PECO's operations. The impact such a hostile environment would have on the services rendered to those most dependent on the provider of last resort is incalculable. Even if those problems did not exist, the Enron Choice Plan does not offer a true alternative or competitive option to consumers. Enron will not be providing service - PECO will be providing service under the Enron name. This is confusing for consumers in an already confusing time. This type of "competition" is little more than a sham that stands to net Enron a tremendous windfall.

The Commission should support the Partial Settlement as a legitimate settlement reflective of the interests of many different groups. AARP, CEPA, PAIEUG, the Office of Consumer Advocate, the Office of Trial Staff, the Office of Small Business Advocate, PECO, and the Department of the Navy all signed the Partial Settlement after thorough examination and negotiation. Those parties negotiated with PECO for a plan that would improve their position relative to PECO's filing. As set forth in this brief, the Partial Settlement has something to offer over the original proposal and still over Enron's self-serving proposal. It offers reduced rates for power for everyone, it offers an opportunity for competition consistent with the overbuilt status of

the market place and it offers a reasonable transition for PECO to a competitive market.

Alternatively, if the Partial Settlement is not adopted AARP encourages this Commission to find in favor of AARP's litigation position as set forth in Section VI above.

**VIII. PROPOSED FINDINGS OF FACT**

**I. THE PARTIAL SETTLEMENT**

**A. Summary Of Principal Terms**

1. The Partial Settlement guarantees a ten percent rate reduction for all PECO customers.
2. The rate reduction provided in the Partial Settlement is to begin in September 1998 and is guaranteed through December 2000.
3. Under the Partial Settlement, all customers will receive a rate reduction prior to the beginning of customer choice, which is scheduled to begin January 1, 1999.
4. The Partial Settlement provides choice to two-thirds of PECO's customers on January 2, 1999, and provides choice to the remaining third on January 2, 2000.
5. The Partial Settlement thus accelerates the timetable provided in the Act by a full year.
6. PECO originally requested that it be permitted to recover \$6.8 billion in stranded costs.
7. PECO subsequently revised its stranded costs request to \$7.461 billion.
8. The Partial Settlement calls for PECO to write off \$2.0 billion in stranded costs, and allows PECO to recover \$5.4 billion.
9. The Partial Settlement provides for an expansion in eligibility for PECO's Customer Assistance Program ("CAP"), with an initial enrollment of 100,000 customers.

10. The initial funding of PECO's CAP under the Partial Settlement will be \$50 million.
11. The Partial Settlement provides for expansion of both the initial CAP enrollment and the initial CAP funding should such expansion be necessary.
12. Under the Partial Settlement, universal service participants will be able to transfer their benefits from PECO to a competitive supplier.
13. PECO will remain the Provider of Last Resort under the Partial Settlement.
14. As the Provider of Last Resort, PECO will guarantee that the rates of customers who return to the PECO system will not exceed the published generation market rate or the generation rate cap set forth in the Partial Settlement.
15. Under the Partial Settlement, PECO will file tariff revisions which allow any customer to install and operate renewable energy generation under 10 kW.
16. Renewable energy is defined by the Partial Settlement so as to include solar, wind, hydro, biomass and methane field generation.
17. The Partial Settlement calls for PECO to provide customer education with initial funding of \$25 million.
18. Under the Partial Settlement, PECO bears the risk for full recovery of the CTC.
19. The Partial Settlement establishes market rates for generation that can currently be matched by suppliers with surplus

generation.

20. The Partial Settlement establishes generation rates that are sufficiently high to protect new entrants while competition develops.
21. Under the Partial Settlement, nuclear decommissioning costs will be paid by PECO's competitive generation affiliate, which will be separate from PECO's regulated transmission and distribution entity. Only if the generation entity is absolutely unable to pay those costs will the regulated entity be permitted to seek recovery from customers via a section 1307(f) proceeding.

**B. The Partial Settlement Is In The Public Interest**

22. The Partial Settlement provides the following benefits to consumers and to competition:
  - a. The Partial Settlement guarantees a ten percent reduction in rates for all ratepayers effective September 1998.
  - b. The Partial Settlement accelerates the availability of choice for more customers.
  - c. Stranded Costs are reduced by the Partial Settlement.
  - d. Universal Service is greatly expanded by the Partial Settlement.
  - e. The Partial Settlement provides portability for Universal Service benefits.
  - f. The Partial Settlement provides for PECO to be the Provider of Last Resort.

- g. The Partial Settlement provides for renewable resources.
  - h. Consumer education is encouraged by the Partial Settlement.
  - i. PECO bears the risk for full recovery of the CTC under the Partial Settlement.
  - j. The Partial Settlement encourages the proper development of competition.
  - k. The Partial Settlement protects residential customers from undue risk for nuclear decommissioning costs.
  - l. The Partial Settlement allows for the further development of generic issues such as consumer education and Codes of Conduct.
23. For these reasons, the Partial Settlement is in the public interest.

**C. The Objections To The Partial Settlement Are Without Merit**

**1. Alleged Overrecovery Of Stranded Costs**

24. 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).
25. 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).
26. 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)

27. 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).
28. 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).

29. 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 underrecovery of approximately \$136 million (PECO St. 1-E, p. 17; PECO Exh. TPH-35).
30. 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).
31. If PECO could securitize as much as \$4.0 billion, 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).
32. 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 that 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).
33. 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).
34. 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).

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

37. 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 Messers. 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).
38. The provision of the Partial Settlement foregoing annual true-up of actual and projected CTC revenue was included because there is substantial value in the rate certainty provided by having PECO bear the risk of future sales variations (Tr. 1989-1991).
39. Sale of energy conservation, energy management and energy efficiency services will increase substantially in a deregulated environment for generation and, as a result, it is more likely than not that PECO's sales levels will decline (Tr. 1991 and 2008).
40. 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).

41. 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)

**2. Transmission And Distribution Rate Levels**

42. 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; PECO Exhibit RAC-10).
43. 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).
44. 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).
  45. PECO incurs uncollectible accounts expense to: (1) fund long-term payment agreements required by Chapter 56; (2) fund the 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).
  46. 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).
  47. 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).

48. 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).
49. 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 allow 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).
50. 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).
51. 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).

52. 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).
53. Enron's First Choice Plan adopted the transmission and distribution rate levels in the Partial Settlement without qualification (Enron St. 6, p. 10).

### **3. Miscellaneous Objections**

54. 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).
55. 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).
56. 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).
57. 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).
58. Issues concerning the design of rate SL-E should not be decided in this proceeding (PECO St. 13-R, p. 12).
  59. 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).
  60. 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).
  61. 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).
  62. Cost-benefit analyses of shut-down alternatives are neither necessary nor appropriate for filing with each and every request to increase decommissioning cost recovery (PECO St. 1-RJ, p. 3).
  63. 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).
  64. 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)
65. 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).
  66. Environmental labeling of energy transactions could occur naturally through the operation of market forces (PECO St. 21-R, p. 26).
  67. 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).
  68. 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).
  69. PECO properly allocated costs and revenues between wholesale and resale service (PECO St. 3-R, pp. 35-36).
  70. 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)

71. 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).

## **II. ISSUES NOT ADDRESSED BY THE PARTIAL SETTLEMENT**

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

72. **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).
73. **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).

74. **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).
75. **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**

76. 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.
77. 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.
78. 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.

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

80. 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.

81. 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.

#### **IV. THE ENRON CHOICE PLANS**

**A. 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**

82. 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).

83. 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, . . ."

84. 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)

85. 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 electric energy for customers.

86. 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.

87. 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**

88. 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).
89. 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).
90. 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).
91. 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).
92. The forced recapitalization that would result from a defeasance of PECO's First Mortgage Bonds would have disastrous consequences for the Company (PECO St. ERJ, p. 14).
93. Defeasance of PECO's First Mortgage Bonds would be considered a taxable exchange for PECO's bondholders (PECO St. 20-ERJ, p. 14).
94. 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).
95. 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).
96. Enron's second Choice Plan, notwithstanding the changes made to it, would still not be able to obtain for 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).

97. 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).

98. 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**

99. 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).

100. 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**

101. 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).

102. 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).

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

104. 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)

105. 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).

106. The various conditions imposed by Enron increase the risk that

Enron would be unaccountable to the Commission (PECO St. 21-E).

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

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

108. 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).

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

**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**

110. 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).

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

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

113. Enron has stated that EESP would only agree to follow Chapter 56 of the Commission's regulations insofar as those regulations are applied to EGSSs generally, notwithstanding

EESP's role as PLR.

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

114. 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).
115. 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).
116. 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**

117. 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).
118. 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**

119. 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).
120. 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 AA, @ pp. 34-35 (Enron Rule 22); Tr. 1788).
121. 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).
122. 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).
123. 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).

124. The Enron Tariff will generate the confusion that Enron claims it was designed to avoid. Customers, EGSSs, 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**

125. Under the Enron Tariff, EGSSs 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).

126. Under the Enron Tariff, EGSSs 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).

127. Under the Enron Tariff, EGSSs 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).

128. Under the Enron Tariff, EGSSs 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).
129. Under the Enron Tariff, Default Service options would be substantially limited for industrial customers (PECO St. 13-E, p. 10, Exhibit WFS-16).
  130. 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).
  131. 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 it exists in the current PECO Tariff (PECO St. 13-E, p. 16; Tr. 1786-87).
  132. 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).
  133. 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).
  134. 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).

135. 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).
136. 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).
137. 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).
138. 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).

139. 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).

140. 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).

141. 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).

142. 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).
143. 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 B i.e., phone lines, computer systems, etc. B to ensure its ability to handle a large volume of calls and service inquiries (PECO St. 13-E, pp. 35-36).
144. 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).
145. 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).

146. 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)

147. 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 subcontractor for default service. The EGSSs, regardless of the number of customers served, would bear a de minimis 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).
148. Even if the Commission were ever to design a non-wires services credit using PECO's proposed cost basis, the result would be additional stranded costs, as PECO would not actually avoid many of these costs (PECO St. 13-E, pp. 39-40).
149. 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 to provide the services. Under such circumstances, 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)
150. If Enron's proposed cost basis and energy-based design for a non-wires services credit were adopted, PECO would significantly under-recover costs properly recoverable through its distribution rates, meaning that as soon as the non-generation charges expires.
151. Under the Enron plan, customers would be deceived and confused, as they would believe they are receiving services from Enron, when in fact the services continue to be provided by PECO.
152. Under the Enron plan, PECO employees would provide services to

customers, but under Enron's name, thus removing one possible check on the quality of such services.

**b. The Plan Is Anti-Competitive**

153. 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, and would prohibit joint marketing (Enron St 5, Exhibit A, p. 36 (Rules 23.5, 23.10)).
154. Enron's proposed restrictions on use of the PECO name and on joint marketing constitute ignore important competitive safeguards that already exist, including the force of competition itself 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).
155. Enron's witness in support of the competitive safeguards contained in the Enron Plan B 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).
156. 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).

157. 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).

158. 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).

159. 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 EGSSs would be allowed to use the Enron name and logos, whereas PECO's competitive EGSSs 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**

160. 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).

161. 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).
162. The Enron Plan would require that the Commission order PECO involuntarily to enter into the Power Purchase Agreement with Enron ( Tr. 1240 and 1394).
163. 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").
164. 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").
165. 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").
166. 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").
  167. 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).
  168. 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).
  169. 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).
  170. 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 for which PECO holds NRC-issued operating licenses (PECO St. 1-E; PECO St. 21-E).

171. 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).
172. 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).
173. 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.

174. 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).
175. 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.
176. 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).
177. 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).
178. 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.)

179. 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)

**IX. PROPOSED CONCLUSIONS OF LAW**

**I. THE PARTIAL SETTLEMENT**

**A. 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 satisfied 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. PECO has established its entitlement to charge the CTCs/ITCs a set forth in the Partial Settlement.
4. PECO is entitled to the issuance of a QRO in the form attached to the Joint Petition for Partial Settlement.
5. The Partial Settlement is in the public interest and should be approved without modification.

**B. The Objections To The Partial Settlement Are Without Merit**

6. 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).

7. 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, constitutes "good reason" as defined by Section 1307(e) as incorporated in Section 2808(f) to forego annual "true-up" adjustments of the CTC.

## II. THE ENRON PLAN(S)

### A. Numerous Legal Impediments Preclude The Implementation Of The Enron Plan

8. A Qualified Rate Order ("QRO") may only be adopted upon application of an electric utility. 66 Pa. C.S. §2812(a)(1).
9. 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).
10. 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).
11. 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).
12. 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).
13. The Commission does not have the authority under the Competition Act to order PECO to securitize its stranded costs, to sell Intangible Transition Property at less than fair value or to enter into the PPA or the MBC Services Agreement.
  14. The Enron Tariff violates the rate cap on non-generation charges imposed by Section 2804(4)(i)(A) by permitting EGSSs to rebundle and resell such services at rates that exceed the utility's rate cap.
  15. 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.
  16. 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.
  17. 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.

18. 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.
19. 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).
20. 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.
21. The supply of energy and capacity to default service customers in PECO's service territory is a public utility function.
  22. By assuming the PLR role in PECO's service territory, Enron would be assuming the role of a public utility.
  23. 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).
  24. It would violate the public policy of Pennsylvania not to regulate a PLR as a public utility subject to the jurisdiction of the Commission.
  25. 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).
  26. 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 force 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.

27. Enron's failure to notify customer of the massive changes proposed to PECO's tariff would result in a violation of customers' due process 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).

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

28. 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.
29. 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.

30. The FPA defines a wholesale transaction as a sale of energy for resale.
31. 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 require FERC review and approval.
32. Under Section 203 of the FPA, the FERC is obligated to determine whether dispositions 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.
33. FERC's Section 203 jurisdiction extends to contracts, accounts and records. Enova Corp., 79 FERC ¶61,107 at 61,489 (1997).
34. 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.
35. 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.
36. 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).

37. 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).
38. 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.")
39. 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).
40. 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 .

41. 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.
42. 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.
43. 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).
44. 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.
45. 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).
46. The Enron Plan involves a deceptive practice by requiring an affirmative act for customers to maintain their status quo.
47. 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.

Respectfully submitted,

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Dated: December 2, 1997

CERTIFICATE OF SERVICE

I, Linda C. Smith, hereby certify that I have this day caused a true copy of the foregoing to be served upon the parties of record in Docket No. R-00973953 in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a participant), in the manner and upon the parties listed below.

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